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LBJ, THE IRS, AND CHURCHES: THE UNCONSTITUTIONALITY OF THE JOHNSON AMENDMENT IN LIGHT OF RECENT SUPREME COURT PRECEDENT

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INTRODUCTION

On September 28, 2008, more than thirty pastors from across the country stood in their pulpits and preached sermons that evaluated candidates running for political office in light of Scripture.[1] They made specific recommendations to their congregations, based on that scriptural evaluation, as to how the congregation ought to vote—either supporting or opposing candidates from their pulpits. The pastors were part of "Pulpit Freedom Sunday," a project of the Alliance Defense Fund ("ADF") intended to present a direct constitutional challenge to the 1954 "Johnson Amendment" to Section 501(c)(3) of the Internal Revenue Code.[2] The pastors who participated in Pulpit Freedom Sunday sent recordings of their sermons to the Internal Revenue Service ("IRS") and awaited enforcement action that might spark a constitutional challenge to the law.[3]

Only one pastor who participated in Pulpit Freedom Sunday that year was investigated; however, the IRS dropped the investigation shortly after it was initiated, and there was no punishment or

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[1] Press Release, Alliance Def. Fund, ADF Prepared to Defend Churches Against Possible IRS Free Speech Investigations (Sept. 29, 2008) [hereinafter ADF Prepared to Defend Churches], http://www.alliancedefensefund.org/News/PRDetail/1978; *see also* Steve Karnowski, *IRS Drops Inquiry into Minnesota Church,* STARTRIB. (July 29, 2009), http://www.startribune.com/templates/Print_This_Story?sid=51992367.

[2] *See* ALLIANCE DEF. FUND, THE PULPIT FREEDOM INITIATIVE EXECUTIVE SUMMARY (2011), *available at* http://adfwebadmin.com/userfiles/file/Pulpit_Initiative_executive_summary_candidates20110930.pdf ("ADF believes that the Johnson amendment is unconstitutional in restricting the expression of sermons delivered from the pulpits of churches. This initiative is designed to return freedom to the pulpit by allowing pastors to speak out on the profound and important issues of the day."). The Johnson Amendment is contained in Section 501(c)(3) of the Internal Revenue Code, named after Lyndon B. Johnson, the sponsor of the Amendment, when it was inserted into the tax code in 1954. *See infra* Part I.B.

[3] *History of Pulpit Freedom Sunday,* ALLIANCE DEF. FUND, http://speakup movement.org/church/LearnMore/details/5253 (last visited Apr. 6, 2012); *see also* ADF Prepared to Defend Churches, *supra* note 1.

enforcement action taken against the church for the pastor's sermon.[4] None of the other participants were investigated or in any way punished by the IRS, despite the fact that Americans United for Separation of Church and State sent letters to the IRS asking it to audit the participating churches.[5] The IRS itself was well aware of the actions of the thirty-three pastors. Their sermons received widespread media coverage, and "[a] spokesman for the I.R.S. said that the agency was aware of Pulpit Freedom Sunday and '[would] monitor the situation and take action as appropriate.'"[6] Yet, no action was taken.

In 2009, the number of Pulpit Freedom Sunday churches grew to eighty-three.[7] In 2010, the number grew again, this time to one hundred.[8] Finally, the number of participating churches in Pulpit Freedom Sunday exploded in 2011 to 539 churches.[9] None of the churches that have participated in Pulpit Freedom Sunday, save the one in 2008, have been investigated, censored, or punished for their sermons, even though they explicitly crossed the line into what the IRS deems prohibited by the Johnson Amendment.

ADF has announced that it will continue to host Pulpit Freedom Sunday in the years to come.[10] The sole goal of the program is to have the Johnson Amendment declared unconstitutional as it applies to pastors' sermons from the pulpit. This might seem like an ambitious goal and one that has been unattainable for churches for over fifty years since the adoption of the Johnson Amendment in 1954. But recent developments—when viewed in light of the history of the Johnson

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[4] *See* Press Release, Alliance Def. Fund, IRS Withdraws Audit on Minn. Pastor's Sermons (July 28, 2009), http://www.alliancedefensefund.org/News/PRDetail/2759.

[5] *See, e.g.*, Press Release, Ams. United for Separation of Church & State, AU Asks IRS To Investigate Oklahoma Church That Endorsed McCain (Oct. 3, 2008), http://www.au.org/media/press-releases/au-asks-irs-to-investigate-oklahoma-church-that-endorsed-mccain.

[6] Laurie Goodstein, *Ministers to Defy I.R.S. by Endorsing Candidates*, N.Y. TIMES, Sept. 26, 2008, at A20.

[7] Press Release, Alliance Def. Fund, Participation in Second Annual Pulpit Freedom Sunday More Than Doubles From Last Year (Oct. 5, 2009), http://www.alliancedefensefund.org/News/PRDetail/3180.

[8] Press Release, Alliance Def. Fund, Participants in Annual Pulpit Freedom Sunday Increase for Third Year (Sept. 27, 2010), http://www.adfmedia.org/News/PRDetail/4361.

[9] Press Release, Alliance Def. Fund, Participation in ADF Pulpit Freedom Sunday More Than Quadruples over Last Year (Sept. 30, 2011), http://www.adfmedia.org/News/PRDetail/4360#CurrentNewsRelease.

[10] ALLIANCE DEF. FUND, PULPIT FREEDOM SUNDAY: FREQUENTLY ASKED QUESTIONS 4 (2011), *available at* http://www.speakupmovement.org/Church/Content/PDF/PFS_FAQ.pdf ("ADF remains committed to achieving the goals of Pulpit Freedom Sunday, no matter how long it takes.").

Amendment's adoption and enforcement—signal that the Pulpit Freedom Sunday churches are likely on the winning side.

Part I of this Article examines the history of church tax exemption and demonstrates that exemption for churches is an unbroken practice with an extremely long historical pedigree. Thus it should not be lightly cast aside, and any threat to its existence should be taken seriously. Part I also traces the history of the restrictions on church tax exemption added by Congress in 1934 and 1954, including the history of the Johnson Amendment and the suspect circumstances surrounding its passage.

Part II analyzes the history of IRS enforcement of the Johnson Amendment, discussing the uneven and sporadic nature of that enforcement. The IRS's vague and uneven enforcement scheme has resulted in a pervasive and palpable chill on the speech of pastors and churches as they have self-censored in order to avoid potential Johnson Amendment violations and the extreme consequences associated with such violations.

Part III builds on the prior two points and analyzes the Johnson Amendment in light of the recent Supreme Court cases of *Citizens United v. FEC*,[11] *Arizona Christian School Tuition Organization v. Winn*,[12] and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[13] The Article concludes that these cases provide important indications that the Johnson Amendment is an unconstitutional violation of the Free Speech and Free Exercise Clauses of the First Amendment, and that it cannot be justified by reliance on tax subsidy theories of regulation.

It is not the goal of this Article to repeat the work of legal scholars who have analyzed the Johnson Amendment from various angles. The great weight of that legal scholarship leans decidedly in favor of the conclusion that the Johnson Amendment is unconstitutional as a violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution as well as the Federal Religious Freedom Restoration Act.[14] Rather, this Article offers a fresh look at the Johnson Amendment in light of recent Supreme Court precedent that has direct bearing on its constitutionality. This precedent—when viewed in light of the history of church tax exemptions, Congress's adoption of the Johnson Amendment, and the IRS's enforcement of the Johnson Amendment—demonstrates that the pastors who participated in Pulpit Freedom

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[11] 130 S. Ct. 876 (2010).

[12] 131 S. Ct. 1436 (2011).

[13] 132 S. Ct. 694 (2012).

[14] See *infra* notes 142–47 for a sample of the legal scholarship arguing that the Johnson Amendment is unconstitutional or violates federal law.

Sunday were justified in challenging the Johnson Amendment and should not have long to wait before it is declared unconstitutional or repealed.

I. CHURCH TAX EXEMPTION IN HISTORY

The starting point for analyzing any issue related to taxation of churches is to understand the history regarding tax exemption of churches. This is especially true in a day and age where society seems to have forgotten or conveniently ignored the fact that church tax exemption has an exceedingly long historical pedigree and that the restrictions contained in the Johnson Amendment are an aberration in the otherwise unbroken history of church tax exemption.

A. A Brief History of Church Tax Exemption Generally

Although a complete history of the tax exemption of churches is beyond the scope of this Article, it is enough to note generally that church tax exemption dates back to ancient times. Legal scholars have traced tax exemption for churches at least as far back as ancient Sumeria,[15] while some have even noted that there is no precise starting point for the exemption. As Dean Kelley once remarked, "There is no time before which churches were taxed and in which we can seek the reason for exemption. It has always been the case, clear back to the priests of Egypt and beyond them into the coulisses of prehistory."[16]

Tracing the roots of tax exemption may be difficult, if not impossible, and the precise origin of church tax exemption may be lost in the mists of time. But the unassailable fact remains that, for as long as anyone can remember, churches have always been tax-exempt or enjoyed favorable tax treatment.

This is not to say that the practice of tax exemption has been universally applied to all churches everywhere. Rather, exemption for churches has been applied unequally at times to favor certain churches.[17]

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[15] *See, e.g.*, John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 524 (1992) ("One of the earliest examples of tax exemption may be found in Sumerian history, 2800 B.C."). Whitehead provides a comprehensive review of the history of church tax exemption in ancient times through American history to the present day. *See id.* at 524–45.

[16] DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 5 (1977).

[17] NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT 71 n.1 (2011) (tracing the historical roots of church tax exemption and noting that rulers throughout history have at times taxed some churches while granting exemptions to other favored churches); *see also* KELLEY, *supra* note 16, at 5–6 ("There were, of course, times and places where churches have been laid under levy to the state, usually in sweeping expropriations designed to counteract the churches' increasing hold on property . . . . But this kind of action was apparently viewed as a drastic corrective to an excess, and the basic condition of exemption has prevailed before and after.").

But, the uneven application of church tax exemption at certain points in the historical record does not negate the fact that church tax exemption has an exceedingly long history.

Even the Supreme Court has acknowledged that church tax exemption is part of an "unbroken" history in the United States that "covers our entire national existence and indeed predates it."[18] The Court has also recognized that church non-taxation is undergirded by "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present."[19] Churches were considered exempt from taxation during the colonial period.[20] The very first federal level income taxes also contained an exemption for churches.[21] After the adoption of the Sixteenth Amendment in 1913, which allowed Congress to levy income taxes,[22] the Revenue Act of that same year contained an exemption for churches.[23] And every iteration of the federal income tax code from that time has contained an exemption for churches.[24] As Justice Brennan declared in *Walz*, "Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming."[25]

B. Restrictions on the Exemption

It was not until 1934 that the first restriction was placed on church tax exemption[26] beyond the normal eligibility requirements to be recognized as tax-exempt. That year, Congress amended the tax code, inserting a provision stipulating that a church will lose its tax exemption if a "substantial part of . . . [its] activities . . . is carrying on propaganda,

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[18] Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970).

[19] Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).

[20] John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 368–80 (1991) (tracing the history of tax exemption for churches during the colonial period and noting that tax exemption derived both from common law and equity traditions).

[21] Whitehead, *supra* note 15, at 541–42.

[22] U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

[23] Revenue Act of 1913, Pub. L. No. 63-16, ch. 16, 38 Stat. 114, 172; *see also* Whitehead, *supra* note 15, at 542. The exemption, of course, was broader than for just churches, and encompassed all charitable, nonprofit organizations. This Article, however, focuses on church tax exemption and so will consider that specific historical aspect.

[24] Whitehead, *supra* note 15, at 542.

[25] Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

[26] Although this restriction applies to all charitable organizations under Section 501(c)(3), this Article focuses solely on church tax exemption and so will address the law from that perspective.

or otherwise attempting, to influence legislation."[27] Interestingly, the original version of the proposed 1934 bill included a ban on tax-exempt organizations' "participation in partisan politics," but that provision was removed in conference out of fears that it was too broad.[28]

The 1934 lobbying provision was evidently passed in response to a threat posed by a nonprofit organization toward a sitting officeholder.[29] The lobbying restriction was sponsored by Senator David Reed, a Republican Senator from Pennsylvania, in an attempt to silence a nonprofit organization, the National Economy League, that had come into direct conflict with Senator Reed over the issue of benefits to veterans.[30] The National Economy League was lobbying against a bill introduced by Senator Reed who had made the issue, and his bill, the centerpiece of his reelection campaign to the U.S. Senate.[31]

The history behind the enactment of the lobbying restriction parallels that of the Johnson Amendment in that both were adopted in the midst of campaigns by powerful senators in an effort to silence their opposition.[32] This history once led authors writing for an IRS instructional program to conclude that the passage of the Johnson Amendment was not the first time "the impetus for a Code provision [was] an exempt organization's opposition to a legislator."[33]

Twenty years later, in 1954, Congress again amended Section 501(c)(3) of the tax code to add an additional restriction. Popularly known as the "Johnson Amendment," after the bill's lead proponent, Lyndon B. Johnson, while he was a Senator from Texas,[34] the Amendment states that a tax-exempt organization is one that "does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any

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[27] Revenue Act of 1934, Pub. L. No. 73-216, § 101(6), 48 Stat. 680, 700 (codified as amended at I.R.C. § 501(c)(3) (2006)).

[28] *See* 78 CONG. REC. 7,831 (1934) (statement of Rep. Samuel B. Hill); H.R. REP. NO. 73-1385, at 3–4 (1934) (Conf. Rep.).

[29] *See* Judith E. Kindell & John Francis Reilly, *Lobbying Issues*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1997, at 261, 265 & n.9 (1996), *available at* http://www.irs.gov/pub/irs-tege/eotopicp97.pdf.

[30] *Id.* at 264–65.

[31] *Id.* at 265 n.9.

[32] *See infra* Part I.B.2 (recounting the dubious history of the adoption of the Johnson Amendment).

[33] Judith E. Kindell & John Francis Reilly, *Election Year Issues*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2002, at 335, 451 n.46 (2001), *available at* http://www.irs.gov/pub/irs-tege/eotopici02.pdf; *see also* CRIMM & WINER, *supra* note 17, at 110 ("[O]rigins of the lobbying restriction also were attributable to political partisanship and politicians' self-interest.").

[34] *See* 100 CONG. REC. 9,604 (1954); CRIMM & WINER, *supra* note 17, at 72.

candidate for public office."[35] The history of this Amendment starkly shows its invalidity.

1. The 1954 U.S. Senate Race in Texas

In 1954, Lyndon B. Johnson was running for reelection to the U.S. Senate seat from Texas that he occupied as a first-term senator. Johnson had won his first election to the Senate "after a very close—and questionable—contest in 1948 which earned him the unflattering sobriquet of 'Landslide Lyndon.'"[36] Johnson won the election by a grand total of eighty-seven votes, which was less than one-hundredth of one percent of the total votes cast.[37] There has been even further speculation surrouding this narrow margin of victory after the contents of the notorious "Ballot Box 13" that supplied Johnson with the necessary number of votes to win the election were destroyed by fire.[38]

Johnson's reelection opponent in 1954 was Dudley Dougherty, a thirty-year-old, first-term state senator from Beeville, Texas, whom Johnson dismissively referred to in communications as the "young man from Beeville."[39] Dougherty adopted an aggressive, anti-communist stance in his campaign for Senate, which was very popular among the "McCarthyites"[40] who were seeking to expose and eradicate communism in the United States.[41]

Johnson was expected to handily defeat Dougherty and gain reelection.[42] That is, until the entrance into the campaign of two very powerful, secular, nonprofit organizations, that were outspokenly opposed to the perceived rise of communism. One group was called the Facts Forum, created in 1951 by Texas oilman H.L. Hunt.[43] The other

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[35] Internal Revenue Code of 1954, Pub. L. No. 591, § 501(c)(3), 83 Stat. 68A, 163 (codified as amended at I.R.C. § 501(c)(3) (2006)). The words "or in opposition to" were added by Congress in 1987. *See infra* Part I.B.2. For a history of the 1987 amendment to the tax code demonstrating that it too was motivated by politicians' self-interest and was aimed at silencing nonprofit organizations, see CRIMM & WINER, *supra* note 17, at 116.

[36] Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 741 (2001).

[37] *Id.*

[38] *See id.*

[39] *Id.* at 742.

[40] *Id.* at 743. "McCarthyism" is named after Senator Joseph R. McCarthy, a Republican from Wisconsin. *See* James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. RELIGIOUS RES. 16, 18 (1998).

[41] Davidson, *supra* note 40, at 18. McCarthy "led an effort to identify communists in government and other spheres of American life." *Id.*

[42] *Id.* at 24. In fact, it was reported Dougherty "knew he could not beat Johnson and told people he was only in the race for the publicity." *Id.*

[43] *Id.* at 19. Through Facts Forum, Hunt hosted "large dinner parties featuring speakers warning of the evils of communism, both at home and abroad." O'Daniel, *supra* note 36, at 753. Facts Forum also had a radio and television broadcasting presence with a

was the Committee for Constitutional Government ("CCG")—"one of the nation's leading anti-communist organizations"—started in 1937 by newspaper publisher Frank Gannett in response to President Roosevelt's effort to pack the Supreme Court.[44]

According to one researcher, "[Johnson] did not like the rising tide of national conservatism, especially McCarthyism . . . . [and] was concerned about the compatibility between Dougherty's anti-communist views and the widespread conservatism in the Texas electorate."[45] Thus, it was with some dismay that Johnson discovered Facts Forum and CCG were not only helping to advance the movement of McCarthyism nationwide but were also actively supporting his campaign's opponents in Texas.[46]

Johnson took steps to investigate CCG and Facts Forum to determine whether they were violating any law by supporting Dougherty. On June 15, 1954, Gerald Siegel who was counsel to the Senate Democratic Policy Committee responded to a question from Johnson whether CCG had violated Texas election laws.[47] Siegel advised Johnson that CCG had not violated the federal income tax code because the code at the time only contained a restriction on lobbying; however, Siegel was of the opinion that CCG had violated Texas election law.[48] Johnson also asked the Democratic Whip in the House, Representative John W. McCormack, to write the IRS Commissioner to determine if CCG had violated its federal tax-exempt status.[49] In response to McCormack, the Commissioner agreed to investigate "'to see just what is the effect of these activities under the internal revenue laws and what, if anything, can be done about their present status in relation to exemption privileges.'"[50] Johnson also reportedly investigated certain members of Facts Forum and CCG and had his staff prepare internal memoranda on the groups' activities.[51] From this history, it is evident that Johnson was concerned about Facts Forum and CCG and was actively looking for a means of silencing these powerful opposition voices.

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following of five million listeners and viewers per week; the programs featured Senator McCarthy and similar anti-Communist speakers. *Id.*

[44] Davidson, *supra* note 40, at 20–21.

[45] *Id.* at 24; *see also* O'Daniel, *supra* note 36, at 745.

[46] Davidson, *supra* note 40, at 24; *see also* O'Daniel, *supra* note 36, at 743 ("CCG was adamantly opposed to Johnson's election and vociferously supported Dougherty—and Johnson suspected that Facts Forum, in spite of its pledge not to involve itself in political campaigns, was clandestinely in support of Dougherty, as well.").

[47] Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 107 (1998).

[48] *Id.*

[49] *Id.* at 107–08.

[50] *Id.* at 108.

[51] O'Daniel, *supra* note 36, at 754–59.

2. The Johnson Amendment

Johnson devised a plan to amend the federal tax code in a way that would silence Facts Forum and CCG. On July 2, 1954, in the midst of his campaign against Dougherty, Johnson appeared on the floor of the U.S. Senate to offer an Amendment to a pending tax overhaul bill.[52] The Congressional Record for that day spells out the details of the Amendment as follows:

> Mr. JOHNSON of Texas. Mr. President, I have an amendment at the desk, which I should like to have stated.
>
> The PRESIDING OFFICER. The Secretary will state the amendment.
>
> THE CHIEF CLERK. On page 117 of the House bill, in section 501 (c) (3), it is proposed to strike out "individuals, and" and insert "individual," and strike out "influence legislation," and insert "influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."
>
> Mr. JOHNSON of Texas. Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.[53]

The legislative history shows that the chairman did indeed take Johnson's Amendment to conference with the House, and the Amendment was agreed upon.[54]

While the Conference Report reveals that the original House version of the tax bill only continued the 1934 lobbying restriction, it also notes that "[t]he Senate amendment provides that such organizations will lose their tax-exempt status if they participate or intervene (including the publishing or distributing of statements) in a political campaign on behalf of any candidate for public office."[55] In response to the differences between the two bills, the Conference Report simply states, "The House

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[52] 100 CONG. REC. 9,604 (1954); *see also* O'Daniel, *supra* note 36, at 741 ("For tax practitioners, 1954 marks the seminal year of the creation of the modern Internal Revenue Code.").

[53] 100 CONG. REC. 9,604 (1954).

[54] *Id.*

[55] H.R. REP. NO. 83-2543, at 46 (1954) (Conf. Rep.).

recedes."[56] President Eisenhower signed the tax bill into law on August 16, 1954.[57]

George Reedy, Johnson's chief aide in 1954, was once interviewed about the events surrounding the passage of the Johnson Amendment. Reedy admitted that Johnson was "very thin-skinned" and that it was quite plausible Johnson moved for the Amendment to the tax code in response to his political adversaries.[58] Reedy added, however, his personal opinion that "Johnson would never have sought restrictions on religious organizations."[59] After reviewing the history of the Johnson Amendment in the context of the "highly-charged political environment" of Johnson's reelection campaign of 1954, one scholar observed,

> The ban on electioneering is not rooted in constitutional provisions for separation of church and state. It actually goes back to 1954 when Congress was revising the tax code, anti-communism was in full bloom, and elections were taking place in Texas. . . . Johnson was not trying to address any constitutional issue related to separation of church and state; and he did not offer the amendment because of anything that churches had done. Churches were not banned from endorsing candidates because they are religious organizations; they were banned because they have the same tax-exempt status as Facts Forum and the Committee for Constitutional Government, the right-wing organizations that Johnson was really after.[60]

The same scholar then bluntly concluded, "The ban on electioneering has nothing to do with the First Amendment or Jeffersonian principles of separation of church and state."[61]

The only other change that Congress made to Section 501(c)(3) was in 1987 when it added the words "in opposition to" in order to clarify that the Johnson Amendment not only applied to prohibit *support for* a candidate, but also prohibited *opposition to* a candidate.[62] The only reason given for this change in the congressional report was that "[t]his clarification reflects the present-law interpretation of the statute."[63]

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[56] *Id.*

[57] Statement by the President Upon Signing Bill Revising the Internal Revenue Code, 199 PUB. PAPERS 715–17 (Aug. 16, 1954).

[58] Halloran & Kearney, *supra* note 47, at 107.

[59] *Id.* (internal quotation marks omitted).

[60] Davidson, *supra* note 40, at 28–29; *see also* O'Daniel, *supra* note 36, at 739–40 ("An examination of the history of the prohibition indicates that it was passed in 1954 with little thought by Congress, or even by its sponsor, the Democratic Minority Leader (soon to be Majority Leader), Senator Lyndon Baines Johnson, concerning its effect on churches. In any event, the prohibition was not the product of a change in public opinion, but instead appears to have been proposed by Johnson as a way to squelch certain unsavory campaign tactics targeted at him by a few tax-exempt entities.").

[61] Davidson, *supra* note 40, at 16.

[62] *See* H.R. REP. NO. 100-391, pt. 2, at 1621 (1987).

[63] *Id.*

Apparently, the IRS had interpreted the Johnson Amendment to mean that opposition to a particular candidate was equivalent to support for another candidate and had been enforcing the Johnson Amendment accordingly.[64] But there is also evidence that this expansion of the Johnson Amendment was directed once again at silencing nonprofit organizations.[65]

What is clear from this brief history of Section 501(c)(3) is that there is no principled justification for the Johnson Amendment other than political maneuvering. The Amendment appears to be nothing more than an attempt by a powerful senator to silence political opponents that he feared were hurting his chances for reelection. Johnson knew how to work the system and inserted his Amendment into a large tax overhaul bill. There was no referral to a committee for further study and hearings. There was no legislative analysis of the effect of the Amendment on tax-exempt organizations. And there was certainly no attempt to understand the effect that the Amendment might have on constitutional rights, especially those of churches and other religious organizations.[66] The Johnson Amendment plainly targets speech because it prohibits statements that are published or distributed,[67] yet Congress made no attempt to reconcile the Johnson Amendment with the First Amendment. There was absolutely no discussion at all of the First Amendment, and Johnson's Amendment simply sailed through Congress as a small addition to a popular tax overhaul bill.[68]

II. IRS ENFORCEMENT OF THE JOHNSON AMENDMENT

Since 1954, the IRS has been tasked with enforcing and applying the Johnson Amendment. As described below, the IRS's enforcement of the law has been vague, arbitrary, sporadic, and even unequal at times.

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[64] As of 1986, the IRS defined an "action organization" as one that "participates or intervenes, directly or indirectly, in any political campaign *on behalf of or in opposition to* any candidate for public office." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1986) (emphasis added).

[65] CRIMM & WINER, *supra* note 17, at 116 ("The 1987 statutory modification yet again was prompted by a mixture of self-serving political agendas, as well as concerns about the use of tax-preferred funds for partisan politics.").

[66] *Id.* at 114; *see also supra* note 60 and accompanying text.

[67] I.R.C. § 501(c)(3) (2006).

[68] Indeed, the Johnson Amendment was so hastily passed that Johnson failed to synthesize it with other provisions of the tax code that it obviously affected. *See* CRIMM & WINER, *supra* note 17, at 114–15 (discussing various efforts after the passage of the Johnson Amendment to plug the holes in the income tax code created by this lack of forethought).

A. Vague Enforcement

The Congressional Research Service, in a 2008 report to Congress on the Johnson Amendment, stated, "The line between what is prohibited and what is permitted can be difficult to discern."[69] It is an unassailable fact that "the IRS has never specified the precise meanings or parameters of the standards that it uses to regulate this highly sensitive area."[70]

1. "Facts and Circumstances"

One of the IRS's first actions after the Johnson Amendment passed was to enact regulations enforcing the new provision by denying tax-exempt status to so-called "action organizations."[71] An "action organization" is now defined as one that "participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office."[72] The regulations further provide,

> Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.[73]

The regulations specify that, in determining whether an organization is an action organization, "all the surrounding facts and circumstances, including the articles [of incorporation] and all activities of the organization, are to be considered."[74]

Instead of clarifying the reach of the Johnson Amendment, the regulations create confusion and raise additional questions. For instance, How does an organization *indirectly* participate or intervene in a campaign? Can that occur even if the organization never mentions the name of a candidate or a political party? When does a communication cross the line so that it is made "on behalf of or in opposition to" a candidate? What do the regulations mean when they say that activities that violate the Johnson Amendment "include, but are not limited to" the activities the IRS chose to list? What are the other activities that could violate the Johnson Amendment? What "surrounding facts and circumstances" are to be considered by the IRS? Where did the term

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[69] ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 2 (2008).

[70] CRIMM & WINER, *supra* note 17, at 127.

[71] Treas. Reg. § 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009).

[72] *Id.* § 1.501(c)(3)-1(c)(3)(iii).

[73] *Id.*

[74] *Id.* § 1.501(c)(3)-1(c)(3)(iv).

"action organization" come from, and why did the IRS introduce this term into the regulations when it is not found anywhere in the statutes?

The IRS's attempts in subsequent years to clarify the regulations have only resulted in additional confusion. This is mainly because the IRS has merely repeated the same "facts and circumstances" language as it initially set forth in the regulations enforcing the Johnson Amendment. For instance, a Revenue Ruling in 1978 advises, "Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."[75] Identical language is repeated in a 2007 Revenue Ruling that purports to clarify the law.[76] The IRS's *Tax Guide for Churches and Religious Organizations* reiterates the "facts and circumstances" test and broadly states, "Certain activities or expenditures may not be prohibited depending on the facts and circumstances."[77]

One legal scholar recently noted that the "facts and circumstances" test means that "the prohibition's exact scope still remains uncertain."[78] Others have similarly commented,

> The [facts and circumstances] test has not been further articulated in statute or regulation, and the courts and the IRS have issued only a very few rulings, even fewer of them precedential. The rulings that have been issued do not offer clear road signs, but rather mere examples of 501(c)(3) behavior that is permissible or impermissible.[79]

Even IRS training materials candidly admit the vagueness of the regulations: "In situations where there is no explicit endorsement or partisan activity, there is no bright-line test for determining if the [Internal Revenue Code] 501(c)(3) organization participated or intervened in a political campaign. Instead, all the facts and circumstances must be considered."[80] The Congressional Research Service, in reporting to Congress on the Johnson Amendment, also described, "In many situations, the activity is permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Some biases can be subtle and whether an activity is

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75 Rev. Rul. 78-248, 1978-1 C.B. 154.

76 Rev. Rul. 2007-41, 2007-1 C.B. 1421.

77 INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 7 (2009), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

78 Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1147 (2009).

79 Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 64–65 (2004).

80 Kindell & Reilly, *supra* note 33, at 344.

campaign intervention will depend on the facts and circumstances of each case."[81]

2. "Code Words"

Worse, the IRS's precedential and non-precedential guidance has gone far beyond simply acknowledging that all the facts and circumstances should be considered in determining whether the Johnson Amendment has been violated. For example, the IRS's training materials explain that a tax-exempt organization does not even have to mention a candidate by name to violate the Johnson Amendment. In 1993, the IRS included the following in its training materials:

> [T]he Service is aware that an IRC 501(c)(3) organization may avail itself of the opportunity to intervene in a political campaign in a rather surreptitious manner. The concern is that an IRC 501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using *code words* to substitute for the candidate's name in its messages, such as "conservative," "liberal," "pro-life," "pro-choice," "anti-choice," "Republican," "Democrat," etc., coupled with a discussion of the candidacy or the election.[82]

In explaining why "code words" can violate the Johnson Amendment, the IRS materials noted, "Code words, in this context, are used with the intent of conjuring favorable or unfavorable images—they have pejorative or commendatory connotations. When combined with discussions of elections, the code words also make specific candidates identifiable . . . ."[83] The "code words" rationale has been used in at least one instance to find that a tax-exempt organization violated the Johnson Amendment.[84]

3. "Issue Advocacy" or "Campaign Intervention"?

Another way the IRS has added to the vagueness of the regulations in this area is in attempting to define when an organization crosses the line from permissible "issue advocacy" to prohibited "campaign intervention." In one Revenue Ruling, the IRS states, "Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, Section

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[81] LUNDER & WHITAKER, *supra* note 69, at 3.

[82] Judith E. Kindell & John F. Reilly, *Election Year Issues*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1993, at 400, 411 (1992) (emphasis added), *available at* http://www.irs.gov/pub/irs-tege/eotopicn93.pdf.

[83] *Id.* at 411 n.6.

[84] I.R.S. Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990) (finding that the organization's use of the words "liberal" and "conservative" qualified as intervention in a political campaign).

501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention."[85] The Ruling goes on to caution, "Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate."[86] At the same time, the IRS offers no determinative guidance for compliance, only a vague reiteration of the facts and circumstances test: "All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention."[87]

4. Who Is a "Candidate"?

Finally, there is also no certainty or precision as to who is considered a candidate. The IRS defines a "candidate for public office" as someone "who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local."[88] It unhelpfully adds in its training materials: "The determination of when an individual has taken sufficient steps prior to announcing an intention to seek election, so that he or she may be considered to have offered himself or herself as a contestant for the office is based on the *facts and circumstances*."[89] And it notes further that "some action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent."[90] So, additional confusion abounds related to when the Johnson Amendment prohibition applies since it only restricts statements made about "candidates," that is, those who the IRS views as candidates based on the facts and circumstances.

5. Vague Enforcement Leading to Self-Censorship

The vagueness in the IRS's regulation of speech is pervasive. The predictable outcome of this state of affairs has been massive self-censorship among churches and pastors. As the Supreme Court has noted, "Uncertain meanings inevitably lead citizens to 'steer far wider of

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85 Rev. Rul. 2007-41, 2007-1 C.B. 1421.

86 *Id.*

87 *Id.* Drawing on an analogy to the 2004 electoral cycle, a legal scholar analyzing this aspect of the IRS's guidance noted that "[p]olitical parties are usually divided in their policy positions on many public issues. . . . Therefore, presumably a church's endorsement of issues that were aligned with the Republican campaign platform could have been construed as an indirect endorsement of President Bush, the [2004] Republican candidate." Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 55 (2007).

88 Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2009); Treas. Reg. § 53.4945-3(a)(2) (2009).

89 Kindell & Reilly, *supra* note 33, at 342 (emphasis added).

90 *Id.*

the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[91] The Court has also observed that when speech restrictions are vague, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[92]

B. Drawing the Line at Speech from the Pulpit

The closest the IRS comes to approximating crystal clarity in its regulations is its insistence that a pastor's statements from the pulpit during a church service supporting or opposing a political candidate violate the Johnson Amendment.[93] The IRS says explicitly that leaders of 501(c)(3) organizations "cannot make partisan comments in official organization publications or at official functions of the organization."[94] The IRS's *Tax Guide for Churches and Religious Organizations* includes examples of situations that violate the Johnson Amendment.[95] One example states,

> Minister D is the minister of Church M, a section 501(c)(3) organization. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concluded by stating, "It is important that you all do your duty in the election and vote for Candidate W." Because Minister D's remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention by Church M.[96]

One notorious example of the application of the Johnson Amendment to a pastor's sermon from the pulpit is the 2005 IRS audit of All Saints Episcopal Church in Pasadena, California.[97] On October 31, 2004, a pastor preached a sermon at All Saints entitled "If Jesus Debated Sen. Kerry and President Bush."[98] The *Los Angeles Times* reported on the sermon, including the minister's "searing indictment of the Bush administration's policies in Iraq," and his general criticism of

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[91] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)) (internal quotation marks omitted).

[92] Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citation omitted).

[93] Yet even here vagueness creeps in because the contours of what is prohibited under the Johnson Amendment remain unclear unless there is explicit endorsement or opposition from the pulpit of a candidate.

[94] Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422.

[95] TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, *supra* note 77, at 8.

[96] *Id.*

[97] LUNDER & WHITAKER, *supra* note 69, at 9–10.

[98] *Id.*

the President's positions on other important issues like tax policy.[99] From the context of the sermon, it appears the minister's motivation for the message was his deeply-held religious conviction on the issues.[100] The IRS launched an investigation of the church that lasted until September 2007, when it sent a letter to All Saints stating without any explanation that "the sermon in question constituted intervention in the 2004 Presidential election."[101]

In a similar case, the IRS launched an investigation of Warroad Community Church in Minnesota after Pastor Gus Booth preached a sermon during the 2008 election that supported John McCain and opposed Barack Obama.[102] Pastor Gus Booth had preached the sermon as part of the ADF Pulpit Freedom Sunday.[103] After an eleven-month audit, the IRS closed the investigation without any findings "because of a pending issue regarding the procedure used to initiate the inquiry."[104]

The IRS has steadfastly maintained that it has the authority to apply the Johnson Amendment to what a pastor says from the pulpit during a sermon. In 2002, the House Ways and Means Committee held a hearing to review the Internal Revenue Code requirements for religious organizations.[105] During this hearing, Steven Miller, the IRS Director of Exempt Organizations, testified and was questioned by members of Congress.[106] Congressman Lewis asked Mr. Miller, "But if you have a minister speaking from the pulpit on Sunday morning, maybe a rabbi from the synagogue or the temple, saying that he had been told by God about somebody, that somebody should be elected, somebody should be

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[99] Josh Getlin, *Pulpits Ring with Election Messages*, L.A. TIMES, Nov. 1, 2004, at A1. George Regas was Rector Emeritus of All Saints Episcopal and had been rector of the church for twenty-eight years before he retired in 1995. Patricia Ward Biederman, *A Long Tradition of Activism*, L.A. TIMES, Nov. 13, 2005, at B1. The *Los Angeles Times* reported that Regas "was legendary for his opposition to war, his championing of female clergy and his commitment to integrating gays and lesbians into the fabric of the church." *Id.*

[100] *See* Getlin, *supra* note 99.

[101] Stephanie A. Bruch, Comment, *Politicking from the Pulpit: An Analysis of the IRS's Current Section 501(c)(3) Enforcement Efforts and How It Is Costing America*, 53 ST. LOUIS U. L.J. 1253, 1270 (2009) (internal quotation marks omitted).

[102] Paul Walsh, *Warroad Pastor's IRS Case Closed, for Now*, STARTRIB. (July 29, 2009, 9:50 PM), http://www.startribune.com/politics/statelocal/52000717.html?page=all&prepage=2&c=y#continue.

[103] IRS Withdraws Audit on Minn. Pastor's Sermons, *supra* note 4.

[104] Letter from Sunita B. Lough, Dir., EO Examination, Internal Revenue Serv., to Warroad Community Church (July 7, 2009), *available at* http://oldsite.alliancedefensefund.org/userdocs/IRSletterClosingFile.pdf.

[105] *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. 2 (2002).

[106] *Id.* at 6–12, 14–23.

defeated, is that political activity?"[107] Mr. Miller responded, "That would constitute political activity."[108]

Tellingly, Mr. Miller went on to demonstrate just how quickly the waters can become murky in this area in response to a question from Congressman Weller who asked, "And can the minister say the following from the pulpit and not be in violation of the tax status, that candidate X is pro-life or candidate Y is pro-choice?"[109] In indicating that this situation would be more problematic, Mr. Miller responded, "The pastor, the minister, the rabbi can speak to issues of the day, but to the extent they start tying it to particular candidates and to a particular election, it begins to look more and more like either opposition to a particular candidate or favoring a particular candidate."[110]

After a thorough review of the IRS's enforcement of the Johnson Amendment, two prominent legal scholars concluded,

> No one questions but that spiritual leaders must be able to address their congregants on matters of religious conscience as related to issues of the day. As a result, one might ask how spiritual leaders can deliver sermons, write pastoral letters, counsel congregants, and conduct Bible studies and discuss the application of scripture passages to current life choices with reasonable certainty of not violating the political campaign speech prohibition. And if there is no such certainty with respect to these matters, how can the IRS determine noncompliance with the statutory ban? Here the unsatisfactory answer seems clear: IRS decisions are based largely on vague or ambiguous criteria because its determinations are "fact and circumstance" sensitive.[111]

If legal scholars, attorneys, and even the IRS itself cannot agree—and in fact argue—over where the line is drawn under the Johnson Amendment, how can the IRS realistically expect pastors to understand and apply these questionable speech restrictions?

C. Unequal Application

The IRS's enforcement of the Johnson Amendment has also been unequal, or at least perceived to be unequal, at times. The *Branch Ministries v. Rossotti* case is the only reported opinion addressing the application of the Johnson Amendment to a church.[112] According to the court's record in that case, "Four days before the 1992 presidential election, Branch Ministries, a tax-exempt church, placed full-page

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[107] *Id.* at 17.

[108] *Id.* By labeling the hypothetical minister's sermon "political activity," Mr. Miller brought the sermon within the prohibition of the Johnson Amendment.

[109] *Id.* at 19.

[110] *Id.*

[111] CRIMM & WINER, *supra* note 17, at 127.

[112] 211 F.3d 137 (D.C. Cir. 2000).

advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his position on certain moral issues."[113] For the first time ever, the IRS responded by revoking the church's tax-exempt status for its involvement in politics.[114]

The church sued the IRS and raised several arguments that the revocation was unlawful. One of the arguments was that the IRS had engaged in selective prosecution of the church in violation of the Fifth Amendment's Equal Protection Clause.[115] Presumably, this argument was premised on the fact that, according to the *Branch Ministries* court (and presumably supported by evidence presented by the IRS), the IRS had never revoked any other church's tax-exempt status due to a violation of the Johnson Amendment from 1954 to 2000, a span of 46 years.[116]

To support its claim of selective prosecution, Branch Ministries presented several hundred pages of newspaper reports regarding other politically-active churches that had retained their tax-exempt status over the years despite also clearly violating the Johnson Amendment.[117] As reported in the case, the evidence presented by the church included "reports of explicit endorsements of Democratic candidates by clergymen as well as many instances in which favored candidates have been invited to address congregations from the pulpit."[118] The church argued that, despite this widespread pattern of violations, the fact that it was the only church to have its exempt status revoked was evidence of selective prosecution.[119] The IRS actually agreed with Branch Ministries at oral argument that the other situations described by the church, if accurately reported, also constituted violations of the Johnson Amendment and "could have resulted in the revocation of those churches' tax-exempt status."[120]

The *Branch Ministries* court ultimately side-stepped the church's selective prosecution argument, however, because the church could not cite to a specific situation where another church had placed a full-page advertisement in a national newspaper in violation of the Johnson Amendment and retained its tax-exempt status. Based on this finding, the court reasoned that Branch Ministries was not similarly-situated to

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[113] *Id.* at 139.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 144.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*

any other church that had engaged in impermissible political activity and not been prosecuted.[121]

Nevertheless, the evidence presented by the *Branch Ministries* case establishes a record of enforcement by the IRS that is spotty at best and selective at worst. From 1954 to 2000, the IRS had never revoked the exempt status of any church, yet conceded that readily available evidence established numerous violations of the Johnson Amendment. The fact that the church was ultimately unsuccessful on its selective prosecution claim does nothing to detract from the evidence of the IRS's enforcement problems in this area. Whether this atrocious record of enforcement of the Johnson Amendment is due to the IRS's reluctance to tread on the First Amendment rights of churches, or for some other reason entirely, matters little. The record established in *Branch Ministries* stands as a clear indictment of the IRS's inconsistent enforcement scheme.

Additional examples abound of the IRS's irregular enforcement of the Johnson Amendment, and space does not permit an in-depth analysis. But consider the following: During the 2008 presidential primaries, Barack Obama's pastor, Jeremiah Wright, preached a sermon in which he made statements that were susceptible of no other interpretation than support for Barack Obama and opposition to Hillary Clinton and Rudy Giuliani, other candidates for President.[122] Reverend Wright stated,

> It just came to me within the past few weeks, y'all, why so many folk are hatin' on Barack Obama. He doesn't fit the model. He ain't white, he ain't rich, and he ain't privileged. Hillary fits the mold. Europeans fit the mold. Guiliani fits the mold. Rich, white men fit the mold.[123]

The IRS never investigated or punished Reverend Wright for his statements made from the pulpit, even though his statements in support of Barack Obama's presidential campaign were widely reported and posted on the Internet for public review.

Reverend Wright is not alone, however. Another example of a blatant violation of the Johnson Amendment occurred during Reverend Jesse Jackson's first presidential campaign.[124] Going beyond simply asking ministers to endorse his campaign, Reverend Jackson called upon

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[121] *Id.*

[122] Jca325, *Jeremiah Wright - Hillary Clinton ain't never been called . . . .*, YOUTUBE (Mar. 12, 2008), http://www.youtube.com/watch?v=hAYe7MT5BxM. The sermon was preached at Trinity United Church of Christ on December 25, 2007. *See* Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1.

[123] Jca325, *supra* note 122.

[124] *See* Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 156–57 (2006).

churches to coordinate major campaign fundraising efforts: "Leading up to Super Bowl Sunday, the Jackson campaign distributed flyers and encouraged church members to bring donations for Jackson's campaign to church that Sunday. Campaign offerings were then collected separately from regular church donations by many churches."[125] Again, the IRS chose not to investigate this potential violation of the Johnson Amendment.

Contrast these situations with the much-reported cases involving All Saints Episcopal Church in Pasadena, California, and Warroad Community Church in Warroad, Minnesota.[126] These churches were investigated by the IRS for statements of support or opposition from the pulpit while Jeremiah Wright and Jesse Jackson were never questioned, despite widespread reporting in the media of their statements and actions. Also contrast Jesse Jackson's campaign with the IRS's investigation of Jimmy Swaggart Ministries during the same election cycle.[127] While Jackson's campaigning in churches was ongoing and widely reported in the media, the IRS took action against Jimmy Swaggart Ministries for participating in Pat Robertson's presidential campaign.[128] The IRS even went so far as to issue a public warning to the religious community after the incident, stating that Swaggart's endorsement of Robertson violated the Johnson Amendment.[129] Yet the IRS never took action or publicly warned any of the churches associated with Jesse Jackson's campaign. These few examples alone illustrate that the IRS's record of enforcing the Johnson Amendment is not uniform, precise, or even-handed.

D. Political Activities Compliance Initiative

Faced with complaints about its uneven and spotty enforcement record, the IRS launched a new program during the 2004 election cycle called the Political Activities Compliance Initiative ("PACI").[130] The IRS's goal for PACI was to review allegations of political intervention on an

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[125] *Id.*

[126] *See supra* notes 97–104 and accompanying text.

[127] *See* Shawn A. Voyles, Comment, *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 249–50 (1997).

[128] *Id.* at 250.

[129] *Id.*

[130] INTERNAL REVENUE SERV., POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY 2 (2006), *available at* www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf.

expedited basis.[131] By doing this, the IRS hoped to deter wrongdoers and establish a more active enforcement presence.[132]

In 2004, PACI investigated 110 nonprofit organizations, including 47 churches.[133] Of the churches that were examined, thirty-seven were found to have violated the Johnson Amendment and were either given a written advisory opinion or assessed an excise tax; no church lost its tax-exempt status.[134] The 2004 PACI was successful in the IRS's view, and it recommended that the program be continued for the 2006 election cycle.[135]

In 2006, PACI handled 237 referrals but only selected 100 for investigation, including 44 churches.[136] When the 2006 PACI report was issued in March 2007, sixty cases remained open; however, the IRS reported that four churches received written advisories and that ten churches had their files closed because political intervention was not substantiated.[137] Once again, no church had its tax-exempt status revoked.[138]

After 2006, the PACI program became decidedly less energetic and seemingly wandered about in the bureaucratic maze of the IRS without any identifiable goal. The IRS continued PACI in 2008 and noted that the Tax-Exempt/Government Entities Commissioner requested a report on the 2008 program by March 31, 2009, including suggestions for the future direction of PACI.[139] But as of this Article, the PACI report for 2008 has never been released,[140] and no IRS explanation has ever been given for this failure. For some unknown and unstated reason, the IRS has apparently lost interest in its PACI program and no longer has the will to put substantial effort into it. There has also been no

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131 *Id.*

132 INTERNAL REVENUE SERV., FINAL REPORT: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (2006), *available at* http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

133 INTERNAL REVENUE SERV., 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI) SUMMARY OF RESULTS 1 (2006), *available at* http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

134 *Id.*

135 FINAL REPORT, *supra* note 132, at 25.

136 INTERNAL REVENUE SERV., 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE REPORT 3 (2007), *available at* http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

137 *Id.* at 5.

138 *Id.*

139 Letter from Lois G. Lerner, Dir., Exempt Orgs., to Marsha Ramirez, Dir., Examinations; Rob Choi, Dir., Rulings & Agreements; and Bobby Zarin, Dir., Customer Educ. & Outreach (Apr. 17, 2008), *available at* http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.

140 *See IRS Unsure When PACI Report Will be Released*, OMB WATCH, http://www.ombwatch.org/node/9864 (last visited Apr. 6, 2012).

communication from the IRS regarding whether it will continue the PACI program for the 2012 election cycle.[141]

The PACI program's fitful "stop and start" history demonstrates a lack of commitment on the part of the IRS to engage in any sustained and measured enforcement efforts of the Johnson Amendment. Considering also the vague and far-reaching pronouncements by the IRS concerning the Johnson Amendment, it seems that the IRS is suffering from a split personality disorder—preferring to make bold, vague, and far-reaching statements regarding what conduct violates the Johnson Amendment while refusing to enforce the law with any real precision or accuracy. The IRS appears to prefer a system of enforcement that relies almost exclusively on intimidation instead of actual interpretation and enforcement in individual cases. And all this is going on while the IRS studiously avoids any court confrontation over the very serious constitutional issues involved in enforcing the Johnson Amendment. It is to those constitutional problems we now turn.

III. THE UNCONSTITUTIONALITY OF THE JOHNSON AMENDMENT IN LIGHT OF RECENT SUPREME COURT PRECEDENT

As noted earlier, a number of authors and legal scholars have concluded that the Johnson Amendment violates the Free Speech Clause,[142] the Free Exercise Clause,[143] the Establishment Clause,[144] the Equal Protection Clause,[145] the Federal Religious Freedom Restoration Act,[146] and the unconstitutional conditions doctrine.[147]

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[141] In their report on PACI, scholars, Nina Crimm and Laurence Winer, expressed, "Despite the IRS's efforts, spiritual leaders of houses of worship continue to voice their frustrations regarding the potential for 'selective prosecution' by the IRS and complain that the vagueness of proffered IRS interpretations leaves them in positions of unwittingly engaging in impermissible political campaign speech or over-censoring themselves." CRIMM & WINER, *supra* note 17, at 144.

[142] *See, e.g.*, Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405, 423 (2009); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 254 (1992); Jeffrey Mikell Johnson, *The 501(c)(3) Campaign Prohibition as Applied to Churches: A Consideration of the Prohibition's Rationale, Constitutionality, and Possible Alternatives*, 2 LIBERTY U. L. REV. 557, 574–75 (2008); Smith, *supra* note 87, at 78–81.

[143] *See, e.g.*, Blair, *supra* note 142, at 423–24; Johnson, *supra* note 142, at 575–77; Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 153, 180 (2007); Smith, *supra* note 87, at 81–84; Voyles, *supra* note 127, at 239.

[144] *See, e.g.*, Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches That Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 479–80 (2009); Johnson, *supra* note 142, at 577–80; Samansky, *supra* note 143, at 152; Bruch, *supra* note 101, at 1278.

[145] *See, e.g.*, Voyles, *supra* note 127, at 245–50.

[146] *See, e.g.*, Kemmitt, *supra* note 124, at 162–63; Mayer, *supra* note 78, at 1216.

It is not the intent of this Article to repeat what those able authors have already articulated. Rather, this Article will analyze the constitutionality of the Johnson Amendment in light of recent Supreme Court decisions in *Citizens United v. FEC*, *Arizona Christian School Tuition Organization v. Winn*, and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. These cases provide substantial guidance and support to the argument that the Johnson Amendment is hopelessly unconstitutional.

A. Citizens United v. FEC

In *Citizens United v. FEC*, the Supreme Court struck down as unconstitutional a portion of the Bipartisan Campaign Reform Act ("BCRA")[148] that prohibited "corporations . . . from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate."[149] Violators of the law were punished through civil and criminal penalties.[150]

Citizens United was a nonprofit corporation that produced a film entitled *Hillary: The Movie*.[151] It wanted to make the movie available to video-on-demand cable subscription customers within thirty days of the 2008 primary elections, but was afraid that the movie would be deemed by the Federal Elections Commission ("FEC") to violate the law as an "electioneering communication" and thus subject it to civil and criminal penalties.[152] Consequently, the corporation filed suit to have the electioneering communications prohibition struck down as unconstitutional. The Supreme Court agreed and issued an opinion striking down the law that is likely one if its strongest precedents on free speech.[153]

In order to understand the application of *Citizens United* to the Johnson Amendment, it is best to address the Court's opinion in sections of analysis, showing how each part has direct application to the unconstitutionality of the Johnson Amendment.

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147 *See, e.g.*, CRIMM & WINER, *supra* note 17, at 281–82.

148 Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (2006).

149 130 S. Ct. 876, 886 (2010).

150 2 U.S.C. § 437g(d) (2006).

151 *Citizens United*, 130 S. Ct. at 886–87.

152 *Id.* at 888. The term "electioneering communication" was defined as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Id.* at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)).

153 *Id.* at 917; *see also* Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 987 (2011) (concluding that the *Citizens United* decision is a "landmark of political freedom").

1. Political Speech Is Essential and Should Not Be Chilled.

a. Citizens United

In *Citizens United*, the Supreme Court placed great emphasis on the importance of political speech and also condemned attempts to chill speech through vague regulations or complex regulatory schemes.[154]

The BCRA contained a requirement that electioneering communications must be received by 50,000 or more persons to fall within the ambit of the statute.[155] In an attempt to preserve its constitutionality, the amici in *Citizens United* urged the Court to limit the reach of this requirement to situations where there is a plausible likelihood that the communication will be seen by 50,000 or more voters, as opposed to simply being technologically capable of being seen.[156] The Court rejected that argument, noting the importance of political speech and of protecting that speech from being chilled:

> Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.[157]

Similarly, the Court rejected the argument that, because movies shown through video-on-demand have a lower risk of distorting the political process than do television advertisements, it could simply strike down the prohibition as applied to movies and leave it in place for television advertisements.[158] In rejecting this argument, the Court refused to draw lines based on the particular technology used to disseminate speech.[159] The Court observed that drawing such lines would require "substantial litigation over an extended time" and that "[t]he interpretive process itself would create an inevitable, pervasive, and

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[154] *Citizens United*, 130 S. Ct. at 889, 898–99.

[155] 2 U.S.C. § 434(f)(3)(C) (2006).

[156] *Citizens United*, 130 S. Ct. at 889.

[157] *Id.* (alteration in original) (citation omitted) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). The Court reasoned,

> In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.

Id.

[158] *Id.* at 890.

[159] *Id.*

serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."[160]

The Court also dismissed an argument that it could carve out an exception to the prohibition for corporate political speech funded overwhelmingly by individuals.[161] The Court noted that the "series of steps suggested [to limit the reach of the law in this way] would be difficult to take in view of the language of the statute,"[162] but more importantly, it stated, "Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. 'First Amendment freedoms need breathing space to survive.' We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned . . . ."[163] In rejecting all of these arguments to limit the reach of the BCRA prohibition on electioneering communications, the Court concluded that it could not "resolve [the] case on a narrower ground without chilling political speech, *speech that is central to the meaning and purpose of the First Amendment*."[164]

In assessing the importance of political speech, the Court rejected deciding the case on an as-applied basis and noted the uncertainty that such an approach would allow.[165] It pointed to the fact that elections frequently require the ability for citizens to speak on an expedited basis.[166] Requiring speakers to file a lawsuit to litigate the permissibility of their speech would frustrate the contemporaneous nature of speech in the midst of heated political campaigns.[167]

The Court also precluded this argument under the rationale that because speech itself is of primary importance to the integrity of the election process, "[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled."[168] Noting the complexity of the FEC's regulations and the deference given by federal courts to administrative determinations, the Supreme Court labeled the restrictions as "onerous" and equated them to prior restraints on speech.[169] It went on to explain that "[w]hen the FEC issues advisory opinions that prohibit speech, '[m]any persons, rather than undertake

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160 *Id.* at 891.

161 *Id.*

162 *Id.* at 892.

163 *Id.* (citations omitted) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468–69 (2007)).

164 *Id.* (emphasis added) (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).

165 *Id.* at 894–95.

166 *Id.* at 895.

167 *Id.*

168 *Id.*

169 *Id.* at 895–96.

the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . ."[170] And, to the Court, the effect was that the regulations harmed "'not only [the speakers] but society as a whole, which is deprived of an uninhibited marketplace of ideas.'"[171]

The FEC's regulatory scheme allowed it to select whatever speech it deemed safe for public consumption through the application of ambiguous tests.[172] This scheme required FEC officials to "pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech."[173]

The importance of political speech was the primary rationale the *Citizens United* Court used in striking down the BCRA prohibition on electioneering communications. In praise of the freedom of political speech, the Court declared,

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."[174]

Furthermore, the Court noted that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[175] Citing well-established Court precedent, it also stated that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"[176]

The vital importance of political speech was the polestar of the *Citizens United* decision, and the Court took great pains to ensure that political speech was not chilled by overly burdensome regulations and regulatory or interpretive schemes that required case-by-case determinations without setting forth with precision what speech was prohibited. In fact, the Court even went so far as to say that complex and

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[170] *Id.* at 896 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003) (alteration in original)).

[171] *Id.* (quoting *Hicks*, 539 U.S. at 119).

[172] *Id.*

[173] *Id.*

[174] *Id.* at 898 (citation omitted) (quoting Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)) (internal quotation marks omitted).

[175] *Id.* at 899.

[176] *Id.* at 904 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

vague laws that require determinations by government officials were functional prior restraints.

The Court has consistently, and in very strong terms, condemned prior restraint schemes: "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[177] Moreover, the Court has warned, "[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights."[178] This is because society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[179] Historically, the Court has also noted that "it has been generally, if not universally, considered . . . the chief purpose of the [First Amendment] to prevent previous restraints . . . ."[180] In *Lovell v. City of Griffin*, it reaffirmed that the prevention of prior restraints was a "leading purpose" in the adoption of the First Amendment.[181] And in *Carroll v. President & Commissioners of Princess Anne*, the Court noted that "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement."[182] Needless to say, this universal disapproval of prior restraints on speech is deeply entrenched in First Amendment doctrine.

b. Application to the Johnson Amendment

It is evident that the *Citizens United* opinion applies to the Johnson Amendment and raises serious questions regarding the constitutionality of that law.

First, the terms of the Johnson Amendment are as ill-defined as the term "electioneering communication" in the BCRA. Terms such as "participate in" or "intervene in" in the Johnson Amendment lack precision. Scholars have noted the vagueness of these terms in the law,[183] and the IRS has even admitted that "[t]he Code contains no bright line test for evaluating political intervention; it requires careful balancing of all of the facts and circumstances."[184] The IRS's "facts and circumstances" test exacerbates the vagueness of the Johnson

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[177] Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (Burger, J., dissenting) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)) (internal quotation marks omitted).

[178] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1975).

[179] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

[180] Near v. Minnesota, 283 U.S. 697, 713 (1931).

[181] 303 U.S. 444, 451–52 (1938) (citing Patterson v. Colorado, 205 U.S. 454, 462 (1907); Grosjean v. Am. Press Co., 297 U.S. 233, 245–46 (1936); *Near*, 283 U.S. at 713–16).

[182] 393 U.S. 175, 181 (1968).

[183] *See, e.g.*, Kingsley & Pomeranz, *supra* note 79, at 64–65.

[184] FINAL REPORT, *supra* note 132, at 1.

Amendment and highlights the fact that there can be no precise interpretation of its terms.

Second, the IRS has a complex regulatory scheme for enforcing the Johnson Amendment. The "facts and circumstances" test mandates that governmental agents use their subjective interpretations of particular speech by a pastor or church to determine whether it violates the Johnson Amendment. Similar to the BCRA's electioneering communication prohibition addressed in *Citizens United*, the IRS, like the FEC, applies ambiguous tests in enforcing the Johnson Amendment, and government agents are required to "pore over each word of a text to see if, in their judgment, it accords" with the agency's test that contains numerous factors.[185] The IRS has created more than one multi-factor test to determine whether speech violates the Johnson Amendment. For instance, the IRS has a seven-factor test to determine whether a communication is permissible "issue advocacy" or unlawful "political campaign intervention."[186] This test is just as complex and susceptible to subjective determinations as the FEC's test for determining whether a communication is an "electioneering communication." Thus, the same dangers exist in the IRS's enforcement scheme of the Johnson Amendment as in the FEC's enforcement of the BCRA: chill on speech, self-censorship, and vague and arbitrary enforcement of the law.

The IRS has also exacerbated the vagueness of the Johnson Amendment by its various interpretations, guidance, and pronouncements throughout the years. As discussed previously, the IRS states that there is such a thing as "indirect participation" in a political campaign.[187] Yet there is no definition of what is considered "indirect," and the IRS has issued no guidance to cabin that phrase and prevent its abuse by government officials tasked with reviewing speech for compliance with the law. At least some IRS training materials also state that the Johnson Amendment can be violated by the use of "code words," yet there is no attempt to define that term or in any way limit its application.[188] In these ways, the enforcement scheme adopted and pursued by the IRS for the Johnson Amendment is even worse than that of the FEC's scheme under the BCRA. The definition of what speech actually violates the Johnson Amendment has become so blurred as to be indecipherable. The predictable result of this sorry state of affairs is the undeniable chill on speech and widespread self-censorship among those

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185 *See* Citizens United v. FEC, 130 S. Ct. 876, 896 (2010).

186 Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424.

187 Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2009).

188 *See* Kindell & Reilly, *supra* note 82, at 411. Instead of providing clarity to define "code words," the IRS only states that code words used in the context of political campaigns "are used with the intent of conjuring favorable or unfavorable images." *Id.* n.6.

organizations and individuals that fall within the Johnson Amendment's tyrannical domain.

Finally, the Supreme Court in *Citizens United* placed great emphasis on the importance of political speech. To be sure, *Citizens United* was not the first time the Court had made similar statements;[189] however, the case stands as one of the Court's strongest declarations of the foundational importance of political speech. While speech by churches about candidates or elections might arguably be characterized as political speech, it is more properly characterized as religious speech since it is motivated and undergirded by the religious doctrine of the church. The Supreme Court has consistently held that religious speech occupies a high estate under the First Amendment: "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[190]

Thus, religious speech is at least as protected, if not more protected, than political speech. Given this fact, the analysis in *Citizens United* applies with equal, if not greater, force to the Johnson Amendment. The restriction that the Johnson Amendment imposes on religious speech is just as egregious and deserving of condemnation as the unconstitutional restriction that the BCRA imposed on political speech.

2. Speaker Identity Restrictions Are Invalid Under the First Amendment.

a. Citizens United

Central to the Court's holding in *Citizens United* is that speaker identity restrictions on speech are invalid. In the context of *Citizens*

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[189] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); *see also* Brown v. Hartlage, 456 U.S. 45, 53 (1982) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); Pennekamp v. Florida, 328 U.S. 331, 346 (1946) ("Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.").

[190] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)). The Court further explained, "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.*

United, this meant that the BCRA prohibition that applied to restrict the speech of corporations, but not others, was unconstitutional.

The Court reaffirmed that restrictions distinguishing among speakers are prohibited under the First Amendment.[191] The Court noted that such speaker identity restrictions are "all too often simply a means to control content."[192] It concluded, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion."[193]

As support for its conclusion, the Court pointed to the history of free speech and the fact that, "[a]t the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge."[194] It recognized that the BCRA prohibition was censorship that was "vast in its reach" and that the government had "muffle[d] the voices that best represent the most significant segments of the economy."[195] The Court reasoned, "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[196] In condemning the BCRA's electioneering communications prohibition as unconstiutional, the Court went on to state,

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses

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[191] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

[192] *Id.* at 899. The Court explained,

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id.

[193] *Id.*

[194] *Id.* at 906.

[195] *Id.* at 907 (alteration in original) (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (internal quotation marks omitted) (Scalia, J., concurring in part, dissenting in part, concurring in the judgment in part, and dissenting in the judgment in part)).

[196] *Id.*

> censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[197]

The Court finally concluded by stating that "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[198]

b. Application to the Johnson Amendment

The Supreme Court's language regarding speaker identity restrictions almost seems calculated to apply directly to the Johnson Amendment. The Court specifically included nonprofit corporations in its opinion.[199] Thus, it is impossible to ignore the application of *Citizens United* to the Johnson Amendment. And, like the political speech doctrine relied upon by the Court in *Citizens United*, the prohibition on speaker identity restrictions applies directly to the Johnson Amendment.

Section 501(c) of the Internal Revenue Code now contains a list of at least twenty-nine categories of entities exempt from federal income taxes.[200] Yet out of these categories, only one, that of 501(c)(3), has historically been subject to the restriction of the Johnson Amendment.[201] This may be owing to the fact that the Amendment was hastily added with no forethought for how it would integrate or synthesize with the remainder of the Code.[202] But, whatever the reason, it is plain that the Amendment has historically only applied to one group of entities—those exempt under Section 501(c)(3).

Some may suggest that the reason for this differential treatment is that only Section 501(c)(3) entities receive the double benefit of exemption and tax-deductible contributions.[203] This is not the case, however. Veterans' organizations are also considered exempt from

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[197] *Id.* at 908.

[198] *Id.* at 913.

[199] *Id.* ("No sufficient governmental interest justifies limits on the political speech of *nonprofit* or for-profit *corporations*." (emphasis added)).

[200] I.R.C. § 501(c) (2006 & Supp. IV 2011).

[201] Section 501(c)(29), recently added to the Internal Revenue Code by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), contains a condition similar to that of the Johnson Amendment. *See* § 501(c)(29)(B)(iv) (Supp. IV 2011).

[202] For a discussion of how the Johnson Amendment was added with no attempt to synthesize its provisions with the rest of the tax code, see CRIMM & WINER, *supra* note 17, at 114–15. Repeated amendments were necessary in later years to integrate the Johnson Amendment fully into the Code. *Id.*

[203] *See, e.g.*, Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. Rev. 843, 866 (2001).

income taxes and are allowed to receive deductible contributions.[204] These organizations are not subject to the Johnson Amendment and yet are still allowed to endorse or oppose candidates without endangering their tax-exempt status.[205]

The Johnson Amendment sets up a speaker-identity restriction where certain nonprofit corporations are prohibited from speaking in such a way as to support or oppose political candidates but others are not. Only organizations that are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals" have historically been prohibited from supporting or opposing candidates for office.[206] All others have been allowed to support or oppose candidates for office and remain exempt and, at least in the case of veterans' organizations, receive deductible contributions. This is a classic speaker-identity restriction, and *Citizens United* seems to indicate that the Supreme Court will invalidate such restrictions as violative of the Free Speech Clause.

3. Corporations Cannot Have Their Speech Restricted by Requiring Them to Establish a PAC to Speak Politically.

a. Citizens United

In *Citizens United*, the Court rejected the argument that, because corporations still had the ability to speak out politically by establishing a Political Action Committee ("PAC"), the BCRA electioneering communication prohibition did not violate the First Amendment.[207] The Court held, in no uncertain terms, that the prohibition "is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."[208]

After cataloging the burdensome process of setting up a PAC and of complying with PAC regulations, the Court concluded that, "[g]iven the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a

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[204] *See* § 501(c)(19) (providing tax exemption); I.R.C. § 170(c)(3) (2006) (providing deductibility of contributions).

[205] There may be a small tax to be paid by the organization for monies expended in supporting or opposing candidates. *See* I.R.C. § 527(f) (2006). But that does not change the fact that these organizations can endorse or oppose candidates while maintaining their exemption and their ability to receive deductible contributions.

[206] § 501(c)(3).

[207] Citizens United v. FEC, 130 S. Ct. 876, 897 (2010).

[208] *Id.* (citing McConnell v. FEC, 540 U.S. 93, 330–33 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in the judgment in part)).

current campaign."[209] Thus, the fact that a corporation has an alternative way to speak (through the establishment of a PAC) does not alleviate the unconstitutional burden on free speech associated with a ban on the corporation itself being able to speak. The burdensome regulations associated with a PAC and the fact that a PAC is not a substitute for the corporation's ability to speak mean that any restriction on political speech by corporations cannot be justified by pointing to the fact that the corporation may speak through an alternative channel.

b. Application to the Johnson Amendment

Some scholars have attempted to justify the Johnson Amendment's ban on speech by arguing that churches can simply create additional, separate organizations to speak for them in the political realm.[210] This idea comes from the Supreme Court's decision in *Regan v. Taxation With Representation of Washington* where the Court upheld the lobbying restrictions in Section 501(c)(3) against a constitutional challenge.[211] After upholding the restrictions, the *Regan* Court noted that a Section 501(c)(3) organization could still receive tax-deductible contributions for its lobbying activities by creating a separate Section 501(c)(4) organization.[212]

Justice Blackmun wrote a concurring opinion in *Regan* where he made it plain that, in his view, "[t]he constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4)" where the charitable goals of the Section 501(c)(3) organization can be pursued through lobbying by an affiliated Section 501(c)(4) organization.[213] Justice Blackmun reasoned, "Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government."[214] He issued, however, the following caveat:

> Should the IRS attempt to limit the control these organizations' exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another

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[209] *Id.* at 897–98.

[210] *See, e.g.*, Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 473–74 (2004); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1324–26 (2007).

[211] 461 U.S. 540, 545, 551 (1983).

[212] *Id.* at 544.

[213] *Id.* at 552 (Blackmun, J., concurring); *see also id.* at 553 ("A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.").

[214] *Id.*

> person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.[215]

The Court has subsequently adopted Justice Blackmun's rationale as the significant holding of *Regan*.[216] The Court of Appeals for the District of Colombia, in *Branch Ministries*, also relied upon Justice Blackmun's concurrence in *Regan* to justify upholding the Johnson Amendment against a free exercise challenge.[217] As evidence that the church's free exercise rights were not substantially burdened, the D.C. Circuit specifically relied upon the fact that the church could initiate a series of steps to create a Section 501(c)(4) organization, which could in turn create a Section 527 political organization.[218]

The *Citizens United* case changes this legal landscape rather dramatically. It is now clear that relying on a separate organization to speak for the Section 501(c)(3) organization is not sufficient to save a statute from unconstitutionality.[219] *Citizens United* is unequivocal in its condemnation of a scheme that does not permit a corporation to speak for itself but forces that speech into a separate organization that can only be set up after a series of burdensome and time-consuming regulations have been met.[220] Instead, *Citizens United* mandates that the corporation *itself* must be permitted to speak in order for any law purporting to regulate the speech of the corporation to be considered constitutional.[221]

Although the Court did not overrule *Regan* in *Citizens United*, it is doubtful that the *Regan* analysis would now apply with any force in a challenge to the Johnson Amendment. It is even less applicable in the case of a pastor preaching a sermon from his pulpit during a Sunday morning service. That sermon is quintessential religious speech and cannot be shifted over to a separate organization. Requiring a pastor to refrain from specifically applying Scripture or church teaching to a

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[215] *Id.* at 553–54 (citation omitted).

[216] *See* Rust v. Sullivan, 500 U.S. 173, 197–98 (1991); FCC v. League of Women Voters, 468 U.S. 364, 399–400 (1984).

[217] Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000). Notably, the church in *Branch Ministries* did not raise a free speech claim. Thus, the court had no opportunity to decide whether the Johnson Amendment violated the Free Speech Clause.

[218] *Id.* at 143.

[219] Citizens United v. FEC, 130 S. Ct. 876, 912–13 (2010).

[220] *Id.*

[221] *Id.*

candidate or election and instead to wait and make that application through a separate Section 501(c)(4) organization makes no practical sense and, in fact, violates the free speech and free exercise rights of churches. There is no substitute for the spiritual guidance of a pastor speaking as the head of his church. That simply cannot be replaced by a speech that is made at a separate meeting of a different Section 501(c)(4) organization.

Also, Justice Blackmun's concurrence in *Regan* rested on the assumption that the lobbying restrictions on Section 501(c)(3) organizations were only constitutional because the Section 501(c)(3) organization could control, and make it views known through, the Section 501(c)(4) organization.[222] That may work in the lobbying context where the prohibition against lobbying is not absolute. But that is an insufficient mechanism to avoid the absolute candidate prohibition of the Johnson Amendment. In its training materials, the IRS has explicitly stated that a Section 501(c)(3) organization (or its officials) may not in any way direct, assist, or coordinate the activities of a non-Section 501(c)(3) organization for partisan political purposes.[223] Thus, the rationale of *Regan* simply does not apply in relation to the Johnson Amendment. And *Citizens United* makes clear that the Court has stepped away from allowing speech regulations to stand under the rationale that the corporation can simply have another organization speak for it. The *Citizens United* case requires that a nonprofit or for-profit corporation be allowed to speak for itself, and any law or regulation prohibiting such speech is unconstitutional.

4. Favorable Status of Corporations Cannot Justify Restrictions on Speech.

a. Citizens United

Finally, the *Citizens United* opinion categorically rejects any attempt to justify speech restrictions on the ground that because corporations get favorable status under state law, they can be more heavily regulated.[224]

In *Austin v. Michigan Chamber of Commerce*, the Court had previously drawn somewhat of a distinction between wealthy individuals and corporations based on the fact that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and

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[222] Regan v. Taxation With Representation of Wash., 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

[223] *See* Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2000, at 255, 265 (1999), *available at* http://www.irs.gov/pub/irs-tege/eotopics00.pdf.

[224] *Citizens United*, 130 S. Ct. at 905.

favorable treatment of the accumulation and distribution of assets."[225] The *Citizens United* Court, however, rejected this distinction in the context of laws regulating free speech: "'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'"[226]

This issue will be addressed more fully below in discussing the *Arizona Christian School Tuition Organization v. Winn* case.[227] But, it is important to note here that this part of the *Citizens United* opinion seems to indicate a philosophical assumption of a majority of the Court that simply granting favorable status to a corporation cannot justify placing restrictions on the corporation's speech. Consequently, a corporation cannot be required to give up those favorable conditions in order to exercise its First Amendment rights.

b. Application to the Johnson Amendment

This portion of the *Citizens United* opinion lays the foundation for the Court's retreat from the "exemption as subsidies" approach to tax exemptions. Additionally, it signals the Court's willingness to deny as unconstitutional attempts to require an individual to surrender favorable status or benefits in order to exercise First Amendment rights.

The application of this line of reasoning to the Johnson Amendment is evident. A Section 501(c)(3) nonprofit corporation cannot be expected to give up its favorable tax treatment in order to exercise its First Amendment rights. Stated differently, Congress cannot condition the exercise of First Amendment rights on the surrender of tax-exempt status or benefits. Doing so runs afoul of *Citizens United.*

Some may argue in this context that there is a major difference between *Citizens United* and the Johnson Amendment, that the former dealt with a criminal prohibition on speech, and that the latter simply conditions receipt of tax exemption on refraining from speaking. The argument would emphasize that there is a major difference between a criminal prohibition and a condition on receipt of tax-exempt status. Proponents of this line of thinking have argued that a Section 501(c)(3) organization is not prohibited from speaking; it just cannot speak and obtain favorable tax status.[228]

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[225] 494 U.S. 652, 658–59 (1990).

[226] *Citizens United*, 130 S. Ct. at 905 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

[227] *See* discussion *infra* Part III.B.

[228] *See, e.g.*, Robert Maddox, *Churches & Taxes: Should We Praise the Lord for Tax Exemption?*, 22 CUMB. L. REV. 471, 474 (1992) ("Some church leaders say that they feel muzzled by this rule and argue that it restricts their right to offer prophetic witness on social and moral issues. But none to my knowledge have felt strongly enough about the issue to voluntarily forego tax exemption.").

Yet *Citizens United* rejects this argument explicitly. Beyond the Court's statement that government cannot condition the receipt of benefits or favorable status on the surrender of First Amendment rights,[229] the Court made it clear that "[l]aws enacted to control or suppress speech may operate at different points in the speech process."[230] It then went on to offer several notable examples of invalid restrictions occurring throughout different stages of the speech process, including "*seeking to exact a cost after the speech occurs*."[231]

Seeking to exact a cost after speech occurs is exactly the scheme propagated by the Johnson Amendment. The IRS seeks to exact a financial *cost* on Section 501(c)(3) organizations for speech that violates the Johnson Amendment, either through an excise tax pursuant to Section 4955,[232] or by revocation of exemption, which requires forfeiting exempt status and deductibility of contributions. And the application of the IRS's "facts and circumstance" test ensures that the financial cost for the speech occurs only *after* the speech is uttered.

The *Citizens United* Court also gave an expansive list of examples of what it would consider unconstitutional censorship of free speech, including one scenario particularly relevant to the Johnson Amendment: "[T]he American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech."[233] If prohibiting the American Civil Liberties Union from creating a website that tells the public to vote for a political candidate is a "classic example of censorship," then so is a regulation that penalizes a pastor for a sermon that specifically applies Scripture or church teachings to a candidate or election in a way that violates the Johnson Amendment. This is as much of a "classic example of censorship" as the examples identified by the Court in *Citizens United*.

Thus, the *Citizens United* Court has signaled its unwillingness to allow restrictions on speech that are based on the receipt of a favorable government benefit or status. The Court will not countenance restrictions that condition receipt of that status or benefit on the surrender of First Amendment rights.

In all, the *Citizens United* opinion has important ramifications that apply directly to the Johnson Amendment. The rationale of *Citizens United* is unavoidable and signals serious trouble for the continued vitality of the Johnson Amendment. The Supreme Court continues to

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[229] *Citizens United*, 130 S. Ct. at 905.

[230] *Id.* at 896.

[231] *Id.* (emphasis added) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964)).

[232] I.R.C. § 4955(a)–(c) (2006).

[233] *Citizens United*, 130 S. Ct. at 897.

march in a direction spelling doom for the Johnson Amendment as indicated by another recent precedent, *Arizona Christian School Tuition Organization v. Winn.*

B. Arizona Christian School Tuition Organization v. Winn

In *Arizona Christian School Tuition Organization v. Winn*, the Supreme Court dismissed on standing grounds a taxpayer challenge under the Establishment Clause to a tax credit given for individuals who contributed money to a student tuition organization that in turn provided scholarships for students to attend private school.[234]

Although this case dealt with taxpayer standing under the Establishment Clause and does not have direct application to the Johnson Amendment, it signals an important shift in the Court's theoretical understanding of the government's ability to equate tax credits and, by logical extension, tax exemptions with direct government expenditures or subsidies. This understanding has direct application in relation to the justification frequently used to argue in favor of the constitutionality of the Johnson Amendment, namely that tax exemptions are akin to subsidies. The argument here is that the Johnson Amendment does not restrict speech but rather represents a reasoned approach by Congress to decide that it will not subsidize political speech of nonprofit organizations.[235]

The *Winn* Court rejected the plaintiffs' argument that a tax credit was akin to a subsidy or governmental expenditure, which the taxpayers would have standing to challenge under the Establishment Clause.[236] It explained that there is a difference between when the government spends money and "[w]hen the government declines to impose a tax."[237]

The *Winn* Court distinguished between governmental expenditures and tax credits by noting that "[w]hen the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is . . . traceable to the government's expenditures."[238] The Court then contrasted governmental expenditures with Arizona's tax-credit program at issue in *Winn*:

> Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute

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[234] 131 S. Ct. 1436, 1449 (2011).

[235] One should question, though, how reasonable or rational the Johnson Amendment is given its suspect inception. *See* discussion *supra* Part I.B.

[236] *Winn*, 131 S. Ct. at 1447 ("In [the plaintiffs'] view, the tax credit is . . . best understood as a governmental expenditure. That is incorrect.").

[237] *Id.*

[238] *Id.*

> to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution.[239]

The Court reasoned, "Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."[240]

The Court's rationale applies directly to the case of donations made to churches. Giving to churches is done by private choice, and everyone understands that when a person decides to give a donation to his church, it is not the government giving the money, but the private individual. The Court's language in *Winn* is extremely close to an outright rejection of the "exemptions as subsidies" argument that is frequently advanced to justify the constitutionality of the Johnson Amendment's restriction on speech. Scholars argue that the Johnson Amendment can be justified despite its loathsome restriction on speech because the government has simply made a decision not to subsidize political speech of nonprofit organizations.[241]

This argument can be traced back to certain statements made by the Court regarding the subject of tax exemption in prior cases. In *Walz v. Tax Commission*, the Supreme Court upheld a property tax exemption granted to religious organizations.[242] The plaintiff in *Walz* contended that the exemption was, in effect, a forced contribution to a religious organization in violation of the Establishment Clause.[243] In other words, the plaintiff argued that the exemption was the equivalent of an unconstitutional direct government subsidy to religion.

The Supreme Court rejected that argument but did acknowledge that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . . ."[244] The indirect economic benefit did not constitute government sponsorship, however, because "the government does not transfer part of its revenue to churches but simply

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[239] *Id.* at 1448.

[240] *Id.* The Court went on to criticize the "exemptions as subsidies" argument: "[The plaintiffs'] contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.*

[241] *See, e.g.*, Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, 57 EMORY L.J. 1605, 1609–10 (2008) ("The campaign intervention restriction ensures that government subsidization of organizations through forbearance from tax collection does not extend to certain partisan activity.").

[242] 397 U.S. 664, 680 (1970).

[243] *Id.* at 667.

[244] *Id.* at 674.

abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'"[245] As the *Walz* Court decided, simply granting a tax exemption is not akin to subsidizing the activity of an exempt entity.[246]

Later, in *Regan v. Taxation With Representation of Washington*, the Court seemed to retreat from this understanding a bit.[247] The *Regan* Court gave great weight to the theory that exemptions are like government subsidies and therefore can be more highly regulated. In upholding the lobbying restriction of Section 501(c)(3) against a constitutional challenge, the Supreme Court reasoned, "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."[248] The Court did qualify its analysis to some degree: "In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical."[249]

The tension between *Walz* and *Regan* represents a theoretical tension inherent in the debate regarding tax exemption. Essentially, from a tax expenditure perspective, tax benefits are economically—and constitutionally—equivalent to direct expenditures of public funds.[250] As one proponent of this view explains, "The benefits granted through the tax code have the same value to the recipients as an equal amount of direct government subsidies."[251] The counterargument, championed by noted scholar and professor Boris Bittker, is that "[t]here is no way to tax *everything* . . . . In specifying the ambit of any tax, the legislature cannot avoid 'exempting' those persons, events, activities, or entities that

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[245] *Id.* at 675.

[246] *Id.*

[247] 461 U.S. 540, 544 (1983).

[248] *Id.* Regarding the lobbying restriction in particular, the Court explained,

> The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

Id.

[249] *Id.* at 544 n.5 (citing *Walz*, 397 U.S. at 674–76 (Brennan, J., concurring)).

[250] *See, e.g.*, Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 856 (1993); Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 399 (1998).

[251] Adler, *supra* note 250, at 856.

are outside the territory of the proposed tax."[252] Thus, as Bittker argues, "the assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a 'correct' or 'ideal' or 'normal' taxing structure as a benchmark from which to measure departures."[253] Tax exemption theory comes from one of two perspectives: Either the government owns all property and "gives back" some by exemptions or tax credits, or the government does not own the property and only takes some private property in taxation to support its needs.

Professor Zelinsky has noted that, in the tax expenditure context, "[t]he Court itself has equivocated, equating tax benefits and direct spending in some constitutional cases but not in others without indicating a rationale for such a seemingly inconsistent approach."[254] The *Winn* case, however, represents the alignment of a majority of the Justices in opposition to tax expenditure analysis. When the Court in *Winn* concluded that "[p]rivate bank accounts cannot be equated with the Arizona State Treasury,"[255] it placed itself more in line with *Walz* than with *Regan*, and against tax expenditure analysis for use in constitutional decision-making.

As applied to the Johnson Amendment, *Winn* signals that the Court will reject an argument that the law is constitutional on the theory that a tax exemption is equivalent to a government subsidy and therefore justifies a higher level of government regulation. After *Winn*, it is highly doubtful that the exemptions as subsidies argument can be used to justify speech restrictions. To be sure, *Winn* is a standing case and exists in an era where the current Court seems to be retreating from finding taxpayer standing under the Establishment Clause.[256] But *Winn* and its theoretical implications for the exemptions as subsidies argument cannot be ignored.

C. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

On January 11, 2012, the United States Supreme Court decided the case of *Hosanna-Tabor Evangelical Lutheran Church & School v.*

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[252] Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1288 (1969).

[253] *Id.* at 1304.

[254] Zelinsky, *supra* note 250, at 380–81.

[255] Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011).

[256] *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 610 (2007) (refusing to allow taxpayer standing to challenge executive expenditures under the Establishment Clause).

EEOC.[257] The case was the Supreme Court's first treatment of the "ministerial exception" from employment discrimination laws.[258]

The case arose in the context of a lawsuit filed against a Christian school by a teacher who claimed that she had been fired in retaliation for threatening to file an Americans with Disabilities Act ("ADA") lawsuit against the school.[259] The Christian school was operated by a Lutheran church that defended against the lawsuit by invoking the "ministerial exception" to employment discrimination laws, arguing that the suit was barred by the First Amendment because the claim at issue involved the employment relationship between the church and one of it ministers.[260]

The Supreme Court held that the ministerial exception indeed exists and that it is rooted in both the Free Exercise and Establishment Clauses.[261] The Court concluded that the ministerial exception barred the teacher's claim and prohibited the state from imposing an unwanted minister on a congregation through the application of employment discrimination laws.[262]

Of special note to the constitutionality of the Johnson Amendment was one of the EEOC's arguments in *Hosanna-Tabor*. The EEOC maintained that the Supreme Court's earlier precedent in *Employment Division v. Smith*[263] precluded recognition of the ministerial exception because the employment discrimination law at issue in *Hosanna-Tabor* was a neutral law of general applicability.[264] In *Smith*, the Court held that a neutral law of general applicability could substantially burden the free exercise of religion.[265] *Smith* represented a shift in the Court's treatment of claims that governmental action violated the Free Exercise Clause. No longer would such claims of burden on the free exercise of religion be subjected to strict scrutiny. Instead, if a law was neutral and generally applicable, then the government would not be required to justify the burden under a strict scrutiny analysis.[266] In reaching its conclusion in *Smith*, the Court reaffirmed its prior holdings—that the "right of free exercise does not relieve an individual of the obligation to

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[257] 132 S. Ct. 694 (2012).

[258] Prior to the Supreme Court's decision in *Hosanna-Tabor*, every U.S. Circuit Court of Appeals to consider the issue had recognized the existence of a ministerial exception to employment discrimination laws. *See id.* at 705 & n.2.

[259] *Id.* at 701.

[260] *Id.*

[261] *Id.* at 706.

[262] *Id.* at 709.

[263] 494 U.S. 872 (1990).

[264] *Hosanna-Tabor*, 132 S. Ct. at 706–07.

[265] *Smith*, 494 U.S. at 879, 884–86.

[266] For a case where the Court found that the law was not neutral as to religion, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[267]

In *Hosanna-Tabor*, the EEOC argued that the *Smith* decision precluded recognition of a ministerial exception.[268] The Supreme Court disagreed,

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use [in *Smith*], is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.[269]

The Court's rejection of *Smith* in *Hosanna-Tabor* is important for purposes of ascertaining the constitutionality of the Johnson Amendment. Scholars have asserted that the Johnson Amendment is a neutral law of general applicability and thus is not amenable to a challenge under the Free Exercise Clause.[270] Yet the *Hosanna-Tabor* decision carves out an exception to *Smith*'s general rule for conduct that is internal to the church and affects the faith and mission of the church itself. The strongest application of *Hosanna-Tabor* in the Johnson Amendment context would be to its regulation of a pastor's sermon from the pulpit. A sermon from the pulpit is quintessentially conduct that is internal to the church and that "affects the faith and mission of the church itself."[271] Indeed, it is difficult to conceive of a matter that affects the faith and mission of a church more than what its pastor says from the pulpit. Just as interfering with a church's selection of its pastor violates the First Amendment's Religion Clauses, so does interfering with what a church's pastor says from the pulpit during a sermon. The Johnson Amendment does not seek to regulate outward physical acts; instead, it inserts itself into the internal workings of churches and affects the very faith and mission of those institutions. As such, it falls within the new exception to *Smith* recognized by the Supreme Court in *Hosanna-Tabor*.

This means that the Johnson Amendment must be justified by a compelling governmental interest that is advanced in the least restrictive means available. This strict scrutiny test is a rigorous standard. In describing the test, the *Smith* Court explained, "[I]f

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[267] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[268] *Hosanna-Tabor*, 132 S. Ct. at 706.

[269] *Id.* at 707.

[270] *See, e.g.*, Mayer, *supra* note 78, at 1152–53.

[271] *Hosanna-Tabor*, 132 S. Ct. at 707.

'compelling interest' really means what it says . . . many laws will not meet the test."[272] Given the history and the lack of any legitimate justification for the Johnson Amendment, it would be exceedingly difficult for the government to advance any compelling interest to justify the law. Even if the government were somehow able to produce a compelling governmental interest, the Johnson Amendment would not advance that interest (whatever it is) in the least restrictive means available. The Johnson Amendment contains no halfway measures and is an absolute prohibition. Such an absolute prohibition is not a least restrictive means of advancing the government's interest, no matter how the Court would view it.

Hosanna-Tabor is yet another recent indication that the Johnson Amendment is in serious constitutional jeopardy. With this landmark decision, the Supreme Court breathed new life into the strict scrutiny standard under the Free Exercise Clause. For the Johnson Amendment to meet that strict scrutiny standard would be next to impossible.

CONCLUSION

The Johnson Amendment to Section 501(c)(3) of the Internal Revenue Code is at odds with the history of tax exemption for churches. Its enactment was an effort to insulate politicians from scrutiny and to ensure reelection by silencing opposing voices. Thus, it is also at odds with the foundational commitment that our country has made to robust and open dialogue in the electoral context. It has been enforced in a way that fosters fear and self-censorship and has a chilling effect on speech. The vagueness of the statute has been exacerbated many times over by accompanying vague regulations, guidance, and pronouncements from the IRS.

The Supreme Court's recent decisions in *Citizens United*, *Winn*, and *Hosanna-Tabor* pave the way for a finding by the Court that the Johnson Amendment is unconstitutional. These cases demonstrate that the Johnson Amendment has no constitutional validity. Whether the challenge arises through churches participating in the Alliance Defense Fund's Pulpit Freedom Sunday or from some other front remains to be seen. But when a court soon addresses the issue, the advocates for declaring the Johnson Amendment unconstitutional now have more powerful ammunition from the Supreme Court to argue for the law's invalidation. Put bluntly, after *Citizens United*, *Winn*, and *Hosanna-Tabor*, the Johnson Amendment's days are numbered.

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[272] *Smith*, 494 U.S. at 888.

DISASTER: THE WORST RELIGIOUS FREEDOM CASE IN FIFTY YEARS

Michael Stokes Paulsen[*]

I. INTRODUCTION TO A DISASTER

Christian Legal Society v. Martinez[1] was the worst constitutional decision of the Supreme Court during the 2009 Term. But that's nothing. *Christian Legal Society* is a strong candidate for the title of "Worst First Amendment Free Speech Decision of the Past Fifty Years"—and that's saying something.[2] Indeed, it is probably one of the dozen or so worst

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[1] 130 S. Ct. 2971 (2010).

[2] Besides *Christian Legal Society*, there are other nominees for this ignominious award. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding a content-based, viewpoint-based prohibition of leafleting and interpersonal communications on public sidewalks, plainly targeted at pro-life advocates seeking to dissuade women entering abortion clinics from having abortions and justified on the grounds that it protected a right to be free from undesired messages); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994) (a forerunner of *Hill*, upholding a content-based, viewpoint-based judicially-crafted injunction against anti-abortion advocacy near abortion clinics and inventing a lessened standard of scrutiny for the seeming purpose of upholding such an injunction); Locke v. Davey, 540 U.S. 712 (2004) (upholding explicitly content-based discrimination in a state program that excluded from eligibility for a state low-income scholarship program anyone who would use the scholarship to pursue a degree in theology or ministry; case primarily addressed the meaning of the Free Exercise Clause but also rejected a Free Speech Clause claim); McConnell v. FEC, 540 U.S. 93 (2003) (upholding a content-based restriction of core political speech in election campaigns on the ground that doing so is desirable as a public policy matter to better enable the government to balance and manage political campaign speech). *McConnell* cannot win the award because that decision (and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)) was largely repudiated by *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). *Locke v. Davey* is an idiotic, idiosyncratic decision that contradicts other well-established principles. But hopefully, *Locke* is simply an unprincipled exception to a sound rule and is of relatively minor consequence—a stupid blip, rather than a fundamental repudiation of all that is right and true. Chief Justice Rehnquist's majority opinion reads, transparently, as a damage-control opinion designed to limit the rationale to the case's own facts and perhaps to sow within a deliberately weak opinion the seeds of its own destruction.

I cheated, subtly, in the statement made in the text: By limiting my proposition to free *speech* cases, I exclude from the Worst in Fifty Years category some atrocious Free *Exercise* Clause decisions. But as my title suggests (and as my analysis below endeavors to show), there is a strong case to be made that *Christian Legal Society* is the worst religious freedom case of the past half-century as well. Its principal rivals for this title are *Employment Division v. Smith*, 494 U.S. 872 (1990) (government may prohibit the free exercise of religion, as long as it does so through the vehicle of facially neutral laws of general application that cannot be *proven* to have been targeted at religion) and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (government does not

Supreme Court First Amendment decisions *of all time*, and there have been some real doozies in that competition.[3]

An occasion as celebratory as the twenty-fifth anniversary of the birth of an evangelical Christian law school deserves an article more cheerfully titled than *"Disaster."* I wish I could be a bearer of Good News.

But alas, *Christian Legal Society* is a disaster. The case holds, by a vote of 5–4, that Christian student groups at public universities do not have the First Amendment right to maintain a distinctive Christian identity or to have a statement of faith to which their members—or even just their leaders—can be expected, by others in the group, to subscribe. Simply stated, student religious groups on state university campuses do not possess First Amendment rights to freedom of association for expressive purposes. That holding is a fundamental negation of the right of Christian campus groups to freedom of speech, to freedom of association, and to the collective free exercise of religion—a First Amendment disaster trifecta.

It is possible, as discussed below, that the holding is broader: *No* campus student groups possess the First Amendment right to freedom of association. It is not just religious groups that lack such rights; no group has them. That would at least acquit the case of the charge of special hostility to *religious* campus groups in particular, and of targeting religious association specifically. But that prospect should not cheer anybody up. It would mean that *Christian Legal Society v. Martinez* creates a rather different disaster—the evisceration of freedom of

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even burden the free exercise of religion by Native Americans when it takes action to destroy a religious sacred site; we stole their land fair and square, so destroying the sacred site does not pose any cognizable injury protected by the Free Exercise Clause). One could reasonably proclaim *Smith* the worst religious freedom case of the past fifty years. It is an immensely consequential and unfortunate decision, wrongly interpreting the Free Exercise Clause. Yet it is not an entirely implausible reading of the Free Exercise Clause and is not as sinister as *Christian Legal Society*. *Lyng v. Northwest Indian Cemetery Protective Ass'n* is a foolish, obtuse decision, but a decision that is relatively limited in its impact. By going back only fifty years, I steer clear of such awful decisions as *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (holding that schoolchildren may be compelled to engage in a patriotic nationalist affirmation contrary to their sincere religious beliefs). I regard *Gobitis* as the worst First Amendment opinion ever, mitigated only slightly by the fact that it was overruled (on the free speech point) by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), just three years later.

[3] In addition to the cases listed in the preceding note, consider *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *overruled by West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *Debs v. United States*, 249 U.S. 211 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), *Schenck v. United States*, 249 U.S. 47 (1919), *Berea College v. Kentucky*, 211 U.S. 45 (1908), and too many Establishment Clause decisions to list separately without overtaxing the cite-checking capabilities of the staff of the *Regent University Law Review*.

expressive association as a general proposition. Misery may love company, but not that much.[4]

Perhaps there is a way to be a bit less dour. Maybe *Christian Legal Society v. Martinez*, although an awful decision, will prove to be of limited scope, an idiosyncratic blip, or First Amendment hiccup, limited to its specific (and somewhat contrived) facts.[5] Maybe it will prove to be a ticket for this day and this train only, like some other bad First Amendment decisions seem to have become.[6] I am not terribly optimistic on this score, as I explain below, but there is at least some reason for hope.

Moreover, and in further mitigation of my uncheerfulness, *Christian Legal Society* does *not*—at least, not in explicit terms—undo the magnificent decisions protecting the First Amendment rights of religious persons and groups to associate and to engage in religious expression on public university campuses, free from government discrimination or exclusion on the basis of the religious content or viewpoint of their messages, or their religious identities. The year 2011 marks the thirtieth anniversary of a magnificent, turning-point constitutional decision concerning the rights of campus student religious groups: *Widmar v. Vincent*, one of the best and brightest, pivotal, and most important religious freedom-of-speech cases of the modern era, lives on. *Widmar* held that government, including state universities, may not exclude religious speakers and groups from public forums for expression, based on their religious nature or the religious content of their messages.[7] That is a magnificent, supremely important principle, and nothing in *Christian Legal Society* directly contradicts it (though, I shall argue, the logic of *Widmar* refutes the illogic of *Christian Legal Society*). *Rosenberger v. Rector and Visitors of the University of Virginia*, an

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[4] In the final section of this Article, I explore whether it is possible to "cabin" *Christian Legal Society* as stating a rule limited to its peculiar, stipulated facts. *See infra* Part IV.

[5] As I will discuss briefly below, the Court proceeded from premises framed by a stipulation of the parties that Hastings College of the Law required every campus group to accept "all comers" for membership—a facially neutral rule, but one that did not accord with factual reality. *Christian Legal Society*, 130 S. Ct. at 2984. The consequence of this framing of the issue would appear to be that, in the view of the Court, *no* campus student groups at state universities possess an affirmative right to freedom of association for expressive purposes, if the university wishes to deny such rights across the board. That conclusion would in effect overrule *Healy v. James*, 408 U.S. 169 (1972), which the Court denied it had any intention of doing. *See Christian Legal Society*, 130 S. Ct. at 2987–88.

[6] Locke v. Davey, 540 U.S. 712, 715 (2004); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 551 (1983).

[7] Widmar v. Vincent, 454 U.S. 263, 267–70, 277 (1981). *See generally* Michael Stokes Paulsen, *The Most Important Religious Liberty Case of the Past Thirty Years*, THE WITHERSPOON INST. (Dec. 8, 2011), http://www.thepublicdiscourse.com/2011/12/4413.

important extension of *Widmar*, also survives.[8] *Rosenberger* held that government may not exclude campus student religious organizations from equal access to *funds* for expressing their messages, simply because of their religious viewpoint.[9]

Christian Legal Society does not alter these decisions or erase these fundamental First Amendment freedoms. But it does hold, perniciously and maliciously, that government may *condition* these Free Speech Clause rights to equal access on a campus religious group's forfeiture of its First Amendment freedom of expressive association—the right of a group to define its expressive identity by defining the set of views with which members of the group agree and which they unite in embracing.

And *that* is a disaster. Make me an Evil Campus Administrator, intent on destroying the presence of religious student groups on my public university (or high school) campus but saddled with the holdings of *Widmar* and *Rosenberger* (and *Board of Education v. Mergens*[10]). I can still achieve my sinister objectives, armed solely with *Christian Legal Society v. Martinez*. All I need to do is require those wretched religious groups to accept members and leaders who do not share their faith, and I can destroy or subvert them from within. I can encourage or even enlist students who *oppose* the group's messages—on morality, on sexuality, on salvation, on God's purposes and commands—to infiltrate the group, to sap its strength, to frustrate its objectives, and to outvote the faithful remnant for control of the group's leadership and direction. There will be plenty such opponents, if the student religious group has any core religious integrity. A faithful Christian group, for example, will by its teaching and example inevitably call forth the resistance of opponents who despise its message. My "anti-discrimination" stance will provide plenty of incentive for them to compromise their principles, rather than cease to exist as a student group on campus. ("C'mon guys, just be a little bit more inclusive, and we'll let you exist. You can do that, can't you?"). The same is true for any committed Jewish or Muslim student group. *I can subvert them all!* The Christian group will be forced to abandon, slowly but surely, its Christian principles, to whatever degree they conflict with the university's "principles." The same holds true for the other religious groups. Either they will have to compromise, or they will have to get off my campus.

Christian Legal Society is a disaster but perhaps not an unmitigated disaster. The decision is, in terms, peculiarly limited by its somewhat odd, almost hypothetical, and decidedly unreal, stipulated facts. It is also

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[8] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[9] *Id.* at 834–35.

[10] 496 U.S. 226, 253 (1990).

limited, probably, by the terms of Justice Kennedy's strange "yes-I-agree-as-long-as-bad-things-don't-happen" concurrence. This does not make the holding of *Christian Legal Society* any less unprincipled and insidious; it just means that the magnitude of impact of the unprincipled holding may be limited by other, equally unprincipled, limitations in the opinion or in future cases. Also, as noted, *Christian Legal Society* does not directly impair *Widmar* or *Rosenberger*. It thus *might* prove to be a blip, or a hiccup, in First Amendment jurisprudence—a case that does not make sense in the overall fabric of free speech law and comes to be either not taken seriously or regarded as an exception. But if *Christian Legal Society v. Martinez* proves to be a mitigated disaster, it is a disaster nonetheless.

In this short diatribe—"essay" or "article" seems too august a label—I will vent my First Amendment rage against *Christian Legal Society*. Hopefully, the rage is fired by sound First Amendment analysis, and motivated by righteous indignation rightfully directed. But it is rage, nonetheless, at one of the great First Amendment outrages of our time. Part II sets forth why the result of the case is wrong as a matter of what should have been regarded as fundamental, well-accepted principles of First Amendment law. Part III collects several specific, miscellaneous objections to Justice Ginsburg's Opinion of the Court (and a few to Justice Kennedy's concurrence). Justice Ginsburg's majority opinion concocts some new, pernicious doctrines to try to weasel out from under the logical force of the principles that I set forth in Part II. These are harmful in and of themselves. Part IV ends on a (slightly) more upbeat note, suggesting ways in which the reasoning of *Christian Legal Society* might be cabined by its assumed facts, and therefore, hopefully, distinguished into oblivion (or even overruled) and rendered an odd museum-piece of discarded judicial nonsense, like *Lochner v. New York*.[11]

II. THE CORRECT ANALYSIS

It is easy enough to explain the basic error of the Court's holding in *Christian Legal Society*. The argument consists simply of stringing together several fairly basic, and reasonably well-accepted, propositions of First Amendment law, and then not creating a destructive, *ad hoc* exception to those First Amendment basics.

Start with the core proposition of the First Amendment's Freedom of Speech Clause: Government may not prohibit, punish, or penalize speech (or expressive conduct) because of its message, content, or

[11] 198 U.S. 45 (1905).

viewpoint.[12] There are certain exceptions to this principle, as well as "compelling-interest" overrides, but this is the core rule.[13] A well-established corollary is that *religious* expression by private speakers and groups is treated like expression on any other subject; there is no "religion exception" to the freedom of speech. Thus, government may not prohibit, punish, or penalize speech because of its *religious* message, content, or viewpoint.[14] *Widmar* is the modern paradigm case for this proposition, but the cases that stand for this proposition are legion.[15]

The next step is to recognize the rights of *groups* of people to communicate their views or to join their voices together. The freedom of speech is a freedom possessed by each individual, but individuals can band together to express a common message. Nothing in the First Amendment limits the freedom of speech to individuals or forbids them from speaking together, and it would be absurd—antithetical to every principle of the First Amendment—to create such a limitation. Nobody would think of it, not in America at least, and such a notion is not supported by any strand of judicial doctrine interpreting the First Amendment.[16] People get to form groups to express common messages. And the groups they form get to speak, the same as individuals do. The right to free speech thus extends to group expression as fully as it extends to individual expression. Where a group, rather than an

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[12] *See Rosenberger*, 515 U.S. at 828–29; Police Dep't v. Mosley, 408 U.S. 92, 101–02 (1972). *See generally* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1919–22 (2001) [hereinafter Paulsen, *Scouts, Families, and Schools*].

[13] *See generally* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 950–58, 967–68 (2010).

[14] Widmar v. Vincent, 454 U.S. 263, 277 (1981).

[15] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); *Rosenberger*, 515 U.S. at 837; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992); *Mergens*, 496 U.S. at 250; Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Schneider v. State, 308 U.S. 147, 160 (1939).

[16] One possible exception is the area of political campaign finance regulation, where certain legislative restrictions on spending for collective advocacy have been sustained by the courts and others have been struck down. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (holding governmental restrictions on corporations' independent political expenditures unconstitutional), *with* McConnell v. FEC, 540 U.S. 93, 143, 154, 157 (2003) (upholding restrictions on financing political campaign speech as justified by government interest as preserving integrity of elections), *overruled by Citizens United*, 130 S. Ct. at 913 (2010), *and* Buckley v. Valeo, 424 U.S. 1, 16–17, 143 (1976) (per curiam) (holding that some limits on campaign contributions are constitutional). In my view, government restrictions on individual or group financial support for political candidates, political parties, or dissemination of political views are presumptively unconstitutional. Paulsen, *Scouts, Families, and Schools*, *supra* note 12, at 1920 & n.30.

individual, is the speaker, the First Amendment can be said to protect the free speech rights *of the group, as a group.*

A vital corollary of this proposition is that a group, engaged in the exercise of its First Amendment rights of group expression, *has the right to control the content of its own messages*, including the right to exclude messages it does not wish to express and persons who do not fully embrace the views or message-identity of the group. Of course, the group itself—and not the state—gets to define what set of messages comprise the group's expressive identity. This corollary is sometimes given the fancy name "the freedom of expressive association," as if there were a separate Freedom of Association Clause of the Constitution. But it is really nothing much more than the proposition that groups may form to express the shared messages and identity of the individuals who comprise the group—that this is a legitimate and natural exercise of the freedom *of speech* itself.[17]

Religious speech is, once again, no exception to these principles. Individuals get to join together to engage in religious speech and expressive conduct, just as they may join together to engage in speech or expressive conduct on other topics. *Widmar* stands for this proposition, as do many other cases.[18] Religious groups possess the right to speak as a group, to associate for expressive purposes, and to exclude from their expression views and voices not in accord with the group's message and identity.

Does the right of freedom of speech, for individuals and for groups, and the allied right of expressive association, apply to *student* groups at state university campuses? That is the next step in the argument, and it is an easy one: Student groups at public universities possess the same First Amendment right to freedom of association for expressive purposes as do any other groups formed to engage in expression. The existence of

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[17] The freedom of expressive association has been held, somewhat controversially, not to extend to entities that are essentially non-expressive business associations. Roberts v. U.S. Jaycees, 468 U.S. 609, 629–31 (1984). This is a plausible, if tenuous, exception. Where a group is *not* actually formed around an expressive identity of any sort but is a *non-expressive, commercial* enterprise, it makes a certain amount of sense to say that the First Amendment is not actually in play: The exception limits "the freedom *of speech*" to groups actually engaged *in speech*—expression—of some kind. One can concede the propriety of this exception without necessarily agreeing with all the purported applications of it. *See generally* Paulsen, *Scouts, Families, and Schools*, *supra* note 12, at 1924–28, 1932–39 (collecting and discussing cases relating to expressive association); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 677–97 (1996) [hereinafter Paulsen, *A Funny Thing Happened*] (collecting and discussing cases involving freedom of expressive association).

[18] *See Good News Club*, 533 U.S. at 111–12; *Rosenberger*, 515 U.S. at 831–32; *Lamb's Chapel*, 508 U.S. at 394; *Widmar*, 454 U.S. at 269.

a general right of campus student groups to freedom of association is the holding of *Healy v. James* in 1972, an early landmark in the law of the First Amendment freedom of expressive association.[19] *Healy* held that state university officials could not ban Students for a Democratic Society ("SDS") from campus just because the officials did not like what SDS stood for or because of the group's association with the national organization of the same name.[20] *Healy* held, explicitly, that campus student groups possess the full First Amendment freedom to form around a common message or identity, whether or not state university officials like that message or identity, and to affiliate with whom they wish for purposes of advancing their shared message and identity: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[21] The Court held in *Healy* that a state university could not deny recognition to a campus student group based on the group's views, or the group's association with the specific tenets or principles of a national organization with which it was affiliated: "The mere disagreement of the President [of the college] with the group's philosophy affords no reason to deny it recognition. . . . The College, acting here as the instrumentality of the State, *may not restrict speech or association* simply because it finds the views expressed by any group to be abhorrent."[22]

One is tempted to observe, snidely, that *Christian Legal Society* overrules *Healy* on these foundational principles of freedom of speech and association for campus groups. But *Christian Legal Society* does not do so, or at least does not purport to do so. *Christian Legal Society* purports not to contradict *Healy* and indeed explicitly affirms its continued validity.[23] It suffices, for now (I will return to the point below), to note and flag the rather obvious tension, if not outright conflict, between the two cases. If *Healy* is right, it is very, very hard for *Christian Legal Society* to be right as well. One can reconcile the two decisions only if one reads *Christian Legal Society* as *assuming*—without actually deciding—that a state university could deny freedom of expressive association to *all* campus student groups, if it does so uniformly.[24] Given that artificial premise, the Court then proceeded to

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19 408 U.S. 169, 170, 181, 187–88 (1972).

20 *Id.* at 170, 186–88.

21 *Id.* at 181.

22 *Id.* at 187–88 (emphasis added).

23 *Christian Legal Society*, 130 S. Ct. at 2987–88.

24 *Contra Healy*, 408 U.S. at 184.

reject Christian Legal Society's claim of discriminatory treatment: The Christian Legal Society had simply been accorded the same expressive-association rights as other student groups—that is, *no* expressive-association rights, at least none with respect to ideological or doctrinal requirements for membership or leadership of the organization.

But assuming *Healy* is still valid, campus student groups possess the freedom of expressive association. That proposition extends to religious student groups. *Widmar v. Vincent* makes that corollary abundantly clear. *Widmar* straightforwardly noted that *Healy*'s principles—that campus student groups possess the First Amendment rights of freedom of speech and association—apply fully to campus *religious* groups just as any other.[25] That, as we shall see, is of direct relevance to *Christian Legal Society v. Martinez.*

Widmar adds one important thing concerning the free speech and association rights of campus student groups. Student groups may have certain free speech and association rights at public universities precisely by virtue of being *campus* student groups.[26] *Widmar* is notable for its careful formulation of the "limited public forum" doctrine: where government has made property, or a program, generally available for expression or participation by a certain subcategory of speakers or beneficiaries, defined *not* by the content or viewpoint of the speakers' expression but rather by their particular status in relation to the property or program at issue (considered apart from their expressive message or identity)—students and student groups at a public university being a classic, almost perfect example—government then may not exclude a speaker or group based on the content or viewpoint of its expression, including religious expression.[27] Thus, even though it need not have opened its property, program, or fund for expression by anyone in the first place, a state university's decision to invite such participation by its natural constituency—students and student organizations—means that First Amendment principles of free speech and association apply fully to such groups as are naturally embraced in the "forum" thus created.[28]

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[25] Widmar v. Vincent, 454 U.S. 263, 268–69 (1981).

[26] *Id.* at 267–69.

[27] *Id.* at 267–69, 276. While the majority affirmed the First Amendment's broad protection against content-based discrimination in limited public forums, *id.* at 277, Justice Stevens's concurring opinion would have narrowed the protection to viewpoints only, not content. *Id.* at 280 (Stevens, J., concurring).

[28] The idea behind the doctrine of a "*limited* public forum" is to describe the bounds of the constituencies designed to be served by the particular property or program at issue. It was originally a variation on the idea of the "public forum," which means that government could not restrict speech or expression on certain public property that

The specific holding of *Widmar* was that a state university, having made the decision to open up its facilities for use by student groups and organizations for expressive purposes, could not constitutionally exclude a student *religious* group based on its religious character and the religious nature of its expression, such as prayer, worship, singing, and evangelism.[29] Religious student groups have the right to freedom of speech and association on campus, the Court held, following and extending *Healy*.[30] The Free Speech Clause protected such rights of expression and association in the "limited public forum" created by the university on its campus, and the Establishment Clause could not properly be construed to nullify the equal First Amendment free speech rights of student religious groups on public university campuses.[31]

Widmar was reaffirmed and extended in *Rosenberger v. Rector & Visitors of the University of Virginia*, decided in 1995.[32] In *Rosenberger*, the Court held that the University of Virginia had created a "limited public forum" in the form of a limited pool of funding from student

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traditionally has been understood to be open for such expression—public sidewalks, streets, and parks being the classic examples. The basic idea is that the fact that property is government-owned does not mean government may suppress or deny free speech on such property. On the contrary, the fact of government ownership often means just the reverse, depending in part on the nature and function of the property: It is *public* property, available for use by *the public*.

The "public forum" doctrine, including the "limited public forum" variation on the theme, has become needlessly, and unhelpfully, jargonized and complicated in the years since *Widmar*. Recent cases have multiplied categories and subcategories of forums to the point of absurdity. At the risk of being professor-like and boring (feel free to skip the rest of this paragraph, because I confess that it bores me): There are (1) *traditional* public forums (streets, sidewalks, and parks being the classic examples), (2) *designated* public forums (where government has opened property or programs for essentially indiscriminate use), and (3) *limited* public forums (where government has opened its property or program to a limited class of users, not defined by their viewpoints but by their legitimate and natural relationship to the property or program at issue, such as student groups at a university). Unfortunately, the Court, in its inartful attempts to distinguish the "limited" subcategory from the "designated" category, drifted in the direction of saying that the government could make "content-based" decisions (but not "viewpoint-based" decisions) with respect to how a "limited" forum is defined. That would come to prove problematic in *Christian Legal Society*, with the Court using the content-based/viewpoint-based dichotomy as a wedge with which to pry religious student groups out of the forum by "defining" the forum as "limited" to student groups willing to abide by a "take-all-comers" policy. *See infra* Part III.

But the essential principles remain as stated: Government may not open a forum for expression by a certain category of persons or groups and then discriminate on the basis of the content or viewpoint of such persons' or groups' expressive messages.

29 *Widmar*, 454 U.S. at 267–69.

30 *Id.* at 276–77.

31 *Id.* at 267–71.

32 Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

activity fees for the activities of campus student groups.[33] The Court held that, having created this forum, the university could not exclude religious student groups from eligibility for funding simply on the basis of the religious content of their expressive identity and activities.[34] A student-activity-fee funding pool "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable," the majority concluded.[35] Thus, the University of Virginia was forbidden from denying funding to a Christian student newspaper simply because of its religious content and viewpoint.[36]

Reviewing the basics so far: The Free Speech Clause prohibits government from penalizing or discriminating against expression on the basis of its content, including religious content. Groups possess free speech rights, just as individuals do, and religious groups possess these rights no less than any other group. Thus, neither an individual nor a group may be penalized, or discriminated against, by the government based on the content of the message the speaker or group wishes to express, including religious content. These First Amendment rights of freedom of expression and association extend to student groups at public university campuses—and extend to religious student groups.

There is one final step in the analysis leading up to the situation in *Christian Legal Society*. A long- and well-accepted aspect of a group's freedom of association for expressive purposes, already alluded to above, is what has been termed the freedom of expressive *disassociation*, or the right of a group to define itself and its membership so as to maintain its message. Groups may define the uniting expressive principles of the group, and by doing so, may define who is and is not part of the group's expressive purposes. Thus, the Democratic Party can exclude Republicans from its primaries if it wants to.[37] That is the holding of the *Democratic Party v. Wisconsin* case: "[T]he freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[38] It is *the Democrats' party* after all.[39] The Republicans can also keep the Democrats out of their

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[33] *Id.* at 829–30, 837.

[34] *Id.* at 825–26, 829–31.

[35] *Id.* at 830.

[36] *See id.* at 825–26, 835.

[37] *See* Democratic Party of the U.S. v. Wisconsin, 450 U.S. 107, 122 (1981).

[38] *Id.* (citation omitted) (internal quotation marks omitted).

[39] I call this the "It's-my-party-and-I'll-cry-if-I-want-to" principle. The #1 hit song was an oldie even when I was young, and today's students often do not get the reference. Filipeschuler, *Lesley Gore—It's My Party*, YOUTUBE (Jan. 8, 2008), http://www.youtube.com/watch?v=XsYJyVEUaC4 (performed in Hollywood in 1965).

party, if they choose. As to campus student groups, this principle means that Students for a Democratic Society, the group involved in *Healy v. James*, can, as part of the group's First Amendment freedom of association, exclude from its membership those who do not share its politically liberal, anti-war political purposes.

Groups formed around a specific expressive identity or ideology may very well wish to limit themselves to persons who share that identity and ideology, in order to maintain the integrity of their intended message. That idea is the essence of the *Democratic Party v. Wisconsin* case, and it was also the central holding of the *Boy Scouts v. Dale* case, which recognized the Boy Scouts' freedom-of-association right to exclude from the ranks of assistant scoutmaster someone they determined was not a proper spokesman of their group's intended messages to young males, on account of the fact that he was openly gay.[40] The Boy Scouts did not need to have a hard-edged ideological message opposing gay rights in order to possess a freedom to express only the messages it wished to convey and control what messages its leaders might communicate to young boys, the Court held.[41] Groups may form around a specific expressive identity that is *not* particularly ideological, and such groups might well wish to exclude speakers who would make the group's expression *more* ideological than the membership as a whole desires, which is really just a different version of the same thing. This principle is also central to the holding of the Court's unanimous decision in *Hurley v. GLIB,* the famous Boston Saint Patrick's Day Parade case, upholding the right of parade organizers to exclude a contingent that wished to display a pro-gay-rights political banner that the organizers thought inappropriate to the character of the parade they wished to sponsor.[42] Again, it's *their* parade, and they can march who they want to. (The *Boy Scouts* case can be understood in this way, too. The Boy Scouts wished to have a more subdued, generic message and felt that the message conveyed by Mr. Dale being a scoutmaster would alter that character.)

The limiting cases, or hard cases, arise where a group is not really organized for expressive purposes, but for essentially *non-expressive, commercial* purposes, and excludes participants for reasons unrelated to any true expressive purpose. The business-club cases can be defended—if they can be defended—on this ground, as not actually falling within

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[40] Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000). *See generally* Paulsen, *Scouts, Families, and Schools, supra* note 17, at 1919–39.

[41] *See Boy Scouts*, 530 U.S. at 655.

[42] 515 U.S. 557, 574–75 (1995).

the scope of the First Amendment's protection of expression.[43] For slightly different reasons, *government itself* may not properly claim a First Amendment right to expressive disassociation—to exclude from a public forum views or speakers it deems incompatible with *its* desired message. First Amendment rights are held by private citizens and groups *against* the government, but the government itself does not possess a "constitutional right" to freedom of expressive association and disassociation. It would obviously contradict *Widmar* to permit government to create a "limited" public forum or "government expressive association," consisting of speaker-members who all agree with the government's messages and excluding all those who disagree.[44]

Political parties, student groups, clubs, scouting organizations, and even parades might wish to be broadly inclusive. That might be part of their whole purpose, even of their expressive identity. But they might also *not* wish to be broadly inclusive. They might wish to limit their membership more tightly to people who agree on common core principles of what the group is all about. Such criteria might be an integral part of their expressive identity. It is up to the group, or should be up to the group, just how inclusive or restrictive it chooses to be.

It follows from this proposition, combined with the ones already discussed, that *a campus student group at a state university possesses the freedom of expressive disassociation as an aspect of its First Amendment rights as a group*. That means that campus student groups, including religious groups, have the First Amendment constitutional right to maintain their expressive identity by requiring that their members and officers subscribe to the principles that define the expressive identity of the group. "Campus Democrats" has a First Amendment right to limit its membership to Democrats. "Students for Choice" has a First Amendment right to require that its members support abortion rights. *And Christian*

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[43] *See* Paulsen, *A Funny Thing Happened*, *supra* note 17, at 685–89; Paulsen, *Scouts, Families, and Schools*, *supra* note 17, at 1924.

[44] In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that when a private healthcare provider received public funds to carry out a government program, the government could restrict the speech of healthcare providers occurring within the government program in such fashion as to limit what messages are conveyed within the context of the government program itself. Specifically, the government could forbid counseling or referrals for abortion within the government-funded program because such restrictions simply were restricting the scope of the program funded by the government. *Id.* at 193–94. *Rosenberger*'s sensible limitation on *Rust* recognizes that when the government funds a private entity to disperse the government's own message, the government can take appropriate measures, including restrictions on speech, to ensure that the message is properly delivered. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

Legal Society has the First Amendment right to insist that its officers subscribe to core Christian beliefs.

It follows that *Christian Legal Society* is wrongly decided. This conclusion, I submit, follows from the above basic premises of First Amendment law. To repeat and compress: Government may not discriminate against private expression because of its content. This content includes religious expression. This includes group expression, including group religious expression. A group's First Amendment freedom of expression rights include the right to control the content of its message by deciding what common views or messages define the group itself and by excluding competing voices and messages—the freedom of "expressive association" (and disassociation). Campus student groups at state colleges and universities possess the First Amendment rights to expression and association.

Christian Legal Society is wrong, unless one (or more) of these building-block basic principles of First Amendment law is wrong.

III. THE INCORRECT ANALYSIS

A. Unconstitutional Conditions and Creatively-Limited, Limited Forums

The majority in *Christian Legal Society* did not dispute any of these underlying propositions,[45] but nonetheless denied the correctness of the conclusion. The Court's reasoning was that a state university may *condition* a religious student group's First Amendment right of access to a limited public forum (recognized in *Widmar* and *Rosenberger*) on a repudiation of the group's First Amendment freedom of expressive association (recognized in *Widmar* and *Healy*).[46] At least, it may do so where the university has "defined" its "limited" forum as one limited by a policy excluding *all* student groups' rights to the freedom of expressive association—assuming it can do such a thing (a large and rather dubious assumption, as we shall see).[47] The parties stipulated—apparently in conflict with the actual facts—that Hastings College of Law in fact had such a policy, and the majority decided the case on that premise.[48] The dissent contested whether the case properly could be decided on such a premise, and whether the litigation stipulation really meant what the majority said it meant,[49] but I set that debate to one side for present purposes.

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45 *See Christian Legal Society*, 130 S. Ct. at 2986.

46 *Id.* at 2994–95.

47 *Id.*

48 *Id.* at 2982, 2984.

49 *Id.* at 3005 (Alito, J., dissenting).

Armed with this factual premise of a "take-all-comers" policy—a premise that in effect transformed the case into an abstract, law-school hypothetical rather than a real-world fact pattern involving a law school —the majority squeezed the case into a rather different doctrinal hole: The case involved a viewpoint-neutral "time, place, and manner" regulation of expressive activity.[50] The "take-all-comers" requirement (put another way, the law school's elimination of the right of expressive association for student groups at the school) was *neutral,* in that it applied to all groups. The policy did not (directly) regulate groups' expression; it merely regulated when, where, how, and by whom such expression might take place.

Or at least this was the majority's theory of the case. The premise, even were it factually justified, is almost certainly not *legally* justified. A state university cannot "neutrally" define its forum so as to define away the right of expressive association for those who otherwise would be entitled to inclusion in the forum.

In a moment, I will circle back to the majority's strange hypothetical premise, or pretense, and show why, even accepting the premise, the majority's conclusion does not follow. But to get there, I first start with the more basic proposition: *Without* this (weird) stipulated premise, it is clear that the Hastings College of Law's position would be a violation of the First Amendment. Hastings's position was, in essence, that it could condition equal access rights on restrictions of a student group's control of its expressive identity. Such a stance, however, runs headlong into the problem of "unconstitutional conditions," another standard doctrine of First Amendment law and constitutional law generally. Simply put, one constitutional right (here, a student religious group's First Amendment right, under *Widmar,* to equal access) cannot be conditioned on forfeiture of another constitutional right (a group's First Amendment right to expressive association, under *Healy* and subsequent cases, and recognized in *Widmar*). If the government could not impose either deprivation of rights independently, it may not condition the exercise of one right on the loss of the other right.[51]

That, reduced to its essential terms, is the unconstitutional conditions doctrine. While the outermost limits of that doctrine can sometimes seem mysterious, its core is relatively stable: *Government may not condition one legal right, benefit, or privilege on the*

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[50] *Id.* at 2978 (majority opinion).

[51] For classic formulations of this doctrine, see *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) ("'[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.") and *Speiser v. Randall,* 357 U.S. 513, 518 (1958).

abandonment of another legal right, benefit, or privilege, the relinquishment of which the government could not command directly, unless the condition is so directly and unavoidably a part of the benefit or privilege bestowed as to be "non-severable."[52]

The application of the unconstitutional conditions doctrine in this context is entirely straightforward: *Widmar* establishes a baseline of First Amendment free speech rights. Building on cases before it that had embraced the principle that there is "an 'equality of status in the field of ideas,'"[53] *Widmar* holds that religious student groups have a First Amendment *right* to equal access to state university facilities for their student meetings, by virtue of their status as a student group and by the university's action in opening up its facilities to other student groups, without discrimination based on the content or viewpoint of the group's religious expression.[54] This is not a mere privilege or benefit to be conferred or withheld on such terms as the university sees fit. It is a First Amendment constitutional right.

Likewise, it is clear—another irreducible baseline proposition—that a state cannot directly regulate the membership practices or expressive-association affiliations of a religious group or any other private group whose purposes are fundamentally expressive (rather than commercial[55]): *Healy v. James, Democratic Party v. Wisconsin, Hurley v. GLIB,* and *Boy Scouts v. Dale,* all stand unequivocally for this proposition.[56] Even in cases where, for other reasons, a claimed constitutional right of expressive association was not accepted, the proposition was still announced (sometimes in dicta). These cases include *Roberts v. United States Jaycees*,[57] and other "business club" cases,[58] and, most recently, *Rumsfeld v. FAIR*.[59]

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[52] This formulation is essentially identical to one that I used fifteen years ago, when I first saw this issue coming. *See* Paulsen, *A Funny Thing Happened*, *supra* note 17, at 664–66 (collecting analysis and slightly varying formulations).

[53] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[54] Widmar v. Vincent, 454 U.S. 263, 276–77 (1981).

[55] As noted, the distinction between "commercial" and "non-commercial" has problems of its own. *See* Paulsen, *Scouts, Families, and Schools*, *supra* note 17, at 1926–27 & n.49.

[56] *See supra* Part II.

[57] 468 U.S. 609, 622 (1984) (holding that application of anti-discrimination portions of state public accommodations law to business club was constitutional).

[58] N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13–14 (1988) (holding that application of anti-discrimination portions of a state public accommodations law to a business club was constitutional); Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548–49 (1987) (same).

[59] 547 U.S. 47, 68–70 (2006).

In a case like *Christian Legal Society*, it is clear that government cannot condition First Amendment "*Widmar* rights" on the loss of First Amendment freedom-of-expressive-association rights. Conversely, government may not condition the freedom of expressive association on the loss of *Widmar* rights of equal access. It thus follows that a state university may not impose, as a condition of access to a forum for student groups, unconstitutional restrictions on such groups' expressive identity and association.

Is the answer different if, as hypothesized in *Christian Legal Society*, the school imposes such unconstitutional restrictions across the board, on everybody? It should not be. There is no logical, constitutional reason why *an across-the-board unconstitutional condition* is any less unconstitutional just because it is imposed across the board. *If* groups, including student groups, have a constitutional right to expressive association—assuming, that is, that *Healy* remains good law and assuming it stands for this proposition—there is no sensible reason to think that such right is extinguished by the exercise of what would otherwise be thought a constitutional right under *Widmar* to use university facilities, as other student groups do, without regard to a group's religious nature or the religious content of its expression or activities. Indeed, it would seem that *Healy*'s expressive-association right and *Widmar*'s "non-exclusion-on-the-basis-of-group-expression-and-identity" right *converge*, and overlap substantially.

Only if the "limited public forum" doctrine permits government essentially to *manipulate the baseline any way it likes*—to circumvent the requirement of "equal access" simply by defining its forum criteria how it wishes and thereby justify any exclusion on the ground that all groups *are* treated equally, in the sense that the same criteria are being applied to all alike—can the government evade the unconstitutional condition problem. But if the state can avoid *Widmar* simply by redefining the scope of its forum, it can eliminate *Widmar* rights at will. It could simply define its "limited" forum as embracing "all student groups that are not religious," or "all student groups that do not define themselves in religious terms," or "all student groups except those that apply religious criteria to membership," or "all student groups that do not maintain certain religious doctrines," or finally, "all student groups that do not limit their membership to students who subscribe to the purposes and ideals of the group." Each of these formulations excludes a campus student group based on its First Amendment identity, or the content and nature of its expression and/or association. If the state can do this, *Widmar* is a meaningless cipher. Campus administrators need not worry about allowing access to disfavored student groups. They can simply limit their "limited" forum in such a way as to gerrymander them out.

Widmar does not mean this, obviously, and *Christian Legal Society* did not disavow *Widmar*. It simply embraced a principle incompatible with *Widmar*.

The conflict with *Widmar* is of course most obvious if a college defines its forum in explicitly religion-excluding terms (as in the first several of my examples above). The trick in *Christian Legal Society* was that Hastings purportedly defined its forum not in *religion-excluding* terms but in broader, *expressive-association-excluding* terms (the last of my examples). This fooled the majority: It made the whole thing feel somehow more "neutral."[60] But the supposedly neutral basis of exclusion was one Hastings should not have been able to impose in the first place, because it denies to student groups—all of them—the First Amendment freedom of expressive association. The fact that all such groups have their First Amendment rights restricted may be "neutral," in a perverse sense, but it is not the kind of neutrality that the First Amendment permits the government to impose.

Consider a few examples by way of analogy. Could a state university condition all student groups' right to meet on campus, or obtain other privileges of recognized campus groups, on the neutral, across-the-board requirement that their groups not discuss politics? This condition is a subject-matter exclusion, not a viewpoint exclusion. Could the university limit the topics for student discussion in such a fashion? Could it condition access or recognition on the students' agreement not to discuss *campus* politics? Could it condition access on students' agreement not to print or distribute any written matter to other students? (If imposed on all, is that not a neutral "manner" regulation of student expression?) Could it condition access or recognition on the agreement of student groups not to create their own websites?

In each case, the restriction is a facially "neutral" subject-matter limitation on the "forum" or a "viewpoint-neutral time, place, or manner" restriction on what a student club that has been granted access may do. In each case, the limitation restricts what would otherwise be, outside the limits of the limited forum, the groups' First Amendment rights.

How is "neutral" restriction of student groups' membership criteria any different? Such criteria and the decisions made pursuant to them are within a group's core First Amendment rights of expressive association. If campus officials may not condition *Widmar* rights on a neutral requirement that groups abandon First Amendment rights in other respects, such as not discussing politics or campus politics, not

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[60] Of course, the cynical observer might argue that the majority may have wanted to be fooled. I set the question of the majority's subjective motivation aside for present purposes.

producing printed or written material, and not using the Internet, then campus officials may not condition *Widmar* rights on a neutral requirement that groups abandon First Amendment rights of expressive association. The majority's premise that an "all-comers" policy removes the Hastings situation into an utterly different doctrinal category does not accomplish the magic trick it seeks to perform. Like the woman sawed in two, it is an illusion. (And if it is *not* an illusion, then the Court has sawed *Widmar,* or *Healy*, or both, in two.)

B. Other Unconstitutional Gambits

Perhaps recognizing, in its heart of hearts, the doctrinal sleight of hand it was performing, the majority attempted to dress up its deception with a few rhetorical flourishes. None of them is persuasive, however. Indeed, quite the contrary, each one, when taken seriously, is itself a serious impairment of First Amendment principles. The Court probably does *not* take these propositions seriously, and they are, in all likelihood, simply makeweight points thrown in for effect. The real argument is the one addressed above: that university officials may condition First Amendment *Widmar* access-to-a-forum rights on relinquishment of the *Healy-Roberts-Hurly-Boy Scouts* freedom-of-expressive-association rights. But the miscellaneous arguments are present in *Christian Legal Society*, and it is worth the time and attention to puncture them.

First, the majority in *Christian Legal Society* advanced a separate argument—less of an argument, really, than a conclusory, misleading label—in an attempt to justify its exclusion of the Christian Legal Society student group: "subvention." The majority referred to equal-access rights for religious student groups, under *Widmar,* as government *subsidization* of the groups: "The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be," Justice Ruth Ginsburg's majority opinion reads, from the beginning, *"[b]ut CLS enjoys no constitutional right to state subvention of its selectivity."*[61] Later, the opinion tries to leverage that label into an argument that Hastings's policy imposes no real burden on the freedom of expressive association: *"CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies . . . ."*[62]

Could anyone possibly be fooled by this? The very premise of the Establishment Clause holdings in *Widmar* and in *Rosenberger* is that inclusion of religious groups in forums for expression or general benefit programs, without discrimination because of their religious nature, is

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[61] *Christian Legal Society*, 130 S. Ct. at 2978 (2010) (emphasis added).

[62] *Id.* at 2986 (emphasis added).

not "subsidization" in any legally meaningful sense; it is recognition of a constitutional right.[63] The right of the student religious group to meet at university facilities, the issue in *Widmar*, was not thought to be a subsidy. If it were thought to be a subsidy, the benefit could have been withheld on such ground. The right of the student religious newspaper to equal access to student-activity-fees funding, the issue in *Rosenberger*, was also not thought a subsidy. If it were thought to be a subsidy, the benefit could have been withheld on such a ground. If a First Amendment right could be withheld from a student group on the ground that access to facilities, funds, or recognition constitutes a "subsidy" to which different rules apply, the results in *Widmar* and *Rosenberger* would have been wrong. The subsidy slur would be offensive were it not so preposterous. The Court in *Christian Legal Society* could not possibly have meant what it said.

A second transparently illegitimate argument (and one that again seeks to use the "subsidy" tack) is that the *government's interests in suppressing disfavored speech*, because of the views thereby expressed, weigh in favor of upholding the power to exclude groups because of their membership practices. I am not making this up. Included in its laundry list of reasons why Hastings's exclusion of CLS was "reasonable" is the following: "Fourth, Hastings' policy, which incorporates . . . state-law proscriptions on discrimination, conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of *which the people of California disapprove*.'"[64]

Talk about a bootstrap! The state's interest in excluding Christian Legal Society, based on its expressive identity, from a public forum, is supported by the state's interest in excluding Christian Legal Society, based on its expressive identity, because the state disapproves of the students' interpretation and application of scriptural principles to its own membership practices. To state the argument is to refute it. The majority opinion, unblinkingly (and seemingly unthinkingly) quoting Hastings's brief, actually embraces the position that *because the Christian Legal Society group is an expressive association of which the government disapproves, it may "reasonably" be excluded from access to benefits, and from an expressive forum*.[65] Again, the Court cannot possibly mean this. It is contrary to the first principle of the First

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[63] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995); Widmar v. Vincent, 454 U.S. 263, 276–77 (1981).

[64] *Christian Legal Society*, 130 S. Ct. at 2990 (emphasis added) (quoting Brief of Hastings College of the Law at 35, *Christian Legal Society*, 130 S. Ct. 2971 (No. 08-1371)).

[65] *Id.* at 2989 (quoting Brief of Hastings College of the Law at 32, *Christian Legal Society*, 130 S. Ct. 2971 (No. 08-1371)).

Amendment: that government may not punish, prohibit, or penalize speech (or association) because of government's disagreement with the content, message, or stance of the speaker in question.

A third argument invoked by the *Christian Legal Society* majority opinion is an out-and-out laugher: Cast in the form of whether the exclusion of Christian Legal Society leaves open adequate "alternative channels" for communication, the Court says, in effect, that *Widmar-Rosenberger* First Amendment rights can be abridged if a student group could meet informally and use Facebook or other social media to promote its meetings. Although Christian Legal Society was denied use of media, recognition, and funding granted to other student advocacy groups, "[T]he advent of electronic media and social-networking sites reduces the importance of those channels."[66] And here we thought that Facebook and unauthorized social media were what activists in *repressive* regimes used to organize their activities! Apparently, Egypt and Iran do not abridge the freedom of speech, because social media exist as an alternative route through which disfavored or excluded advocacy might still find the ability to communicate. The argument, of course, is a familiar one that has appeared in several different forms in American legal history and has some (limited) intuitive, rhetorical appeal: If the complainer has another way of accomplishing his purpose, are his rights really violated in any meaningful sense when government limits only one avenue? Justice Ginsburg and the other Justices joining the majority opinion seemed to have embraced that view. One wonders if they would similarly argue that racial segregation is permissible as long as all train cars are going to the same destination.[67]

A variation on this theme, set forth in the very next paragraph of the Court's opinion, notes that the Christian Legal Society "hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled."[68] Well, then. Suppression is *good* for expression! Restricting the freedom of association creates *more* association and *more* freedom. Oppression is *good* for the soul and *good* for promoting group membership. Slavery is freedom. I love Big Brother.

So the majority opinion in *Christian Legal Society* appears to reason. Indeed, to argue that the Court's approach here is wrong *in*

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[66] *Id.* at 2991. The Court actually invoked the examples of "Yahoo!" and "MySpace," showing how hip and "with-it" it is. *See id.*

[67] *See* Plessy v. Ferguson, 163 U.S. 537, 548–49 (1896) (upholding segregation laws applied to railroad coaches on "separate but equal" grounds), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[68] *Christian Legal Society*, 130 S. Ct. at 2991.

principle is to make an argument that itself ought to be suppressed: "It is beyond dissenter's license, we note again, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking."[69]

Beyond dissenter's license! Apparently, dissents too ought to be governed by licensing requirements. The majority opinion is indeed rather astonishing in its disregard for basic First Amendment principles. One would have thought, until June 28, 2010, that a group's ability to speak elsewhere was not a proper basis for suppression of speech in a limited public forum where the group wished to engage in speech and expressive association and that licensing requirements that denied recognition to engage in expressive activity in an otherwise proper venue *were* the legal equivalent of abridging the freedom of speech. As Justice Alito poignantly, and pointedly, concluded his dissent: "I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. . . . I can only hope that this decision will turn out to be an aberration."[70]

IV. DAMAGE CONTROL, LESSONS LEARNED

So hope we all, Sam, so hope we all. For if *Christian Legal Society* is *not* an aberration—if the core of its analysis becomes generally accepted, if its collateral damage to basic First Amendment principles is allowed to fester, and if its holding is accepted outside its hypothesized facts—it could well become one of the most damaging First Amendment cases of all time.

Consider its likely impact on several fronts: First, and most immediately, the *Christian Legal Society* opinion declares "open season" on campus student religious groups at public universities. Those inclined to target campus religious groups, whether they be hostile (or indifferent) administrators or hostile student groups or other constituencies, have been armed with a powerful weapon. Under *Christian Legal Society*, all one has to do is press on a point of religious doctrine that a group takes seriously enough not to abandon and that poses a conflict with either the religious views of some other person (which is to say, potentially anything) or, better yet, current or evolving social and political norms concerning sexuality and sexual conduct. If a religious group discriminates on the basis of religion—and what religious group does not?—*Christian Legal Society* licenses its enemies to try to have it killed as a campus organization. The result in *Christian Legal Society* deprives even sympathetic campus administrators of the

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[69] *Id.* at 2991–92 (citation omitted).

[70] *Id.* at 3020 (Alito, J., dissenting).

response that religious groups *must* be permitted to be religious—that it is their legal *right*. No, it is not, the Supreme Court has said. If campus religious groups no longer enjoy that protection, they are easy game for their opponents. Religious beliefs are frequently unpopular with secular society as a whole, and all the more so with the dominant culture at most state universities in America. If campus religious groups do not have a *right* to maintain a distinctive religious identity, you can be sure that at a great many state universities they will not be allowed to maintain such an identity, for political reasons. For path-of-least-resistance state university administrators—and what state university administrator is not?—and for litigation-avoiding university general counsels, *Christian Legal Society* affords a safe harbor: Adopt a "take-all-comers" policy, and you are fine. Even without an "all-comers" policy, *Christian Legal Society*'s atmospherics make it the better bet to enforce a general anti-discrimination policy over a religious group's claim to expressive association in its membership criteria.[71]

But why stop at *university* religious groups? Under the Equal Access Act, public secondary schools must allow student religious groups to meet on campus if the school allows one or more other voluntary, non-curriculum student groups to meet on campus.[72] Such meetings have long met with resistance. *Christian Legal Society* arms opponents of such meetings with a powerful weapon: Require that each such group not have a religion-exclusive identity. It will not take long for a faith-based group to cease to operate as a faith-based group if it cannot be based on faith. Likewise, after-hours elementary school religious clubs, led by adults, can be effectively destroyed by requiring that the sponsoring group accept all comers and not have a statement of faith even for those leaders.[73] Finally, churches seeking to rent school facilities for their weekend worship meetings or seeking to use school facilities after hours on the same basis as other community groups can be shut out simply by

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[71] This has already happened. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795, 805 (9th Cir. 2011) (upholding a university policy forbidding student organizations from "discriminating" on the basis of religion by using faith criteria for membership on the authority of *Christian Legal Society*), *cert. denied*, 80 U.S.L.W. 3381 (U.S. Mar. 19, 2012).

[72] Equal Access Act, 20 U.S.C. § 4071(a)–(b) (2006). The constitutionality of the Equal Access Act was upheld in *Board of Education v. Mergens*, 496 U.S. 226, 248–49, 253 (1990).

[73] *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001) (holding that a school's interest in not violating the Establishment Clause did not outweigh a Christian club's interest in having equal access to school facilities).

insisting that the church or other religious organization have no "exclusive" tenets or faith criteria.[74]

And why stop there? If the reasoning of *Christian Legal Society* stands, a *religious private* school that accepts students who use state-funded vouchers for his or her education or even tax benefits, under a state's or community's "school choice" program, could be required to secularize itself as a condition of participation. The school could be required to take all comers, not merely as far as students are concerned, but also with respect to faculty hiring decisions. No religious hiring criteria exists for a religious school that accepts such government "subvention."

These results can be avoided only if *Christian Legal Society* is cabined—limited very narrowly to its peculiar set of hypothesized facts—and thereby becomes Justice Alito's hoped-for "aberration" in the law. Here is where the Court's decision to decide the case on hypothetical facts may be turned into a virtue. As noted, the Court decided *Christian Legal Society* on the assumption that a public university could uniformly deprive all campus student organizations of the "freedom of association" for expressive purposes. Arguably, the Court *assumed, but did not decide*, this point. On that assumed premise, the majority held that a neutral, suppress-all-groups-equally condition would not violate Christian Legal Society's right to equal access. But it should be open to the Court to reexamine that conclusion in a case in which such a stipulation was not made, or in which the point is actually contested. As discussed above, the assumption appears directly contrary to the longstanding precedent of *Healy v. James* and to a long line of cases following and building on it. It is therefore hard to believe that such a premise will long survive. *Christian Legal Society* could—one hopes, one prays—come to be regarded as an idiosyncratic, one-off special case.

CONCLUSION

There is much more that could be said about this disastrous decision, but I will end with some brief concluding observations and reflections.

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[74] *Cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (holding that an organization cannot be denied equal access to a forum to show a film series on child rearing solely on the basis that the film series would be presented from a Christian perspective, a result that would likely be the opposite if the administrators of the forum could simply have excluded organizations that had exclusive memberships from the limited public forum). *See also* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 51 (2d Cir. 2011) (upholding the constitutionality of a policy excluding church rental of school facilities for "worship"), *cert. denied*, 80 U.S.L.W. 3334 (U.S. Dec. 5, 2011).

First, *Christian Legal Society* demonstrates, or at least illustrates, the problem with overly complex doctrinal formulations and "tests" in constitutional law. I have recited in this essay a number of core First Amendment principles myself: the rule that government may not discriminate against or punish speech because of its message, the derived rule protecting group expression and the corollary right of a group to define itself, and the sometimes inscrutable "unconstitutional conditions" doctrine. But as essential as such propositions are to explicate the meaning of "the freedom of speech," *constitutional law doctrine is dangerous stuff.* It can obscure as much as enlighten, and it is readily subject to manipulation. The "limited public forum" doctrine was always a tad fuzzy, and more recent cases have fuzzed it up considerably. What once was a rule that government could not open up a forum for some but not others—that there is an equality of status in the field of ideas—somehow, gradually, became transmogrified into an elaborate matrix for government defining the terms under which it will and will not be bound to honor the freedom of speech. It makes no sense to say that government's exclusions from a forum are governed by the strictest of strict-scrutiny standards but then add, in the next breath, that the government can decide what is embraced by the forum and what is not. That is doctrine gone awry. Doctrine is manipulable, of course, but this is manipulability on stilts. Couple that with the double doctrine permitting "reasonable, content-neutral, time, place, or manner" regulations of speech, and what you have is a house of mirrors. What began as a set of rules for clarifying and applying a constitutional command framed in absolutist terms—government may make no law abridging the freedom of speech—ends up as a set of tools for circumventing and manipulating legal categories to reach preferred outcomes. The Court either got tripped up by its own confusing categories or deliberately used the categories to trip up the First Amendment.

Second, *Christian Legal Society* illustrates an odd paradox. No doubt everyone has heard it said that bad facts make bad law, but *Christian Legal Society* says unto us that sometimes *good* facts make bad law. The fact that the student group was allowed to meet, informally and without recognition or permission, and that the consequence of Hastings's discrimination was to increase the fervor of student participation, worked against Christian Legal Society in the end. The Court, or at least the five-member majority, was able to regard this as a *reasonable* abridgment of the freedom of speech, so mild a violation of the First Amendment on its facts that it could certainly be upheld as a matter of constitutional law. The lesson seems to be, for First Amendment litigators, to make sure that the facts are stinking, rotten, and squalid. Only then can one be reasonably certain that the Court will

not lose sight of the principle involved. When I used to litigate student religious free-speech cases, I *wanted* students to be forcibly removed from classrooms, told they could not pray, suspended by the principal, or given failing grades for writing on religious topics. If a student is granted a partial accommodation or given a grade of "B-," the case is harder to win.

Third, *good* stipulations can make bad law. How strange is that? Doubtless, the attorney who succeeded in getting Hastings College of Law to stipulate that, in effect, it had violated *Healy v. James* by denying all student groups the freedom of expressive association thought that he had managed to get a public law school to blunder into the smoking-gun concession of the century. The fact that Hastings *had* blundered, however, somehow became the basis for the appellate courts, including the Supreme Court, deciding the case as a bizarre class hypothetical: "Let us assume that it is okay to violate the First Amendment and that everybody has stipulated to facts conceding that the government has done so. But is it *viewpoint*-based discrimination when the government violates the First Amendment *equally as to everyone*?" One would have thought such a framing of the question unimaginable. But beware the stipulation that turns "*good*" bad facts into a too-good-to-be-true abstraction that takes the case in a different direction.

Finally, a sad and regrettable observation (or rather, informed speculation): This opinion was written by a law clerk, not by Justice Ginsburg. To be sure, Justice Ginsburg signed on to it, and the conclusion doubtless faithfully reflects her vote as to her preferred outcome. But the opinion is so riddled with overly-clever logical tricks and so embarrassed by flat-out wrong propositions of basic First Amendment law, that it is impossible to believe that Ruth Bader Ginsburg was really and truly its author. Doubtless, she was distracted by other, more pressing personal matters. Her husband of many years, Martin Ginsburg, was dying, and he indeed died on June 27, 2010.[75] The *Christian Legal Society* opinion was announced on June 28, 2010. This was not the work of an attentive, focused Supreme Court Justice, and to the extent others in the majority might have been troubled by some of the reasoning in the opinion, there may have been a tendency not to press such points upon an understandably already-stressed, personally-distressed colleague of many years. "If the opinion is written as limited to these facts, I'm fine with it." Thus, a law clerk was left alone to write the opinion, employing the doctrinal gymnastics available for the job at

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[75] Gardiner Harris, *M.D. Ginsburg, 78, Dies; Lawyer and Tax Expert*, N.Y. TIMES, June 28, 2010, at B8.

hand and displaying the brilliance and wit of a freshly-minted Ivy League law school graduate with a mission.

The lesson here is two-fold. Law, including constitutional law, for all its abstractions and principles, remains very much a human enterprise. This is not to say that judicial interpretations of the Constitution turn on what a judge had for breakfast. But certainly the personal circumstances of an individual Justice can affect the way in which a particular opinion is written and perhaps even the final outcome of a case. The other side of this observation is simply that *bad law clerks* make bad law.

For whatever accounts for its inputs, the output that is the Court's decision in *Christian Legal Society v. Martinez* stands as one of the most atrocious First Amendment decisions of the United States Supreme Court in its history. Its pernicious holding, pernicious collateral holdings, and pernicious implications truly make *Christian Legal Society* a First Amendment disaster.

RELIGIOUS NEUTRALITY IN THE EARLY REPUBLIC

Wesley J. Campbell[*]

ABSTRACT

Governmental neutrality is the heart of the modern Free Exercise Clause. Mindful of this core principle, which prevents the government from treating individuals differently because of their religious convictions, the Supreme Court held in *Employment Division v. Smith* that a neutral law can be constitutionally applied despite any incidental burdens it might impose on an individual's exercise of religion. Conscientious objectors such as Quakers, for instance, do not have a constitutional right to be exempt from a military draft. Thus, neutrality now forms both the core and the outer limit of constitutionally guaranteed religious freedom. Judged according to founding-era views, however, this interpretation of the Free Exercise Clause is deeply problematic. Although historical scholarship has focused on the particular issue of religious exemptions, this Article takes a different approach by reexamining early debates about neutrality itself. These neglected sources demonstrate that modern cases invert the founding-era conception of religious freedom. For the Founders, religious freedom was primarily an unalienable natural right to practice religion—not a right that depended on whether a law was neutral. This evidence illuminates not only a significant transition in constitutional meaning since the Founding but also the extent to which modern priorities often color our understanding of the past.

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INTRODUCTION

The core of our modern understanding of religious freedom is governmental neutrality—a principle that generally forbids the government from treating people differently on the basis of their religious beliefs.[1] In *Sherbert v. Verner*, for example, the Supreme Court declared that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."[2] Any law that "establishes a religious classification"[3] is therefore unconstitutional even if the law neither infringes upon a person's practice of religion nor deprives the individual of a civil right.[4] Based on this principle, the Supreme Court has held that the federal and state governments may not discriminate against particular religious groups,[5] prevent clergy from serving in civil offices,[6] or bar atheists from becoming notaries public.[7] The same neutrality requirement also applies even if the law is "*rewarding* religious beliefs as such."[8]

While considering neutrality as the core principle of religious freedom, the Supreme Court has also evaluated whether facially neutral

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[1] This definition of religious neutrality follows the holdings of modern free exercise decisions. *See infra* note 4. Some scholars have posited other meanings of neutrality. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 994 (1990).

[2] 374 U.S. 398, 402 (1963); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . .").

[3] McDaniel v. Paty, 435 U.S. 618, 631–32 (1978) (Brennan, J., concurring) ("Whether or not the provision discriminates among religions . . . it establishes a religious classification . . . .").

[4] *See, e.g.*, *id.* at 633 ("[T]hat the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is also squarely rejected by precedent."); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) ("The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."). One decision potentially in conflict with a neutrality-based view is *Locke v. Davey*, 540 U.S. 712, 725 (2004), which rejected a free-exercise challenge to a state's denial of a government-funded vocational scholarship that an individual wished to use to fund religious training in preparation for a career in the ministry. In *Locke*, the majority found it significant that the State had conditioned the receipt of funds on the student's choice of *vocation*, which the Court considered as distinct from the student's *religious beliefs*. *Id.* at 720–21 ("And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction." (footnote and citations omitted)).

[5] Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953).

[6] *McDaniel*, 435 U.S. at 628–29 (plurality opinion).

[7] *Torcaso*, 367 U.S. at 489, 495.

[8] *McDaniel*, 435 U.S. at 626 (plurality opinion) (emphasis added).

laws violate the Free Exercise Clause when their enforcement incidentally interferes with an individual's religious beliefs or practices. In the decades prior to 1990, the Supreme Court held that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[9] In other words, a law ostensibly having nothing to do with religion (such as a military draft) could nonetheless unconstitutionally burden the free exercise rights of particular individuals (such as conscientious objectors). In these instances, the Court formerly applied strict scrutiny and required the government to prove a compelling interest for infringing upon an individual's religious practice.[10] In taking this position, the Court explained that not applying strict scrutiny to neutral infringements upon the individual right to free exercise would "relegate[] a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."[11]

In *Employment Division v. Smith*, however, the Supreme Court shifted course, holding that the Free Exercise Clause does not provide an individual right of religious exemption from facially neutral laws.[12] In particular, the five-Justice majority decided that states can enforce their controlled substance laws against Native Americans who use hallucinogenic drugs as part of their sacramental practices.[13] The government still may not discriminate under the guise of facially neutral laws, but following *Smith*, the constitutional inquiry centers on the *governmental* action—not the law's effect on *individuals*.[14] In other words, governmental neutrality now is not just the core of constitutionally protected religious liberty; it also marks the outer boundary.

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9 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

10 Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 141 (1987).

11 *Id.* at 141–42 (quoting Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring)) (internal quotation marks omitted).

12 494 U.S. 872, 878–79, 890 (1990).

13 *Id.* at 873–74, 890. Justice O'Connor filed a separate concurring opinion criticizing the majority's departure from "established free exercise jurisprudence," but she agreed that Oregon could prohibit the religious use of peyote because she thought the law survived heightened scrutiny under existing doctrine. *Id.* at 902, 907 (O'Connor, J., concurring).

14 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."). In these instances, it is critical to realize that the constitutional infirmity—at least according to the Court—is not the effect of the law on *individuals*. Rather, the *government's* effort to target those individuals is what offends the First Amendment. *Id.*

With the rise of originalism jurisprudence, historical evidence has played a significant role in modern debates about how to interpret the Free Exercise Clause. Because it is now accepted that the government may not discriminate on the basis of religion, these debates have generally focused on the question presented in *Smith*: whether the Free Exercise Clause provides an individual right of religious exemption from neutral, generally applicable laws.[15] In *City of Boerne v. Flores*,[16] for example, Justice Scalia's concurrence and Justice O'Connor's dissent wrangled over whether *Smith* was consistent with the original meaning of the Free Exercise Clause.[17] Historical arguments have also been featured prominently in discussions among academic scholars. Michael McConnell writes that the "doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation."[18] Others vigorously dispute that claim. Philip Hamburger, for instance, argues that "late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws."[19] Neither position has garnered scholarly consensus, in part because founding-era debates about exemptions were often mired in uncertainty.[20] Nonetheless, scholarly debates about religious freedom

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[15] *See Smith*, 494 U.S. at 874.

[16] 521 U.S. 507 (1997).

[17] *Id.* at 537–38 (Scalia, J., concurring); *id.* at 544–45 (O'Connor, J., dissenting).

[18] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) [hereinafter McConnell, *Origins*]; *see also* Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1, 39–40 (2004) (arguing that early state free exercise decisions support religious exemptions).

[19] Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) [hereinafter Hamburger, *Religious Exemption*]; *see also* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247–48 (1991) (arguing on historical grounds against religious exemptions); *see also* Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 370–71 (1993–1994).

[20] Several factors account for the indeterminacy of nineteenth-century religious exemption cases. First, eighteenth-century and early nineteenth-century views about theology, evidence rules, and judicial review differed dramatically from our own, thus limiting our ability to glean constitutional meaning out of these early cases. Wesley J. Campbell, Note, *A New Approach to Nineteenth-Century Religious Exemption Cases*, 63 STAN. L. REV. 973, 976 (2011). Moreover, early jurists may have applied something akin to our modern "compelling governmental interest" test whereby a compelling governmental interest can be sufficient to override a person's individual liberty claim. *See* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 845–46 (1998) [hereinafter McConnell, *Freedom from Persecution*] ("The most persuasive interpretation of the state precursors of the Free Exercise Clause, therefore, is that they provided substantive protection for religious conduct, except for acts that violate the peace and safety of the state or the rights of others."). Thus, it is often difficult when

remain active, and the Court continues to wrestle with the often uncomfortable implications of its *Smith* decision.[21]

Historical studies by legal scholars have focused almost exclusively on early American debates about exemptions and ignored debates about neutrality. McConnell, for instance, acknowledges that most early nineteenth-century religious-freedom cases involved witnesses excluded from testifying because of their faith, or prosecutions for blasphemous statements, but he does not discuss these cases because they "involved laws specifically directed at religion" and therefore "did not raise the exemption question."[22] The scholarly focus on exemption cases is perfectly natural, of course, but it also has led scholars to overlook a wealth of historical materials not directly related to exemption debates but nonetheless integral to understanding how the Founders thought about religious freedom. In particular, debates concerning religious neutrality oftentimes better reveal the values and priorities implicit in founding-era understandings of free exercise.

Only one scholar has examined how these early debates about neutrality bear on the exemption question. In an important historical analysis of religious exemptions, Gerard Bradley persuasively demonstrates that courts were historically unwilling to overturn laws that facially discriminated on the basis of religious belief.[23] Bradley then pounces on McConnell's dismissal of religious neutrality cases as unconnected to the exemption debate by stating, "[O]ne has to wonder about the coherence of [McConnell's] project: courts *would* enforce laws 'specifically directed at religion' (and thus intentionally coerce belief), but *not* laws that pursued secular goals incidentally burdening belief."[24] With such indifference toward religious neutrality, Bradley argues, judges surely were unwilling to provide exemptions from neutral laws.[25]

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reading early cases to discern whether jurists rejected the possibility of exemptions generally, or instead thought an exemption was not warranted in the context of particular cases notwithstanding constitutional protection for other exemptions.

[21] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706–07 (2012) (addressing whether and to what extent the First Amendment affords religious institutions constitutional exemptions from certain employment laws).

[22] McConnell, *Origins*, *supra* note 18, at 1503.

[23] Bradley, *supra* note 19, at 271–72, 275–76, 285.

[24] *Id.* at 274. Bradley argues that blasphemy and testimonial exclusion cases were not "directed at religion" but rather aimed at the religiously neutral goals of protecting public safety and ensuring testimonial veracity. *Id.* at 274–77. He clarifies, however, that "[t]o the extent that the cases *are* 'directed at religion,' their significance cuts deeply into McConnell's case." *Id.* at 277. Under modern neutrality principles, these laws would be "directed at religion," irrespective of whether the government was pursuing a neutral goal. *See supra* note 4.

[25] *See id.* at 275.

Although perhaps counterintuitive, early judicial enforcement of facially discriminatory laws actually *supports* the historical argument for religious exemptions. State governments during the Founding Era generally accommodated minority religious practices while simultaneously restricting certain civil privileges on the basis of religious belief.[26] When considering the consistency of these discriminatory laws with constitutionally protected religious liberty, late eighteenth-century and early nineteenth-century judges, legislators, and other legal commentators frequently noted that governmental classifications were legitimate so long as they did not infringe upon a person's free exercise. By putting aside our modern priorities and rereading these debates on their own terms, the original meaning of the First Amendment becomes much clearer: The Free Exercise Clause guaranteed a natural, unalienable right of religious freedom—not a right to governmental neutrality.

This Article argues that in order to understand the Founders' views regarding religious exemptions, we must first understand how they thought about religious liberty more generally and how much that viewpoint differs from our own. Part I lays the theoretical groundwork of the paper by describing two theories of religious freedom: the governmental neutrality approach and the individual liberty approach. Early state and federal constitutional provisions concerning religious freedom are presented in Part II, which analyzes the values and priorities underlying those provisions. Part III then discusses judicial decisions and other early nineteenth-century debates about religious neutrality. In particular, this Part analyzes neglected evidence from testimonial exclusion cases, test oath debates, blasphemy prosecutions, and religious assessment controversies. As argued in Part IV, nineteenth-century perspectives regarding religious neutrality are an under-utilized yet remarkably revealing source for understanding the original public meaning of the Free Exercise Clause. The Article does not take a normative position about how much this historical meaning should matter in modern jurisprudence, and it certainly does not aim to undercut modern neutrality jurisprudence.[27] To those who factor original meaning into their constitutional calculus, however, historical evidence casts doubt on the Supreme Court's current refusal to recognize the

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[26] *See infra* Part III.

[27] The proper home for neutrality values, however, may be elsewhere in the Constitution, particularly in the Establishment Clause and the Equal Protection Clause. Rather than attack neutrality principles, this Article argues that the Court's current focus on neutrality tends to warp its understanding of original free-exercise principles.

constitutional underpinnings of an individual right to religious accommodation.[28]

I. TWO THEORIES OF RELIGIOUS FREEDOM

Before turning to the historical evidence, it is important to explain two general theories of religious freedom that animate modern debates about the Free Exercise Clause. One of these theories, labeled here as the *individual liberty* theory, focuses on the primacy of religious duties for individuals. For adherents to this view, the core of religious liberty is individual freedom to practice religion without legal constraints, even if those legal constraints are not directly or intentionally aimed at religion. The second theory, labeled here as the *neutrality* theory, focuses on governmental actions. Here, the central question is whether the law treats people differently because of their religious beliefs or practices.[29]

The basic contours of these two theories are best illustrated through examples. Some laws would offend both theories of religious freedom. For instance, a law banning the Christian rite of communion would infringe upon the individual liberty of Christians to practice their religion, yet the same law would also be non-neutral because it would discriminate on the basis of religion. Many laws, however, would offend one approach but not the other. Forbidding all uses of wine, for example, would interfere with the individual liberty of some Christians to practice communion, but it would nonetheless be neutral because it would apply to everyone without targeting a religious practice. By contrast, a law preventing Catholics from serving in the legislature would violate neutrality principles by targeting Catholics, but it would not offend individual liberty because, strictly understood, serving in the legislature has nothing to do with Catholic religious practices. These theories are not incompatible with each other, but they nonetheless reflect fundamentally different outlooks about the source and purpose of religious liberty.

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[28] Recognizing that religious exemptions have constitutional underpinnings is important even if one thinks that *Smith* was correctly decided for prudential reasons. That is because the constitutional nature of exemption claims suggests that even if they are not judicially enforceable, other branches of government still have a constitutional duty to afford exemptions. Moreover, the prudential concerns that might have influenced the Court in *Smith* should be beside the point when assessing *congressional* attempts to protect free exercise under Section Five of the Fourteenth Amendment. *But see* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

[29] Keeping largely to the terms of the founding-era debates, this Article concentrates on classifications between religious groups rather than classifications based on whether someone has *any* religious belief. Modern neutrality principles, of course, also prevent discrimination against those without religious faith. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

As explained in the Introduction, the Supreme Court has openly adopted a neutrality-based approach to the Free Exercise Clause. In *Employment Division v. Smith*, Justice Scalia's majority opinion declared,

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not . . . impose special disabilities on the basis of religious views or religious status . . . .[30]

Protecting neutrality, however, was as far as the Court was willing to go. With very limited exceptions, the Court in *Smith* rejected an individual liberty interpretation of religious freedom. "[T]he right of free exercise," Justice Scalia wrote, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[31] In other words, neutral laws applicable to everyone are constitutional despite any unintended burdens they might impose on religious practices. According to the Court, "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[32] Nineteenth-century neutrality cases, however, suggest that the Court's fleeting reference to history may have been misguided.

II. NEUTRALITY AT THE FOUNDING

In the 1780s, every state constitution or declaration of rights included a religious liberty provision, although the exact language of these articles differed between states.[33] Scholars have thoroughly

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[30] Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

[31] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[32] *Id.* (quoting Minersville Sch. Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586, 594 (1940)) (internal quotation marks omitted). *Gobitis* was overruled on free speech grounds just three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The Court in *Barnette* specifically noted that "[i]t is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." *Id.* at 635.

[33] *See* JOHN WITTE, JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 44, 46 (3d ed. 2011); John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & ST. 753, 755 (1990); McConnell, *Origins*, *supra* note 18, at 1456–58 (listing each clause). In addition, although Connecticut continued under its colonial charter, the legislature passed in 1776 "An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same." ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 1 (Timothy Green ed., 1784). The preamble mentions "civil and religious Rights and Liberties" and states that

canvassed these early state constitutional provisions, but reexamining these texts is a useful starting point for understanding founding-era views about religious liberty.[34]

The constitution or bill of rights in most states during the Founding Era expressly mentioned that freedom of religion is an "unalienable right."[35] This reference to unalienable rights provides a critical insight

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> as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

Id.

[34] Judicial review was in its earliest stages during the 1780s. *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN L. REV. 455, 474 (2005); Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 215 (2003). Therefore, state constitutional provisions may better elucidate *what* religious liberty meant rather than *how* it would be enforced. McConnell makes a similar point in an important footnote: "The exemptions of the colonial and revolutionary periods took place before the Constitution (even before the state constitutions) and before judicial review. The point of this preconstitutional history is to understand the experience against which the Framers and ratifiers would understand the proposed Amendment." McConnell, *Freedom from Persecution*, *supra* note 20, at 838 n.112. McConnell acknowledges that early state constitutional protections may have been merely legislative guidelines, but he observes that "the Framers of the federal Bill of Rights, and particularly Madison, had completed the transition from hortatory declarations to judicially enforceable rights." *Id.*

[35] *See, e.g.*, DEL. DECLARATION OF RIGHTS of 1776, § 2, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 5 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . ."); KY. CONST. of 1792, art. XII, § 3, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1264, 1274 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] ("[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); N.H. CONST. pt. I, art. V, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2453, 2454 ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ."); N.J. CONST. of 1776, art. XVIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2594, 2597 (recognizing "the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience"); N.C. CONST. of 1776, art. XIX, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787, 2788 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."); PA. CONST. of 1776, art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3082 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . ."). Other states spoke of religious duties. *See, e.g.*, MD. DECLARATION OF RIGHTS of 1776, art. XXXIII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1686, 1689 ("[I]t is the duty of every man to worship God in such manner as he thinks most acceptable to him . . . ."); MASS. CONST. pt. 1, art. II, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1888, 1889 ("It is the right as well as the duty of all men . . . to worship the SUPREME BEING . . . ."); VA. CONST. of 1776, § 16, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3812, 3814 ("[R]eligion,

into how contemporaries understood religious liberty. Under Lockean social contract theory, individuals in a state of nature have certain natural rights. These rights include both alienable rights, which individuals may give up (or alienate) upon entering the social contract, and unalienable rights.[36] According to James Madison,

> The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.[37]

Thus, Madison considered religious freedom to be unalienable because duties to God supersede worldly obligations. As shown in Part III, invocations of the inalienability of religious freedom were common in early constitutional debates.

Viewing religious freedom as a natural and unalienable right aligns with the individual liberty view of free exercise. Governments do not exist in the state of nature, and therefore the meaning of natural rights cannot depend upon their relationship to governmental authorities.[38] Upon exiting the state of nature, however, individuals may forfeit most of their natural rights to the government, or they may redefine those rights in terms of governmental neutrality.[39] But unalienable rights are different because, as Madison had explained with respect to free exercise, they cannot be given up or redefined.[40] Suppose, for instance, that the right to self-defense is an unalienable right. Then suppose that the government passes a neutral law banning all intentional killings, irrespective of whether a person kills in self-defense. In this example,

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or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . . .").

[36] For one description of Lockean rights theory, see DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 87 (1989).

[37] James Madison, A Memorial and Remonstrance (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 298, 299 (Robert A. Rutland et al. eds., 1973).

[38] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8–9 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); *see also* Richard Tuck, *The Dangers of Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 683, 691 (1997) ("Natural rights are obviously by definition *meta*-political, though they may be adduced in discussion by legislators or interpreters of legislation . . . .").

[39] For a useful and nuanced explanation of founding-era views on this issue, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 935–37 (1993) [hereinafter Hamburger, *Natural Rights*].

[40] *See* Madison, *supra* note 37, at 299 ("This duty [to God] is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.").

prosecuting someone for an intentional killing made in self-defense would plainly violate the individual, unalienable right to self-defense. The right predates and necessarily survives the social contract, and therefore the right's definition and application do not depend on any feature of positive law, including a law's neutrality or non-neutrality. Similarly, the Founders' understanding of free exercise as an unalienable right strongly suggests that this right was individually held and not understood to be a guarantee of governmental neutrality.[41]

Even in the state of nature, however, individuals cannot in the name of religious liberty infringe upon the rights of others. According to John Locke, the state of nature is "a *state of perfect freedom* . . . . yet *it is not a state of licence*."[42] Instead, it "has a law of nature to govern it, which obliges every one . . . that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions . . . ."[43]

Early state constitutions mentioning the inalienability of religious freedom also recognized this fundamental limitation on religious liberty.[44] In New Hampshire, for example, the constitution guaranteed the inalienability of free exercise for every person, "provided he doth not disturb the public peace, or disturb others, in their religious worship."[45] Scholars dispute the meaning of these limiting provisions and particularly what it meant for someone to "disturb the peace." Hamburger asserts that the founding generation considered all violations of law to be disruptions of the public peace.[46] Therefore, he argues, limiting clauses in early religious-freedom provisions expressly

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[41] Of course, a society that forms a social contract may *also* recognize a religious neutrality norm. But that does not transform neutrality into an unalienable right, which in Lockean terms is a right that predates and necessarily survives the social contract. *See* LOCKE, *supra* note 38, at 13.

[42] *Id.* at 8–9.

[43] *Id.* at 9. Locke himself wrote in a time of Parliamentary sovereignty, thus making his views on the inalienability of religious rights slightly different than the views of the American founders. *See* McConnell, *Origins*, *supra* note 18, at 1435; *see also* McConnell, *Freedom from Persecution*, *supra* note 20, at 827–29 & n.47 (presenting a slightly different reading of Locke).

[44] Hamburger asserts that the inalienability of the rights of conscience proves that this right could not be conditioned, and then he uses the right's supposed unconditionality to explain why it must have been highly circumscribed. Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 847–57 (2004) [hereinafter Hamburger, *More Is Less*]. Saying that a right is unalienable, however, is quite different than saying that it is unconditional. In the Lockean state of nature, rights did not extend so far as to allow individuals to violate the rights of others. *See* LOCKE, *supra* note 38, at 9. Indeed, Hamburger has previously articulated a similar point. *See* Hamburger, *Natural Rights*, *supra* note 39, at 927–28.

[45] N.H. CONST., pt. 1, art. V, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 2453, 2454.

[46] Hamburger, *Religious Exemption*, *supra* note 19, at 918.

denied an individual right of religious exemption from neutral laws.[47] In making this argument, however, Hamburger makes two critical mistakes. First, he assumes the point he is trying to prove. If exemptions were statutorily or constitutionally mandated, then judges who accommodated religious scruples would be following, not violating, the law. Indeed, military-service exemptions for Quakers were widely accepted rather than condemned as "lawless" or disruptive of the public peace.[48]

More importantly, though, Hamburger overlooks the well-accepted eighteenth-century meaning of disruptions of the public peace.[49] In his famous *Commentaries on the Laws of England*, for instance, William Blackstone listed thirteen "offenses against the public peace"—a list that did not include every civil and criminal law on the books.[50] Similarly, the Articles of Confederation stated that "the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or *breach of the peace*."[51] Of course, this protection from "arrests and imprisonments" would have been nugatory if the phrase "breaches of the peace" included any illegal act. An early dictionary the Supreme Court has used to establish the original public meaning of other constitutional provisions[52] provides that "[a] violation of the public

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[47] *Id.* at 917–26. Hamburger states, "The behavior described by the caveats included more than just nonpeaceful behavior. . . . Whereas McConnell assumes that a disturbance of the peace was simply nonpeaceful behavior, eighteenth-century lawyers made clear that 'every breach of law is against the peace.'" *Id.* at 918 (quoting Queen v. Lane, (1704) 87 Eng. Rep. 884 (Q.B.) 885; 6 Mod. 128, 128). Justice Scalia used this quotation in his concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring in part).

[48] Hamburger's own evidence in an early episode of controversy surrounding Quaker militia exemptions in the Revolutionary War largely supports this point. *See* Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1625 (2005) [hereinafter Hamburger, *Religious Freedom*]. To be sure, there were adamant denials that Quakers should be exempted and not have to pay an equivalent, but the overwhelming thrust of Hamburger's evidence takes for granted the idea that militia exemptions for Quakers fall with the understood meaning of religious freedom. *See, e.g.*, Commonwealth v. Smith, 9 Mass. (8 Tyng) 107, 110 (1812) (discussing how Quakers were usually either exempted or excused from serving as grand jurors).

[49] The most thorough rebuttal of Hamburger's position regarding disturbances of the peace appears in Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 280–300 (2002); *see also* McConnell, *Freedom from Persecution*, *supra* note 20, at 834–37.

[50] 4 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 113–18 (Wayne Morrison ed., 2001).

[51] ARTICLES OF CONFEDERATION of 1777, art. V (emphasis added).

[52] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004) (relying on Noah Webster's dictionary to define the term "witnesses" in the Confrontation Clause).

peace, as by a riot, affray, or any tumult which is contrary to law, and destructive to the public tranquility, is called a *breach of the peace*."[53]

Therefore, when state constitutions guaranteed the "unalienable rights of conscience," except when individuals disturbed the public peace, these constitutional provisions recognized the basic idea of Lockean rights: Individuals may exercise their rights so long as they do not encroach upon the rights of others.

This is not to say that neutrality was wholly unimportant. Many state constitutions also included clauses that contemplated limited forms of religious neutrality, particularly by circumscribing or renouncing state religious establishments.[54] These provisions, however, were often in separate sections and generally did not affect the scope of free exercise protections.[55] An interesting exception appears in the constitutions of New York and South Carolina, which declared that the "free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall forever hereafter be allowed, within this State, to all mankind . . . ."[56] This provision may appear to be a straightforward endorsement of governmental neutrality. A closer reading, however, reveals that the modifier "without discrimination or preference" applies to the phrase "free exercise and enjoyment of religious profession and worship" and not to the enactment of laws generally.[57] In other words, the *right of free exercise* had to be respected

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[53] NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprint 2005) (1828).

[54] *See, e.g.*, PA. CONST. of 1790, art. IX, § 3, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 3092, 3100 (providing that "no preference shall ever be given, by law, to any religious establishments or modes of worship"). Even Massachusetts, which had an official religious establishment, also had a constitutional guarantee that every Christian sect was under the equal protection of the law. MASS. CONST. pt. I, art. III, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 1888, 1890 ("And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.").

[55] *See, e.g.*, PA. CONST. of 1790, art. IX, § 4, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 3092, 3100 ("[N]o person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth"); *id.* § 3 ("[N]o preference shall ever be given, by law, to any religious establishments or modes of worship.").

[56] N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 2623, 2637 (emphasis added); S.C. CONST. of 1790, art. VIII, § 1, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 3258, 3264 (emphasis added).

[57] If one took a strict view of neutrality, it would be difficult to see how religious exemptions themselves would not constitute a "discrimination or preference." Yet "there is virtually no evidence that anyone thought [regulatory religious exemptions] were

equally, but this did not prevent the government from treating certain religious groups differently than others in ways that did not infringe upon that right.[58]

Given the modern primacy of governmental neutrality with respect to religious beliefs, it is easy to view the individual liberty approach to free exercise as expansive or even radical. According to Hamburger, "most eighteenth-century advocates of religious liberty sought a freedom from laws that imposed constraints on the basis of religion (or at least religious differences), [but] numerous modern advocates and judges *expect more*. . . . They thereby adopt a *very expansive* definition of the First Amendment's right of free exercise."[59] Applied to our modern circumstances, the scope of the individual liberty approach may, in fact, be expansive. The Supreme Court currently considers the neutrality theory as a baseline,[60] so mandatory exemptions would increase the scope of free exercise, based on the current doctrine.

In the eighteenth century, however, religious exemptions were highly *non*-radical. As William Marshall has mentioned, "[T]here [were] few religiously neutral state provisions with which the religious practices could have been in conflict. The regulatory state did not exist."[61] Moreover, "[T]he culture of the United States in the late eighteenth century was fairly homogeneous, being composed almost entirely of Christian sects whose practices were unlikely to violate non-

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constitutionally *prohibited* or that they were part of an establishment of religion." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006).

[58] Thus, when the New York Constitutional Ratification Convention proposed in 1788 that "the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others," the *equal* right to free exercise meant that the right existed regardless of a person's religion, not that all religions had to be treated equally under the law. Ratification of the Constitution by the State of New York (July 26, 1788), *in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 191 (Dep't of State ed., 1894). Similar language appeared in Virginia's 1776 Bill of Rights, which proclaimed that "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are *equally* entitled to the free exercise of religion, according to the dictates of conscience . . . ." VA. CONST. of 1776, § 16, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 3812, 3814 (emphasis added).

[59] Hamburger, *More Is Less*, *supra* note 44, at 836 (emphasis added). Hamburger, however, argues that state free exercise clauses were generally even more limited, applying only to state-imposed prohibitions on religious practices rather than any religious classification. *Id.* at 841.

[60] *See supra* note 30 and accompanying text.

[61] William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 7 J.L. & RELIGION 363, 382 (1989).

religious societal norms."[62] In some notable instances, neutral laws did conflict with individual liberty. Quakers, for example, had conscientious scruples against swearing oaths and serving in the military.[63] Faced with this dilemma, however, states readily granted religious accommodations throughout the first decades of the young republic, apparently with little social cost.[64] In addition to the rarity of conflicts between individual religious scruples and neutral laws, several important backstops prevented conscientious-objection claims from destabilizing the legal regime. Prevailing religious norms still placed a high premium on conformity to church doctrine, and the government generally recognized only those conscientious objections shared by an entire denomination.[65] Therefore, guaranteeing religious exemptions as a constitutional principle did not mean a free-for-all in practice, where any individual could claim and receive exemptions on a whim.[66] Additionally, as it had in the state of nature, religious liberty did not permit individuals to interfere with the rights of others, thus giving states yet another means of limiting exemptions.[67]

De facto limits on religious exemptions help explain why the Federal Free Exercise Clause received such little debate. Recently, Nicholas Rosenkranz argued that the First Amendment's famous opening phrase, "Congress shall make no law," implies that the Free Exercise Clause prevents facially discriminatory laws but does not provide an individual right to conscientious exemption.[68] In his initial remarks on the clause, however, James Madison suggested a different reason why the First Amendment only mentions Congress:

> Whether the words [of the amendment] are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a

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[62] *Id.* at 383.

[63] *See, e.g.*, Commonwealth v. Smith, 9 Mass. (8 Tyng) 107, 110 (1812); *see also* Hamburger, *Religious Freedom*, *supra* note 48, at 1625.

[64] *See* McConnell, *Origins*, *supra* note 18, at 1466–73 (discussing common eighteenth-century exemptions); *see also infra* note 89.

[65] McConnell, *Origins*, *supra* note 18, at 1472.

[66] *See* Campbell, *supra* note 20, at 978–79.

[67] *See* McConnell, *Freedom from Persecution*, *supra* note 20, at 845–46.

[68] Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1263, 1266–68 (2010). Other textually-based critiques of the individual-liberty view focus on the word "prohibiting." *See, e.g.*, Allan Ides, *The Text of the Free Exercise Clause as a Measure of* Employment Division v. Smith *and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 147–51 (1994). *But see* McConnell, *Origins*, *supra* note 18, at 1486–88 (responding to the argument that the word "prohibiting" mediates against the individual liberty view of free exercise).

> nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.[69]

If Madison's views are representative, specifying that *Congress* shall not prohibit the free exercise of religion was an antidote to lingering concern about the Necessary and Proper Clause. It was not a subtle repudiation of the inalienability of religious freedom.

Indeed, evidence from the drafting of the First Amendment belies the idea that the First Congress recognized something other than the prevailing concept of religious freedom. On August 15, 1789, for instance, some delegates expressed concern over whether the text of the current draft—"no religion shall be established by law, nor shall the equal rights of conscience be infringed"—could be misconstrued to prohibit state establishments or even church bylaws.[70] Responding to this objection, Samuel Livermore proposed an alternative: "Congress shall make no laws touching religion, or infringing the rights of conscience."[71] Daniel Carroll remarked that he "would not contend with gentlemen about the phraseology," but rather wanted "to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."[72] Indeed, the delegates were not debating the meaning of free exercise at all. Rather, they were trying to ensure that the text of the Establishment Clause would not be construed to interfere with state laws or church bylaws. Modern legal scholars who use hyper-technical textual readings to interpret the Free Exercise Clause are simply missing the point. The use of words like "Congress" or "prohibiting" in the Free Exercise Clause had nothing to do with how contemporaries would have understood the substance of the right itself.

Yet Madison's musings about whether the Free Exercise Clause was even necessary are also quite revealing. Indeed, in the eighteenth-century context, it was hard to imagine how Congress could possibly have interfered with an individual's free exercise of religion. Other provisions of the Constitution precluded federal interference with religious liberty by allowing affirmations instead of oaths and by granting states, rather than Congress, control over militia attendance laws.[73] Other than these well-known areas, there were scarcely other

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69 1 ANNALS OF CONG. 730 (1789) (Joseph Gales ed., 1834).

70 *Id.*

71 *Id.* at 731.

72 *Id.* at 730.

73 U.S. CONST. art. VI ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); U.S. CONST. art. I, § 8, cl. 16 ("[R]eserving to the

ways federal laws could have burdened free exercise.[74]

Many founding-era laws, however, drew distinctions on the basis of religion, thus defying incipient notions of religious neutrality. For instance, most states used religious distinctions to prevent some individuals from serving as legislators or as courtroom witnesses.[75] Blasphemy prosecutions and religious assessment laws also conflicted with religious neutrality.[76] Although largely overlooked, the controversies surrounding these laws demonstrate that in eighteenth-century and early nineteenth-century terms, contrary to our modern understanding, religious neutrality was the far more radical and expansive theory of religious freedom.

III. EARLY DEBATES OVER NEUTRALITY

Almost all historical examinations of religious freedom concentrate on early exemption decisions without also considering neutrality cases.[77] Despite this modern scholarly imbalance, nineteenth-century neutrality cases were far more prevalent than exemption cases. The most common controversies involved the constitutionality of testimonial exclusions, test oaths, blasphemy laws, and religious assessments. Participants in early debates about religious neutrality repeatedly referred to the individual liberty theory as the core, and often the extent, of constitutionally protected religious liberty. Gradually, however, Americans in the first half of the nineteenth century embraced a more inclusive vision of religious freedom that included wider protections of governmental neutrality.

A. Testimonial Exclusions

In the late eighteenth century, oaths were explicitly religious. Swearing on the Bible or another religious book constituted an

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States respectively, the Appointment of the Officers, and the Authority of training the Militia . . . ."). Before the First Amendment was ratified, the House of Representatives passed a bill granting Quakers exemptions from militia service, though the Senate apparently rejected this language. *See* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1085–86 (2008) (arguing that the First Congress did not agree to exemptions). Federal law, however, did not reject exemptions. *See id.* at 1120. It merely left the issue to be decided by state governments.

[74] Another area of nineteenth-century litigation concerned whether Jews were exempt from serving as jurors or witnesses on Saturday. *See, e.g.*, Philips v. Gratz, 2 Pen. & W. 412, 412 (Pa. 1831); Stansbury v. Marks, 2 Dall. 213, 213 (Pa. 1793). I have not discovered any such conflicts in federal court.

[75] *See infra* Parts III.A–B.

[76] *See infra* Parts III.C–D.

[77] *See, e.g.*, McConnell, *Origins*, *supra* note 18, at 1503. *But see* Bradley, *supra* note 19, at 272–77 (discussing testimonial exclusion and blasphemy cases, though arguing that these cases did not involve laws targeting religion).

invocation of divine punishment against perjury.[78] Originally at common law, only Christians were allowed to swear under oath.[79] During the seventeenth and eighteenth centuries, however, English courts slowly allowed exceptions to the strict common-law rule, primarily to allow testimony from Jewish merchants.[80] The result of this transition was the general rule announced by Lord Chief Justice John Willes in *Omychund v. Barker* that swearing an oath required belief in God and belief in hell.[81] According to Lord Chief Justice Willes, any persons "who believe [in] God, and future rewards and punishments in the other world, may be witnesses; yet I am as clearly of opinion, that if they do not believe [in] God, or future rewards and punishments, they ought not to be admitted as witnesses."[82] While the rule allowed most non-Christians to swear oaths, it still required certain religious beliefs. As George Washington asked rhetorically in his 1796 Farewell Address, "[W]here is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice?"[83]

Quakers as well as certain other Christians believed in God and future rewards and punishments, which normally would have been sufficient to allow them to testify, but they famously refused to swear oaths because of their literal interpretation of the biblical injunction: "Swear not at all . . . ."[84] This refusal to swear oaths because of conscientious scruples brought the common-law rule into conflict with religious beliefs and not only left those Christians unable to serve as witnesses or jurors but also left them susceptible to contempt charges for refusing to fulfill their legal obligations in response to subpoenas and jury summonses.[85] This had the potential to place effective criminal sanctions on certain religious beliefs.[86] In response, colonial and state

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[78] *See* Curtiss v. Strong, 4 Day 51, 55–56 (Conn. 1809).

[79] *See* B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659, 661 & n.12 (1930).

[80] Omychund v. Barker, (1744) 26 Eng. Rep. 15 (Ch.) 30; 1 Atk. 21, 44 (Lord Willes, C.J.).

[81] *Id.* at 31; 1 Atk. at 45.

[82] *Id.* In a later report of the *Omychund* decision, supposedly based on Willes's original manuscripts, Willes was reported to have said that a person may be admitted if he "believes a God and that he will reward and punish him in this world, but does not believe a future state . . . ." Omichund v. Barker, (1744) Willes 538 (Ch.) 550 (Lord Willes C.J.).

[83] 35 THE WRITINGS OF GEORGE WASHINGTON 229 (John C. Fitzpatrick ed., 1940).

[84] *Matthew* 5:34 (King James).

[85] *E.g.*, Bryan's Case, 1 D.C. (1 Cranch) 151, 151 (C.C. 1804) (holding a juror, who was a member of the Methodist denomination, in contempt for refusing to swear); M'Intire's Case, 1 D.C. (1 Cranch) 157, 157 (C.C. 1803) (holding a juror in contempt for refusing to swear).

[86] *See Bryan's Case*, 1 D.C. (1 Cranch) at 151.

governments passed laws allowing affirmations instead of oaths from Quakers and members of other sects known to have religious scruples.[87] According to Connecticut Supreme Court Justice Zephaniah Swift,

> There is no appeal to God in an affirmation. It is merely a declaration that the affirmant will speak the truth, upon the pains and penalties of perjury: yet, there is no question but that Quakers pay as much regard to the truth under an affirmation, as other denominations of christians under an oath, and are entitled to as much credit.[88]

And in those states that did not authorize affirmations in lieu of oaths, Quakers and other religious objectors received routine exemptions from serving as jurors or witnesses.[89] The near universality of these exemptions shows that state laws were, at a minimum, consistent with an individual liberty theory of religious freedom.

Oaths themselves, however, remained explicitly religious and were therefore incongruous with a neutrality-based understanding of religious freedom. In one of the first reported challenges to the common-law incompetency rule, the Connecticut Supreme Court of Errors reaffirmed the necessity of religious qualifications:

> Every person who does not believe in the obligation of an oath, and a future state of rewards and punishments, or any accountability after death for his conduct, is by law excluded from being a witness; for to such a person the law presumes no credit is to be given. Testimony is not to be received from any person in a court of justice, but under the sanction of an oath. It would therefore be idle to administer an oath to a man who disregards its obligation. . . . [T]he fear of offending God should have its influence upon a witness to induce him to speak the truth. But no such influence can be expected from the man who disregards an oath.[90]

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[87] *See* McConnell, *Origins*, *supra* note 18, at 1467–68.

[88] ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES 51 (photo. reprint 1972) (1810).

[89] *See, e.g.*, Commonwealth v. Smith, 9 Mass. (8 Tyng) 107, 110 (1812) ("Before the recent statute . . . Quakers, and persons scrupulous of taking judicial oaths, were either exempted or excused from serving on the grand jury . . . ."); *see also* Philips v. Gratz, 2 Pen. & W. 412, 416 (Pa. 1831) ("The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath."); Guardians of the Poor v. Greene, 5 Binn. 554, 562 (Pa. 1813) ("[P]ublic ministers of all denominations returned as jurors, have uniformly been excused by the Court on their application."); State v. Willson, 13 S.C.L. (2 McCord) 393, 396 (1823) (mentioning "certain instances of individuals being excused" from jury duty because of conscientious scruples).

[90] Curtiss v. Strong, 4 Day 51, 55–56 (Conn. 1809); *see also* State v. Cooper, 2 Tenn. (2 Overt.) 96, 96 (1807) (Campbell, J.) (finding that "no man who did not believe in a future state of existence, rewards and punishments, could be a witness"); *Important Judicial Decision*, 1 AM. MONTHLY MAG. & CRITICAL REV. 64, 65 (1817) (reporting that Chief Justice

Witness competency rules were not meant as a form of punishment for those who disbelieved in God or future punishment. Nevertheless, the common-law incompetency rule explicitly discriminated between individuals on the basis of religious belief.[91]

In *Jackson, ex dem. Tuttle v. Gridley*, the highest appellate court in New York heard a novel challenge to the common-law oath requirements.[92] A trial judge advised the jury to disregard an avowed atheist's testimony because the atheist purportedly lacked the beliefs necessary to feel bound by an oath.[93] On appeal, the party offering the witness's testimony argued that the State's constitutional guarantee of religious freedom had abrogated common-law exclusions based on religious belief.[94] Chief Justice Ambrose Spencer replied,

> Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere. They are bound to see that no man's rights are impaired or taken away, but through the medium of testimony entitled to belief; and no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man.[95]

At first glance, Spencer seems to have articulated a compelling governmental interest for discriminating on the basis of religious belief. Indeed, protection of other rights was a well-accepted justification for allowing infringements upon religious liberty.[96] On a closer reading, though, Spencer seems mostly concerned with the act of investigating a witness's religious views, not with any subsequent discrimination on the basis of those views.[97] According to Spencer, religious beliefs are a

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John Louis Taylor of North Carolina had recently excluded a witness who professed disbelief in "either a heaven or a hell").

91 *Accord* Bradley, *supra* note 19, at 274–75.

92 Jackson, ex dem. Tuttle v. Gridley, 18 Johns. 98, 106 (N.Y. Sup. Ct. 1820).

93 Amos Gridley, the contested witness, had allegedly denied belief in God, though he stated shortly before the trial that "he had formerly embraced the principles of the *Universalists*, and rather believed *it* was right." *Id.* at 99.

94 *Id.* at 101, 103.

95 *Id.* at 106.

96 *See supra* notes 42–45 and accompanying text; McConnell, *Freedom from Persecution*, *supra* note 20, at 845–46.

97 *Gridley*, 18 Johns. at 104 ("[T]he most religious witness may be scandalized by the imputation which the very question implies.").

"solemn concern between [a man's] conscience and his God."[98] Yet government had a right to "meddle" or "interfere" with religious privacy when there was sufficient doubt about a person's religious fitness to testify in court.[99] In other words, Spencer's focus was on the rights of the individual, not a fear of governmental discrimination. Indeed, when a prospective witness's religious qualifications were in doubt, the prevailing method of ascertaining those beliefs was hearsay evidence rather than direct questioning because the latter was thought to interfere with a person's freedom of conscience.[100] As Judge Swift wrote in his widely distributed evidence treatise, "A man's opinions are matters between himself and his God, so long as he does not disclose them, and it is wholly inconsistent with the rights of conscience, to compel him to do it."[101]

Although some courts allowed testimony from witnesses who did not believe in future punishment,[102] courts generally rejected arguments based on religious liberty. In *Atwood v. Welton*, for example, the Connecticut Supreme Court reexamined its holding from *Curtiss v. Strong*,[103] which affirmed the common-law incompetency rule.[104] This time, however, an attorney raised a constitutional objection to the process of excluding witnesses based on their religious beliefs.[105] The court acknowledged that "a man ought not to be [directly] questioned respecting his religious opinions," but it upheld the constitutionality of testimonial exclusions when hearsay evidence proved that a prospective witness did not believe in God or future rewards and punishments.[106] The court declared,

> The plain meaning of these [constitutional] provisions, is to secure an entire freedom in religious profession and worship and an entire exclusion by law of any preference to any sect or mode of worship. No man shall be prohibited from professing what religion he pleases, or

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98 *Id.* at 106.

99 *Id.*

100 *See* SWIFT, *supra* note 88, at 18.

101 *Id.*

102 These courts usually did not articulate reasons why such witnesses should be admitted contrary to the common-law rule. *See, e.g.*, Hunscom v. Hunscom, 15 Mass. (14 Tyng) 184, 184 (1818) (allowing a witness who "professed disbelief of a future state of existence" to be sworn in); *cf.* Noble v. People, 1 Ill. (Breese) 54, 55–56 (1822) (admitting witness who did not believe in future punishments but believed in God and a future state). Some courts based their decisions on different understandings of the common law rather than constitutional arguments about religious liberty. *See, e.g.*, People v. Matteson, 2 Cow. 433, 434–35 (N.Y. Oyer & Terminer 1824).

103 Curtiss v. Strong, 4 Day 51, 55–56 (Conn. 1809).

104 Atwood v. Welton, 7 Day 66, 82 (Conn. 1828).

105 *Id.* at 68, 77.

106 *Id.* at 73–74.

> worshipping in any manner he pleases; nor shall there be any religious establishment, or approximation towards it, by any law giving any preference to any sect or mode of worship.[107]

"But," the court asked rhetorically, "cannot a person be free in his profession and worship, who is excluded from giving testimony, on the ground of his denial of all liability to future punishment? How does his exclusion affect his belief, profession or mode of worship? It has no possible bearing on either."[108] In other words, religious freedom is infringed upon only if a law "affects" a person's "belief, profession, or mode of worship," not when a law discriminates between individuals on the basis of their religious beliefs.

Excluding witnesses because of disqualifying religious beliefs was widespread and well-accepted at the founding, but by the late 1820s, it was becoming increasingly disfavored. In 1827, a chancery decision in South Carolina articulated the emerging neutrality-based argument for overturning the common-law rule.[109] The case involved the competency of a witness who denied the possibility of divine punishment after death.[110] Counsel in support of the witness argued that excluding him would contravene South Carolina's free exercise clause.[111] Opposing counsel responded, "[T]he inquiry into [the witness's] religious opinions did not contravene . . . the Constitution [because] he might still enjoy his religious profession, and worship notwithstanding such exclusion, and . . . the exclusion would merely operate on his civil and not his religious rights."[112]

In deciding the case, Chancellor Henry William DeSaussure interpreted the common law as allowing the witness to testify.[113] In addition, DeSaussure expounded upon his understanding that the state constitution prohibited the government from placing religious restrictions on an individual's enjoyment of civil rights:

> If a man's religious opinions are made a ground to exclude him from the enjoyment of civil rights, then he does not enjoy the freedom of his religious profession and worship. His exclusion from being a witness in Courts of Justice is a serious injury to him; it is also degrading to him and others who think with him. If men may be excluded for their religious opinions, from being witnesses, they may be excluded from being Jurors or Judges; and the Legislature might enact a law excluding such persons from holding any other office, or serving in the Legislature, or becoming teachers of schools, or professors of colleges.

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[107] *Id.* at 77.

[108] *Id.* at 78.

[109] Farnandis v. Henderson, 1 CAROLINA L.J. 202 (1831) (S.C. Ch. Ct. 1827).

[110] *Id.* at 202–03.

[111] *Id.* at 211.

[112] *Id.* at 212.

[113] *Id.* at 210–11.

> In my judgment this would be in the very teeth of the Constitution, and would violate the spirit of all our institutions. . . . It would seem to me to be a mockery to say to men, you may enjoy the freedom of your religious professions and worship; but if you differ from us in certain dogmas and points of belief, you shall be disqualified and deprived of the rights of a citizen, to which you would be entitled but for those differences of religious opinion.[114]

DeSaussure's eloquent decision was at the vanguard of a neutrality-based view of religious liberty and expresses a view similar to modern unconstitutional-conditions doctrine.[115] His opinion illustrates a growing yet still contested notion that the government should not discriminate on the basis of religious belief.[116] Religious freedom, however, remained first and foremost an individual liberty concern.[117] The concept of religious liberty was gradually expanding beyond—but not yet displacing—its individual liberty core.

B. Religious Tests

In addition to imposing religious requirements for testifying in court, several states also placed religious tests for officeholders into their constitutions.[118] Debates over these provisions often paralleled the

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[114] *Id.* at 212.

[115] The connection between a constitutional requirement of neutrality and the unconstitutional-conditions doctrine is well-recognized in existing scholarship. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1490 (1989) ("[A]n unconstitutional condition can skew the distribution of constitutional rights *among* rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition. If government has an obligation of evenhandedness or neutrality with regard to a right, this sort of redistribution is inappropriate."); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 616 (1990) ("If the relevant constitutional provision requires neutrality, consideration of conscientious objections is probably illegitimate and, in any case, insufficiently weighty to justify selective decisionmaking. A decision to fund Christian but not Jewish art, or paintings favorable to Republicans, would be plainly unconstitutional.").

[116] The next reported decision that cited constitutional grounds for overturning common-law exclusions came almost twenty years later in *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 645, 654–55 (1846) (stating that Virginia's Bill of Rights abrogated the common-law exclusion rule). Judges could also use other arguments to allow religious groups like Universalists to testify, and many legislatures took steps to ensure that courts did not discriminate on religious grounds. *See* Ronald P. Formisano & Stephen Pickering, *The Christian Nation Debate and Witness Competency*, 29 J. EARLY REPUBLIC 219, 227, 232–33 (2009); Thomas Raeburn White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 51 AM. L. REG. 373, 392–93 & n.39 (1903).

[117] *See* McConnell, *Origins*, *supra* note 18, at 1446.

[118] The five states with test oath provisions in their constitutions in 1789 were Delaware, Maryland, Massachusetts, North Carolina, and Pennsylvania. DEL. CONST. OF 1776, art. XXII, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 562, 566; MD. CONST. of 1776, art. LV, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 1686, 1700; MASS. CONST. pt. 2, ch. VI, art. I, *reprinted*

arguments made in the context of witness exclusions. Contemporaries occasionally understood these provisions as infringements on the rights of conscience.[119] Generally, however, public comments reflected an emphasis on individual liberty rather than governmental neutrality.

In arguing that test oaths violated the rights of conscience, some people framed their critiques in terms of individual liberty. Jewish leader Jonas Phillips, for example, pleaded in a petition to the 1787 Philadelphia Convention that "to swear and believe [in certain Christian tenets] is absolutly [sic] against the religious principle of a Jew[] and [it] is against his Conscience to take any such oath."[120] Constitutional Framer and future Supreme Court Chief Justice Oliver Ellsworth articulated his opposition to test oaths in slightly different terms:

> [T]he sole purpose and effect of [the Federal Constitution's No Religious Test Oath Clause] is to exclude persecution, and to secure to [the people] the important right of religious liberty. We are almost the only people in the world, who have a full enjoyment of this important right of human nature. In our country every man has a right to worship God in that way which is most agreeable to his own conscience. If he be a good and peaceable citizen, he is liable to no penalties or incapacities on account of his religious sentiments; or in other words, he is not subject to persecution.
>
> . . . .
>
> . . . A test-law is the parent of hypocrisy, and the offspring of error and the spirit of persecution. Legislatures have no right to set up an inquisition, and examine into the private opinions of men.[121]

In this passage, Ellsworth advocates for governmental neutrality, but he frames this argument in terms of individual liberty, not in terms of a right to equal treatment. According to Ellsworth, excluding people from the legislature was a type of "penalty or incapacity," thus punishing particular religious convictions.[122] Moreover, like Judge Spencer later recognized in *Jackson, ex dem. Tuttle v. Gridley*, Ellsworth thought test

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in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 1888, 1908; N.C. CONST. of 1776, art. XXXII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 2787, 2793; PA. CONST. of 1776, § 10, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 3081, 3085. The Federal Constitution bans federal test oaths. U.S. CONST. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

[119] *See, e.g.*, Letter from Jonas Phillips to President and Members of the Convention (Sept. 7, 1787), *in* 4 THE FOUNDERS' CONSTITUTION 638 (Philip B. Kurland & Ralph Lerner eds., 2000).

[120] *Id.*

[121] Oliver Ellsworth, *"A Landholder" VII*, CONN. COURANT, Dec. 17, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 521, 522, 525 (Bernard Bailyn ed., 1993).

[122] *See id.* at 522–23.

oaths constituted a governmental inquisition into religious beliefs and therefore interfered with the individual right of conscience.[123]

Discussions at the 1820 Massachusetts Constitutional Convention illustrate the arguments made in support of religious tests. At that time, Massachusetts still had various non-neutral laws. The state collected special religious taxes to support local pastors,[124] and it required many state officeholders to swear the following: "I believe the Christian religion, and have a firm persuasion of its truth . . . ."[125] As the delegates congregated in 1820, some wanted the convention to reconsider the religious test oath required of all public officials.[126] In pursuit of this goal, reformers such as James Prince often invoked religious freedom. In one of the most detailed attacks on religious tests, Prince explained,

> There are . . . two distinct rights belonging to man—UNALIENABLE and NATURAL—among those of the first class are the rights of conscience in all matters of religion. . . . [A]s man owes supreme allegiance to God, as the Creator, and as the undivided governor of the universe, he cannot absolve himself, nor can others absolve him from this supreme allegiance; and hence, on entering into a social compact, the rights he gives up, and the powers he delegates must be tributary to, and in subordination to this high and first allegiance . . . .[127]

Because religious duties are supreme, and because governmental authority is subordinate to those duties, Prince then concluded that "on entering into the social compact, every man has a right to enter *on equal terms*; but, if the consciences of men are in any wise shackled by *forms or qualifications*, this would not be the case."[128] Therefore, according to Prince, inequality in the treatment of different religions violates the basic terms of the social contract. Notably, Prince was not opposing an individual liberty view of religious freedom. Instead, much like Ellsworth, he explicitly used an individual liberty framework to justify governmental neutrality. According to Prince, the government could not

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[123] Jackson, ex dem. Tuttle v. Gridley, 18 Johns. 98, 106 (N.Y. Sup. Ct. 1820); Ellsworth, *supra* note 121, at 525; *cf.* Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1658 (2007) (arguing that the No Religious Test Oath Clause prohibits *only* test oaths not religious qualifications for office). While plausible (and supportive of the thesis of this Article), this latter argument probably takes the text of the Clause too literally.

[124] *See infra* Part III.D.

[125] MASS. CONST. pt. 2, ch. VI, art. I, *repealed by* MASS. CONST. amend. art. VII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 1888, 1908.

[126] BOSTON DAILY ADVERTISER, JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 83 (1821).

[127] *Id.* at 84.

[128] *Id.* at 85 (internal quotation marks omitted).

place conditions on the exercise of political privileges because doing so would "shackle" or punish minority religious beliefs.[129]

Delegates in the Massachusetts convention universally agreed that religious freedom was an unalienable right, yet most speakers rejected Prince's conclusion about test oaths. In a lengthy floor speech, future Senator Daniel Webster stated that "[n]othing is more unfounded than the notion that any man has a *right* to an office. . . . This qualification has nothing to do with any man's *conscience*. If he dislikes the condition, he may decline the office . . . ."[130] Many delegates opposed religious tests for policy reasons but denied that test oaths interfered with freedom of conscience.[131] Massachusetts Supreme Judicial Court Justice Samuel S. Wilde, for instance, argued against the propriety of religious tests but noted that they "d[o] not interfere with the rights of conscience.—No person has any conscience about becoming a Legislator. He is not obliged to accept of office, and he has no right to claim it."[132]

Webster and Wilde made two points in these speeches. First, an opportunity to become a public official was not a right of citizenship, and therefore, test oaths did not infringe upon political or civil rights. Second, Webster and Wilde explained that no individual has a religious duty to serve in public office. Thus, because the law did not interfere with anyone's religious duties, it also did not interfere with the right of conscience. The obvious assumption in Webster's and Wilde's remarks is that a law can infringe upon religious freedom only if it interferes with an individual's worship or conscience.

In the end, the delegates decided by a vote of 242 to 176 to omit religious tests for office.[133] While this vote reflects a trend toward separating governmental and religious concerns, the preceding debates illustrate the priorities implicit in the delegates' understandings of religious freedom. The prevailing view seems to have been that religious

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[129] *See id.* at 85–86.

[130] *Id.* at 83–84; *see also id.* at 88 (remarks of Samuel Hubbard) ("The right to be elected to office was not an unalienable right. It affected neither a man's life, liberty nor conscience.").

[131] *See, e.g., id.* at 91 (remarks of Thomas Baldwin) (arguing that tests did not violate religious freedom but were nonetheless dubious on policy grounds); *id.* at 93 (remarks of Lovell Walker) ("Admitting that we have the right to demand [religious tests]—he doubted the expediency of it."). Samuel A. Welles agreed that a religious test oath was unwise as a policy matter, but he observed that the religious neutrality proponents were not being internally consistent:

> [F]or if it be an interference in the right of conscience, to require that persons who may be chosen by the people to certain offices, shall swear to their belief in the christian religion, it must also be an interference in the right of conscience, to require that they shall swear by the name of God himself . . . .

Id. at 89.

[132] *Id.* at 90.

[133] *Id.* at 94.

tests did not infringe upon the individual right of conscience; therefore, such tests should be considered in terms of their practicality, not whether they interfered with unalienable rights. The delegates were not debating exemptions,[134] but their arguments seem to endorse the individual liberty theory of religious freedom.

C. Blasphemy Prosecutions

Blasphemy—or "open and malicious . . . reviling of God or Scripture"—was punishable at common law as a breach of the peace.[135] As one judge wrote in 1838, the crime of blasphemy was "not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace."[136] Defendants in several nineteenth-century blasphemy cases, however, argued that constitutionally guaranteed religious liberty protected their religious expressions—even when blasphemous.[137] The constitutional arguments in these cases were slightly different than those involved in oath cases. First, unlike an exclusion from legislative service, those convicted of blasphemy suffered criminal punishment. Moreover, test oaths and testimonial exclusions focused on an individual's underlying beliefs, whereas blasphemy prosecutions were based on an overt act. Nonetheless, similar religious freedom arguments appear in blasphemy cases. The responses to these arguments yet again reveal a marked

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[134] Interestingly, a few delegates did oppose religious tests because occasionally religious tests *did* interfere with conscience. Daniel Webster, for instance, stated,

> It has been said that there are many very devout and serious persons—persons who esteem the Christian religion to be above all price—to whom, nevertheless, the terms of this declaration seem somewhat too strong and intense. They seem, to these persons, to require the declaration of that *faith* which is deemed essential to personal salvation . . . . There may, however, and there appears to be, *conscience* in this objection; and all conscience ought to be respected. I was not aware, before I attended the discussions in the committee, of the extent to which this objection prevailed.

Id. at 84. Josiah Hussey noted that Quakers could not swear to oaths and were therefore excluded as legislators. Therefore, he proposed allowing "any other person who cannot by the principles of his religious faith take an oath" to still serve as a representative. *Id.* at 86 (internal quotation marks omitted). These points typically came without further discussion, and therefore it is unclear how widely other delegates shared these sentiments.

[135] *See* Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682, 694 (2000); *cf.* LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 401–23 (1993) (discussing early blasphemy cases).

[136] Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 221 (1838).

[137] *See, e.g.*, *Kneeland*, 37 Mass. (20 Pick.) at 217, 219–20; People v. Ruggles, 8 Johns. 290, 291–92 (N.Y. Sup. Ct. 1811); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 395 (Pa. 1824).

preference for an individual liberty conception of religious freedom rather than one based on governmental neutrality.

The most famous nineteenth-century blasphemy case was an 1811 appeal of the conviction of John Ruggles, who allegedly had shouted in public that Jesus Christ was the illegitimate child of a promiscuous mother.[138] Ruggles was convicted but appealed, arguing in part that New York's constitutional guarantee of religious freedom had abrogated the common-law crime of blasphemy.[139] Ruggles never alleged that his religious beliefs compelled him to attack the prevailing Christian understanding of Jesus' virgin birth. Rather, he argued that the dissolution of an established church removed any state interest or authority in mediating religious arguments.[140]

Chief Justice James Kent delivered the opinion of the court: "The free, equal, and undisturbed enjoyment of religious opinion . . . is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."[141] Later in the opinion he added,

> [The state constitution's religious freedom provision] (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration, without any of the tests, disabilities, or discriminations, incident to a religious establishment.[142]

Further clarifying the constitutionality of uneven treatment for various religious groups, Kent acknowledged that the crime of blasphemy applied only to anti-Christian remarks.[143] Yet he dismissed Ruggles's insistence that the guarantee of free exercise "without preference or discrimination" meant that the state had to treat all inflammatory religious critiques equally:

> Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama* . . . . [I]mputation of malice could not be inferred from any invectives upon superstitions equally false and unknown.[144]

According to Kent, Christianity was the religion of the people, and the state could therefore punish malicious attacks against it.[145]

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138 *Ruggles*, 8 Johns. at 290–91.

139 *Id.* at 291–92.

140 *See id.*

141 *Id.* at 292, 295.

142 *Id.* at 296.

143 *See id.* at 295.

144 *Id.*

145 *Id.*

Constitutionally guaranteed religious freedom did not necessarily mean that all attacks on religion had to be treated equally.[146]

Other courts offered similar rationales for punishing blasphemy in spite of religious freedom clauses. "While our own free constitution secures liberty of conscience and freedom of religious worship to all," the Supreme Court of Pennsylvania held in *Updegraph v. Commonwealth*, "it is not necessary to maintain that any man should have the right publicly to vilify the religion of his neighbours and of the country. These two privileges are directly opposed."[147] Indeed, the court was careful to point out that blasphemy prosecutions did not punish individuals for their religious beliefs or practices. Writing for the court, Justice Duncan stated, "I do not think [blasphemy prosecutions] will be an invasion of any man's right of private judgment, or of the most extended privilege of propagating his sentiments with regard to religion, in the manner which he thinks most conclusive."[148] In short, the statements at issue in *Updegraph* were not a form of religious practice and therefore fell outside the bounds of constitutionally protected religious freedom.[149]

The Supreme Court of North Carolina's decision in *State v. Jasper* elaborates on the *Updegraph* court's distinction between liberty and license.[150] The dispute arose when Henry Jasper attended a Baptist worship service and began "talking and laughing in a loud voice, and by then and there making divers ridiculous and indecent actions and grimaces."[151] Rather than being indicted for nuisance, trespass, or breach of the peace, Jasper was charged and convicted for disturbing a religious service.[152] On appeal, the justices considered the validity of Jasper's conviction for a seemingly novel offense.[153]

In upholding Jasper's conviction, the decision emphasized the importance of religious freedom under the state constitution, which stated that "all persons shall be at liberty to exercise their own mode of worship."[154] Writing for the court, Chief Justice Thomas Ruffin stated that this "provision does not profess to confer this right. It is worded, so as to show that it is acknowledged as pre-existing. The right is declared

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146 *Id.*

147 11 Serg. & Rawle 394, 408 (Pa. 1824).

148 *Id.* at 409.

149 *Id.*

150 15 N.C. (4 Dev.) 323, 326–27 (1833). A short summary of this case also appears in Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 308–09 (2006).

151 *Jasper*, 15 N.C. (4 Dev.) at 323.

152 *Id.* at 324.

153 *Id.* at 325.

154 N.C. CONST. of 1776, art. XXXIV, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 35, at 2787, 2793.

in the Bill of Rights to be a *natural* and unalienable *right* in all men."[155] Therefore, Ruffin declared,

> The worship of God is not therein treated as indifferent, either in reference to the welfare of individuals, or the common interest. On the contrary, it is assumed to be a moral duty incumbent upon all men, and their highest privilege, as intelligent and accountable beings; a duty, that is best performed, both in honour to God, the comfort of each man and the peace and order of society, when that natural privilege is subjected to no legal restraints nor allowed to be disturbed by any person, either with or without the pretence of authority.[156]

Thus, Jasper's prosecution was not only constitutionally valid, but it actually furthered specific constitutional objectives. "[R]eligion needs no aid from the civil power," Ruffin wrote.[157] Instead, religion needed only "the guaranty of its freedom from interruption, either by unjust laws or lawless force, or wantonness of individuals. Against the former, the Constitution is an express warrant, and by a necessary construction from that, as it seems to me, it equally forbids the latter."[158]

The *Jasper* decision rests on the idea that the government has an affirmative duty to protect private rights by allowing individuals to seek redress in court when those rights are violated.[159] In another religious disturbance case, Chief Judge William Cranch of the United States Circuit Court for the District of Columbia explained,

> The principles upon which the disturbance of public worship becomes an offence at common law are these: Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience, and to assemble and unite with others in the same act of worship, so that he does not interfere with the equal rights of others. The common law protects this right, either by giving the party his private action for damages on account of the injury he has sustained; or if the violation of the right be directly, or consequentially injurious to society, by a public prosecution.[160]

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[155] *Jasper*, 15 N.C. (4 Dev.) at 324.

[156] *Id.*

[157] *Id.* at 326.

[158] *Id.*

[159] *Accord* Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (listing "[p]rotection by the government" among the "privileges and immunities of citizens in the several states" (internal quotation marks omitted)). Individuals' ability to seek redress in court for the invasion of their rights was understood in the nineteenth century to be part of their right to "protection of the laws." *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 43–69 (2008) (listing nineteenth-century examples of the phrase "protection of the laws"); *see also* Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 499, 507–10, 522, 525 (1985) (linking the understanding of "protection of the laws" with the adoption of the Equal Protection Clause).

[160] United States v. Brooks, 24 F. Cas. 1244, 1245 (C.C.D.C. 1834).

In other words, because the right to religious freedom was individually held, the government was not the only one who could interfere with free exercise. Individuals also could violate that right, just as they could have done in the state of nature. As the Delaware Supreme Court observed in 1839, religious disturbances by private individuals "violated the constitutional right of every [congregant] to the free exercise of religious worship without molestation."[161] When that right was violated, the governmental duty to protect private rights justified prosecution of the offenders.[162] The logic of this argument may seem odd, but in nineteenth-century terms it made perfect sense because the unalienable right of free exercise was a natural right, not a guarantee of governmental neutrality.

It would be easy to dismiss nineteenth-century blasphemy cases and the *Jasper* decision as illegitimately infused with a parochial pro-Christian bias. What this Article hopefully demonstrates, however, is that regardless of any judicial predisposition to bend the law to advance Christianity (or punish dissenters), the decisions were at least consistent with prevailing views of religious freedom. The constitutional guarantee of an equally protected right to religious freedom was not considered a requirement that the government treat all religions equally. Rather, the government could not infringe upon—and sometimes it even had to affirmatively protect—the right of individuals to worship God according to their own consciences.

D. Religious Assessments

Blasphemy laws were not the only way that American states tried to support religion. Although most newly independent states eliminated any formal recognition of an established church,[163] some states continued to levy taxes, often called religious assessments, for the support of ministers.[164] Unlike religious tests for witnesses and legislators, these laws did not withhold certain privileges on the basis of religious belief, and generally all individuals had to pay the assessments regardless of their religious views.[165] Nonetheless, while the *collection* of assessment taxes was neutral, the *use* of those taxes was not. Unless the law provided an exemption, assessment taxes supported a minister from the established church, or a minister preferred by the majority of local

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[161] State v. Townsend, 2 Del. (2 Harr.) 543, 547 (1839); *see also* Carl Zollmann, *Disturbance of Religious Meetings in the American Law*, 49 AM. L. REV. 880, 880–81 (1915) (containing more information about past laws protecting against private infringements on free exercise).

[162] *Townsend*, 2 Del. (2 Harr.) at 547.

[163] Wilson, *supra* note 33, at 754.

[164] *Id.*

[165] *Id.*

taxpayers.[166] Thus, religious dissenters often vehemently opposed assessment laws and argued instead for governmental neutrality toward religion. Perhaps not surprisingly, these dissenters frequently invoked religious liberty.

Early nineteenth-century debates in Massachusetts illustrate the arguments on both sides of the assessments controversy. Massachusetts law provided that dissenters could designate their religious taxes for the support of their own pastors.[167] In 1810, the state's Supreme Judicial Court considered a case in which a minister from a minority sect known as the Universalists claimed a right to public funds pursuant to that statute.[168] Universalists, however, were only beginning to view themselves as a distinct sect separate from their Congregationalist forbearers.[169] More importantly, the legislature had not yet recognized their incorporation, which was a precondition for receiving funds under the assessment law.[170] Undeterred by this legislative inaction, the Universalist minister argued that the court should broadly construe the assessment law's exemption provision: "[W]hen a man disapproves of any religion, or of any supported doctrines of any religion," the minister argued, "to compel him by law to contribute money for public instruction in such religion or doctrine, is an infraction of his liberty of conscience . . . ."[171]

The Supreme Judicial Court rejected the minister's religious liberty argument.[172] Writing for the court, Chief Justice Theophilus Parsons explained,

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[166] *Id.* at 756.

[167] *See An ACT providing for the public Worship of GOD, and other Purposes therein mentioned, and for repealing the Laws heretofore made relating to this Subject (1800), in* 3 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 105, 106 (I. Thomas & E.T. Andrews eds., 1801). The law provided,

> That when any person taxed in any such tax or assessment voted to be raised as aforesaid, for the purposes aforesaid, being at the time of voting or raising any such tax or assessment of a different sect or denomination from that of the corporation, body politic or religious society by which said tax was so assessed, shall request, that the tax set against him or her, in the assessment made for the purposes aforesaid, may be applied to the support of the public teacher of his own religious sect or denomination; such person, procuring a certificate signed by the public teacher on whose instruction he usually attends, and by two other persons of the society of which he usually attends, and by two other persons of the society of which he is a member (having been specially chosen a committee to sign said certificate) . . . .

Id. at 106.

[168] Barnes v. Inhabitants of the First Parish in Falmouth, 6 Mass. (6 Tyng) 401, 401–03 (1810).

[169] *Id.* at 402.

[170] *Id.*

[171] *Id.* at 408.

[172] *Id.*

> When it is remembered that no man is compellable to attend on any religious instruction, which he conscientiously disapproves, and that he is absolutely protected in the most perfect freedom of conscience in his religious opinions and worship, the first objection seems to mistake a man's conscience for his money, and to deny the state a right of levying and of appropriating the money of the citizens, at the will of the legislature, in which they all are represented.[173]

According to Parsons, "The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection."[174] Religious dissenters may not wish to fund the propagation of majority religious views, he remarked, but paying taxes does not infringe upon their free exercise of religion.[175]

Assessment debates at the 1820 Massachusetts Constitutional Convention reflect similar understandings of religious liberty. In a lengthy discussion of religious freedom, most delegates strongly rejected the notion that religious taxes infringed upon the rights of conscience.[176] George Blake's comment exemplified the delegates' frequent retorts: "The question was not a question of conscience, but of pounds shillings and pence. There was no injunction in [the assessment law] to attend at any particular place of public worship: every man might attend where he pleased."[177] In other words, liberty of conscience is unalienable, but governmental power to distribute taxes in favor of certain religious groups does not implicate that basic freedom. Dissenters objected to this favoritism, but the assessment law left them free to practice their own religion without interference.

E. The 1821 New York Convention

With a sizeable Catholic population[178] and a thriving community of religious dissenters in the western part of the state,[179] New York's history is full of debates about religious liberty. In 1811, for instance, New York's highest court upheld the blasphemy conviction of John

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[173] *Id.* Parsons continued, "[I]f any individual can lawfully withhold his contribution, because he dislikes the appropriation, the authority of the state to levy taxes would be annihilated; and without money it would soon cease to have any authority." *Id.* at 409.

[174] *Id.*

[175] *Id.* at 417–18.

[176] BOSTON DAILY ADVERTISER, *supra* note 126, at 167.

[177] *Id.*

[178] *See generally* JASON K. DUNCAN, CITIZENS OR PAPISTS?: THE POLITICS OF ANTI-CATHOLICISM IN NEW YORK, 1685–1821, at xviii (2005).

[179] *See generally* WHITNEY R. CROSS, THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800–1850, at 3–13 (photo. reprint 1981) (1950).

Ruggles for disparaging Jesus' virgin birth.[180] Only nine years later, the court again handed down a widely publicized case, this time affirming the state's authority to exclude atheists and Universalists from testifying in court.[181] In the intervening years, lower courts decided two prominent cases addressing the right of individuals to receive religious exemptions from common-law evidence rules.[182]

Early proponents of neutrality usually accepted the premise of the individual liberty theory but interpreted that theory broadly so as to incorporate neutrality principles. Oliver Ellsworth, for instance, argued that individuals should not be required to divulge their religious beliefs, and therefore, laws relying on such statements were *per se* unconstitutional.[183] Debates at the 1821 New York Constitutional Convention, however, demonstrate that the two theories of religious freedom occasionally collided, with neutrality advocates wanting to displace rather than expand upon the individual liberty approach. In particular, some neutrality proponents hinted that accommodations for religious scruples constituted a religious preference inconsistent with the equal right of free exercise.

Controversy in the 1821 Constitutional Convention first surfaced over whether Quakers should receive exemptions from militia service and, if so, whether they should have to pay an equivalent fee.[184] State legislator Erastus Root, the champion of the neutrality position, argued against accommodations for Quakers. "The consequence" of such accommodations, he argued, "is, that the state is overrun with Quakers—both *wet* and *dry*."[185] Instead, Root wanted to "amend the constitution, as to bring them up to the work. He would place them all on the same muster roll."[186] Root then took aim at the government's lack of religious neutrality, proposing a constitutional guarantee that "[t]he

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[180] People v. Ruggles, 8 Johns. 290, 291, 298 (N.Y. Sup. Ct. 1811).

[181] *See* Jackson, ex dem. Tuttle v. Gridley, 18 Johns. 98, 99–100, 106 (N.Y. Sup. Ct. 1820).

[182] People v. Smith (N.Y. Oyer & Terminer 1817), *reprinted in* 1 AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY 779, 784 (John D. Lawson ed., 1914) (rejecting a similar right of exemption for Protestants because penance is not part of their religious practice); People v. Philips (N.Y. Ct. Gen. Sess. 1813), *reprinted in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 5, 9–10 (Edward Gillespy ed., 1813) (upholding the right of a Catholic priest to an exemption from testifying about confessional statements); *see also* Walsh, *supra* note 18, at 39–40 (containing thorough discussions of these cases).

[183] Ellsworth, *supra* note 121, at 522–23.

[184] NATHANIEL H. CARTER ET AL., REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 462 (1821).

[185] *Id.*

[186] *Id.*

judiciary shall not declare any particular religion, to be the law of the land; nor exclude any witness on account of his religious faith."[187] This latter proposal attempted to repudiate the state supreme court's recent decisions in *Ruggles* and *Gridley*.[188]

Root's proposals met a cool reception in the convention. Chancellor James Kent replied that blasphemy was punishable

> not because christianity was established by law, but because christianity was in fact the religion of this country, the rule of our faith and practice, and the basis of the public morals. . . . The court never intended to interfere with any religious creeds or sects, or with religious discussions.[189]

According to Chancellor Kent, "[t]he constitution had declared that there was to be 'no discrimination or preference in religious profession or worship.' But Christianity was, *in fact*, the religion of the people of this state, and that fact was the principle of the decision."[190] Rufus King agreed. "While all mankind are by our constitution tolerated, and free to enjoy religious profession and worship within this state," the senator and former delegate at the Federal Constitutional Convention declared, "the religious professions of the Pagan, the Mahomedan, and the Christian, are not, in the eye of the law, of equal truth and excellence. . . . While the constitution tolerates the religious professions and worship of all men, it does more in behalf of the religion of the gospel."[191] In other words, all were equally free to practice their own religions, but the government could still treat religions differently so long as there was no interference with religious beliefs and worship.

The delegates eventually voted by a margin of sixty-two to twenty-six in favor of a provision stating, "It shall not be declared or adjudged that any particular religion is the law of the land."[192] Far from being a victory for Root, however, many delegates viewed the amendment as purely symbolic.[193] Chancellor Kent voted for the measure, later noting that "[i]t was perfectly harmless, and might be a security. No judge would think of making any particular religion a part of the law of the land."[194] For Chancellor Kent, the provision guaranteed non-

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[187] *Id.*

[188] *See id.*

[189] *Id.* at 463. Chancellor Kent continued, "Such blasphemy was an outrage upon public decorum, and if sanctioned by our tribunals would shock the moral sense of the country, and degrade our character as a christian people." *Id.*

[190] *Id.* at 575.

[191] *Id.*

[192] *Id.* at 464.

[193] *Id.* at 465.

[194] *Id.* Chancellor Kent "repeated that if he were to decide to-morrow, in a case similar to the one referred to . . . he should give such a decision as had been read in debate yesterday." *Id.*

establishment rather than strict governmental neutrality. Root then reintroduced his proposal to allow witnesses to testify irrespective of their religious faith.[195] One delegate supported the motion, stating that "we should be above such prejudices, and act on the broad principles of liberty."[196] After several comments regarding the efficacy of oaths, the delegates voted against Root's proposal by a vote of ninety-four to eight.[197]

Still stinging from defeat, Root returned several days later to his fight against religious exemptions for Quakers.[198] The delegates primarily wrangled over how to determine whether conscientious objectors were sincere in their religious scruples. Responding to Root's argument that many people were only pretending to harbor conscientious scruples, Judge Ambrose Spencer, author of the recent testimonial-exclusion opinion in *Gridley*, stated that "we have reason to think [Quakers are] very sincere. They abstain from the use of sugar and molasses, and all other articles which are produced by the means of slavery."[199] Judge Spencer continued,

> These men are also abridged in the right of suffrage; by neglecting to do military duty, many of them will lose the privilege of voting; and there is not the least probability that men will turn Quakers merely to get clear of military duty. This was a subject which might be safely left to the legislature to determine; and it would certainly be much more appropriate for that body to decide the question, than for this Convention, under existing circumstances, to do it.[200]

Not everyone agreed with Judge Spencer's optimistic appraisal.[201] There was broad consensus, however, that the rights of conscience should be protected for genuine conscientious objectors.[202] One delegate noted,

> If scruples of conscience are ever acknowledged to be sincere, why should they now be violated, and a whole religious sect be arraigned for hypocrisy? Were they not as likely to be as honest and sincere in their professions, as any other class of Christians; and should we act upon the supposition that all religious professions were hypocritical and false?[203]

After a colloquy between several delegates regarding "the rights of conscience," the convention voted to exempt Quakers, although it also

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195 *Id.*

196 *Id.*

197 *Id.* at 466.

198 *Id.* at 577–78.

199 *Id.* at 578.

200 *Id.* at 579.

201 *Id.*

202 *Id.*

203 *Id.* (comments of Mr. E. Williams).

provided for an equivalent to be levied "according to the expense, in time and money, of an ordinary able-bodied militia-man."[204]

CONCLUSION

New York's elder jurists, including Kent, Spencer, and King, prevailed over Root in their fight to maintain an individual liberty view of religious freedom without simultaneously recognizing a broader right against governmental classifications based on religious beliefs. Meanwhile, Root and his supporters never explicitly denounced an individual liberty conception of religious freedom. They merely questioned the sincerity of conscientious objectors. Yet their simultaneous attacks on testimonial exclusions, blasphemy prosecutions, and legislative accommodations exposed the priority these delegates placed on governmental neutrality. In subsequent decades, neutrality arguments became more prevalent and well-accepted.[205] States gradually removed testimonial exclusion rules, test oaths, and religious assessments.[206]

Although the Supreme Court has exalted neutrality as the core of religious liberty, early nineteenth-century debates reveal that this focus on neutrality has not always prevailed. In fact, by viewing religious freedom as an unalienable natural right rather than a government-created right, most early jurists and legislators understood religious freedom primarily in terms of individual liberty. As neutrality cases demonstrate, they considered infringements on religious practice to be a necessary component of a free exercise claim. Governments routinely classified individuals on the basis of religious belief, but these laws withstood constitutional scrutiny because they did not directly interfere with religious practices. When neutrality proponents attacked these classifications by invoking religious freedom, the usual response was a terse reminder that the unalienable right of conscience did not remove religion from the purview of legislative power.

To be sure, states also recognized nascent principles of governmental neutrality. The federal and state establishment clauses, for example, circumscribed governmental power over religion. The key thing to keep in mind, though, is that while state establishment clauses gradually moved further toward a neutrality-based view of proper governmental powers, the unalienable right of free exercise continued to

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[204] *Id.* at 579–80 (internal quotation marks omitted). There is no recorded vote regarding the exemption for Quakers. The vote was eighty-eight to twenty-eight in favor of retaining a provision for militia service equivalents. *Id.*

[205] For one story of this change, see Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100–05 (1995).

[206] *Id.* at 1117.

protect individuals. As John Witte writes, "Where general laws and policies did intrude on the religious scruples of an individual or group, liberty of conscience demanded protection of religious minorities through exemptions from such laws and policies. This was the heart of the meaning of religious toleration."[207] This did not, of course, mean that all individuals became judges of their own causes with respect to religious exemptions. Government still had to decide whether religious objections were sincere and whether providing exemptions would disturb the peace. At its core, however, religious freedom protected the unalienable, individual right to worship God according to the dictates of conscience.

In 1978, the Supreme Court considered a challenge to Tennessee's prohibition against ministers serving as legislators.[208] The Court unanimously struck down the rule, which had existed in Tennessee's constitution since 1796.[209] Not surprisingly, nearly all the justices thought the prohibition violated the Free Exercise Clause because it discriminated against religion.[210] Yet, oddly enough, Justice Byron White disagreed. The majority, he argued, "fails to explain in what way [the plaintiff minister] has been deterred in the observance of his religious beliefs. Certainly he has not felt compelled to abandon the ministry as a result of the challenged statute, nor has he been required to disavow any of his religious beliefs."[211] For that reason, Justice White was "not persuaded that the Tennessee statute in any way interferes with [the minister's] ability to exercise his religion as he desires," and therefore the provision did not offend the Free Exercise Clause.[212] Instead, Justice White would have overturned Tennessee's ministerial exclusion as a violation of the Equal Protection Clause.[213]

Justice White's interpretation of the Free Exercise Clause embodies an older understanding that has long since fallen out of favor. When assessing religious freedom claims, courts no longer consider whether a law actually interferes with an individual's religious beliefs or

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[207] WITTE, *supra* note 33, at 44. Witte continues, "Whether such exemptions should be accorded by the legislature or by the judiciary and whether they were per se a constitutional right or simply a rule of equity—the principal bones of much scholarly contention today—the eighteenth-century sources do not dispositively say." *Id.* Similarly, in this paper, I focus on the *meaning* of free exercise—not how the founding generation anticipated that concept to become operational.

[208] McDaniel v. Paty, 435 U.S. 618, 620 (1978) (plurality opinion).

[209] *Id.* at 621, 629.

[210] *See id.* at 629; *id.* at 630 (Brennan, J., concurring); *id.* at 642 (Stewart, J., concurring).

[211] *Id.* at 643–44 (White, J., concurring).

[212] *Id.* at 644.

[213] *Id.* at 646.

worship.[214] Rather, governmental neutrality has taken over as the preeminent concern of the Free Exercise Clause. This neutrality-based understanding of religious freedom is not inherently incompatible with the individual liberty theory. Indeed, the comments of Oliver Ellsworth and James Prince illustrate that neutrality itself originated, at least in part, as an extension of individual liberty principles. In the years since, however, Supreme Court jurisprudence has lost touch with this original understanding. Perhaps not surprisingly, exalting neutrality as the core value of religious freedom has colored how we think about whether religious exemptions fall within the purview of free exercise. From a neutrality-centered perspective, the idea of granting religious exemptions seems expansive or perhaps even radical.

Yet the founding generation did not operate under these assumptions. Far from being radical, exemptions were standard practice in the late eighteenth and early nineteenth centuries. Meanwhile, governmental neutrality was the more expansive theory of religious liberty and a greater threat to the status quo. Prolific, yet largely neglected, neutrality debates help clarify this original understanding of free exercise as an unalienable right rather than as a religion-specific precursor to modern equal protection principles.

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[214] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . .").

KEYNOTE ADDRESS: BEYOND RIGHT OF CONSCIENCE TO FREEDOM TO LIVE FAITHFULLY†

*Stanley W. Carlson-Thies**

INTRODUCTION

My thanks to the Regent University Law Review, the symposium team, and to Dean Jeffrey Brauch for the opportunity to reflect on this very important topic. And my thanks to each attendee for your concern about maintaining space in our society for people to live in accordance with their convictions, even when those convictions differ from our society's consensus.

This symposium on the right of conscience has two excellent panels to discuss the legal and constitutional dimensions of that right in commercial settings. My own approach will be different. I am a policy expert, not a lawyer. In fact, as my son brutally said to me after I had labored many years to finish my doctoral dissertation and finally received my Ph.D. degree: "Great, Dad, you are now a paper doctor!" So I cannot even cure real physical ills.

But I am hopeful that a policy perspective will be illuminating. I will call it a broad reconnaissance into maintaining the possibility in our society for people of faith to live faithful lives. I do not think this will be a mere flight of fancy—interesting but irrelevant. Rather, by setting the right of conscience in an institutional and even society-wide framework, I believe we can better understand what needs to be protected and how best to protect it.

I will begin by highlighting the need for a positive freedom to follow a way of life, not just the negative right to avoid participating in actions that we regard as morally-troubling. Then, I will make three related points. First, we should protect the right of institutions as well as individuals to be different. Second, conscience protections should extend to the commercial realm and not be limited only to nonprofits. Finally, to

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adequately protect conscience, we must be guided by a social architecture and policy of pluralism, rather than restricting ourselves to the goal of securing narrow exemptions to uniform rules here and there.

I. IN PRAISE OF THE RIGHT OF CONSCIENCE

A. The Right of Conscience Generally

Before I say why I think the right of conscience, as commonly understood, is an insufficiently robust instrument to safeguard living by conviction, let me begin by affirming just how important a right it is. Generally, the right of conscience is regarded as the freedom of a person to refuse to fulfill a normally required duty, due to that person's conscientious objection to performing the duty.[1]

Seamus Hasson, founder of the Becket Fund for Religious Liberty, discussed the basic concept and its development in the American context in his book, *The Right to Be Wrong*.[2] It is a provocative idea: that the law in some circumstances should give a person permission to be wrong by refusing to act, even though everyone else thinks it is right to require the action. And the act that is refused may be weighty indeed. For example, Hasson discusses the long development of the status of conscientious objectors to military service—the gradual acceptance of the idea that a person with a deeply-rooted objection to taking part in war has the right

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[1] ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 1 (2010) ("[L]iberty of conscience [is] a legal protection that arises at the point of conflict between an individual's deeply held moral or religious belief and state power."). In the words of James Madison, "[A man] has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . . . Conscience is the most sacred of all property." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* JAMES MADISON'S "ADVICE TO MY COUNTRY" 25, 83–84 (David B. Mattern ed., 1997). President George W. Bush passed a conscience regulation in December 2008, the purpose of which was to implement federal statutory provisions that "protect the rights of health care entities . . . both individuals and institutions, to *refuse to perform* health care services and research activities to which they may object for religious, moral, ethical, or other reasons." Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices, 45 C.F.R. § 88.1 (2010) (emphasis added). The regulation, which was both celebrated and reviled, has since been repealed in large part by President Barack Obama. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88). Similarly, at the state level, the Illinois Health Care Right of Conscience Act is designed to implement the state's declared public policy to protect "persons" and "entities," who, for reasons of conscience, *refuse* to provide or pay for some health care services. 745 ILL. COMP. STAT. ANN. 70/2 (West 2010).

[2] KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA (2005).

not to answer the call to defend the nation, even in its hour of extreme peril.[3]

B. Right of Conscience in the Commercial Context

Currently, claims for the right to refuse to act in some way are often less dramatic than conscientious objection to military service, but they are more numerous and significant in their own right. In the commercial context, three examples come to mind.

1. Elane Photography

Elane Photography, a husband-and-wife business, received an e-mail request to take pictures at a same-sex commitment ceremony. One of the owners emailed back: "[W]e do not photograph same-sex weddings, but again, thanks for checking out our site!"[4] These small businesspersons tried to conduct their business in a way that they thought honored God's values, but instead, Elane Photography was penalized with thousands of dollars in attorney's fees and costs for violating New Mexico's sexual-orientation nondiscrimination requirement.[5] Of course, this photography business, like every other one, turns down many other requests for its services without being hauled into court.

2. North Coast Women's Care Medical Group

A doctor in North Coast Women's Care Medical Group refused to perform a particular reproductive procedure requested by her lesbian patient.[6] The doctor said she would not perform that procedure on any unmarried patient, due to her convictions about marriage.[7] The patient was referred to another clinic, which performed the procedure.[8] The North Coast clinic provided all other care before and after this refusal, but it was sued for violating California's ban on sexual-orientation

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[3] *Id.* at 49–53.

[4] Opinion and Order, Elane Photography, LLC v. Willock, CV-2008-06632, ¶ 3 (N.M. 2d Jud. Dist. Ct. Dec. 11, 2009).

[5] The Human Rights Commission found that Elane Photography had violated the New Mexico Human Rights Act and ordered the company to pay Ms. Willock's attorney's fees and costs. *Id.* ¶ 5.

[6] N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 963 (Cal. 2008).

[7] *Id.*

[8] *Id.* at 964.

discrimination.[9] The California Supreme Court ruled that the religious convictions of the doctor did not outweigh that prohibition.[10]

3. Pharmacists

The question of whether pharmacists may refuse to dispense particular drugs, such as the Plan B "morning-after" pill, due to their convictions about contraception and abortion, has been raised in a number of states. Some states provide a right of conscience for pharmacists—the right not to dispense those drugs—while other states do not.[11] Interestingly, in the legislative debates and in litigation against dissenting pharmacists, little or no evidence has been provided that any customer was unable to find the pills from another source.[12]

C. Why the Right of Conscience?

Clearly, conflicts of conscience are a notable feature of our contemporary society. Should our society and our laws respect the right of conscience—the right of some to refuse to act in certain ways, even though others are required to act in those ways and even though, due to the refusal of the objectors, other people are inconvenienced and may even suffer a loss of dignity? If so, why?

Hasson contends that the right of conscience is grounded in something we all know in our hearts: "The truth about man is that man

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[9] *Id.*

[10] *Id.* at 970 (holding that the defendant's right to free speech and free exercise of religion did not exempt her from complying with the Unruh Civil Rights Act's prohibition of sexual-orientation discrimination). *See generally* Sumeet Ajmani, North Coast Women's Care*: California's Still-Undefined Standard for Protecting Religious Freedom*, 97 CALIF. L. REV. 1867, 1867–71 (2009) (discussing the ambiguous standard for free exercise of religion under the California Constitution and California courts' failure to resolve the ambiguity in conscientious objection cases); *Tensions Between Rights of Conscience and Civil Rights: Are Health Care Workers Obligated to Treat Gays and Lesbians?*, PEW FORUM ON RELIGION & PUB. LIFE (June 3, 2010), http://www.pewforum.org/Church-State-Law/Tensions-Between-Rights-of-Conscience-and-Civil-Rights.aspx (comparing conscience cases and discussing the merits of conscience clause exemptions); *Religious Liberty at Issue in Insemination Case Involving Unmarried Woman*, ALLIANCE DEF. FUND (Feb. 1, 2005), http://www.adfmedia.org/News/PRDetail/1377?search=1.

[11] *See* Kimberly D. Phillips, *Promulgating Conscience: Drafting Pharmacist Conscientious Objector Clauses That Balance a Pharmacist's Moral Right to Refuse to Dispense Medication with Non-Beneficiaries' Economic and Legal Rights*, 15 MICH. ST. U. J. MED. & L. 227, 244–45 (2011) (surveying current state provisions regarding conscientious objections of pharmacists); *see also* CAL. BUS. & PROF. CODE § 733(b)(3) (West Supp. 2012); COLO. REV. STAT. ANN. § 25-6-102(9) (West 2008 & Supp. 2009); FLA. STAT. ANN. § 381.0051(6) (West 2007); ME. REV. STAT. ANN. tit. 22, § 1903(4) (2004); TENN. CODE ANN. § 68-34-104(5) (West 2008); WASH. REV. CODE § 48.43.065(2)(a) (West 2008).

[12] Luke W. Goodrich, *The Health Care and Conscience Debate*, 12 ENGAGE 121, 122–23 (2011), http://www.fed-soc.org/doclib/20110603_GoodrichEngage12.1.pdf.

is born to seek freely the truth about God."[13] People disagree with one another about who God is and what He requires; thus, respect for that free search requires extending to each other the right to be wrong. That right should include the freedom not to perform acts otherwise required if our conscience tells us that doing those things is a grievous sin. So, our respect for each other requires a right of conscience—a right to refuse to act.

We may add another reason for the right of conscience: Respect for God requires us to obey His commands even when His commands clash with our government's requirements. Recall the words of Peter and the apostles in the Book of Acts when they were told by the religious authorities not to teach any more in the name of Jesus: "We must obey God rather than men."[14]

We should additionally stress that in our system of constitutional, limited government, the government's respect for its citizens requires it to avoid, where possible, forcing those citizens to act in ways they regard to be wrong.[15]

II. FROM NEGATIVE TO POSITIVE FREEDOM

For such reasons, I am sure that our society ought to respect the right of conscience. Yet, I am also sure that adequately respecting a person's freedom to follow God rather than man (to use the biblical phrasing) requires a concept, a freedom, broader than a right of refusal to participate in evil. We need also to acknowledge and secure a positive freedom for two reasons: the nature of our society and the character of our duty to God.

What do we owe to God? It is a long list, but we do have a summary: We should love God with all of our capabilities and passions—that is, we should follow His way and not some other way—and we should love our neighbors as ourselves.[16] Living in accordance with our consciences, considered in light of this summary, means not only *refraining* from doing things that dishonor God or harm our neighbors, but also actually *doing* things that please God and that are good for our neighbors. So, to fully respect conscience, there must be a positive freedom to act in

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[13] HASSON, *supra* note 2, at 145.

[14] *Acts* 5:29.

[15] For one probing discussion, see WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002).

[16] *Matthew* 22:37–40. Because of my own Christian commitments, editorial convenience, and the Christian setting where this Article was first presented as a keynote address, I will throughout mainly refer to Christian convictions and institutions. For reasons both of principle and of Christian conviction, however, I am certain that religious freedom is a freedom that extends to all religions and also to deep, secular convictions.

certain ways, even when those ways go against our society's conception of what is good. It is not enough to have a right to refrain from taking part in certain actions that we regard as unacceptable.

That is a simple, even simplistic, point. Why, then, does the concept of the right of conscience stress the freedom to avoid objectionable action rather than a positive freedom to do what we believe is right? I suspect that the concept is grounded in the assumption that we already do enjoy a broad freedom to do what is right. How so? First, many actions are simply unregulated by government so that we are free to act as we choose. Second, while other actions are compelled by government, most of what our government compels us to do is not morally-troubling. It normally requires us to do things we can engage in without objection. Given these two circumstances, to honor conscience, we need only be concerned about a limited number of instances where some people object to some action required by government that everyone else considers proper.

Should I study the Bible? Our laws neither compel me to study nor forbid me from opening the Holy Book. I need no right of conscience if there is no law on the matter.[17] On the other hand, in time of war I might be ordered into military service, not free at all to make my own decision. And yet, for me and for most of us, that requirement to serve seems appropriate—at least in principle—so no right of conscience is needed. Only a few of our fellow citizens—those with the opposite conviction—need the right of conscience, the negative freedom to refuse to defend the country through military action. Therefore, we need only a narrow and negative right not to engage in certain actions if we are free most of the time to exercise our own judgment about what to do and if, when we are compelled by government to act, the government's demands fit well with what we believe to be right.

But to many Christians and other adherents of historic religious faiths, the happy circumstance I have just sketched seems to be increasingly unrepresentative of our actual society. We find instead a constant shrinking of our freedom to decide on our own what to do, untrammeled by government rules. At the same time, we find that the government's rules are increasingly at odds with our deep convictions. If

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[17] Of course, even this seemingly obvious point is not so simple in today's legal climate. Rightly or wrongly, Bible study might be forbidden in some instances, such as public school classrooms (unless the Bible is being treated as literature). *See, e.g.*, Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 205, 225 (1963). Similarly, home Bible studies have even been challenged in certain municipalities based on residential zoning laws. *E.g.*, Nichols v. Planning & Zoning Comm'n, 667 F. Supp. 72, 78 (D. Conn. 1987) (holding that an ordinance was unconstitutionally vague and problematic because it gave administrative officials the discretionary power to restrict the free exercise of religion).

both of these are the case, then we are in a less happy circumstance and need stronger, different protections. If the government is commanding more, and more of what it commands is morally suspect, I need a more vigorous protective instrument than only a limited right of conscience—more than a limited right not to participate—if I am to be free to follow my God.

Consider the right of conscience in the school context. Let us say it means that a high school teacher in Massachusetts has a right to opt out of teaching the unit on marriage that explains that all relationships regarded as legal marriages by the Commonwealth of Massachusetts are real marriages that foster the flourishing of the spouses and create a good place for children to be raised. And yet, surely that dissenting teacher would, from her heart, desire not just to *avoid* teaching the official view of marriage but rather to *positively teach* what she is convinced that the Bible and natural law say about marriage and children. She desires the freedom to teach what she is sure is the truth and not just the right to avoid telling the government's untruth. Yet the right of conscience does not itself create the opportunity for her to teach as she feels compelled.

The situation is similar for many Christian doctors and nurses. They are grateful for the legal provisions that require federally-supported hospitals and medical schools to excuse them from having to perform or refer for abortions,[18] yet many of these same pro-life doctors and nurses believe that pleasing God in medicine requires more than refraining from killing unborn children. They are glad that normal medical practice is dedicated to healing, but they regard that practice also to be strongly influenced by commercial considerations, prestige, and a technological imperative. Those forces are not always favorable to the God-honoring medical practice that pro-life doctors and nurses seek.[19] They want to serve in a practice or hospital that takes the spiritual lives and concerns of its patients seriously. They want their place of work to contribute to the flourishing of the surrounding community, not only because it does not kill unborn children, but

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[18] *E.g.*, 42 U.S.C. § 238n(a) (2006) (preventing government discrimination against physicians who are trained or licensed by organizations that refuse to participate or train in abortion-related services); 42 U.S.C. § 300a-7(b)–(e) (2006) (prohibiting entities that receive federal grants from discriminating between grant recipients based on the recipients' moral or religious objections); 42 U.S.C.A. § 18023(b)(4) (West Supp. 2011) (prohibiting health plans offered through government exchanges from discriminating against any health care provider or facility because of its refusal to provide, pay for, provide coverage of, or refer for abortions).

[19] *See* CLARKE E. COCHRAN & DAVID CARROLL COCHRAN, CATHOLICS, POLITICS, AND PUBLIC POLICY: BEYOND LEFT AND RIGHT 65–67 (2003) (discussing rapidly advancing medical technologies and procedures, often conflicting with Catholic teaching).

because it offers excellent free clinical care to the needy. They may want to be part of a team in which not only the chaplain but also the other staff members are able to preach the Gospel, even "us[ing] words if necessary."[20]

As the dominant values of our society increasingly diverge in important ways from Christian convictions, many of us will find it harder and harder to find places of work that respect our convictions. That search will be futile if the government imposes the dominant values of the society on every workplace rather than leaving a broad scope of freedom for private persons and private organizations to determine on their own how best to conduct their lives and work.

In these circumstances, the right of conscience will enable citizens who dissent from the dominant values of our age to avoid participating in the worst, but they will not be able to do the best. We will be able to avoid complicity in many things that we believe are wrong, but we will have little opportunity to pursue activities in which we can wholeheartedly rejoice.

In short, the right of conscience is a precious freedom, but when there is less and less private freedom because government regulates more and more, and when the demands that government imposes through that expanding net of regulations diverges more and more from what Christians (and others) believe is right and good, then to follow God rather than men requires that the current right of conscience be supplemented by more robust mechanisms. We need to enlarge the freedom to do right rather than only protecting the right to avoid doing wrong. If I am correct about this need for a positive freedom to supplement the right of conscience, then I believe my three other points can be easily developed.

A. Beyond the Right of Conscience: Institutions and Not Only Individuals

The right of conscience is typically understood as an individual right: the right of a doctor or nurse not to participate in abortions;[21] the right of a Quaker not to answer the call to arms;[22] or freedom for a

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[20] "Preach the gospel at all times. Use words if necessary." This quote is often attributed to St. Francis of Assisi and, while it is unlikely that he spoke these exact words, he did encourage ministers to "preach by their example." RANDY NEWMAN, BRINGING THE GOSPEL HOME 101 (2011).

[21] *See supra* note 18.

[22] *See* HASSON, *supra* note 2, at 49–52 (recounting the early history of the Quakers' conscientious objection to compulsory military service in the United States). Courts later extended conscientious-objector protections to all sincerely held moral beliefs in *United States v. Seeger*, 380 U.S. 163, 186–88 (1965) (holding that a person's moral objection to military service was sufficient to entitle him to a religious exemption).

justice of the peace to avoid registering a same-sex marriage.[23] Yet, as I mentioned above, the right of institutions to be different also needs to be protected.[24]

Most significant projects and occupations require us to work together with others in a structured way. Doctors need the support of nurses in order to carry out their mission of healing and care, not to mention people expert in the minutia and irrationality of health insurance plans. Teachers are normally employed by schools and count on those schools to be supportive of their vision of what to pass on and how best to do so. And the list goes on. To put into practice our varied conceptions of how best to obey God and serve our neighbor, we will usually need to band together with others who, because they share our view, will put their own talents to work with ours to achieve our common conception.

Of course, for any of those organizations—the school, the medical practice, the broadcast company, the charity—to be vehicles for bringing to life one or another distinctive vision, the organization must have the legal freedom to be distinctive. Our Massachusetts teacher who is committed to marriage as taught in the Bible needs to be able to find or create a school that dissents from the new Massachusetts orthodoxy about the equivalence of various sexual relationships. Her quest will be impossible if the government requires every school to teach that same-sex marriages are equivalent to traditional marriages and that they must be equally celebrated. Moreover, her commitment to teach about biblical marriage will be undermined if, although she is free to say what she believes about marriage, her private school is required by law not to "discriminate" on the bases of marital status and sexual orientation in its hiring and employee-benefits policies.

What does it take for an organization to be faith-shaped—to be a vehicle or instrument to put into practice a wholehearted commitment to some particular vision of the good, some specific understanding of how best to love God and neighbor? If we reflect on mission organizations we know—Regent University, Catholic Charities, the Salvation Army, a

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[23] *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 321–22 (2010) (arguing that in certain circumstances states should grant conscience exemptions for government employees with religious objections to facilitating same-sex marriages).

[24] There are many helpful resources detailing the "institutional" dimension of honoring conscience. *See generally* STEPHEN V. MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY (2012) (discussing the importance of recognizing an institutional right of conscience in light of increasing challenges that religious institutions are facing in the United States); VISCHER, *supra* note 1 (examining the role and importance of conscience in various institutional settings including associations, schools, healthcare, corporations, and education).

Gospel rescue mission, or others—we can identify three expressions of that mission or commitment to a particular conception of the good. The organization's *faith-shaped identity* will be evident perhaps in its name, in the symbols on its walls, in the membership of its board of directors, or in its mission statement. The organization also has a distinctive inner-life that features, for example, *faith-shaped standards* for employment, a particular schedule of employee benefits, certain staff practices, or spiritual formation retreats. The organization also has a *faith-influenced set of services*: it offers spiritual counseling as well as psychological counseling; it will not perform abortions but will refer for adoption; it will not turn away those who cannot pay or who do not have proper immigration documentation.

But will government allow an organization to be distinctive in these ways? Federal, state, municipal, and county rules affect institutions at every turn: the imperatives of employment law, the requirements of licensing for the organization and for its professional staff, rules about how clients must be treated and who must be counted as a client, restrictions attached to government funding, standards that must be met to obtain tax-exempt status, and much more.[25]

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[25] For the many ways that rules enforcing the equality of same-sex marriages may impinge on the freedom of faith-based organizations, see the eye-opening essay by Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1–57 (Douglas Laycock et al. eds., 2008). For a more general discussion of the clash between non-discrimination requirements and the religious freedom of faith-based organizations, see Gregory S. Baylor & Timothy J. Tracey, *Nondiscrimination Rules and Religious Associational Freedom*, 8 ENGAGE 138, 138–45 (2007), http://www.fed-soc.org/doclib/20080613_Engage.8.3.pdf. Most recently, in January 2012, the Supreme Court announced a landmark decision in favor of the institutional rights of religious organizations in unanimously holding that a minister of a religious organization (a specially commissioned teacher) could not bring an employment discrimination suit against her employer institution (a church-operated school) without violating core principles of the First Amendment. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

Since the Clinton administration, the federal government has adopted rules for recipients of its funds that explicitly protect a faith-based identity, many faith-shaped standards, and sometimes faith-influenced sets of services. *See* Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, 32 HARV. J.L. & PUB. POL'Y 931, 936 (2009); *see also* Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010) (establishing "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations"). The Obama administration, however, recently struck a blow to faith-based institutions' collective consciences by mandating that, with very narrow exceptions, faith-based employers, just as their secular counterparts, must provide health-care coverage of contraceptives. News Release, U.S. Dep't of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html. In an attempt to "compromise" with Catholic and other religious leaders who protested the requirement, the

For the organization to be able to exemplify—to testify to and to put into practice—its mission and its vision, even though that vision differs from what much of society thinks is best, the government must not compel it to follow the society's vision instead of its own. There must be a robust institutional freedom of conscience, freedom for the organization to depart from what is otherwise required of other organizations at work in the same area of service.

For example, if a faith-based adoption or foster-care agency is to be free to operate in accordance with the conviction that children are best raised by a mother and father who are married to each other, there must be an institutional right of conscience and not only an individual right. The private agency must be able to recruit families holding the same convictions and be able to turn away or refer other types of households to other agencies. In deciding whether a family is ready to accept a child, the agency must be able to assess the quality of the commitment of the man and woman to each other, and possibly disqualify the couple if marital infidelity is evident. It should be able to tell people who have decided they must give up a child that if that child is brought to this agency, the child will be placed with a married mother and father, perhaps even a mother and father who are committed to the same religion as the birth parents. In short, for that conviction about like-minded families to come to expression in adoption and foster-care practice, the law must allow the private agency to maintain those distinctive practices, even though the law enforces as a general rule a prohibition on discrimination based on sexual orientation and marital status.

This is not an abstract matter, of course. In 2006, Catholic Charities of Boston was forced out of its long-standing adoption services because the Commonwealth prohibited discrimination based on sexual

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administration then said it would promulgate a new rule requiring the insurers, not objecting faith-based employers, to pay for the contraceptive services and to offer them to the employees. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147). The U.S. Conference of Catholic Bishops and others still oppose the measure, noting that it would not help those organizations that are self-insured, and that even with a third-party provider, the regulation still mandates coverage for contraceptives, which would in practice be paid for by the organization in its health plan with the provider. *See* Janet Adamy, *Contraceptive Plan Still Draws Heat*, WALL ST. J., Feb. 13, 2012, at A4; Cathy Lynn Grossman & Richard Wolf, *Bishops, Obama in Church-State Faceoff*, USA TODAY, Feb. 13, 2012, at 5A.

orientation in selecting adoptive families and placing children.[26] Similarly, Catholic Charities of Washington, D.C. had to abandon its adoption services when the city redefined marriage to include same-sex couples.[27] Even more recently, both Catholic and evangelical foster-care agencies in Illinois have been stripped of their state contracts because of the state's civil union law and its prohibition of sexual-orientation discrimination.[28]

In summary, when most organizations of a society have adopted a view of serving neighbors that falls short of God's pattern, believers will want to develop alternative service organizations. But if the government's rules are pervasive and the standards it enforces are those of the societal consensus, believers will be able to put into practice their convictions about good service only if there is an institutional right of conscience—an organizational freedom to be different—rather than only an individual right not to participate in some objectionable practice.

B. Beyond the Right of Conscience: Religious Businesses and Not Only Religious Nonprofits

The institutional right to be different should extend to commercial religious enterprises and not be limited to churches and para-church organizations. Our society does, in important ways, respect an institutional right of conscience. For example, as a general rule, faith-based schools and charities are free to consider religion when they decide which applicants to hire, even though it is illegal for secular organizations to discriminate on the basis of religion when they select new employees.[29] Yet there is a strong bias in the American sense of justice, which shows up in court decisions and in policy-making, that this so-called "right to discriminate" in hiring should be allowed only to

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[26] Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals,* CHILD. LEGAL RTS. J., Fall 2007, at 1, 13.

[27] Julia Duin, *D.C. Gay-Marriage Law Spurs Archdiocese to End Foster Care,* WASH. TIMES, Feb. 18, 2010, at A1.

[28] Manya A. Brachear, *Final Faith Foe of Civil Unions Exits Foster Care,* CHI. TRIB., Nov. 16, 2011, at 5.

[29] 42 U.S.C. § 2000e–1(a) (2006) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities."); *see also* CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS 9 (2004).

nonprofit religious organizations and not to religious organizations that are making money, that is, religious businesses.[30]

But that limitation, it seems to me, is unjustifiable. As I began to consider this presentation, three items appeared in the newspapers that bear on this question. First, there was a story about a new coffee business opening its doors in the Washington, D.C. area.[31] The business is called "Blessed Coffee" to testify to its Ethiopian inspiration to foster, as the *Washington Post* reported, both "community and a spiritual connection to our world."[32] Moreover, Blessed Coffee is one of the first so-called "benefit corporations" that Maryland has begun chartering. Benefit corporations like Blessed Coffee are commercial enterprises that must make a positive social contribution and not only economic profits; they must have a social mission and not only try to make money.[33]

Similarly, an article in the *Wall Street Journal* discussed the challenges and successes experienced by the small network of kosher Subway shops.[34] These are not the usual Subway sandwich stores. All of the products, ingredients, and processes must meet kosher standards, and that means more than not serving ham and cheese sandwiches. Just a page later in the *Journal*, the Aflac insurance company had placed a half-page advertisement announcing that it had been selected by the Ethisphere organization as one of the world's most ethical companies. Aflac announced, "We're proud of all our employees and agents who strive to do the right thing every day. And we thank our clients and shareholders for their trust and belief that companies can succeed and prosper without having to compromise."[35]

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[30] For instance, in *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011) (per curiam), the Ninth Circuit upheld the freedom of World Vision to consider religion in its hiring and firing decisions. *Id.* at 724. The case turned on whether World Vision is a religious organization and thus, unlike secular organizations, is permitted to use religion as a criterion in making employment decisions. *Id.* at 725 (O'Scannlain, J., concurring). The panel of appellate judges agreed, two-to-one, that World Vision is a religious organization. *Id.* at 724 (per curiam). One of the judges in the majority, however, signaled his view in concurrence that an organization is more likely to be authentically a religious organization if it "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 748 (Kleinfeld, J., concurring).

[31] Jeremy Borden, *Takoma Park Coffee Firm Holds 'Blessed' Event*, WASH. POST, Sept. 17, 2011, at B1.

[32] *Id.*

[33] *Id.*; *see generally* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 1–22 (2011) (discussing the legal challenges faced by nonprofits, corporations, and LLCs operating with a social mission).

[34] Julie Jargon, *Kosher Subways Don't Cut It*, WALL ST. J., Sept. 28, 2011, at B1.

[35] The main text of the advertisement reads, "Here's to another year of doing the right thing." Aflac, WALL ST. J., Sept. 28, 2011, at B3.

Three newspaper items do not prove anything, but they are suggestive. They indicate that the law and scholarly opinion are off-track in assuming that a bright line or clear division exists between nonprofits and for-profits when it comes to key issues such as whether an organization has a distinctive identity, whether it should be able to have a staff with shared convictions and standards of conduct, and whether it will serve society in a distinctive way.[36]

Is it actually an incoherent idea that a commercial enterprise might be dedicated to serving God by serving neighbors in a particular way? Should not an orthodox Jewish grocery store, even though it makes a profit, be able to hire staff and conduct its internal activities in a way that reflects its religious commitments, even if the Safeway supermarket down the street must follow other rules? The law permits the Christian Legal Society, a nonprofit organization, to employ only Christian lawyers, paralegals, and support staff. What is the sufficiently weighty reason to say that a for-profit law firm that intends to follow biblical concepts of justice should not be free to make the same religion-based employment decisions? That firm, too, wants its discussions of the law and the interactions of its staff to reflect Gospel convictions. It, too, wants its legal services to reflect Gospel values and not only assessments of profitability, prestige, and legal novelty.

I think that commercial entities, and not only nonprofits, ought to be able to have a distinctive profile in how they operate internally and how they serve externally. A pharmacist employed by CVS or some other business should be able to refuse to dispense certain drugs for reasons of conscience. That is an instance of the individual right of conscience. The small drugstore operated internally by a Catholic hospital should not be required to stock Plan B pills, even though the pills are approved by the government. That freedom would reflect an institutional right of conscience for a nonprofit organization.

What, then, about the for-profit pharmacy that seeks to be life-affirming in every way possible, to the glory of God and the well-being of its neighbors? Why should it be required to stock every legal pill and medical device and not be able to rely on an institutional right to be different? Surely it should not be denied an institutional right of conscience simply because it is commercial, because it is a market participant. After all, it is the very essence of the free market that its

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[36] There is significant literature on the social, missional, and religious aspects of businesses. For an interesting early study, see IAN I. MITROFF & ELIZABETH A. DENTON, A SPIRITUAL AUDIT OF CORPORATE AMERICA: A HARD LOOK AT SPIRITUALITY, RELIGION, AND VALUES IN THE WORKPLACE (1999).

participants will profile themselves by doing things differently, such that customers can distinguish each participant from its competitors.

I readily admit that there are weighty questions about who must be served and who can be turned away, and about what services must be offered and which can be left out. But I do not see how answers to those questions depend fundamentally on whether the organization tries to make money.

C. Beyond the Right of Conscience: Pluralism and Not Just Exceptions

Perhaps it is obvious by now what I intend with this third and final point. We should use pluralism as the structuring principle for protecting conscience rather than accepting only a few narrow exceptions to sweeping uniformity enforced by government.[37]

I begin with a reminder. It is not only service professionals such as pharmacists and teachers who are determined to live in accordance with their convictions, even when some of those convictions are unpopular. And it is not only service organizations such as health clinics and adoption agencies that desire the freedom to follow God rather than man when it comes to particular services and practices.

To the contrary, there are also different moral communities of service recipients: customers, clients, and patients. Some doctors and hospitals insist they will not perform abortions, and, equally, some patients desire exactly such pro-life medical care. These patients do not fully trust doctors and nurses whose actions ignore the Scriptures and the original Hippocratic Oath.[38] Just as some adoption agencies are convinced that children are best raised by a married mother and father who together attempt to be faithful to God, some single mothers who have to give up a child for adoption are looking for a family with exactly those convictions as the new home for their child.

In short, when considering the call of conscience, we ought to have in mind not only heroic professionals with deep but unconventional views about how best to serve, or dissenting organizations intent on operating differently than other providers of the same type of services.

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[37] Helpful treatments of pluralism for public policy include Stanley W. Carlson-Thies, *Why Should Washington, DC, Listen to Rome and Geneva About Public Policy for Civil Society?*, *in* CHRISTIANITY AND CIVIL SOCIETY: CATHOLIC AND NEO-CALVINIST PERSPECTIVES 165 (Jeanne Heffernan Schindler ed., 2008); JONATHAN CHAPLIN, HERMAN DOOYEWEERD: CHRISTIAN PHILOSOPHER OF STATE AND CIVIL SOCIETY (2011); EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY (Stephen V. Monsma & J. Christopher Soper eds., 1998); GALSTON, *supra* note 15; MONSMA, *supra* note 24.

[38] *See, e.g.*, Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html (reflecting on the medical profession's evolving views toward, and changes to, the Hippocratic Oath).

We should also have clearly in mind recipients of services—in biblical terms, those "neighbors" who need our love.[39] If we consider professionals, organizations, and patients, I am certain we have to admit that our society is comprised of more than one way of life, and each of those different ways of life embodies the deep convictions of one group of patients but not other patients; this set of professionals but not others; this group of organizations but not the others. We are not a *moral monoculture* with just a few isolated and disconnected oddballs, such that protecting conscience requires crafting only a few narrow exceptions for this doctor or that parochial school.

Without defending that statement about our society's moral heterogeneity, I will make just one suggestion about public policy. If we have become a society with multiple ways of life, then the appropriate policy for government is not to impose uniform laws with a few exceptions. Instead, the appropriate policy will look more like the accreditation system for higher education institutions.[40]

In higher education, government acknowledges that multiple, different visions of education are represented in a wide variety of colleges and universities. There is no uniform secular model of higher education accompanied by a few eccentric colleges that have tacked on some strange religious practices. Rather, even the secular institutions follow a variety of ideas about how best to educate and form young men and women. And the religious institutions are even more diverse in what they do and how they do it.

These institutions are not all forced by government into a single pattern with merely a conscience provision for a few exceptions. Instead, the government accepts the need for multiple accrediting agencies—in other words, the need for varied sets of standards. In fact, excellent education is defined differently from one accrediting agency to another, and the Higher Education Act recognizes these varied ways to educate beyond high school. The law actually requires accrediting agencies to respect diverse missions, including the varied religious missions, of the colleges and universities they supervise.[41]

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[39] *See Luke* 10:25–37 (recounting Jesus' parable of the Good Samaritan).

[40] Accrediting agencies are private bodies, but the government backs up their decisions by authorizing their operations and by accepting their decisions as definitive when it decides, for example, at which colleges or universities students may use their federal scholarship aid. *See* 20 U.S.C. § 1001(a)(5), (c) (2006) (requiring that institutions of higher education be accredited by a recognized accreditation agency, and requiring the Education Secretary to publish a list of recognized accreditation agencies).

[41] The Higher Education Act requires accrediting agencies to "respect the stated mission of the institution of higher education, including religious missions," when assessing institutions. 20 U.S.C. § 1099b(a)(4)(A) (Supp. IV 2010). It bears emphasis that

To adequately promote the public good in a society with multiple ways of life, government policy should be more like our higher education accrediting policy, and less an effort to force uniformity while grudgingly allowing a few exceptions.

III. THE FREEDOM TO MAKE AN UNCOMMON CONTRIBUTION TO THE COMMON GOOD

I have stressed both difference and protecting difference—protecting in law the freedom for individuals and organizations to depart from society's consensus and to conduct their affairs and to offer their services in ways not approved by the majority.

It is not my view, however, that Christians (or other religious people and organizations) are the only ones pursuing good in our society. Knowledge of God's ways certainly is communicated to people outside the Christian community. Indeed, Christians would have to be very dishonest not to admit that often believers in other gods or in no god have taught us what it means to accurately understand God's world and how we can genuinely contribute to the flourishing of our neighbors.[42] It is not the case that non-Christian doctors, pharmacists, or charities do everything in such unacceptable ways that Christians must necessarily separate and do things on their own.

Nor is it my intent that Christians will withdraw from society, asking for freedom from the government's rules so that we can construct our own subculture in which we can live pure lives untouched by the world around us. Far from it. I seek government policies that robustly protect the freedom of organizations and individuals to obey God precisely so that Christians can be a clear witness about God to the world and a great blessing to our neighbors.

Like every citizen, we are called to contribute to the common good. And yet, as believers in Christ, we have some distinct convictions about what is good and about how best to help others. We need a robust

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this requirement of respect for religious missions was added to the act only against strong pressure by the ACLU, Americans United for Separation of Church and State, and others, who wanted the law instead to require accreditors to enforce secular standards. *See* Press Release, Am. United for Separation of Church & State, Congress Should Block Backdoor Move to Endorse Discrimination by Colleges, Says Americans United (June 20, 2007), http://www.au.org/media/press-releases/congress-should-block-backdoor-move-to-endorse-discrimination-by-colleges-says.

[42] Miroslav Volf rightly stresses, "Christians have received wisdom from others in the past and . . . continue to do so." MIROSLAV VOLF, A PUBLIC FAITH: HOW FOLLOWERS OF CHRIST SHOULD SERVE THE COMMON GOOD 111 (2011).

institutional as well as individual *freedom to be different* exactly so that we can make our best *uncommon* contribution to the common good.[43]

[43] Volf similarly remarks that, while Christians have much to learn from others, we also have our own "wisdom" to share with the broader society. *Id.* at 100–01. A proper pluralism gives voice and space to diverse wisdoms, removing government from attempting to enforce a single view. This idea of making an uncommon contribution to the common good is, to my mind, characteristic of the public philosophy and theology of Abraham Kuyper, the Reformed "Renaissance man" of the late 19th and early 20th century Netherlands. For a very accessible introduction, see RICHARD J. MOUW, ABRAHAM KUYPER: A SHORT AND PERSONAL INTRODUCTION (2011). The same approach was carried forth by Herman Dooyeweerd. *See* CHAPLIN, *supra* note 37.

"CHARITABLE" DISCRIMINATION: WHY TAXPAYERS SHOULD NOT HAVE TO FUND 501(C)(3) ORGANIZATIONS THAT DISCRIMINATE AGAINST LGBT EMPLOYEES†

*Austin Caster**

ABSTRACT

Until now, First Amendment protection of religious liberty[1] has allowed—and even indirectly publicly funded through tax exemption—discrimination against lesbian, gay, bisexual, and transgender ("LGBT") employees, but this Article argues that *Christian Legal Society v. Martinez*[2] changes that analysis. According to *Bob Jones University v. United States*, charitable, tax-exempt organizations that make admissions decisions based on racial discrimination violate public policy and cannot receive taxpayer funding.[3] Similarly, *Martinez* demonstrates that universities do not have to fund student organizations that discriminate on the basis of sexual orientation.[4] Therefore, because discrimination based on an immutable[5] minority trait bars taxpayer

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1 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2 130 S. Ct. 2971 (2010).

3 461 U.S. 574, 595–96 (1983).

4 *Martinez*, 130 S. Ct. at 2998.

5 Either unaware of or choosing to ignore the wealth of evidence to the contrary, Professor James Davids's response to this Article cites "ex-gays" as evidence that sexual orientation is in fact a mutable characteristic like religion. James A. Davids, *Enforcing a Traditional Moral Code Does Not Trigger a Religious Institution's Loss of Tax Exemption*, 24 REGENT U. L. REV. 433, 433 n.1 (2012). The American Psychological Association and American Psychiatric Association, however, widely regard "reparative" therapy as not only ineffective, but also harmful to patients. For an accurate professional discussion of these dangerous experiments, please see generally GREGORY HEREK, "REPARATIVE THERAPY" AND OTHER ATTEMPTS TO ALTER SEXUAL ORIENTATION: A BACKGROUND PAPER (1999), *available at* http://psychology.ucdavis.edu/rainbow/html/reptherapy.pdf; AM. PSYCHOLOGICAL ASS'N,

funding in one instance, this Article argues it should also in the other. Private organizations will continue to be allowed to discriminate, but if they do, they should no longer receive public funding through tax-exempt status, taxpayer-funded federal loans, and tax-deductible donations.

INTRODUCTION

For fifteen years, Lucinda Naylor served as the artist-in-residence for the Basilica of St. Mary in Minneapolis, Minnesota, creating artwork for church banners and publications.[6] After the Knights of Columbus—"the world's foremost Catholic fraternal benefit society"[7]—mailed out 400,000 DVDs to Minnesota residents calling for a constitutional amendment banning same-sex marriage just before the 2010 midterm elections, however, Naylor decided to use her talents to take a stand.[8] Naylor peacefully protested and raised awareness for marriage equality by creating a sculpture out of the unwanted DVDs she collected from parishioners.[9] Two days after she commenced the project, though, Naylor received a suspension from her job, what she believed to be a "kind word for termination."[10]

Whereas the church had a legitimate argument that Naylor directly took a stand against Catholic social teaching and, thus, against her employer's mission, Laine Tadlock was terminated from Benedictine University in Springfield, Illinois for something thousands of Americans do each week: putting her wedding announcement in the newspaper.[11]

APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf; *Sexual Orientation*, AM. PSYCHIATRIC ASS'N, http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx (last visited Apr. 6, 2012).

6 Jim Spencer, *Job on Line over DVD Protest*, STAR TRIB., Sept. 28, 2010, at 1B.

7 *Learn About Us*, KNIGHTS OF COLUMBUS, http://www.kofc.org/un/en/about/index.html (last visited Apr. 6, 2012). Though many reports and opinions suggest that the Catholic Church sent out the DVDs, fairness requires it be noted that, though the Knights of Columbus roots its mission in Catholic Social Teaching, the two are actually separate entities. *See* Carl A. Anderson, *Ethics and Profitability*, KNIGHTS COLUMBUS (May 1, 2010), http://www.kofc.org/un/en/columbia/detail/2010_05_ethics.html. Like the Catholic Church, however, the Knights of Columbus organization does enjoy tax-exempt status. Letter from Harold N. Toppall, Chief, Projects Branch 2, Exempt Orgs. Div., Internal Revenue Serv., to Knights of Columbus Supreme Council (Oct. 15, 1998), *available at* http://www.kofc-or.org/Forms/2010%20annual%20tax%20filing%20packet.pdf. In any case, the Catholic Church had a large hand in the production and distribution of the DVD in Minnesota along with the Knights of Columbus. Mary Jane Smetanka, *Catholics to Get DVDs Opposing Gay Marriage*, STAR TRIB., Sept. 22, 2010, at 1A.

8 Spencer, *supra* note 6.

9 *Id.*

10 *Id.*

11 Dave Bakke, *Women's Wedding Announcement Irks Benedictine*, ST. J.-REG., Nov. 10, 2010, at 1.

Tadlock, who served as the director of Benedictine's education program, was upfront with her employer about her sexual orientation from the beginning of her employment, and the university even knew when her wedding would take place.[12] Yet, after her announcement that listed Benedictine as her employer was published in *The State Journal-Register*, Tadlock left her position.[13] Though the university alleged she resigned—a claim Tadlock disputed—Benedictine President William Carroll wrote, "By publicizing the marriage ceremony in which she participated in Iowa she has significantly disregarded and flouted core religious beliefs which, as a Catholic institution, it is our mission to uphold."[14]

Still other cases further blur the line between what is speaking out against an employer's mission and what is participating in conduct fundamental to one's immutable identity. Lisa Howe, a soccer coach at Belmont University in Tennessee, got her pink slip just days after sharing with her team her excitement about expecting a child.[15] Belmont, a private Christian school, insisted the midyear departure was Howe's decision, but many sources on and off the campus, including her team members, were quoted as saying that she was fired or forced to resign.[16] Her players—thirty of whom earned Atlantic Sun All-Academic honors for their achievements on and off the field since Howe arrived in 2005—were "shocked and angered" by the dismissal.[17] Even religious liberties scholars would likely be appalled that a pregnant woman could get fired for privately sharing the news about something as fundamental as having a child,[18] especially considering coaching soccer, even at a Christian institution, is not a religious sacrament.

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Pierce Greenberg, *Coach Lisa Howe's Dismissal Shocks Women's Soccer Team*, BELMONTVISION.COM (Dec. 2, 2010, 11:09 PM), http://belmontvision.com/2010/12/02/belmont-soccer-coach-fired/.

[16] *Id.*

[17] *Id.*

[18] *See, e.g.*, Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 226 (2010) ("To make it possible for both sides [gay-rights and religious-liberty] to live out their identities, it is necessary to compare the burdens on them."). Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law and a noted religious liberties scholar. According to his faculty biography, "Berg has established himself as one of the leading scholars of law and religion in the United States. He has written approximately 60 articles in law reviews and religion journals on religious freedom, constitutional law, and the role of religion in law, politics and society." He has also "received the Religious Liberty Defender of the Year Award from the Christian Legal Society in 1996" and "the Alpha Sigma Nu Book Award (2004) from the Association of Jesuit Colleges and Universities, for the Religion and the Constitution casebook, and the

At least two of these firings seem completely unwarranted, but the commonality—and why they are all permissible under Title VII of the Civil Rights Act of 1964[19] and the employment at will doctrine—is the fact that these employees were lesbians. Title VII does not include sexual orientation as a protected class.[20] So, in the forty-nine states that follow the employment-at-will doctrine,[21] an employee can be fired at any time, for any (or no) reason at all, unless the state legislature enacts, for example, a sexual-orientation-specific non-discrimination statute.[22] Though the stories of Naylor, Tadlock, and Howe are only a few examples of targeted discrimination that LGBT employees face,[23] taxpayers currently have no choice but to subsidize these actions. Under the Internal Revenue Code, organizations deemed "charitable" receive tax-exempt status,[24] and individuals who donate to these organizations

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John Courtney Murray Award from DePaul University College of Law for scholarly and other contributions to church-state studies." *See id.* at 206; *School of Law: Faculty Biography of Professor Thomas C. Berg*, UNIV. ST. THOMAS, http://www.stthomas.edu/law/facultystaff/faculty/bergthomas/ (last visited Apr. 6, 2012).

[19] Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (2006)).

[20] § 2000e-2(a)(1).

[21] Montana's "just cause" statute makes it the only state that does not strictly adhere to the employment at will doctrine. *See* MONT. CODE ANN. § 39-2-904 (2011); Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 16 (2010); *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/employment-working-families/at-will-employment-overview.aspx (last visited Apr. 6, 2012).

[22] 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2003) ("'Employment at will' is a term used to mean that an employer may discharge an employee without restriction, that is, for any reason or for no reason, without incurring any liability to the employee, as long as the reason for the discharge does not violate public policy.").

[23] *See, e.g.*, JODY L. HERMAN, WILLIAMS INST., THE COST OF EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER RESIDENTS OF MASSACHUSETTS (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-MA-TransEmp Discrim-Apr-2011.pdf; CHRISTY MALLORY ET AL., WILLIAMS INST., EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN OKLAHOMA (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Herman-Badgett-OK-Emp-Discrim-Jan-2011.pdf; CLIFFORD ROSKY ET AL., WILLIAMS INST., EMPLOYMENT DISCRIMINATION AGAINST LGBT UTAHNS (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rosky-Mallory-Smith-Badgett-Utah-Emp-Discrim-Jan-11.pdf; BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf; BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 2003–2007 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-DiscriminationComplaintsReport-July-2011.pdf.

[24] I.R.C. § 501(a), (c)(3) (2006).

can also correspondingly deduct qualifying contributions from their own incomes.[25]

Because these charitable organizations—even if they are private schools—do not have to pay taxes, they receive a benefit from our entire society, even from those taxpayers who believe in equality. While discrimination by tax-exempt organizations in a racial context will lead to the revocation of a charitable organization's tax-exempt status because racial discrimination has been held to violate public policy,[26] only recently has protection for the LGBT community evolved.[27] Though other minorities have received federal protection from employment discrimination under Title VII of the Civil Rights Act of 1964,[28] the Age Discrimination in Employment Act,[29] and the Pregnancy Discrimination Act,[30] no "governmental declaration" has evidenced that discrimination on the basis of sexual orientation violates public policy, something required to revoke tax-exempt status.[31] That may soon change, however,

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[25] I.R.C. § 170(a)(1), (c)(2) (2006).

[26] Bob Jones Univ. v. United States, 461 U.S. 574, 595–96 (1983).

[27] *See, e.g.*, Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654 (2006)); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009) (codified as amended in scattered sections of Titles 18, 28, and 42 of the U.S.C.); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2993, 2998 (2010) (holding that public universities "may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership"); Romer v. Evans, 517 U.S. 620, 624, 635–36 (1996) (holding that a Colorado constitutional amendment prohibiting "all legislative, executive or judicial action at any level of state or local government" from protecting homosexuals as a class violated the Equal Protection Clause); Perry v. Brown, No. 10-16696, slip. op. at 79–80 (9th Cir. Feb. 7, 2012) (holding that California's Proposition 8 restricting marriage to opposite-sex couples is unconstitutional as a violation of the Equal Protection Clause); Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html (stating that the Department of Justice will no longer defend Section 3 of the Defense of Marriage Act).

[28] 42 U.S.C. § 2000e-2(a) (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

[29] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602, 602–03 (codified as amended at 29 U.S.C. § 623(a) (2006)) (prohibiting employment discrimination based on age).

[30] The Pregnancy Discrimination Act modified the definitions of "because of sex" and "on the basis of sex" from the Civil Rights Act of 1964 to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

[31] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("[E]ntitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."); Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30, 33–34 (1958) ("[D]eductibility . . . is limited to expenses that are both ordinary and necessary to carrying on the taxpayer's business. . . . A finding of 'necessity' cannot be

as the Ninth Circuit recently held in a landmark decision, *Perry v. Brown*, that discrimination against the LGBT community in the form of a ballot initiative restricting marriage to opposite-sex couples violates the U.S. Constitution.[32] The Supreme Court could hear an appeal as early as 2013.[33]

The first Part of this Article explains how and why tax-exempt status for charitable organizations came about in the United States. The second Part applies the original intent of charitable, tax-exempt status to LGBT employment discrimination. The third Part offers a public policy analysis explaining why equal protection should at least be balanced equally with religious liberty when those interests conflict. The fourth Part analyzes case law regarding discrimination and tax-exempt status and shows how *Martinez* in particular evolves the debate. The fifth and final Part analyzes how other countries have handled constitutional conflicts between equal protection and religious freedom and discusses what the United States should learn from the way these countries balance these important rights.

I. HISTORY OF CHARITABLE TAX EXEMPTION

A. How Did Tax-Exempt Status Come About?

In the United States, the first modern reference to tax exemption for charitable organizations appeared in an 1894 tax law.[34] It provided, "[N]othing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."[35] The corresponding deduction for taxpayers who donate to these organizations first appeared in 1917.[36] Most of the requirements to receive tax-exempt status dealt more with procedure

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made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.") (citations omitted) (citing Comm'r v. Heininger, 320 U.S. 467, 473 (1943)).

[32] Perry v. Brown, No. 10-16696, slip. op. at 79–80 (9th Cir. Feb. 7, 2012).

[33] *See* Maura Dolan & Carol J. Williams, *Divided Court Rejects Prop. 8*, L.A. TIMES, Feb. 8, 2012, at A1; Bob Egelko, *Prop. 8: Supreme Court May Redefine Gay Rights*, SFGATE (Feb. 12, 2012), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/12/MNO51N5108.DTL.

[34] Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556; *see also* Michael Yaffa, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 158 (1982) ("The tax exemption for [charitable] organizations originated with the income tax law enacted in 1894.").

[35] § 32, 28 Stat. at 556.

[36] War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917); *see also* Yaffa, *supra* note 34, at 158.

than substance, making it a relatively easy and unregulated process.[37] The IRS required that "(1) the organization . . . be involved in one of the (now) eight general listed purposes [in I.R.C. Section 501(c)(3)]; (2) the organization . . . not be a profit-making unit; [and] (3) the organization . . . not be involved in 'lobbying' or other similar 'political activities.'"[38]

To receive tax-exempt status, the organization merely needed to submit a form to the IRS and meet both the "organizational" and "operational" tests.[39] Though some scholars disagree as to the rationale for charitable tax exemption and the corresponding contribution deduction for taxpayers,[40] one judge proffered that Congress intended to lower the standard to regulate charitable organizations as opposed to other government programs in order to "relieve[] itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government."[41] Receiving a classification as a charitable organization and the tax-exempt status that came with it was relatively routine and non-controversial until 1970.[42]

Prior to 1970, as long as the organization fell into one of the broad categories prescribed in the tax code,[43] these entities received tax-exempt status without much regard to violations of national public policy, notwithstanding the statutory or constitutional grounds on which the alleged violations were based.[44] Not only do charitable organizations

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[37] Yaffa, *supra* note 34, at 158.

[38] *Id.* at 158.

[39] *Id.* at 158–59 ("To meet the organizational test, the applicant must show through such means as its articles of incorporation or corporate charter that it is organized exclusively for one or more exempt purposes. To meet the operational test, the organization must satisfy the Internal Revenue Service (IRS) that it engages 'primarily in activities which accomplish one or more of such exempt purposes specified in 501(c)(3).' If more than an insubstantial part of the organization's activities are not in furtherance of an exempt purpose, then the organization will not pass the 'operational' test." (citations omitted) (citing Treas. Reg. §§ 1.501(c)(3)-1(b), (c) (1960))).

[40] *See id.* at 159–60.

[41] McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972).

[42] Yaffa, *supra* note 34, at 156–57.

[43] *Id.* at 157 n.6 ("Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office [are exempt from taxation]." (quoting I.R.C. § 501(c)(3) (1976))).

[44] *See id.* at 157.

receive tax-exempt status under Section 501(c)(3), Section 170(c) provides a deduction for any contribution a taxpayer makes to a charitable organization, within certain parameters.[45] Consequently, individuals who donate to these charitable organizations that discriminate against LGBT employees also receive a reward on their personal income taxes, a benefit intended to be reserved for causes that actually help marginalized populations, such as soup kitchens or homeless shelters.

B. What Makes an Organization "Charitable"?

This Article should not be misconstrued as an attack on all religious charities because the only organizations affected by this Article's thesis would be those that actively choose to discriminate against LGBT employees or use taxpayer funding to advocate for political measures targeting minorities. The thesis does not suggest that religious organizations should have to perform same-sex marriages or photograph commitment ceremonies against their will, but it seems that the only right currently taken into account in employment discrimination cases has been religious liberty—an approach that can have devastating effects on minorities and their families.

There is no denying that many religiously affiliated organizations substantially contribute to charity—Catholic Charities being "the largest provider of social services after the federal government"[46]—but, in a case like the one in which a soccer coach was fired for telling her team that she was pregnant, there should be a balancing of interests when deciding whether a corporation should get to retain its tax-exempt status. Many churches donate food or provide shelter to the homeless or provide medical care for children. Even the Knights of Columbus donated "more than $151 million to charitable needs and projects" in a single year,[47] but these organizations should not be able to use taxpayer funding toward projects that target marginalized populations, such as anti-marriage-equality DVDs or hiring and training replacements for employees who were fired just for being gay.

This Article recognizes the value of religion in many people's lives and the services that many religious institutions provide to society, but rational minds should agree that the privilege of charitable tax exemption is being abused. Even though some 501(c)(3) organizations that discriminate against LGBT employees use part of their tax-exempt

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[45] I.R.C. § 170(a)(1), (c)(2)(B) (2006).

[46] Berg, *supra* note 18, at 224.

[47] *During the Past Decade, the Knights of Columbus Has Donated More than $1.367 Billion to Charity*, KNIGHTS OF COLUMBUS, http://www.kofc676.org/what.htm (last visited Apr. 6, 2012).

donations to aid the poor and marginalized, it is still against public policy to let taxpayer money go toward causes that directly harm minorities—especially considering that the language of Section 501(c)(3) itself prohibits political or lobbying activities.[48] Considering all things objectively, these causes do not conform to the charitable standard. Consequently, even though religious freedom will continue to be constitutionally protected, the Internal Revenue Code should not reward discriminatory organizations with tax exemptions when their actions do not conform to the charitable scrutiny test.

II. IF THE U.S. WILL NOT ENACT FEDERAL LEGISLATION TO PROTECT LGBT EMPLOYEES, THEN TAXPAYERS SHOULD AT LEAST NOT HAVE TO FUND "CHARITABLE" ORGANIZATIONS THAT DISCRIMINATE.

As long as LGBT employees have no federal statutory protection from employment discrimination, tax-exempt status for charitable organizations that discriminate against minorities from both the state and federal government violates public policy. Federal taxpayer funds especially should benefit the *entire* nation. Even scholars who argue for religious exemptions for government employees recognize that public funds should support the entire public.[49]

Allowing unfettered religious liberty to organizations funded by taxpayer money puts a substantial burden on those in favor of workplace equality that goes beyond monetary terms. For example, under the U.S. military's "Don't Ask, Don't Tell" policy,[50] nearly 3,700 active-duty soldiers were discharged between 2004 and 2009 alone.[51] Discharging these soldiers and recruiting and training their replacements cost American taxpayers more than $193 million, or about $52,800 per troop.[52] According to a report from the Government Accountability Office, "[A]bout 39% of the service members separated under the policy

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[48] I.R.C. § 501(c)(3) (2006).

[49] Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW J.L. & SOC. POL'Y 318, 319 (2010) ("Some are willing to exempt both individuals and groups who object for religious reasons to facilitating a same-sex marriage so long as they perform no government functions and receive no public funds.").

[50] The policy was enacted in 1993 as a compromise under President Bill Clinton after the Department of Defense's 1982 policy stating that homosexuality was "incompatible with military service" garnered so much support that a gay naval officer was brutally murdered. *See* Sam Jameson, *U.S. Sailor Sentenced to Life Imprisonment in Murder*, TECH, May 28, 1993, at 2; *see also* Sharon E. Debbage Alexander & Kathi S. Wescott, *Repeal of "Don't Ask, Don't Tell:" A Smooth Transition*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 129, 129 (2008).

[51] Andrew Tilghman, *Report: More than $193M Spent on 'Don't Ask, Don't Tell,'* USA TODAY (Jan. 23, 2011, 2:31 PM), http://www.usatoday.com/news/military/2011-01-21-military-cost_N.htm.

[52] *Id.*

held 'critical occupations,' such as infantryman and security forces."[53] About 98% of the troops discharged were enlisted, and of those, approximately 67% had served less than two years.[54] Additionally, some of the discharged soldiers had critical language skills, such as Arabic or Chinese,[55] losses that cannot be measured in terms of money.

Detractors might argue that many taxpayers do not want their tax dollars supporting wars overseas, but they are not allowed to stop paying taxes,[56] so taxpayers in favor of LGBT employment equality should be treated no differently. Though it is true that not all taxpayers agree with the decisions of the Department of Defense, the military does defend the entire country. When taxpayer money goes to organizations that discriminate against LGBT employees, taxpayers are forced to support organizations that not only prevent equal access to a public good but also actively try to take it away from others.[57]

Consequently, *Arizona Christian School Tuition Organization v. Winn*, a 2011 case in which the Supreme Court denied a group of taxpayers' challenge to a religious school voucher program because they lacked standing,[58] is not binding in this context because, here, taxpayers do have standing. Even if 501(c)(3) charitable organization exemptions were not considered "governmental expenditures,"[59] discriminatory organizations like Liberty University, which was founded by fundamentalist Baptist minister Jerry Falwell, received almost half a billion dollars in federal financial aid last year.[60]

When a discriminatory firing occurs, courts do not even balance the hardships faced by religious organizations against the hardships faced by LGBT employees, as many rational religious liberties scholars

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[53] *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-170, MILITARY PERSONNEL: PERSONNEL AND COST DATA ASSOCIATED WITH IMPLEMENTING DOD'S HOMOSEXUAL CONDUCT POLICY 10 (2011).

[54] Tilghman, *supra* note 51.

[55] *Id.*

[56] *See, e.g.*, Welch v. United States, 750 F.2d 1101, 1106 (1st Cir. 1985) (holding that war objectors who deducted "war tax" credits from their tax returns did so in clear violation of the law).

[57] For example, the Catholic Church using taxpayer funds to send out anti-marriage-equality DVDs. *See* Spencer, *supra* note 6.

[58] 131 S. Ct. 1436, 1440 (2011).

[59] *Id.* at 1447.

[60] *See* Liz Barry, *Liberty Tops State in Federal Aid for Its Students: Online Enrollment Spurs Big Increase in Assistance*, NEWS & ADVANCE (Mar. 27, 2011), http://www2.newsadvance.com/news/2011/mar/27/liberty-tops-state-federal-aid-its-students-ar-929147/; Alex Pareene, *Evangelical Liberty University Received Half a Billion Dollars in Federal Aid Money*, SALON.COM (Apr. 5, 2011, 11:45 AM), http://www.salon.com/life/education/index.html?story=/politics/war_room/2011/04/05/liberty_university_federal_money.

suggest they should do in other contexts.[61] These scholars reasonably argue that religious employees who do not want to perform same-sex marriages should get a hardship exception only when there is not another justice of the peace, photographer, or government clerk issuing marriage licenses available because this alone would not create a barrier to same-sex couples' rights.[62] This strategy would take both sides' harms into consideration:

> Cabining the ability to object to only those situations when no hardship for same-sex couples would result is principled: the state should not confer the right to marry with one hand and then take it back with the other by enacting broad, unqualified religious objections that could operate to bar same-sex couples from marrying.[63]

In the context of employment discrimination used to preserve religious liberties, however, no balance of competing interests occurs. Currently, in many states, religious employers can fire LGBT employees without fear of any recourse[64] and then use taxpayer money to hire and train replacements.[65] In these cases, because courts do not balance the competing interests of equal protection and religious liberty, discriminatory organizations receive a windfall.

Not only does unfettered religious liberty to discriminate against LGBT workers in hiring and firing practices unfairly burden taxpayers who are in favor of equality, it also prevents the LGBT employees themselves from having equal access to employment. LGBT employees getting fired simply for living their lives without "walking on eggshells" does not compare to getting transferred to a different department or finding another photographer in a free exercise case concerning a religious exemption. This Article respects and does not advocate eliminating the ministerial exception,[66] but an administrative or coaching job does not involve religious sacraments, and the public can differentiate between laypersons and those speaking on behalf of the church.

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[61] *See, e.g.*, Letter from Robin Fretwell Wilson et al. to Chet Culver, Governor of the State of Iowa (July 9, 2009) ("[O]ur aim is to define a "middle way" where both equality in marriage and religious liberty can be honored and respected."); *see also* Berg, *supra* note 18, at 226; Wilson, *supra* note 49, at 331.

[62] Wilson, *supra* note 49, at 331 n.70, 333; Letter from Wilson, *supra* note 61.

[63] Wilson, *supra* note 49, at 334–35.

[64] *See supra* notes 21–22 and accompanying text.

[65] Because charitable religious organizations are tax-exempt under Section 501(c)(3), they can use money that they would otherwise have to pay in taxes to hire and train these replacements.

[66] The "ministerial exception" for religious employers was recently reaffirmed by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 707 (2012) (concluding that the ministerial exception is grounded in the First Amendment).

III. CONFLICTING CONSTITUTIONAL RIGHTS: RELIGIOUS FREEDOM V. EQUAL PROTECTION

A. Religious Freedom Under the First Amendment

While religious freedom is protected under the First Amendment,[67] as the Supreme Court held in *United States v. Lee*, even constitutional amendments have rational limitations.[68] For example, the Second Amendment guarantees the right to bear arms,[69] but reasonable individuals would agree that this right should not be extended to the mentally ill or to minors under ten-years-old.[70] Hate speech may be allowed under the First Amendment,[71] but even the freedom of speech stops short of falsely yelling "Fire!" in a crowded theater.[72]

If a gun-toting, mentally-ill toddler seems beyond the realm of possibility, consider the facts of *Employment Division v. Smith*, a case in which drug rehabilitation counselors appealed a denial of unemployment benefits all the way to the Supreme Court after they were fired for using a powerful psychedelic drug called peyote for religious purposes.[73] If drug counselors could use illegal drugs for religious reasons, what would stop semi-truck drivers from doing the same? The Bible condones many dubious acts that the law does not encourage or protect, such as slavery, genocide, polygamy, misogyny, and spousal abuse.[74] Even constitutional rights have limits that must be balanced against other rights. Religious

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[67] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

[68] 455 U.S. 252, 259 (1982) ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.").

[69] U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.").

[70] *See, e.g.*, United States v. Rene E., 583 F.3d 8, 16 (1st Cir. 2009) (holding that a federal statute prohibiting juveniles from possessing handguns did not violate the Second Amendment); United States v. Milheron, 231 F. Supp. 2d 376, 377 (D. Me. 2002) (rejecting a mentally-ill defendant's argument that a federal statute denying him the right to bear arms violated due process).

[71] Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

[72] Schenck v. United States, 249 U.S. 47, 52 (1919).

[73] 494 U.S. 872, 874, 890 (1990) (holding that Oregon could prohibit sacramental peyote use consistent with the Free Exercise Clause and, thus, deny unemployment benefits to persons discharged for such use).

[74] For example, Professor Elizabeth Burleson has argued that passages in Leviticus should not be relied on to condemn homosexuality any more than to condone slavery. *See* Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 CORNELL J.L. & PUB. POL'Y 383, 422–27 (2010).

freedom should not be a catch-all defense against discrimination that allows for persecution of a marginalized minority.

Additionally, even if organizations with tax-exempt status are religion-based, coaching soccer is not a religious sacrament.[75] The zone of doctrinal transmission protected by the Free Exercise Clause includes activities such as "preaching, praying, proselytizing, and worshipping within a group."[76] Howe was not fired for refusing to perform her job.[77] In fact, her team performed exceptionally well on and off the field.[78] Howe had no choice in the matter. She was fired based on an immutable trait, which is much harsher than being given the choice to step down rather than perform same-sex marriages. Forcing religious workers to choose between supporting their families and trying to find a new job in a poor economy does not seem so harsh when compared to employees who were fired with neither a choice nor any notice. Even if Howe's employment contract contained a morality clause, it would certainly be debatable whether having a child within a committed relationship is immoral. If these employers are allowed to continue legally firing employees just for being gay, they should no longer receive taxpayer money because state action approving or encouraging discrimination violates the Fourteenth Amendment.

B. Equal Protection Under the Fourteenth Amendment

After *Employment Division v. Smith*, religious organizations worried the holding would be used as precedent to deny them other religious liberties, so they lobbied the legislatures to enact the Religious Freedom Restoration Act of 1993.[79] Even this Act was held unconstitutional as applied to the states four years later in *City of Boerne v. Flores* because the legislature usurped the judicial branch's power to interpret the Fourteenth Amendment:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. . . . While the line

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[75] Wilson, *supra* note 49, at 328 n.46 and accompanying text (noting that for many people marriage is traditionally considered a religious sacrament and, while they would not object to providing services to gays and lesbians, they would not directly facilitate a homosexual marriage).

[76] Burleson, *supra* note 74, at 421.

[77] *See* Greenberg, *supra* note 15.

[78] *Id.*

[79] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507, 536 (1997); *see also* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties,"* 84 NEB. L. REV. 795, 814–18 (2006) (chronicling the lobbying efforts of religious groups in the 1990s to overturn *Smith* by legislative means, an effort which ultimately culminated in the passage of the Religious Freedom Restoration Act).

> between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.[80]

Over the years, the debate has been, and seemingly always will be, over where to draw the line between religious freedom and equal protection.[81] It is beyond the scope of this Article to discuss the ramifications of every religious freedom statute and holding, but the basic point this Article seeks to make is that, when constitutional rights conflict, there should be a balancing of interests rather than a winner-take-all approach in which one right always trumps the other. As stated previously, conservative scholars recognize the importance of such a balance in their arguments as well.[82]

C. The Lack of Protection Against Sexual-Orientation Discrimination Under the Civil Rights Act

Denying taxpayer funding to organizations that target marginalized minorities does not stop religious groups from practicing their religions, as the Supreme Court has repeatedly ruled that tax-exempt status is a privilege rather than a right.[83] Therefore, allowing LGBT employment discrimination should not even be cast as providing an accommodation to religious liberty. In a free country, American employees should not need an accommodation to be excited about getting married or having a child. It would be nonsensical to suggest that any straight woman would be worried about getting fired for submitting a wedding announcement to the local newspaper or for having a child—especially considering the

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[80] *Boerne*, 521 U.S. at 519–20.

[81] *See, e.g.*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (2006) (providing that no government may impose substantial burdens on the religious exercise of inmates, even by laws of general applicability, unless the government has a compelling interest and the law is narrowly tailored); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (holding that the government had no compelling interest under the Religious Freedom Restoration Act to prosecute a religious group for using a hallucinogenic drug in its rituals); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–39 (1987) (holding that the religious exemption to the Civil Rights Act does not violate equal protection).

[82] *See, e.g.*, Berg, *supra* note 18, at 226; Wilson, *supra* note 49, at 331–32 & n.70.

[83] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990); Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963); *see also* Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 308–19 (2003) (citing Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983)) (explaining how recent precedents reveal that the Supreme Court may now consider tax exemption a mere privilege rather than a constitutional right).

Pregnancy Discrimination Act.[84] For LGBT employees, doing so would be like asking for an accommodation to be alive. Even under Title VII, employers must provide a reasonable accommodation to preserve the employee's status if one is available.[85]

Title VII does not extend to sexual orientation,[86] but, because LGBT employees face discrimination similar to the injustices that Title VII was enacted to prevent for other discrete and insular minorities, many states have already enacted employment protection for LGBT workers despite the federal government's inaction.[87] These states reap considerable rewards for their foresight. For instance, author and professor Kirk Snyder argues that "[g]ay male bosses produce 35 to 60 percent higher levels of employee engagement, satisfaction, and morale than straight bosses" because of LGBT employees' huge skills in adaptability, intuitive communications, and creative problem-solving as a result of "'having to dodge and weave and assess how and where they're going as they grow up.'"[88] LGBT employment protection started at the municipal level in East Lansing, Michigan in 1972.[89] Until Massachusetts acted in 1989, however, Wisconsin was the only state able to enact a statewide protection.[90] Twenty-nine states in the United States still allow employment discrimination against the LGBT community,[91] even though "ninety percent of Americans in recent Gallup polls support equal employment opportunities" for LGBT employees.[92]

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[84] *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

[85] The Equal Employment Opportunity Act of 1972 amended Title VII by mandating that employers accommodate "all aspects of [an employee's] religious observance and practice." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e(j)).

[86] *See* 42 U.S.C. § 2000e-2(a) (2006) (making it unlawful for employers to discriminate on the basis of race, color, religion, sex, or national origin).

[87] *E.g.*, CAL. GOV'T CODE § 12940(a) (West 2011 & Supp. 2012); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010 & Supp. 2012).

[88] Danielle Sacks, *Why Gay Men Make the Best Bosses: America's Most Desirable Managers All Have One Thing in Common: Homosexuality*, DETAILS, http://www.details.com/culture-trends/career-and-money/200702/why-gay-men-are-the-best-bosses?currentPage=1 (last visited Apr. 6, 2012) (citing KIRK SNYDER, THE G QUOTIENT: WHY GAY EXECUTIVES ARE EXCELLING AS LEADERS . . . AND WHAT EVERY MANAGER NEEDS TO KNOW (2006)).

[89] *See* EAST LANSING, MICH., CODE OF ORDINANCES § 22-33(b)(1) (1972); Burleson, *supra* note 74, at 413.

[90] *See* WIS. STAT. § 111.36(d)(1) (1982); Burlseon, *supra* note 74, at 414.

[91] According to the Human Rights Campaign, as of 2011, there are twenty-nine states that allow employment discrimination on the basis of sexual orientation. *See Pass ENDA Now: End Workplace Discrimination!*, HUM. RTS. CAMPAIGN, http://www.hrc.org/laws_and_elections/enda.asp (last visited Apr. 6, 2012).

[92] Berg, *supra* note 18, at 233 n.164.

Naylor's firing by the Catholic Church in Minnesota seems rather puzzling considering the state's non-discrimination law makes it an unfair employment practice

> *for an employer, because of* race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, *sexual orientation*, or age to: (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (b) *discharge an employee*; or (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.[93]

The church, however, would argue that Naylor was not fired for being gay, but, rather, her vocal opposition to church teaching. Yet, many would consider those issues inextricably intertwined. Scholars disagree whether Title VII's charitable choice provision, which allows religious organizations receiving taxpayer funds to discriminate in hiring, applies to state non-discrimination laws, but no court has ruled on the question.[94]

Though the context was marriage rather than employment, the Supreme Court of Connecticut recently held that sexual orientation is a quasi-suspect class and used an intermediate scrutiny standard to determine that the state's prohibition of same-sex marriage violated substantive due process and equal protection under the Connecticut Constitution.[95] The court concluded, "To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others."[96] Furthermore, the court reasoned, "[T]he bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even more severe than, those confronted by some groups that have been accorded heightened judicial protection."[97]

Though more and more states and individual employers are contemplating protection for LGBT workers against employment discrimination,[98] the Employment Non-Discrimination Act ("ENDA"),

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[93] MINN. STAT. ANN. § 363A.08 (West 2004) (emphasis added).

[94] Melissa McClellan, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH. & LEE L. REV. 1437, 1443 (2004).

[95] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411–12 (Conn. 2008).

[96] *Id.* at 482.

[97] *Id.* at 446.

[98] For instance, in 2011, the Virginia Senate passed a bill that would have prohibited employment discrimination on the basis of sexual orientation, but the bill did not become law because it was not voted upon by the Virginia House of Delegates. S.B. 747, 2011 Session (Va. 2011).

which would provide federal protection, is currently stalled in Congress.[99]

D. Tax Exemption and State Action

For the Fourteenth Amendment to bar a charitable organization's discriminatory use of funds, a grant of tax-exempt status must be considered state action.[100] Though the Supreme Court *has* discussed this distinction in dicta,[101] cases such as *Green v. Connally*[102] and *Bob Jones*[103] were decided on statutory grounds. Many scholars and cases point out marked differences between granting tax-exempt status and directly funding a private organization, arguing that it does not violate the Establishment Clause merely to grant tax-exempt status.[104] Granting tax-exempt status could not signify approval, they argue, because the government grants tax-exempt status to so many organizations with contrary and opposing views.[105] For example, if Planned Parenthood and the Catholic Church are both deemed nonprofits, the government cannot possibly endorse both organizations' views regarding abortion and contraception.

The distinction here—which Professor Davids fails to acknowledge or attempt to refute in his response[106]—is that religious employers use tax dollars as a sword rather than a shield, as equal rights organizations do. Though based on recent governmental declarations,[107] it seems intuitive that LGBT employment discrimination does violate the

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99 Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 4(a) (2011).

100 *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 17 (1883).

101 Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."); Green v. Connally, 330 F. Supp. 1150, 1164 (D.D.C.) (noting that private schools operating predominantly through public funds is an "*a fortiori* case of unconstitutional state action"), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

102 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

103 Bob Jones Univ. v. United States, 461 U.S. 574, 595–96 (1983); *Connally*, 330 F. Supp. at 1164–65. For a detailed analysis of the issue of tax-exempt status and state action, see generally Stephen Cohen & Laura Sager, *Why Civil Rights Lawyers Should Study Tax*, 22 HARV. BLACKLETTER L.J. 1, 14–24 (2006) and Yaffa, *supra* note 34, at 174–87.

104 Cohen & Sager, *supra* note 103, at 18.

105 Yaffa, *supra* note 34, at 184.

106 *See generally* Davids, *supra* note 5.

107 Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.").

Fourteenth Amendment if the granting of tax-exempt status were deemed state action. That connection, however, is not necessary because LGBT employment discrimination also violates public policy—the statutory grounds on which previous cases have been decided.

IV. TAX-EXEMPT STATUS HAS BEEN REVOKED IN THE PAST FOR RACIAL DISCRIMINATION, AND PROTECTION AGAINST SEXUAL-ORIENTATION DISCRIMINATION HAS EVOLVED IN A SIMILAR FASHION.

This would not be the first time the government revoked tax-exempt status as a result of discrimination. Several state and federal cases over the years have addressed racial discrimination at publicly funded institutions.[108] Private schools promoting racial segregation and prohibiting miscegenation have not been able to pass the charitable scrutiny test as a violation of public policy, regardless of any purported biblical or religious justification.[109] Even now, however, courts disagree whether sexual orientation constitutes a suspect class similar to race.[110]

In determining whether a group should be considered a suspect class for purposes of the Equal Protection Clause, courts generally consider whether the minority group is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,"[111] and whether the trait making the members of the class a minority is immutable.[112] Even conceding inherent differences between racial and sexual orientation discrimination,[113] however, many recent governmental declarations illustrate that discrimination against the LGBT community alone violates public policy.[114] Therefore, notwithstanding differing opinions about whether the LGBT community should be considered a suspect class, organizations discriminating based on sexual orientation

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[108] *Bob Jones*, 461 U.S. at 580–81; Norwood v. Harrison, 413 U.S. 455, 462 (1973); Goldsboro Christian Sch., Inc. v. United States, 436 F. Supp. 1314, 1317 (E.D.N.C. 1977); Green v. Connally, 330 F. Supp. 1150, 1156 (D.D.C. 1970), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[109] *E.g.*, *Bob Jones*, 461 U.S. at 580, 592, 595–96.

[110] *Compare* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ("[S]trict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect . . . .") *with* Conaway v. Deane, 932 A.2d 571, 616 (Md. 2007) ("[W]e decline on the record in the present case to recognize sexual orientation as an immutable trait and therefore a suspect or quasi-suspect classification.").

[111] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[112] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[113] *See* Berg, *supra* note 18, at 235 (noting several differences between racial and sexual-orientation discrimination).

[114] *See supra* note 27.

should not be rewarded with tax-exempt status for violating public policy.

A. Green v. Connally

In *Green v. Kennedy*, a federal district court ordered a preliminary injunction preventing the IRS from granting tax-exempt status to any Mississippi private schools practicing racial discrimination.[115] In 1970, a group of black "Federal taxpayers and their minor children attending public schools in Mississippi" brought a class action lawsuit to enjoin the Secretary of the Treasury from granting tax-exempt status to private schools that practiced racial discrimination in their admissions practices.[116] The name of the case changed before trial when John Connally replaced David Kennedy as Secretary of the Treasury,[117] but another development affected the case more substantially. On July 10 and 19, 1970, the IRS issued two releases stating that it "[could] no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor [could] it treat gifts to such schools as charitable deductions for income tax purposes."[118]

Testifying before the Senate Select Committee on Equal Educational Opportunity, the Commissioner of Internal Revenue stated, "An organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of section 501(c)(3) and section 170, must meet the tests of being 'charitable' in the common-law sense."[119] The IRS found that racial discrimination failed that test, declaring, "[T]he Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools."[120] Consequently, because the IRS changed its position, litigation was no longer necessary.

In dictum, however, the court found that the Internal Revenue Code should be construed to avoid frustrations of public policy.[121] The court

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[115] Green v. Kennedy, 309 F. Supp. 1127, 1140 (D.D.C. 1970).

[116] *Id.* at 1129.

[117] Yaffa, *supra* note 34, at 162 n.34.

[118] Green v. Connally, 330 F. Supp. 1150, 1156 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (internal quotation marks omitted).

[119] *Id.* (quoting *Hearings Before the S. Select Comm. on Equal Educ. Opportunity*, 91st Cong. 1995 (1970)) (internal quotation marks omitted) (statement of Randolph W. Thrower, Comm'r of Internal Revenue).

[120] *Id.*

[121] *Id.* at 1161 ("[T]he Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy.").

based its analysis on *Tank Truck Rentals, Inc. v. Commissioner*.[122] In *Tank Truck Rentals*, a case disallowing tax deductions for fines that truck drivers paid for violating maximum weight restriction laws, the Court held, "A finding of 'necessity' cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof."[123] The *Green* Court also cited the Thirteenth Amendment,[124] *Brown v. Board of Education*,[125] and the Civil Rights Act of 1964[126] as examples of governmental declarations evidencing the nation's view that racial discrimination violates public policy.[127]

B. Norwood v. Harrison

Three years later, in *Norwood v. Harrison*, the Supreme Court held unconstitutional a state-run program that supplied and lent textbooks to Mississippi schools without regard to their racially discriminatory practices.[128] Parents of children in the school complained that, by supplying textbooks to students attending racially segregated schools, the program provided direct funding to racially segregated education and impeded desegregation in public schools.[129] In striking down the program, the Court reasoned, "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[130]

C. Goldsboro Christian Schools v. United States

In *Goldsboro Christian Schools v. United States*, a private, religious school in North Carolina sued the federal government to recover taxes that had been withheld under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.[131] The school, which was heavily influenced by the fundamentalist Second Baptist Church of Goldsboro, maintained a racially discriminatory admissions policy based

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[122] *Id.* at 1162.

[123] 356 U.S. 30, 31, 33–34 (1958).

[124] U.S. CONST. amend. XIII.

[125] 347 U.S. 483 (1954).

[126] Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000(d) (2006)).

[127] *Green*, 330 F. Supp. at 1163.

[128] 413 U.S. 455, 457–58, 471 (1973).

[129] *Id.* at 457.

[130] *Id.* at 470.

[131] 436 F. Supp. 1314, 1315–16 (E.D.N.C. 1977).

upon its interpretation of the Bible.[132] The school never received a determination from the Commissioner of Internal Revenue that it qualified as a 501(c)(3) tax-exempt organization, yet it paid teachers' salaries—even providing them with housing—without withholding taxes required under the law.[133] Analyzing case law precedent and the legislative intent behind Section 501(c)(3), the court reasoned that "[s]ince benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy."[134] Looking to *Green v. Connally*, the court held that the Treasury Department could validly disallow tax benefits to racially discriminatory schools because "there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation"[135] and that "the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion."[136]

D. Bob Jones University v. United States

The Supreme Court granted certiorari in *Bob Jones University v. United States* to decide whether nonprofit, private schools enforcing racially discriminatory admissions practices qualify for tax-exempt status under Section 501(c)(3).[137] Scholars uniformly consider *Bob Jones* the seminal case concerning discrimination by tax-exempt charities,[138] since the case also incorporated the appeal from *Goldsboro*,[139] and *Norwood* narrowly dealt with a particular program rather than nonprofit status as a whole.[140] Like Goldsboro Christian School, at one point in its history, Bob Jones University completely excluded black students.[141] In

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[132] *Id.* at 1316–17.

[133] *Id.* at 1317.

[134] *Id.* at 1318.

[135] *Id.* at 1319–20 (quoting *Green*, 330 F. Supp. at 1163) (internal quotation marks omitted).

[136] *Id.* at 1320.

[137] 461 U.S. 574, 577 (1983).

[138] *See, e.g.*, Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 199 n.69 (2004) (referring to *Bob Jones* as the "seminal tax exemption case"); Mindy Herzfeld, *Restricting the Flow of Funds from U.S. Charities to International Terrorist Organizations—A Proposal*, 56 TAX LAW. 875, 879 (2003) (calling *Bob Jones* one of the most important cases concerning the revocation of tax-exempt status for charities engaging in activities that violate public policy).

[139] *Bob Jones Univ.*, 461 U.S. at 583–85.

[140] Norwood v. Harrison, 413 U.S. 455, 458 (1973).

[141] *Bob Jones Univ.*, 461 U.S. at 580, 583.

1971, Bob Jones began to permit blacks married within their own race to apply.[142] Forced by precedent in 1975, the university finally began to admit unmarried black students but continued to prohibit interracial dating or marriage.[143]

The Court emphasized, "[A] declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[144] It subsequently listed numerous indicia why "racial discrimination in education violates deeply and widely accepted views of elementary justice."[145] Chief Justice Burger, writing for the majority, explained,

> Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept . . . or within the congressional intent underlying § 170 and § 501(c)(3).[146]

E. Romer v. Evans

In a landmark decision for LGBT rights, the Supreme Court in *Romer v. Evans* struck down an amendment to the Colorado Constitution that would have barred any governmental action intended to protect homosexuals from discrimination.[147] The case is a clear indication that, in the eyes of the Supreme Court, discrimination against LGBT persons also violates public policy. Justice Kennedy rejected the argument that the LGBT community was looking for special protection by recognizing, "These are protections taken for granted by most people either because they already have them or do not need them . . . ."[148]

F. Cradle of Liberty Council v. City of Philadelphia

Even before *Boy Scouts of America v. Dale*—which held that under the First Amendment Freedom of Association a private organization could exclude a person from membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints"[149]—the American public had already questioned whether it should have to support discrimination. According to the

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[142] *Id.* at 580.

[143] *Id.*

[144] *Id.* at 592.

[145] *Id.* at 592–96.

[146] *Id.* at 595–96.

[147] 517 U.S. 620, 630, 635–36 (1996).

[148] *Id.* at 631.

[149] 530 U.S. 640, 648 (2000) (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988)).

American Civil Liberties Union, "About 360 school districts and 4,500 schools in 10 states have terminated sponsorship of scout activities because of the scouts' stand on homosexuals."[150] Though the case was eventually settled rather than appealed to the Supreme Court, taxpayers in Philadelphia also did not agree that a discriminatory organization should receive the benefit of using a public building and, therefore, revoked the discriminating organization's license.[151]

G. Christian Legal Society v. Martinez

Like most of the previously mentioned cases involving discrimination sanctioned by public funding in some form, *Christian Legal Society v. Martinez* involved a religious organization that wanted to keep its university funding and status as an official university group based on its First Amendment rights, despite its exclusion of a marginalized minority group.[152] The Christian Legal Society ("CLS") chapter at the University of California Hastings College of the Law wanted recognition as, and benefits of, being a "Registered Student Organization," but the university's non-discrimination policy required that all student groups "not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[153] CLS claimed that sexual *conduct* rather than status was its concern, but that argument seems hypocritically disingenuous considering that of the eighty-eight percent of unmarried young adults (ages eighteen to twenty-nine) in the United States who report having premarital sex, eighty percent self-identify as "evangelicals."[154] In upholding the school's policy, the Court disagreed with CLS's argument that it was prohibiting membership based on homosexual conduct rather homosexual status,[155] further adding to the growing national sentiment that sexual orientation should be treated with heightened scrutiny for

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[150] Nathan Gorenstein, *Federal Jury Decides in Favor of Scouts*, PHILLY.COM (June 23, 2010), http://articles.philly.com/2010-06-23/news/24961775_1_city-solicitor-shelley-smith-cradle-of-liberty-council-national-scout-policy.

[151] Cradle of Liberty Council, Inc. v. City of Philadelphia, No. 08-2429, slip op. at 7 (E.D. Pa. Mar. 2, 2010) (requiring the organization to post bond to accompany a previously issued preliminary injunction); *see also* Nathan Gorenstein, *Philadelphia, Boy Scouts in Talks to Settle Dispute over Headquarters*, PHILLY.COM (July 30, 2010), http://articles.philly.com/2010-07-30/news/24970975_1_antigay-policy-national-scout-policy-boy-scouts-first-amendment.

[152] 130 S. Ct. 2971, 2979–81 (2010).

[153] *Id.* at 2979–80.

[154] Tyler Charles, *(Almost) Everyone's Doing It*, RELEVANT, Sept.–Oct. 2011, at 64, 65, *available at* http://www.relevantmagazine.com/digital-issue/53?page=66.

[155] *Martinez*, 130 S. Ct. at 2990.

purposes of judicial review and that discrimination against the LGBT community runs contrary to public policy.[156]

V. HOW DO OTHER NATIONS HANDLE THE CONSTITUTIONAL CONFLICTS BETWEEN EQUAL PROTECTION AND RELIGIOUS LIBERTY?

Fifty-four countries throughout the world completely prohibit employment discrimination against the LGBT community.[157] Though some scholars argue it is not only irresponsible but also dangerous to look to other countries' interpretations of their constitutions due to the many existing variables,[158] others argue that this information can only help the United States inform its analysis.[159] For the same reasons that motivate individuals to ask their friends and families for advice knowing that they might think of something their own emotional state precluded, it can be helpful for the United States to seek an outside perspective on

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[156] *See* Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 139, 164 (2010) (arguing that same-sex couples should be considered a "suspect class," and, therefore, that laws that oppress the homosexual class should be reviewed by courts under a heighted judicial scrutiny); Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 68–69 (2010) (concluding that, considering the public policy rationales underlying marriage laws, marriage should not be limited only to opposite-sex couples); Evan Perez, *Reversal on Gay Marriage: In Legal Shift, Obama Administration Contends Same-Sex Ban Unconstitutional*, WALL ST. J., Feb. 24, 2011, at A3 ("The administration's latest legal reversal shows how the gay-rights drive is gaining steam in Washington, after years in which a handful of states took the lead by legalizing gay marriage.").

[157] According to a 2011 report by The International Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA"), fifty-four countries prohibit employment discrimination against the LGBT community. *See* EDDIE BRUCE-JONES & LUCAS PAOLI ITABORAHY, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASSOC., STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS 12 (2011), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf.

[158] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (Scalia rejecting the argument that "American law should conform to the laws of the rest of the world"); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 437 (1985) ("Comparison is considered useful only with regard to laws that fulfill the same function.").

[159] *See, e.g.*, *Roper*, 543 U.S. at 576–78 (majority opinion) (Justice Kennedy citing favorably to international law in making his argument regarding capital punishment); Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691–93 (1976) (arguing that comparative constitutional law has the following five values: (1) it provides Americans with insight into other constitutional democracies; (2) it can be helpful in defining "public good" and "right political order"; (3) it can "enrich the study of comparative politics"; (4) it can "enrich the study of American constitutional law"; and (5) it can "contribute to the growth of American Constitutional law"); *see also* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 615–16 (2001) (noting that U.S. courts are citing institutions that are not that different from American courts and that they are engaged in the same basic tasks).

constitutional law matters as well. Though factors ranging from politics to cultural mores to even geography make certain laws inapplicable or at least impractical in other parts of the world,[160] without at least considering any other options, it is irrational to continue assuming that the United States's policies are complete or the best.

A. Canada

Unlike the United States, Canada regulates family law nationally.[161] Under the Canadian Charter of Rights and Freedoms "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[162] Though United States judges and justices often quibble about the Founders' original intent regarding subjects our Founders could not have possibly fathomed, the Ontario Court of Appeals evidenced its "living document" interpretation of the Canadian constitution by remarking in 2003, "[T]o freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation."[163] This quote becomes somewhat ironic in context knowing that Canada did not recognize Catholic marriages before 1847 or Jewish marriages until 1857.[164] The LGBT community would logically follow as a sympathetic case to religious organizations, considering religious discrimination has historically even led to Diasporas.

Looking to Canada for advice regarding the conflict between civil rights and religious liberties in employment law would certainly not be the first time that American courts have looked to Canadian courts for guidance. For instance, the Massachusetts Supreme Court cited Canadian decisions in *Goodridge v. Department of Public Health*, its historic decision granting same-sex couples the right to marry in Massachusetts.[165] Canadian courts have in turn analyzed American cases in their opinions.[166] Regarding the application of various levels of

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[160] For this very reason, I chose the two countries that many would consider culturally and socially most like the United States: Canada and the United Kingdom.

[161] *See* Burleson, *supra* note 74, at 395.

[162] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.).

[163] Halpern v. Toronto (2003), 65 O.R. 3d 161, 175 (Can. Ont. C.A.).

[164] Burleson, *supra* note 74, at 394.

[165] 798 N.E.2d 941, 948 n.3 (Mass. 2003) (citing *Halpern*, 65 O.R. 3d at 161; Egale Canada, Inc. v. Canada (Att'y Gen.) (2003), 13 B.C.L.R. 4th 1 (Can. B.C. C.A.).

[166] The Canadian Supreme Court has cited American law on a number of substantive issues. *See, e.g.*, Canadian Nat'l Ry. v. Norsk Pac. S.S., [1992] 1 S.C.R. 1021,

scrutiny to laws in both Canada and the United States, Professor Burleson notes,

> Section I of the Charter of Rights and Freedoms requires that there be proportionality and a rational connection between the objective of a law and the means selected to achieve it, a standard on par with the lowest level of scrutiny that federal courts in the United States apply to a law passed by the federal government.[167]

Though many viewed it as the result of an attempt to change its reputation rather than a genuine attempt to advance human rights, Quebec became the first North American jurisdiction to prohibit discrimination based on sexual orientation in 1977.[168] The Canadian Human Rights Act, originally passed in 1976, followed suit in 1996, adding an amendment to include sexual orientation—something the United States Congress has yet to add to Title VII.[169] As early as 1992, Canadian courts overturned laws discriminating against the LGBT community, such as bans on military service and restrictions on same-sex partner employment benefits.[170] Though the United States did finally repeal its "Don't Ask, Don't Tell" policy amid much controversy in late 2010,[171] according to a report by the Human Rights Campaign, many other nations had already prohibited similar discrimination, including Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.[172]

A marriage commissioner in Saskatchewan, Canada was even fined by the Human Rights Tribunal after refusing to perform ceremonies for same-sex couples.[173] Though a decision like this still seems quite far off in the United States, American scholars should follow Canadian courts and statutes as they seem to be a good indication of our future, being only a few decades ahead of America's progress.

1074 (Can.) (tort and contract law); Carey v. Ontario, [1986] 2 S.C.R. 637, 659–60 (Can.) (executive immunity); *see also* Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 217 (1994) (Former Justice of the Supreme Court of Canada discussing the increasing use of American law by the Canadian Supreme Court in recent years).

[167] Burleson, *supra* note 74, at 396.

[168] *See id.* at 396–97.

[169] *Id.* at 397–98. *Compare* Canadian Human Rights Act, S.C. 2004, c. 14 § 3(1) (Can.) (making discrimination on the basis of sexual orientation a violation of human rights), *with* 42 U.S.C. § 2000e-2 (2006) (failing to make sexual-orientation discrimination an unlawful employment practice).

[170] Burleson, *supra* note 74, at 398.

[171] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. 654 § (2006)).

[172] *See* Burleson, *supra* note 74, at 410.

[173] Wilson, *supra* note 49, at 328.

Though Americans still vigorously debate whether sexual orientation is caused genetically or environmentally, one Canadian justice took a mature stance when he remarked that it is truly irrelevant, and the mere fact that society continues this debate only causes pain to those already downtrodden.[174] Overturning a ban on benefits to a same-sex couple in a forty-six-year relationship that straight couples who had been together only one year in Canada received, former Canadian Supreme Court Justice Gerard V. La Forest explained,

> [W]hether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of [the Canadian Charter of Rights and Freedoms] protection as being analogous to the enumerated grounds.[175]

Many Americans still oppose same-sex marriage, and some still believe that employment discrimination is not wrong based on their own particular religion, but Canada shows compassion for sexual orientation in the same way it halted discrimination against religious minorities.

B. United Kingdom

Because the United Kingdom does not have a written constitution,[176] it is slightly more difficult to compare to the United States, yet it nonetheless is a leader in progress toward equality. The United Kingdom's Constitution comprises various documents, including "statutes, European Union legislation, the common law, and conventions."[177] Most notable for human rights progress in the United Kingdom, however, was the Human Rights Act of 1998, which incorporated the European Convention on Human Rights ("ECHR").[178] Article 8 of the ECHR provides,

> Everyone has the right to respect for his private and family life, his home and his correspondence. . . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

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[174] *See* Egan v. Canada, [1995] 2 S.C.R. 513, 528–29 (Can.).

[175] *Id.*

[176] Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 15–16 (2007).

[177] *Id.* at 16.

[178] Human Rights Act, 1998, c. 42 (U.K.); *see also* Cumper, *supra* note 176, at 16.

protection of health or morals, or for the protection of the rights and freedoms of others.[179]

Though some might argue that the provision regarding the "protection of health or morals" might exclude the LGBT community, the European Court of Human Rights in 1981 used Article 8(2) to strike down Northern Ireland's anti-sodomy law.[180] Because the morality clause did not preclude same-sex relationships between consenting adults in that case, definitions of morality that discount the LGBT community could be considered merely subjective. Not everyone is going to agree with or approve of what everyone else does, but in a modern, civilized society, balancing harms suggests that one group's ideals do not justify discrimination against another. As Professor Burleson observed regarding Europe's leadership in recognizing human rights, "As new countries have sought membership in the European Union, each has had to address the substantial level of discrimination against sexual minorities that remained pervasive and legally sanctioned within its borders."[181]

CONCLUSION

Though LGBT employees can take comfort in the repeal of the discriminatory and expensive "Don't Ask, Don't Tell" policy[182] and the fact that even Belmont University has adopted a new non-discrimination policy in the wake of Lisa Howe's firing,[183] LGBT employees can still be fired just for being gay in twenty-nine states.[184] Because these discriminatory actions by 501(c)(3) charitable organizations violate notions of freedom, equality, and public policy, the Internal Revenue Code should cease rewarding them with tax-exempt status now that we have several declarations that discrimination based on sexual orientation is against public policy. Professor Davids's response dwells on the novelty of these declarations, arguing that sexual orientation has not been a protected class for most of our nation's history,[185] but slavery,

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[179] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, 230.

[180] *See* Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. 149, 151, 165–70 (1981).

[181] Burleson, *supra* note 74, at 404 (citing ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 95 (1995)).

[182] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654 (2006)); *see also* William Branigin et al., *Obama Signs DADT Repeal Before Big, Emotional Crowd*, WASH. POST (Dec. 22, 2010, 11:49 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122201888.html.

[183] Travis Loller, *Belmont Changes Policy After Gay Coach Protest*, USA TODAY (Jan. 26, 2011, 8:24 PM), http://www.usatoday.com/sports/soccer/2011-01-26-1707853827_x.htm.

[184] *See supra* note 91.

[185] *See* Davids, *supra* note 5, at 444–53.

racism, and sexism were all commonplace at one time as well. Just because an idea is popular with the majority in power for a significant period of time does not mean that it is correct. At various periods throughout history the majority also believed the earth was flat and the sun revolved around it. Consequently, until the United States adopts the human rights norms followed in much of the rest of the world, our federal government should at least stop incentivizing discrimination by granting tax-exempt status.

PROTECTING CONSCIENCE THROUGH LITIGATION: LESSONS LEARNED IN THE LAND OF BLAGOJEVICH†

*Francis J. Manion**

> Resolved, That the guarantee of the rights of conscience, as found in our Constitution, is most sacred and inviolable, and one that belongs no less to the Catholic, than to the Protestant; and that all attempts to abridge or interfere with these rights, either of Catholic or Protestant, directly or indirectly, have our decided disapprobation, and shall ever have our most effective opposition.[1]
> —Abraham Lincoln

> [Illinois] pharmacists with moral objections [to dispensing certain drugs,] should find another profession.[2]
> —Governor Rod Blagojevich

INTRODUCTION

On April 1, 2005, Illinois Governor Rod Blagojevich issued an Emergency Amendment to the Illinois Pharmacy Practice Act requiring all Illinois retail pharmacies to dispense all Federal Drug Administration ("FDA") approved contraceptives "without delay."[3] The Emergency Amendment ("the Rule" or "the Emergency Rule") contained no exemption for pharmacists or pharmacy owners with religious objections to selling any forms of contraception, particularly contraception considered by the pharmacists to be abortifacient in

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1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 338 (Roy P. Basler et al. eds., 1953) (quoting a resolution proposed by Abraham Lincoln to a meeting of the Whig Party in Springfield, Illinois, on June 12, 1844).

2 Morr-Fitz v. Blagojevich, 231 Ill. 2d 474, 501 (2008) (quoting a statement made by Governor Rod Blagojevich) (internal quotation marks omitted).

3 Press Release, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005) [hereinafter Press Release, Gov. Blagojevich Takes Emergency Action] (on file with author).

nature.[4] The Blagojevich Emergency Rule brought to a boil a simmering controversy about conscience rights and gave rise to a series of lawsuits whose starts and stops and twists and turns provide a useful framework for examining how litigation can be used effectively to protect the rights of conscience of pro-life citizens in the medical profession. In Parts I and II, this Article looks at the sources of the controversy. Part III proceeds with an account of the Illinois pharmacists' legal battle against the Blagojevich Emergency Rule. Part IV discusses the various lawsuits brought in response to the Rule, the legal strategies employed, the arguments advanced, and the results obtained. The Article concludes, in Part V, with a review of the lessons learned from a legal standpoint—which strategies worked and which failed—along with some observations about which of those lessons learned in the Illinois battle show promise for pro-life medical professionals who find themselves involved in similar struggles elsewhere.

I. THE BACKGROUND

One of the effects of the Supreme Court's decisions in *Roe v. Wade*[5] and *Doe v. Bolton*[6] was the creation within the American health care system of a potential class of conscientious objectors of a kind and on a scale previously unknown.[7] The Court's 1973 decisions, effectively striking down the abortion laws of all the states, placed in jeopardy the consciences of health care professionals for whom participation in abortion was the equivalent of participating in an act of killing an innocent human being. Yet, at the same time the Court was legalizing abortion, the Court itself recognized the potential clash between its decision and the consciences of those to whom abortion was repugnant, and expressly recognized—and, at least arguably, upheld—the constitutionality of statutory measures designed to protect the right of conscience. In *Doe v. Bolton*, the Court unanimously upheld Section 26-1202(e)[8] of the Georgia abortion law at issue in that case.[9] Justice

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[4] Press Release, Office of the Governor, State Comm'n Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Ill. Women's Right to Birth Control (Aug. 16, 2005) [hereinafter Press Release, State Comm'n Gives Permanent Approval to Emergency Rule] (on file with author).

[5] 410 U.S. 113 (1973).

[6] 410 U.S. 179 (1973).

[7] *See generally* Eric M. Uslaner & Ronald E. Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the* Roe *and* Doe *Decisions*, 77 MICH. L. REV. 1772, 1780 (1979) ("The abortion policies of *Roe* and *Doe* have not been legitimized. We have not seen substantial increases in public support for abortion after the Court decisions; instead, we have witnessed a hardening of positions by many who were opposed to abortions. The issues have become increasingly salient rather than resolved.").

[8] The Court in *Doe* quoted the Georgia statute, including the relevant subsection:

Blackmun described the provisions of that statute as providing that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure."[10] Blackmun's opinion on this issue was joined by the entire Court, leading Professor Lynn Wardle to note,

> Thus, not merely the author of *Roe*, Justice Blackmun, and not merely the majority of justices on the Court, but all nine justices in the seminal abortion cases, expressed clearly that statutory conscience protections for both individual and institutional health-care providers are constitutionally permissible. The constitutionality of "conscience clause" legislation in principle cannot be in doubt as a matter of general constitutional principle after *Doe*.[11]

In response to *Roe* and *Doe*, and the green light given to conscience-protecting legislation as noted above, state and federal legislatures enacted a patchwork of "conscience clauses."[12] These laws range in scope from measures that cover broad classes of potential objectors and objectionable procedures to laws that are narrowly focused on one or two categories of medical personnel performing abortions.[13] On the state level, some forty-seven state legislatures have over the years enacted conscience legislation directly addressing the moral and ethical dilemma faced by those seeking to remain fully engaged in the provision of health care within a system that, post *Roe* and *Doe*, is required to include the provision of services many find morally and ethically unacceptable.[14]

The state conscience laws are, however, anything but uniform in scope. To illustrate the available spectrum of conscience protections among state laws, contrast North Carolina's conscience law, which provides protection only to physicians and nurses who refuse to

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> Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

Doe, 410 U.S. at 205 (quoting GA. CODE ANN. § 26-1202(e) (1968)).

[9] *Id.* at 201–02, 205.

[10] *Id.* at 197–98.

[11] Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 18–19 (2010).

[12] *Id.* at 27.

[13] *Id.* at 27–28, 34 & n.123.

[14] *See id.* at 27.

participate in abortions,[15] with Illinois's Health Care Right of Conscience Act,[16] which makes it unlawful for "any person, public or private institution, or public official to discriminate against any person in any manner, . . . because of such person's conscientious refusal to . . . participate in any way in any particular form of health care services contrary to his or her conscience."[17] The North Carolina law hews closely to the relatively narrow language and scope of the Georgia provision upheld in *Doe*.[18] The Illinois statute, on the other hand, opens up the widest vista of conscience protection imaginable.[19] For those who favor broad conscience protection in health care, the Illinois Health Care Right of Conscience Act has long been the "gold standard."

On the federal level, the "Church Amendment" appears to offer conscience protection to a class of individuals and procedures as broad as

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[15] N.C. GEN. STAT. § 14-45.1(e) (2009) ("Nothing in this section shall require a physician licensed to practice medicine in North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion. The refusal of such physician to perform or participate in these medical procedures shall not be a basis for damages for such refusal, or for any disciplinary or any other recriminatory action against such physician.").

[16] The Illinois Health Care Right of Conscience Act provides in pertinent part as follows:

> Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of *all persons* who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

745 ILL. COMP. STAT. ANN. 70/2 (West 2010) (emphasis added).

> Liability. No physician or health care personnel shall be civilly or criminally liable to any person, estate, public or private entity or public official by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.

Id. at 70/4.

[17] *Id.* at 70/5.

[18] *Compare* Doe v. Bolton, 410 U.S. 179, 197–98 (1973) (citing GA. CODE ANN. § 26-1202(e) (1968)) (permitting conscience protections for hospitals and physicians), *with* N.C. GEN. STAT. § 14-45.1(e) (2009) (providing conscience protections solely to physicians and nurses).

[19] *See* 745 ILL. COMP. STAT. ANN. 70/2, 70/4 (West 2010) (providing broad conscience protections to "all persons" involved in the health-care industry in addition to explicitly protecting physicians and health care personnel).

those set forth in the Illinois Health Care Right of Conscience Act.[20] Unlike the Illinois statute, however, the Church Amendment was drafted without the enforcement mechanism of a private right of action. And, thus far, arguing to the courts that a private right of action is implied under the law has proven unavailing.[21] Other federal conscience measures also lack any effective enforcement mechanisms for private citizens seeking to invoke their protection.[22]

In addition to specific "conscience clause" measures, enacted expressly to respond to the Supreme Court's legalization of abortion, First and Fourteenth Amendment arguments in favor of the right of conscience have been advanced by those seeking conscience protection.[23] As discussed below, despite dire warnings of the "end of free exercise" following the Supreme Court's decision in *Employment Division v. Smith*,[24] arguments that certain conscience-coercing statutory and regulatory measures violate the Free Exercise Clause have proven successful on occasion.[25] In addition, state Religious Freedom Restoration Acts ("RFRA")—enacted in response to *Smith*—have also been invoked in conscience litigation.[26] Also widely invoked in the area of

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[20] 42 U.S.C. § 300a-7(c)(1) (2006) provides in pertinent part as follows:

> No entity which receives a grant, contract, loan, or loan guarantee under [certain statutory schemes governing federal health care funding] . . . may . . . discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

[21] *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698–99 (2d Cir. 2010); Nead v. Bd. of Trs. of E. Ill. Univ., No. 2:05-cv-02137-HAB-DGB, slip op. at 6 (C.D. Ill. June 6, 2006); Moncivaiz v. Dekalb, No. 3:03-cv-50226, slip op. at 1 (N.D. Ill. Mar. 12, 2004).

[22] *See, e.g.*, 42 U.S.C. § 238n (2006) (disallowing Federal funds when there is abortion-related discrimination in governmental activities regarding training and licensing of physicians, but lacking an enforcement mechanism); *see also* Hyde-Weldon Amendment, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

[23] *See infra* Part III.A.

[24] 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause permits Oregon to prohibit religious peyote use and thus deny unemployment compensation to respondents using the drug).

[25] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding that city ordinances prohibiting religious practices violated the Free Exercise Clause); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (holding that the Department's policy regarding the wearing of beards by officers for religious reasons violated the Free Exercise Clause).

[26] *See, e.g.*, Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 233–34 (3d Cir. 2008).

conscience protection is Title VII of the Civil Rights Act of 1964.[27] Although not necessarily the first place one might look for legal defense against public or private threats to conscience rights, Title VII has, in fact, proven a most flexible and effective tool in preventing or redressing specific threats to conscience rights, at least when those threats have arisen in the workplace.

II. CONSCIENCES IN CONFLICT WITH "EMERGENCY CONTRACEPTION"

In the post-*Roe/Doe* period, it must be admitted that reported instances of government or private actors compelling, or threatening to compel, unwilling objectors to directly perform or participate in surgical abortions, including suction aspiration, dilation and curettage, or dilation and evacuation procedures, have been relatively rare.[28] But with the FDA's 1997 approval of the Yuzpe regimen of post-coital contraception, followed soon thereafter by widespread U.S. marketing of various forms of "emergency contraception," "morning-after pills," and "Plan B," there occurred an upsurge in conscientious objection claims that shows no sign of subsiding anytime soon.[29] "Emergency contraception" became the catalyst for new attention to conscience clauses and conscience cases for several reasons: (1) disagreement about whether emergency contraception drugs or regimens may properly be seen as causing abortions;[30] (2) ambiguity in existing conscience laws about whether such laws cover procedures other than surgical abortions;[31] (3) ambiguity in existing conscience laws about who may

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[27] *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 995, 1002–03 (C.D. Ill. 2006) (illustrating plaintiffs' successful use of Title VII as a legal defense against threats to conscience rights).

[28] *But see* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 696 (2d Cir. 2010) (detailing an account of a nurse's supervisors compelling her to participate in a late-term abortion against her conscientious objections); Settlement Order at 1, Danquah v. UMDNJ, No. 2:11-cv-06377-JLL-MAH (D.N.J. Dec. 23, 2011), ECF No. 41 (detailing a case where employers required employees to perform terminations of pregnancies, which were contrary to the employees' religious beliefs and moral convictions).

[29] *See* R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2471 (2005); Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83, 91 (2006); Jessica D. Yoder, Note, *Pharmacists' Right of Conscience: Strategies for Showing Respect for Pharmacists' Beliefs While Maintaining Adequate Care for Patients*, 41 VAL. U. L. REV. 975, 1010 (2006).

[30] *See* Yoder, *supra* note 29, at 978–80 (describing the conflict between different medical/scientific studies and opinions); *see also* Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 85 (2002–03) (explaining that the conflict as to whether emergency contraception constitutes abortion stems from different views of "when human life begins").

[31] *See* Herbe, *supra* note 30, at 97–98.

claim their protection;[32] and (4) the venue where emergency contraception is typically sought, or the retail pharmacy as opposed to the privacy of the physician's office or a clinic.[33]

With regard to the first reason, there is no room for doubt about what happens in a surgical abortion: A pregnant woman undergoes a medical procedure the purpose and effect of which is to terminate the pregnancy by any one of a number of medical techniques. For those who hold that human life begins at fertilization, and whose religious or ethical principles forbid them to participate in the direct taking of an innocent human life, participating in such a procedure is obviously unacceptable. In emergency contraception, on the other hand, there is at least room for scientific debate about whether the action of the drugs used terminates a pregnancy or merely prevents pregnancy from occurring.[34] Much of the ambiguity here can be traced to the still controversial actions of the American College of Obstetricians and Gynecologists ("ACOG"), the American Medical Association ("AMA"), and the FDA in defining pregnancy as beginning at implantation as opposed to fertilization.[35] By defining pregnancy as beginning at implantation, and by assuming *sub silentio* that the beginning of pregnancy marks the beginning of human life, it is logical to conclude that drugs that merely prevent (sometimes) the implantation of the blastocyst in the uterine wall merely prevent pregnancy from occurring and thus cannot be seen as causing an abortion. For those who believe that human life begins at fertilization, however, regardless of when "pregnancy" is said to begin, administering drugs that prevent implantation in the uterine wall

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[32] *See id.* at 98.

[33] *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 1001 (C.D. Ill. 2006). Plaintiffs alleged that the Emergency Rule applies only to Division I pharmacies, not hospitals and emergency rooms. *Id.*

[34] *See* Yoder, *supra* note 29, at 979–80 n.27; FDA Center for Drug Evaluation and Research, *FDA's Decision Regarding Plan B: Questions and Answers,* FDA (May 7, 2004), *available at* http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm (providing the FDA's description of how Plan B works).

[35] Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant,* GUTTMACHER REP. ON PUB. POL'Y, May 2005, at 7, 7 ("In fact, medical experts—notably the American College of Obstetricians and Gynecologists (ACOG)—agree that the establishment of a pregnancy takes several days and is not completed until a fertilized egg is implanted in the lining of a woman's uterus."); Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception,* 17 J.L. & Health 77, 86 (2002–03) ("The American Medical Association (AMA) equates conception, and in effect the beginning of life, with the implantation of the blastocyst in the woman's uterus."); Walter L. Larimore et al., *In Response: Does Pregnancy Begin at Fertilization?* 36 FAM. MED. 690, 690 (2004); Yoder, *supra* note 29, at 979 ("[T]he FDA has adopted the view that pregnancy begins when a fertilized egg is implanted in the uterine lining . . . .").

evidences the intent to terminate a human life and, thus, intent to abort.[36]

In addition to this most basic reason for the upsurge in conscience-related controversies beginning in the late 1990s, the ambiguity in existing conscience laws regarding what and whom they cover as well as the venue where the controversy is normally played out—the retail pharmacy counter—all contributed to the disturbance of the previously mentioned relative calm post-*Roe* and *Doe*, at least when it came to public or private coercion of unwilling participants' consciences. But beginning with the 1999 case of *Brauer v. K-Mart Corporation*,[37] in which an Ohio pharmacist sued her ex-employer after being fired for refusing to dispense birth control pills with post-implantation mechanisms of action, cases involving pharmacists and other medical workers in disputes with employers over the issue of emergency contraception, the morning-after pill, and Plan B became more frequent.[38] An Alan Guttmacher Institute report in June 1999, sounded a warning that such cases, once seen as no more than "isolated cases" and "fluke occurrences," were becoming more widespread, jeopardizing access

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[36] For example, a leading textbook on embryology responds to a question about whether "morning-after pills" (postcoital birth control pills) may properly be said to cause abortions as follows:

> *Postcoital birth control pills* ("morning after pills") . . . usually prevent implantation of the blastocyst, probably by altering tubal motility, interfering with corpus luteum function, or causing abnormal changes in the endometrium. *These hormones prevent implantation, not fertilization.* Consequently, they should not be called contraceptive pills. Conception occurs but the blastocyst does not implant. It would be more appropriate to call them "contraimplantation pills." Because the term *abortion* refers to a premature stoppage of a pregnancy, the term *abortion* could be applied to such an early termination of pregnancy.

KEITH L. MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 532 (6th ed. 1998).

[37] Order, Brauer v. K-Mart Corp., No. 1:99-cv-00618-TSB (S.D. Ohio Jan. 23, 2001). In Brauer, the court denied K-Mart's motion for summary judgment on Brauer's claim under Ohio's abortion conscience clause, O.R.C. § 4731.91(D). Brauer had argued, and the court agreed, that the statute which read, in pertinent part, that "no person is required to . . . participate in medical procedures which result in abortion" and that refusal to participate in such procedures "is not grounds . . . for disciplinary or other recriminatory action" did apply to pharmacists and that, given the intent of the legislature in enacting the measure to provide broad protection to individuals to act in accordance with the dictates of their consciences, Brauer should be permitted to pursue her claim. *Id.* at 1, 8, 22.

[38] *See, e.g.*, Order at 1–2, Diaz v. Cnty. of Riverside Health Servs. Agency, No. 5:00-cv-00936-VAP-SGL (C.D. Cal. July 23, 2002), ECF No. 81 (detailing jury verdict for nurse who was terminated for refusing to dispense the morning-after-pill and awarding damages and attorneys' fees); Settlement Agreement, Koch v. Indian Health Serv., IHS-027-01 (2005) (reaching agreement exempting pharmacist employed by the Bureau of Indian Affairs from dispensing morning-after-pill).

to the full range of contraceptive services nationwide.[39] The report noted with alarm that retail giant Wal-Mart, apparently responding to concerns expressed by some of its pharmacists, had elected to not sell emergency contraception at all on a company-wide basis.[40]

Enter Illinois Governor Rod Blagojevich.

III. BLAGOJEVICH ANNOUNCES THE EMERGENCY RULE

The Illinois Emergency Rule announced by Governor Blagojevich on April 1, 2005, read, in pertinent part, as follows:

> Duty of Division I Pharmacy to Dispense Contraceptives
>
> 1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.
>
> 2) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.[41]

The issuing of the Rule was accompanied by considerable publicity. At a press conference announcing the Rule, Governor Blagojevich stood with National Abortion Rights Action League ("NARAL") President Nancy Keenan, and President of Planned Parenthood Karen Pearl, and boasted that he was making Illinois the first state to require pharmacies and pharmacists to dispense emergency contraceptives "without delay."[42]

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[39] Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access To Emergency Contraception,* GUTTMACHER REP. ON PUB. POL'Y, June 1999, at 1, 1.

[40] *Id.* at 1–2.

[41] 29 Ill. Reg. 13639, 13663 (Sept. 9, 2005).

[42] Press Release, Gov. Blagojevich Takes Emergency Action, *supra* note 3; *see also* Appellants' Brief at 6, 9, Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373 (Ill. 2008) (No. 104692) (noting Governor Blagojevich's "unequivocal commitment to enforcing the Rule against objecting pharmacists"); Press Release, Office of the Governor, Statement from Gov. Rod Blagojevich (Apr. 13, 2005) [hereinafter Statement from Gov. Rod Blagojevich] (on file with author) ("If a pharmacy wants to be in the business of dispensing contraceptives, then it must fill prescriptions without making moral judgments. Pharmacists—like everyone else—are free to hold personal religious beliefs, but pharmacies are not free to let those beliefs stand in the way of their obligation to their

Blagojevich cited two instances of women in Chicago having their prescriptions for emergency contraception declined by pharmacists with religious objections to filling them.[43] During the press conference, Blagojevich made clear that the Rule was directed at pharmacists who refused to dispense drugs due to the pharmacists' moral or religious convictions.[44] On the same day, the Governor issued a press release that included supportive quotations from NARAL and other pro-choice groups and urged citizens to call a toll-free number to report instances of pharmacies refusing to dispense emergency contraceptives.[45]

Less than two weeks later, Blagojevich issued a letter warning that pharmacists who turned away emergency contraception prescriptions because they "disagree with the use of birth control" would face serious consequences up to and including revocation of their licenses.[46] On April 13, 2005, the Governor's office issued a press release stating that pharmacies must fill prescriptions "without making moral judgments."[47] Blagojevich conceded that "[p]harmacists—like everyone else—are free to hold personal religious beliefs," but warned that "pharmacies are not free to let those beliefs stand in the way of their obligation to their customers."[48]

A. Pro-life Pharmacists Respond to the Rule

Governor Blagojevich's Emergency Rule contained an inherent ambiguity that contributed greatly to the numerous lawsuits the Rule sparked and bedeviled their easy resolution. The Rule, on its face, applied only to pharmacies—not pharmacists.[49] But both the common-sense reading of it—pharmacies do not dispense drugs, pharmacists do—as well as Blagojevich's own public utterances about the Rule's intended targets, served to render this pharmacy/pharmacists distinction a distinction without any real practical difference for pharmacists and pharmacy owners.

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customers."); Letter from Rod Blagojevich, Governor of Ill., to Paul Caprio, Exec. Dir., Family-Pac (Apr. 11, 2005) [hereinafter Letter from Blagojevich to Caprio] (on file with author) ("If a pharmacist refuses to fill a woman's prescription for birth control, their employer faces significant penalties, ranging from fines to losing their license to fill prescriptions of any kind.").

43 Press Release, Gov. Blagojevich Takes Emergency Action, *supra* note 3.

44 *Id.*; *see also* Appellants' Brief at 6, 9, *Morr-Fitz*, 901 N.E.2d 373 (Ill. 2008) (No. 104692).

45 *Id.*

46 Letter from Blagojevich to Caprio, *supra* note 42.

47 Statement from Gov. Rod Blagojevich, *supra* note 42.

48 *Id.*

49 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005).

Peggy Pace and John Menges were the first Illinois pharmacists to file legal challenges to the Rule.[50] As of the date the Rule was announced, both Pace and Menges were employed by Walgreens, the largest retail pharmacy chain in Illinois.[51] They shared "religious, moral, and ethical beliefs" that prohibited them from dispensing drugs with an abortifacient mechanism of action, including emergency contraception.[52] Pace and Menges had each informed Walgreens in the past of their opposition to dispensing such drugs and Walgreens had, in fact, honored and accommodated their beliefs through its company-wide "Referral Pharmacist Policy."[53] This policy allowed Walgreens pharmacists to decline to fill prescriptions based on their religious convictions as long as the prescriptions could be filled by another pharmacist at the store or in a nearby store.[54] According to Pace and Menges, this policy had worked for a number of years and enabled them to avoid conflicts with their employer or their customers.[55] But on the same day that Blagojevich issued the Rule, Walgreens sent an e-mail to each of its pharmacists informing them that, because of the Rule, the company was rescinding its Referral Pharmacist Policy in the state of Illinois.[56] Pace, Menges, and other Walgreens pharmacists were thus faced with a stark choice: Obey their employer's rules, purporting to apply the Emergency Rule, or face adverse employment action and possible state discipline.[57]

On April 13, 2005, less than two weeks after the Rule's effective date, Pace and Menges filed suit against the Governor and state regulatory officials in the Seventh Judicial Circuit, Sangamon County, Springfield, Illinois.[58] Their Complaint contained the following allegations: (1) that the Rule was a regulation in direct conflict with the Illinois Health Care Right of Conscience Act's ("HCRCA") broad prohibition of discrimination by public or private parties against "any person in any manner" because of that person's refusal to "participate in any way in any particular form of health care services contrary to his or

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50 Complaint at 1–2, Pace v. Blagojevich, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. Apr. 13, 2005) [hereinafter Pace Complaint]; Rachel Rustay, *Illinois Pharmacists Have Right to Refuse*, LIBERTY CHAMPION, Apr. 26, 2005, at A5 (documenting that the Complaint against Blagojevich was filed on April 13, 2005).

51 Pace Complaint, *supra* note 50, at 3–4. Although this Complaint does not specify Walgreens was the employer, the federal case of Menges v. Blagojevich, 451 F. Supp. 2d 992, 995–96 (C.D. Ill. 2006), which includes plaintiff Menges, does specifically name Walgreens as the pharmacy chain.

52 Pace Complaint, *supra* note 50, at 3–4.

53 *Menges*, 451 F. Supp. 2d at 998.

54 *Id.*

55 *Id.*

56 Pace Complaint, *supra* note 50, at 4.

57 *Id.*

58 *Id.* at 1; Rustay, *supra* note 50, at A5.

her conscience"; (2) that the Rule imposed a substantial burden on the plaintiffs' exercise of religion in violation of the Illinois Religious Freedom Restoration Act; (3) that the Rule, which contained no exceptions for religious objectors, was in direct conflict with the provisions of both Title VII and the Illinois Human Rights Act requiring employers to make reasonable accommodations for their employees' religious beliefs and practices; and (4) that the Rule was adopted in violation of the Illinois Administrative Procedure Act.[59] In addition to filing their Complaint, Pace and Menges moved for a preliminary injunction.[60]

With regard to the first count, the plaintiffs' argument was straightforward: The Rule (at least as interpreted by the Governor himself, if not expressly) compelled pharmacists such as Pace and Menges to participate in health care services contrary to their consciences, such as dispensing emergency contraception.[61] Since the Rule, an administrative regulation, was subordinate to any contrary state statute, such as the HCRCA, the Rule was invalid. The RFRA argument was (not surprisingly, given the purpose of RFRA) essentially the type of free exercise argument that carried the day in *Wisconsin v. Yoder*[62] and *Sherbert v. Verner*.[63] The Rule substantially burdened the plaintiffs in their exercise of religion and was not justified by any compelling state interest.[64] The Title VII and Human Rights Act counts argued that the Rule was invalid because its lack of even the possibility of an employee religious exemption conflicted with both statutes' religious accommodation provisions.[65] Finally, Pace and Menges claimed that the government's failure to adhere to the notice and comment

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[59] Pace Complaint, *supra* note 50, at 5, 7–12.

[60] *Id.* at 12.

[61] *Id.* at 4, 6.

[62] 406 U.S. 205 (1972). The Court reasoned,

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations."

Id. at 214 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)) (second alteration in original).

[63] 374 U.S. 398, 410 (1963) (holding that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest").

[64] Pace Complaint, *supra* note 50, at 8. Curiously, especially in light of subsequent developments, Pace and Menges did not include a straight free exercise challenge.

[65] *Id.* at 9–10.

provisions of the Illinois Administrative Procedure Act, coupled with the lack of anything approaching a true emergency, rendered the Rule void.[66]

The State responded with a Motion to Dismiss the Complaint.[67] In addition to attempting to counter plaintiffs' merits arguments, the State took a position that, frankly, contradicted the position publicly taken by the Governor. The State argued that the plaintiffs lacked standing because the Rule, on its face, did not apply to the plaintiffs since they were pharmacists and not pharmacies.[68] Further, the State represented to the court that it did not intend, indeed it lacked the authority, to take any action whatsoever against individual pharmacists under the Rule.[69] Only pharmacies themselves were affected. According to the Illinois Attorney General's Office, it was up to pharmacy owners to come up with a way to comply with the Rule without compelling objecting pharmacists whom they employed.[70]

Before the *Pace* motions were adjudicated, two Illinois pharmacy owners also filed a challenge to the Rule. Luke Vander Bleek and Glenn Kosirog, principal owners of three pharmacies between them, shared with Pace and Menges the same beliefs regarding emergency contraception.[71] Vander Bleek and Kosirog refused for religious reasons to stock or sell emergency contraception in their stores.[72] They sued in the same court as Pace and Menges under the caption, *Morr-Fitz, Inc. v. Blagojevich*.[73] The *Morr-Fitz* Complaint alleged the same causes of action as *Pace* with the addition of counts alleging violations of the Free Exercise Clause, the Fourteenth Amendment, and the federal Hyde-Weldon Amendment.[74] The *Morr-Fitz* plaintiffs moved for a permanent injunction, and the State countered with a motion to dismiss.[75]

As it did in *Pace*, the State's response in *Morr-Fitz* argued that the plaintiffs lacked standing, the case was not ripe, and the plaintiffs had failed to exhaust their administrative remedies.[76] The Circuit Court was

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66 *Id.* at 11–12.

67 Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 1, Pace v. Blagojevich, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005).

68 *Id.* at 2.

69 *Id.* at 7.

70 *Id.* at 5–6.

71 *See* Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164, 1164–65 (Ill. App. Ct. 2007).

72 *Id.* at 1165.

73 Morr-Fitz, Inc. was the name of one of Vander Bleek's corporations. Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 378 (Ill. 2008).

74 First Amended Complaint for Declaratory and Injunctive Relief at 12, 14, 17–21, *Morr-Fitz*, 901 N.E.2d 373 (Ill. 2008).

75 *Morr-Fitz*, 867 N.E.2d at 1165.

76 The State's standing, ripeness, and exhaustion arguments are summarized (and decisively rejected) by the Illinois Supreme Court in *Morr-Fitz*. 901 N.E.2d at 384–88 (Ill. 2008).

persuaded by the State's arguments on ripeness and exhaustion and therefore dismissed the *Morr-Fitz* complaint.[77] In *Pace*, plaintiffs Pace and Menges agreed to voluntarily dismiss their case without prejudice, based upon the State's representation that it did not intend to enforce the Rule against individual pharmacists because the Rule did not apply to them (whatever the Governor might have said), as well as facing certain dismissal from the same court that had held that the claims of the pharmacy owners themselves were not ripe.[78] Thus, the initial skirmish over the Blagojevich Rule ended with pro-life pharmacy owners (Vander Bleek and Kosirog) heading off to the court of appeals and pro-life individual pharmacists (Pace and Menges) working under, at best, an uncertain cease-fire.

The cease-fire for individual pharmacists lasted less than a month. On November 28, 2005, Walgreens, the employer of Pace, Menges, and a number of other pharmacists with the same objection, suspended without pay Menges and four other downstate Illinois pharmacists[79] who had refused to sign a form indicating that they would, in fact, agree to dispense emergency contraception.[80] Walgreens took this action because it had received what it called "informal guidance" from the State's Department of Professional Regulation that, in spite of the representations being made by the Attorney General's Office in the *Pace* litigation, Walgreens was not permitted to keep in place its Referral Pharmacist Policy.[81] In addition, since the issuing of the Rule in April, the Department had filed two enforcement actions against Walgreens under the Rule in cases where Walgreens pharmacists had refused to fill emergency contraception prescriptions based on the pharmacists' religious beliefs.[82]

Menges and the other suspended Walgreens pharmacists responded swiftly to their suspension by filing complaints of employment

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[77] *Id.* at 378.

[78] Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 2, Pace v. Blagojevich, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005) (stating the position of the Attorney General's office that the rule only applied to pharmacies not pharmacists); Case Information, Pace v. Blagojevich, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. dismissed Jan. 6, 2006).

[79] Peggy Pace was not suspended because she had, by this time, resigned from Walgreens and gone to work in the State of Missouri.

[80] Menges v. Blagojevich, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006); Complaint and Demand for Jury Trial at 4, Quayle v. Walgreen Co. (Ill. 3d J. Cir. Ct. dismissed Oct. 13, 2009) (No. 2006-L-93) [hereinafter Quayle Complaint].

[81] Third-Party Plaintiff/Intervenor Walgreen Co.'s Complaint for Declaratory and Injunctive Relief at 4, *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307) [hereinafter Walgreen Co.'s Complaint].

[82] *Menges*, 451 F. Supp. 2d at 998.

discrimination in violation of Title VII with the EEOC.[83] The suspensions and the filing of the EEOC Complaints received national publicity. On December 1, 2005, in an interview on CNN's Lou Dobbs program, Governor Blagojevich stated that what Walgreens had done was "following the law," seeming to contradict the representations made by his own Attorney General's Office, which had indicated in court filings that the rule only applied to pharmacies not individual pharmacists.[84] Individual pharmacists in Illinois with religious objections to dispensing emergency contraception now knew that they could no longer rely on the representations made in the *Pace* litigation.

B. The Pharmacists' Two-Pronged Strategy

Menges and other pro-life pharmacists found themselves faced with employers that, with the express concurrence of the Governor himself, claimed to do only what the State demanded of them, and a state government that sent decidedly mixed messages about whether the Rule applied to individual pharmacists at all. In response, the pro-life pharmacists adopted a two-pronged strategy that ultimately succeeded in persuading the State to revise the Rule in a manner that expressly acknowledged the right of objecting pharmacists (though not pharmacy owners) to step away from and not participate in dispensing emergency contraception. That strategy consisted of two very different lawsuits filed nearly simultaneously in January 2006.

In the first lawsuit, Menges and six other pharmacists sued in the United States District Court in Springfield, Illinois, naming as defendants the Governor and various state officials charged with implementing the Rule.[85] The Menges complaint, dispensing with two of the four counts that had been in the Pace complaint, alleged two causes of action: (1) a violation of the Free Exercise Clause; and (2) a conflict, impermissible under the Supremacy Clause, between the Rule and Title

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[83] *Id.* at 999.

[84] *Lou Dobbs Tonight: Walgreens Suspends Pharmacists for Not Giving Out Morning After Pill* (CNN television broadcast Dec. 1, 2005), http://transcripts.cnn.com/TRANSCRIPTS/0512/01/ldt.01.html; *see Menges*, 451 F. Supp. 2d at 998 ("Governor Blagojevich allegedly stated in a national television broadcast that Walgreens' actions were in compliance with the Rule and that, in terminating the Discharged Plaintiffs for asserting their religious objections to dispensing Emergency Contraceptives, Walgreens was following the law."); Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at 2, Pace v. Blagojevich, No. 2005-MR-000199 (Ill. 7th J. Cir. Ct. May 2, 2005) ("Contrary to Plaintiffs' allegations, the Rule does not require pharmacists to fill any prescriptions. The rule only requires that pharmacies implement policies to make certain that patients have access to their lawfully prescribed medications.").

[85] *Menges*, 451 F. Supp. 2d at 995–96.

VII's requirement of religious accommodation.[86] Five days after filing the federal lawsuit, Menges and the other suspended Walgreens pharmacists sued Walgreens in state court in Madison County, Illinois, alleging a single count of violation of the Illinois Health Care Right of Conscience Act.[87] In the federal case, the plaintiffs sought both a declaratory judgment that the Rule was unconstitutional under the Free Exercise Clause and in violation of the Supremacy Clause and a permanent injunction against enforcement of the Rule.[88] In the state case, the plaintiffs demanded that the court make Walgreens pay treble damages, costs, and attorney's fees as permitted under the Health Care Right of Conscience Act.[89]

Within weeks of being sued in the state court damages action, Walgreens took the unusual step of moving to intervene in the federal case as a co-plaintiff with its suspended pharmacists.[90] The court granted Walgreens's motion in June 2006, and the issues were joined in one case among the three parties: state, employer, and individuals.[91]

1. The Arguments in *Menges v. Blagojevich*

In their complaint, the *Menges* plaintiffs alleged that the Rule placed a substantial burden on their exercise of religion by requiring them to engage in conduct forbidden by their religious principles, namely, dispensing drugs that the plaintiffs believed caused the termination of human life.[92] The complaint alleged that, prior to the Rule's adoption, their employers had accommodated their beliefs but that, after the Rule's adoption, their employers had notified them that they could no longer offer such an accommodation.[93] The plaintiffs cited government press releases and other public statements by the Governor and his spokespeople that expressed or implied that the State's intention in adopting the Rule was to coerce religious objectors into dispensing emergency contraception.[94] The plaintiffs pointed out that the Rule was "underinclusive" in that it did not apply to all Illinois pharmacies and their pharmacists, but left untouched by its provisions a large of number

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86 Amended Complaint for Declaratory and Injunctive Relief at 9–10, *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307) [hereinafter Menges Amended Complaint].

87 Quayle Complaint, *supra* note 80, at 5.

88 Menges Amended Complaint, *supra* note 86, at 11–12; *see also* 745 ILL. COMP. STAT. ANN. 70/12 (West 2010).

89 Quayle Complaint, *supra* note 80, at 6.

90 *Menges*, 451 F. Supp. 2d at 995.

91 *Id.*; Menges v. Blagojevich, No. 05-3307, slip op. at 17 (C.D. Ill. June 8, 2006).

92 *Menges*, 451 F. Supp. 2d at 997–98.

93 *Id.* at 998.

94 *Id.* at 997–98.

of pharmacies, for example, hospital pharmacies.[95] Further, the plaintiffs argued, the Rule did allow individual pharmacists to decline to dispense for no less than eight specific reasons, some of which involved subjective assessments by the pharmacist, but not for religious reasons.[96]

In joining the individual pharmacists, Walgreens alleged that the Rule was pre-empted by Title VII.[97] The company asserted that the Rule, both on its face and as it had been interpreted by the State in its dealings with Walgreens, "denies Walgreens a mechanism to provide reasonable accommodations to sincerely-held religious beliefs of its pharmacists."[98] Walgreens's complaint detailed the ultimately unsuccessful efforts the company had made in the months following enactment of the Rule to comply with both the Rule and the obligations of Title VII.[99] The company claimed that the Rule "required or permitted Walgreens to take adverse employment action against its pharmacists [the Menges plaintiffs] who refused to dispense emergency contraception," and the adverse employment action had subjected Walgreens to damages lawsuits.[100] In addition, the Walgreens complaint went beyond a mere request (such as the plaintiffs were making) that the court declare the Rule violates Title VII. Walgreens also asked the court to declare that its Referral Pharmacist Policy complied with the Rule and to order state officials to accept that interpretation.[101]

The State responded by filing a 12(b)(6) motion to dismiss.[102] The State argued that the Rule was a neutral law of general applicability and, citing *Employment Division v. Smith*, should not be subjected to strict scrutiny.[103] The State contended that the Rule was facially neutral and neutral in its effects. The State brushed off the statements by the Governor and those speaking on his behalf as irrelevant to the analysis under Seventh Circuit precedent[104] and simply ignored the "under-inclusiveness" pointed out in the complaint.[105] If anything, the State dug itself deeper into the under-inclusiveness hole by pointing out that,

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95 *Id.* at 1001–02.

96 *Id.* at 997–98; *see also* Menges Amended Complaint, *supra* note 86, at 6.

97 Walgreen Co.'s Complaint, *supra* note 81, at 1–2.

98 *Id.* at 4.

99 *Id.* at 5–6.

100 *Id.* at 6.

101 *Id.* at 9–10.

102 Menges v. Blagojevich, 451 F. Supp. 2d 992, 995 (C.D. Ill. 2006) (denying Defendants' Motion to Dismiss the Amended Complaint but allowing in part and denying in part Defendants' Motion to Dismiss Walgreens's Third Party Complaint).

103 *Id.* at 999.

104 Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth., 100 F.3d 1287, 1292–93 (7th Cir. 1996).

105 Defendants' Memorandum of Law in Support of Motion to Dismiss at 4, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307).

under the Rule, pharmacies were not even required to stock *any* contraceptives; the Rule simply required those which did to also stock and dispense emergency contraceptives.[106] On the Title VII preemption issue, the State once again denied that the Rule had any bearing on individual pharmacists (though the State seemed to have abandoned the lack of standing and ripeness arguments it had made in *Pace*), and argued that although "the Rule in question might have some bearing on the hardship an employer will face in accommodating a particular pharmacist's religious views, it does not require an employer to violate Title VII."[107] Finally, the State argued that the Eleventh Amendment barred the court from granting the relief requested by Walgreens for a declaration that its Referral Pharmacist Policy complied with the Rule.[108]

In responding to the State's motion, the Menges plaintiffs began by noting, "Like that of Mark Twain, rumors of the Free Exercise Clause's death have been greatly exaggerated."[109] The plaintiffs argued that facial neutrality was hardly the end of the inquiry, relying heavily on language to that effect from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* and a pair of Third Circuit opinions, including one authored by then-Judge, now-Justice Alito.[110] The plaintiffs cited the statements of the Governor as indicating a specific intent on his part to single out for coercion religious objectors and drew an analogy between these statements and statements by Hialeah City Council members regarding the practice of Santeria in *Lukumi*.[111] In addition, the plaintiffs highlighted the numerous non-religious reasons for which a customer seeking emergency contraception, lawfully according to the State, could be turned away from a pharmacy in Illinois.[112] For instance, hospital pharmacies were not covered by the Rule despite the fact that it was precisely in such a setting—a hospital *emergency* room—that one would logically expect to be faced with patients seeking *emergency*

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[106] *See id.* at 1, 3.

[107] *Id.* at 5–6.

[108] *Id.* at 6–7.

[109] Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Statement of Points and Authorities at 4, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307) [hereinafter Plaintiffs' Response to Defendants' Motion to Dismiss].

[110] *Id.* at 4–7; *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38, 540, 542 (1993); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165–67 (3d Cir. 2002); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364–65 (3d Cir. 1999).

[111] Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 109, at 7.

[112] *Id.* at 8.

medications.[113] Pharmacists were permitted to turn away patients based merely on their subjective conclusions that a particular drug was not appropriate for a patient for a variety of medical or social reasons, such as clinical abuse or misuse.[114] Finally, as the State's motion revealed, it was interpreting the Rule in such a way that it permitted a pharmacy, for non-religious, business reasons, to decline to stock *any* contraceptives and thus avoid entirely the operation of the Rule.[115]

On the Title VII issue, the plaintiffs argued that the Rule did indeed conflict with Title VII's accommodation provisions and cited language from Title VII itself that "any law which purports to require or permit the doing of any act which would be an unlawful employment practice" under Title VII was preempted by the Act and, therefore, unenforceable.[116] Plaintiffs also cited Supreme Court precedent standing for the proposition that state laws that would stand as obstacles to the accomplishment and execution of Title VII's objectives would be preempted.[117] This, plaintiffs argued, was precisely what the Rule did.

For its part, Walgreens echoed and amplified plaintiffs' arguments on the Title VII issue. Walgreens emphasized that, until the Rule was promulgated, the company had in place throughout the nation, including Illinois, a policy that allowed objecting pharmacists to step away from prescriptions they deemed morally unacceptable.[118] Once the Rule was in place, however, and after seeking guidance from the State regulatory authority on the issue, Walgreens had concluded that it could no longer offer its Illinois pharmacists the accommodation it had previously offered under its Referral Pharmacist Policy—or any meaningful accommodation for that matter.[119]

2. The District Court Rejects Illinois' 12(b)(6) Motion

The U.S. District Court, Honorable Jeanne Scott,[120] denied in part and granted in part the State's motion.[121] The court denied the motion as

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[113] *Id.* at 7. This was most likely a political calculation on the State's part since a rule that encompassed say, Catholic hospitals, would likely have brought yet another influential intervenor into the case.

[114] *Id.* at 8.

[115] Menges Amended Complaint, *supra* note 86, at 6.

[116] Plaintiffs' Response to Defendants' Motion to Dismiss, *supra* note 109, at 10 (quoting 42 U.S.C. § 2000e-7 (2006)) (internal quotation marks omitted).

[117] *Id.* at 10 (citing Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 281 (1987)).

[118] Opposition of Plaintiff Walgreen Co. to Defendants' Motion to Dismiss Walgreens' Third Party Complaint at 3, Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307).

[119] *Id.* at 3–4.

[120] Judge Scott was nominated by President Clinton. *See History of the Federal Judiciary: Scott, Jeanne E.*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2804&cid=999&ctype=na&instate=na (last visited Apr. 6, 2012).

to both the Free Exercise and Title VII preemption causes of action brought by the individual plaintiffs,[122] denied the motion as to Walgreens's Title VII preemption cause of action,[123] but granted it, on Eleventh Amendment grounds, as to Walgreens's request for a declaration that its policy complied with the Rule.[124]

With regard to the free exercise claim, Judge Scott, applying the familiar 12(b)(6) standard, accepted as true all of the well-plead allegations of the complaint.[125] The court then followed the analytical framework laid out in *Smith* and *Lukumi*.[126] The court cited the plaintiffs' allegations that the Governor and other state officials had made statements that indicated that religious objectors were, indeed, the specific targets of the Rule. The court found these statements to be not only relevant but potentially highly probative of a lack of religious neutrality: "In the Free Exercise context, the Court must look beyond the face of the statute to determine its object. Governor Blagojevich's statements regarding the object of the Rule are relevant."[127] The court held as follows:

> The Plaintiffs' allegations, if true, may establish that the object of the Rule is to target pharmacists, such as the Plaintiffs, who have religious objections to Emergency Contraceptives, for the purpose of forcing them either to compromise their religious beliefs or to leave the practice of pharmacy. Such an object is not religiously neutral. If so, the Rule may be subject to strict scrutiny.[128]

On the under-inclusiveness issue, the court cited the numerous exceptions to the Rule that suggested that the sort of universal, "without delay" access that was purportedly its goal was questionable at best:

> The Rule is supposed to meet a critical need to make Emergency Contraceptives available. . . . [H]owever, . . . [t]he Rule only applies to Division I pharmacies. The Rule, therefore, does not apply to hospitals and, in particular, emergency rooms. The Rule also allows Division I pharmacies to refuse to dispense Emergency Contraceptives or to delay dispensing them for reasons other than the pharmacist's

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[121] *Menges*, 451 F. Supp. 2d at 995.

[122] *Id.* at 1002, 1004–05.

[123] *Id.* at 1004–05.

[124] *Id.* at 1005.

[125] *Id.* at 999–1002.

[126] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (reasoning that, in order to withstand scrutiny, the state must demonstrate that a compelling state interest exists and that the law in question is "narrowly tailored to advance that interest"); Emp't Div. v. Smith, 494 U.S. 872, 878 (1990) (reasoning that a law imposing incidental burdens on religion does not necessarily violate the First Amendment if such burdens are not the object of the law in question).

[127] *Menges*, 451 F. Supp. 2d at 1000 n.2 (citation omitted).

[128] *Id.* at 1001.

> personal religious beliefs. These allegations, at least, create an issue of fact regarding whether the Rule is generally applicable.[129]

On the Title VII claims of both the plaintiffs and Walgreens, the court determined that, given the allegations made by both parties about the practical effect of the Rule's lack of provision for religious accommodation, both parties stated cognizable claims that the Rule was in conflict with Title VII.[130] The court seemed particularly persuaded by the allegations of plaintiffs and Walgreens that, prior to adoption of the Rule, Walgreens had no difficulty whatsoever in accommodating pharmacists with the same objections and continued to do so in every state except Illinois.[131] Finally, the court granted the State's motion solely as to Walgreens's request for a declaratory judgment regarding the compliance of its Referral Pharmacist Policy with Title VII and the Rule.[132]

In a footnote to its opinion, the court wrote that the State's arguments "may suggest a basis for possible amendment of the Rule to clarify its object and application," and advised the parties that it was inclined to refer the matter to the magistrate judge "to explore settlement possibilities that would be consistent with individual constitutional rights."[133] Accordingly, following the decision on the motion to dismiss in September 2006, the parties entered into a lengthy mediation process before the Honorable Byron Cudmore.[134] That process culminated in April 2008 with the adoption of the Amended Rule.[135]

In the Amended Rule, the State for the first time recognized and protected what it labeled an "objecting pharmacist."[136] The Amended Rule provided a procedure whereby an "objecting pharmacist" presented with a prescription for emergency contraception (or any other drug for that matter) would be able to decline to personally participate in the filling of such a prescription while, at the same time, his employing pharmacy could have the prescription filled through something called "Remote Medication Order Processing" ("RMOP").[137] Thus, three years after the issuance of the Emergency Rule, individual pro-life

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[129] *Id.*

[130] *Id.* at 1003–04.

[131] *Id.* at 1003.

[132] *Id.* at 1004–05.

[133] *Id.* at 1004 n.4.

[134] *See* Agreed Joint Motion of Plaintiff Walgreen Co. and Defendants to Stay Case at 1, Menges v. Blagojevich, No. 05-3307 (C.D. Ill. Oct. 5, 2007) (explaining that as a result of mediation efforts, Walgreens and the defendants were able to enter into a Mutual Agreement and Understanding).

[135] 32 Ill. Reg. 7116, 7127 (May 2, 2008).

[136] *Id.*

[137] *Id.* at 7127–28. The details of the RMOP procedure are summarized by the Illinois Supreme Court in *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373, 382 (Ill. 2008).

pharmacists in Illinois finally enjoyed a significant measure of protection against the coercion embodied in the Governor's original edict.[138] Upon formal adoption of the Amended Rule, *Menges v. Blagojevich* was dismissed by agreement of the parties.[139]

C. The Damages Actions Against Walgreens and Wal-Mart

While continuing to participate as co-plaintiffs in the federal court mediation seeking an amendment of the Rule "consistent with individual constitutional rights" in Judge Scott's phrase,[140] Walgreens, Menges, and the other downstate pharmacists remained pitted against each other in the state court action under the caption of *Quayle v. Walgreens*.[141] In that case, the plaintiffs' sole cause of action was based on Walgreens's alleged violation of the Illinois Health Care Right of Conscience Act in handing the plaintiffs indefinite, unpaid suspensions in November 2005 when they refused to agree to dispense emergency contraceptives.[142] In April 2006, Walgreens moved to dismiss the *Quayle* cases, arguing that the Health Care Right of Conscience Act did not apply to pharmacists or the dispensing of drugs at all and relying on arguments that had originally been made by the State in the *Pace* case.[143] While Walgreens's motion was pending, the court entered a stay of the cases upon hearing that the mediation in *Menges* could have an impact on the resolution of the

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[138] *Compare* 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005) (stating that a pharmacist must dispense a contraceptive upon receipt of a valid prescription), *with* 32 Ill. Reg. at 7127 (providing protocol to accommodate the refusal of an "objecting pharmacist" to dispense a contraceptive).

[139] The individual plaintiffs in *Menges* did not sign on to the settlement agreement in that case because, while the Amended Rule gave individual pharmacists a right to object and decline to participate in dispensing emergency contraception, it maintained the requirement that pro-life pharmacy owners do so. *See Their Own 'Plan B': State, Pharmacists Reach Deal on Dispensing the Morning-After Pill*, DAILY HERALD, Oct. 11, 2007, at 8 ("Francis Manion, an attorney for those pharmacists, said the settlement is technically an agreement between Walgreens and the state. Although his clients are dropping their lawsuit, they aren't part of the compromise to let a remote pharmacist oversee filling the prescription."); Editorial, *Fair Compromise on Morning-After Pill*, DAILY HERALD, Oct. 15, 2007, at 12 ("The American Center for Law and Justice, which is representing pharmacists, agreed to drop the lawsuits but did not agree to be part of the compromise (it is between the state and Walgreens) because it still requires pharmacies to sell the morning-after pill . . . .").

[140] Menges v. Blagojevich, 451 F. Supp. 2d 992, 1004 n.4 (C.D. Ill. 2006). The plaintiffs were G. Richard Quayle, Carol Muzzarrelli, Kelly Hubble, and John Menges. *Id.* at 995–96.

[141] Quayle v. Walgreen Co., No. 2006-L-93 (Ill. 3d J. Cir. Ct. dismissed Oct. 13, 2009).

[142] Quayle Complaint, *supra* note 80, at 4–6; *see Menges*, 451 F. Supp. 2d at 998.

[143] *Illinois Court Backs Pro-Life Pharmacists*, ACLJ (Apr. 22, 2008), http://aclj.org/pro-life/illinois-court-backs-pro-life-pharmacists.

Quayle cases.[144] Ironically, it would be a decision by U.S. District Judge Jeanne Scott, not in *Menges*, but in a separate case against a different retail pharmacy chain, *Vandersand v. Wal-Mart*,[145] that would ultimately prove decisive in convincing the state court in *Quayle* to deny Walgreens's motion to dismiss, leading directly to the settlement of those cases.[146] The *Vandersand* case would also play an important part in the pharmacists' eventual victory in *Morr-Fitz*, as will be explained in Part IV.

Ethan Vandersand was an Illinois pharmacist who worked for Wal-Mart. Like the plaintiffs in *Menges*, *Quayle*, and *Morr-Fitz*, Vandersand had a religious objection to selling emergency contraception.[147] In February 2006, he was placed on unpaid leave by his employer after turning away a prescription for emergency contraception.[148] Vandersand sued in U.S. District Court and alleged that Wal-Mart had violated his rights under Title VII and the Illinois Health Care Right of Conscience Act.[149] The case was assigned to Judge Jeanne Scott. Wal-Mart moved to dismiss or, in the alternative, to stay the case pending the resolution of *Menges*. In support of its motion to dismiss, Wal-Mart argued that it could not be liable as a matter of law because it was only complying with the Rule when it took action against the plaintiff.[150] The court rejected this argument, noting that it was unclear at that early stage of the proceedings whether Wal-Mart could have both complied with the Rule *and* accommodated Vandersand.[151]

Wal-Mart's arguments on the Health Care Right of Conscience Act essentially parroted the arguments made by Walgreens in its motion to dismiss the *Quayle* cases, a motion that was then subject to a stay.[152] Wal-Mart argued that the Right of Conscience Act covered only medical care "rendered by physicians, nurses, paraprofessionals or health care facilities"; further, so the argument went, pharmacists were not within the Act's definition of "health care personnel."[153] In addition, Wal-Mart

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144 Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. May 3, 2007) (granting Walgreens's motion to stay the case).

145 Vandersand v. Wal-Mart Stores, Inc., 525 F. Supp. 2d 1052, 1055–58 (C.D. Ill. 2007).

146 Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Apr. 9, 2008) (denying Defendant's Motion to Dismiss); Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Oct. 13, 2009) (dismissing the case with prejudice based on the written stipulation of both parties).

147 *Vandersand*, 525 F. Supp. 2d at 1054–55.

148 *Id.*

149 *Id.* at 1055.

150 *Id.* at 1053.

151 *Id.* at 1056.

152 *Id.* at 1057.

153 *Id.* (internal quotation marks omitted).

referred the court to legislative history that the company claimed compelled the conclusion that pharmacists were not intended to be included in the Act's coverage.[154] Judge Scott rejected all these arguments. The court reasoned that, since the Act by its plain terms covered "any person" participating "in any way in any particular form of health care services," there was no doubt that it should be read to include pharmacists.[155] Moreover, the court declined to look to the legislative history, noting that Illinois courts do not resort to aids for construction, such as legislative history, when the language of the statute is clear.[156] Vandersand stated claims under both Title VII and the Right of Conscience Act.[157] Finally, Judge Scott declined Wal-Mart's request to stay the *Vandersand* matter pending the outcome of the *Menges* case.[158]

Once the stay was lifted in the *Quayle* cases, a hearing date was set for Walgreens's motion to dismiss.[159] The state court, however, now having the benefit of Judge Scott's opinion in *Vandersand*, disposed of Walgreens's arguments *in toto*, citing the *Vandersand* opinion as persuasive.[160] The *Quayle* cases proceeded through the discovery process before settling in 2009.[161]

IV. THE RETURN OF *MORR-FITZ* AND THE DEMISE OF BLAGOJEVICH'S RULE

While the individual pharmacists were litigating their claims and achieving real results against the State and their respective employers, the pharmacy owners in the *Morr-Fitz* case moved forward with their appeal.[162] It should be recalled that the fruit of the *Menges v. Blagojevich* litigation—an Amended Rule allowing objecting pharmacists to opt out of dispensing certain prescriptions—provided no relief for pharmacy

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[154] *Id.*

[155] *Id.* at 1056–57.

[156] *Id.* at 1057.

[157] *Id.* at 1053. Following the denial of the Motion to Dismiss, the *Vandersand* case was settled for an undisclosed amount. *See* Stipulation to Voluntary Dismissal by Plaintiff at 1, *Vandersand*, No. 06-cv-3292-JES-DGB (C.D. Ill. May 29, 2008).

[158] *Vandersand*, 525 F. Supp. 2d at 1058.

[159] Order Granting Plaintiffs' Motion to Lift Stay and Schedule Motion Hearing at 1, Quayle v. Walgreen Co., No. 2006-L-93 (Ill. 3d J. Cir. Ct. Feb. 11, 2008) (lifting the stay and setting a hearing date for Walgreens's Motion to Dismiss).

[160] Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Apr. 9, 2008) (denying Walgreens's Motion to Dismiss and finding Judge Scott's reasoning in *Vandersand* to be "instructive, influential and logical").

[161] Order at 1, *Quayle*, No. 2006-L-93 (Ill. 3d J. Cir. Ct. Oct. 13, 2009) (dismissing the case with prejudice based on the written stipulation of both parties).

[162] *See* Appellants' Brief at 2, Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373 (Ill. 2008) (No. 104692).

owners like Vander Bleek and Kosirog.[163] In March 2007, a divided appellate court upheld the Sangamon Circuit Court's dismissal of the case on ripeness grounds.[164]

But on December, 18, 2008, the Illinois Supreme Court reversed and remanded the case.[165] The court noted that the Amended Rule, adopted while *Morr-Fitz* was on appeal, in its application to pharmacy owners was even more coercive than the original Rule.[166] The Amended Rule now required all pharmacy owners to stock emergency contraception: "Under the current version, the simple failure by plaintiffs to make efforts to stock the contraceptive in question would subject plaintiffs to a range of penalties, including license revocation."[167] Citing Judge Scott's *Menges* opinion as well as a case from the Western District of Washington, the Illinois Supreme Court found that the *Morr-Fitz* plaintiffs stated a justiciable First Amendment claim.[168]

The court also rejected the State's exhaustion of administrative remedies argument. The State had argued that the plaintiffs should be required to formally request, and be denied, a variance from the Rule before being allowed to bring a court challenge.[169] Noting that the exhaustion requirement is based on the theory that ordinarily an administrative agency has some special expertise that a court lacks and is the proper place to resolve factual issues surrounding a variance request, the Illinois Supreme Court concluded,

> [I]f there are no questions of fact or agency expertise is not involved, a litigant is not required to exhaust remedies. In our opinion, this is largely a case involving a question of law—whether pharmacists and pharmacies can be compelled to violate their consciences and religious beliefs in violation of two Illinois statutes and the *first amendment.* There is no agency expertise involved.[170]

Accordingly, the court reversed the decision of the Illinois Court of Appeals and remanded.[171]

And so, nearly four years after Governor Blagojevich announced his Emergency Rule, and only a week after Blagojevich himself was arrested

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[163] *See supra* note 139 and accompanying text; *see also Menges*, 451 F. Supp. 2d at 1001.

[164] Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164, 1171 (Ill. App. Ct. 2007).

[165] *Morr-Fitz*, 901 N.E.2d at 393.

[166] *Id.* at 386.

[167] *Id.*

[168] *Id.* at 387 (citing Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245 (W.D. Wash. 2007); *Menges*, 451 F. Supp. 2d 992 (C.D. Ill. 2006)).

[169] *Id.* at 392.

[170] *Id.* (emphasis added).

[171] *Id.* at 393.

on federal corruption charges,[172] the *Morr-Fitz* case was headed back to Sangamon Circuit Court for trial.

A. Illinois Moves the Target

Now armed with the Illinois Supreme Court's decision, which contained ample dicta on the underlying merits in addition to reversing on the justiciability arguments, all of which tended to favor the plaintiffs, Vander Bleek and Kosirog first obtained a Temporary Restraining Order after a hearing in circuit court on April 3, 2009,[173] and then obtained a full Preliminary Injunction after a second hearing on August 21, 2009.[174] The case then proceeded to discovery with a trial anticipated sometime in 2010. Upon completion of discovery, the plaintiffs moved for summary judgment.[175]

On April 29, 2010, while plaintiffs' motion for summary judgment was pending, Illinois adopted yet another version of the Rule.[176] This fourth version[177] was purportedly modeled after the Washington State rule at issue in *Stormans, Inc. v. Selecky*.[178] Gone from the new version was the entire "objecting pharmacist" procedure that was the result of the *Menges* litigation. The new Rule made no allowance whatever for conscientious objections by pharmacists or pharmacies. Indeed, the new Rule was actually worse than its predecessors for two reasons: (1) It eliminated the wiggle room in the prior version that allowed pharmacy owners to avoid its application by declining to sell any contraceptives; and (2) It extended its coverage to include non-prescription drugs,

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[172] *See generally* Jeff Coen et al., *Arrested*, CHICAGO TRIBUNE, Dec. 9, 2008, at C1.

[173] Temporary Restraining Order at 1, Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 3, 2009) (granting Plaintiffs' Motion for a Temporary Restraining Order).

[174] Order Granting Preliminary Injunction and Denying Motion to Dismiss at 2, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Aug. 21, 2009).

[175] Plaintiffs' Opposition to Defendants' Motion to Dismiss and Reply Brief in Support of Plaintiffs' Motion for Summary Judgment at 10, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Aug. 17, 2010).

[176] 34 Ill. Reg. 6688, 6727–32 (May 14, 2010).

[177] The first version was the April 1, 2005 Emergency Rule. 29 Ill. Reg. 5586, 5596 (Apr. 15, 2005). The second version was the Permanent Rule adopted by JCAR on August 25, 2005. 29 Ill. Reg. 13639, 13656 (Sept. 9, 2005). The third version was the Amended Rule that resulted from the *Menges/Walgreens* mediation in April 2008. 32 Ill. Reg. 7116, 7126–33 (May 2, 2008). *See* Order Granting Declaratory and Injunctive Relief at 2–3, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011) (containing a history of the various versions of the Rule).

[178] 524 F. Supp. 2d 1245, 1249–50 (W.D. Wash. 2007), *rev'd*, 586 F.3d 1109 (9th Cir. 2009). On remand, the United States District Court for the Western District of Washington permanently enjoined the enforcement of the rule against the plaintiffs, who were religious objectors, stating that the rule was not neutral and was not generally applicable. Stormans, Inc. v. Selecky, No. 3:07-cv-05374-RBL, slip op. at 47–48 (W.D. Wash. Feb. 22, 2012).

presumably to bring within its purview over-the-counter requests for emergency contraceptives.[179]

The plaintiffs sought and were granted leave to amend their complaint to assert their claims against this latest iteration of the Rule.[180] A motion by the State to dismiss the amended complaint and the plaintiffs' motion for summary judgment was denied on December 15, 2010, and the court scheduled the matter for a bench trial to take place on March 10, 2011.[181]

B. The Blagojevich Rule on Trial

On March 10, 2011, nearly six years after Governor Blagojevich announced his Emergency Rule, Luke Vander Bleek and Glenn Kosirog finally had the opportunity to try their claims on the merits in open court.[182] Both pharmacy owners testified about their religious beliefs, their opposition to selling emergency contraceptives, the impact that the Rule (in all of its iterations) had on their businesses and on them personally, and their determination to do whatever they could to remain in business without having to violate their consciences.[183] Both men testified that their pharmacies were located within minimal walking or driving distances of other pharmacies whose owners did not share their objection to emergency contraception.[184]

Brent Adams, the Secretary of the Illinois Department of Financial and Professional Regulation, testified for the State. Adams acknowledged that the fourth version of the Rule was prompted not by any complaints about shortages of any particular drugs but solely to develop a regulation that he hoped would compel objecting pharmacists to dispense emergency contraceptives and would also survive constitutional and other legal challenges.[185] He testified that he drafted the new Rule after reading the decision in *Stormans, Inc. v. Selecky* and modeled the Rule directly on the Rule at issue in *Stormans*.[186]

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[179] *See* 34 Ill. Reg. 6690, 6730–31 (May 14, 2010). On December 14, 2006, the FDA approved over-the-counter sales of emergency contraceptives ("Plan B") for those over 17 years of age. U.S. Dep't Health & Human Servs., *Plan B: Questions and Answers*, FDA, http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109783.htm (last updated Dec. 14, 2006).

[180] Case Information, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. May 28, 2010).

[181] *Id.*

[182] Order Granting Declaratory and Injunctive Relief at 1, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

[183] *Id.* at 1–2.

[184] *Id.* at 4.

[185] *Id.* at 3.

[186] *Id.*

Adams conceded that he had no evidence of any person in Illinois being unable to obtain emergency contraception because of a pharmacy owner's religious beliefs.[187] Nor did he have any evidence of anyone in the State having difficulty obtaining over-the-counter emergency contraceptives.[188] Adams acknowledged that he was unaware of any pharmacist ever refusing to sell such drugs for any reason other than religious beliefs.[189] The Secretary admitted that the Rule contained numerous exceptions for what he called "common sense business realities."[190] Perhaps most telling of all, Adams conceded that the Rule contained a variance procedure for what he himself labeled "individualized governmental assessments" and that, while "he could envision a 'whole variety' of reasons that might be accepted, . . . he could not foresee a variance being granted for a religious objection."[191]

In its April 5, 2011 ruling on the merits, the court found for the plaintiffs on three of their four causes of action.[192] On the Health Care Right of Conscience Act claim, the court, citing the Act's definitions and Judge Scott's opinion in *Vandersand,* held that "[t]he Illinois Right to Conscience Act applies to pharmacists and pharmacies."[193] Moreover, the court found that "[t]he government may certainly promote drug access, but the Act requires them to do so without coercing unwilling providers."[194] The court rejected an argument by the State that plaintiffs had failed to show that their personal conscientious objections were attributable to their closely-held corporations as separate legal entities.[195]

On plaintiffs' RFRA claim, the court found that plaintiffs had proven the existence of a substantial burden on their religion as to all versions of the Rule.[196] The Government had failed to prove that "forcing participation by these Plaintiffs is the least restrictive means of furthering a compelling interest."[197] The court found that the Government's compelling interest argument was seriously undermined

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[187] *Id.* at 3–4.

[188] *Id.* at 4.

[189] *Id.* at 3.

[190] *Id.* at 4.

[191] *Id.*

[192] The court found for the plaintiffs on all but their Fourteenth Amendment substantive due process claim. *Id.* at 5–7.

[193] *Id.* at 5 (citing Vandersand v. Wal-Mart Stores, Inc., 525 F. Supp. 2d 1052 (C.D. Ill. 2007)).

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* at 6.

by its concessions about numerous exceptions to the Rule as well as the variance procedure.[198]

On the free exercise claim, the court found that the Rule was neither neutral nor generally applicable.[199] The record evidence showed that, from the beginning, the Rule targeted pharmacists and pharmacy owners with religious objections to selling emergency contraceptives: "The Rule and its predecessors were designed to stop pharmacies and pharmacists from considering their religious beliefs when deciding whether to sell emergency contraceptives."[200] The court found that this demonstrated a lack of neutrality. In addition, the court found that the Rule was not generally applicable since the variance procedure was "by the government's admission, a system of individualized governmental assessments that is available for non-religious reasons, but not for religious ones."[201] The court quoted *Lukumi*'s holding that where "individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason."[202] The court concluded that the Rule must, therefore, be subjected to strict scrutiny and that it failed that test for the same reasons outlined in the court's discussion of the RFRA claim.[203]

Having found for the plaintiffs on three of their four causes of action the circuit court concluded, "The Court finds and declares that the Rule is invalid on its face and as applied under the Illinois Right to Conscience Act, Illinois Religious Freedom Restoration Act, and is unconstitutional on its face and as applied and is void under the First Amendment."[204] The court thereupon entered judgment for the plaintiffs and permanently enjoined the State of Illinois from enforcing the Rule.[205]

Not surprisingly, the State has appealed the trial court's decision.[206] And while prognostications of such things are fraught with peril, several factors augur well for the upholding of the permanent injunction. To begin with, the appeal will ultimately make its way back to the Illinois Supreme Court. That court, in ruling on the prior dismissal of plaintiffs' case on justiciability grounds, managed to signal in dicta a view of the

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198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 7 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993)) (internal quotation marks omitted).

203 *Id.*

204 *Id.*

205 *Id.*

206 Case Information, Morr-Fitz, Inc. v. Blagojevich, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

merits that clearly favored the pharmacists' claims.[207] Also, on appeal the factual findings made by the trial court are unlikely to be disturbed given the deferential standard of review.[208] Those findings, based to a large extent on the State's own damning admissions, give solid support to the trial court's legal conclusions. The State will simply be unable to avoid the fact that it attempted to create a regulation complete with a system of variances with—in the State regulator's own words—"individualized governmental assessments" that are only *unavailable* to those citizens requesting variances for religious reasons.[209]

Thus, at the end of this very long day, with the author of the Rule soon to be ensconced in federal prison,[210] the right of Illinois pharmacists and pharmacy owners to practice their profession in a manner consistent with their deeply held religious beliefs appears to be on solid legal ground.

V. LESSONS LEARNED FOR THE PROTECTION OF CONSCIENCE

With the benefit of now six years of experience with conscience litigation in the Land of Blagojevich, it is useful to assess what lessons have been learned from both a legal perspective as well as a broader strategic perspective of what can and cannot be done to ensure the protection of the conscience rights of pro-life health care professionals. Those lessons include at least the following:

A. Legislation Is Not Enough.

Perhaps the most obvious lesson is this: Mere legislation, however broadly it appears to protect conscience rights, is not enough. Against a government determined to impose its will in defiance of statutory and constitutional protections of conscience, a swift and vigorous litigation response is essential. When Governor Blagojevich announced his Emergency Rule in April 2005, Illinois already had on the books for many years the "gold standard" of conscience protecting legislation: the Illinois Health Care Right of Conscience Act. The Governor, however, completely ignored the law, casting pharmacists, pharmacy owners, and businesses into an uncertainty that resulted in loss of jobs, disruption of pharmacists' careers, interference with pharmacy owners' businesses, and expensive litigation for those businesses that felt compelled to apply the Governor's Rule to their employees. It was only after several years of

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[207] *Morr-Fitz*, 901 N.E.2d 373, 390–93 (Ill. 2008).

[208] *See, e.g.*, Illinois v. Ballard, 794 N.E.2d 788, 798 (Ill. 2002).

[209] Order Granting Declaratory and Injunctive Relief at 4, *Morr-Fitz*, No. 2005-CH-000495 (Ill. 7th J. Cir. Ct. Apr. 5, 2011).

[210] In December 2011, Governor Blagojevich was sentenced to fourteen years in prison on federal corruption charges. Monica Davey, *Blagojevich Draws 14-Year Sentence for Corruption Conviction*, N.Y. TIMES, Dec. 8, 2011, at A22.

hard-fought litigation that a partial measure of protection (for individual pharmacists at least) was secured with the settlement of the *Menges v. Blagojevich* case. And when that protection proved to be short-lived with the State's continual amendments to the Rule, another two years would pass before the conscience rights of all Illinois pharmacists were secured due to the March 2011 victory following trial in *Morr-Fitz v. Blagojevich*. Aside from the *Morr-Fitz* permanent injunction barring enforcement of the Rule itself, faced with the precedents established in the *Menges*, *Morr-Fitz*, *Vandersand*, and *Quayle* cases, it is difficult to imagine an Illinois government official or private employer ever again taking the position consistently argued by the State, Walgreens, and Wal-Mart that the Right of Conscience Act does *not* cover pharmacists or may be construed in any but the broadest possible way.

B. Litigation Should Not Be Confined to Direct Statutory/Constitutional Challenges.

One of the critical elements in achieving the successes that have been achieved in Illinois conscience litigation was the decision to file employment litigation/damages cases at the same time as the direct statutory/constitutional challenge in federal court. The pharmacists could have limited themselves to filing direct challenges on statutory and constitutional grounds to the Rule.

By suing the State and Walgreens simultaneously, the *Menges* and *Quayle* plaintiffs made it impossible for either of those entities to avoid dealing with and resolving the fundamental conscience issues created by the Rule. The State could no longer fall back on a literalist reading of the Rule—pharmacies *not* pharmacists—when it was now clear that the State itself had told Walgreens it could not accommodate individual pharmacists, and with the Governor, the chief law enforcement officer of the State, publicly praising Walgreens's suspension (the pharmacists called it "firing") of individual pharmacists as "following the law."[211] Conversely, Walgreens could not simply point the finger at the State because the absolutist language of the Health Care Right of Conscience Act left no wiggle room for such a defense. Thus, the pharmacists, squeezed between two far more powerful adversaries, attacked them both and did so with enough force to convince them to come to the negotiating table.

It was the filing of the *Quayle* damages cases in state court that caused Walgreens to intervene in the direct constitutional challenge then pending in *Menges v. Blagojevich*. And there can be little doubt that it was the involvement of Walgreens, the largest retail pharmacy chain

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[211] *Lou Dobbs Tonight: Walgreens Suspends Pharmacists for Not Giving Out Morning After Pill*, *supra* note 84.

in Illinois and employer of thousands of Illinois citizens, that more or less compelled the State to come up with the reasonable *modus vivendi* embodied in the Amended Rule.

In addition, the role played by the seemingly unrelated *Vandersand* case cannot be overlooked. Vandersand eschewed any involvement in the statutory/constitutional challenge then proceeding, opting instead to confine himself to a damages action against his former employer. But it was Judge Scott's opinion in *Vandersand* that was thereafter crucial in the favorable decisions in the *Quayle* cases, and was the only case cited by the circuit court in ruling in favor of the *Morr-Fitz* plaintiffs on their Right of Conscience Act claims.

C. The Free Exercise Clause Is Alive and Well.

Somber academic warnings notwithstanding,[212] the Free Exercise Clause of the First Amendment remains an effective weapon against governmental efforts to override the rights of conscience. Close attention to the circumstances of the Rule's promulgation—the statements of government officials, press releases, and the like—were important elements in the plaintiffs' successful argument in both *Menges* and *Morr-Fitz* that the Rule was not neutral but, instead, impermissibly targeted people because of their religious views.

On the question of general applicability, these cases demonstrate that political and business realities, such as the desire not to alienate important constituencies, will often make it virtually impossible for regulators to avoid drafting rules that savvy litigators will not be able to drive a truck through. Thus, the Blagojevich Rule—despite protestations of a compelling need to ensure universal access to emergency contraceptives—failed to include large swathes of the known universe of pharmacies. These included all hospitals—Catholic hospitals would certainly have balked at the Rule's application to them—and basically any pharmacy that for "common sense business reasons" chose not to or simply failed to comply with the strictures of the Rule. On top of that, the system of "individualized governmental assessments" available to pharmacy owners with non-religious reasons for not stocking emergency contraceptives—another concession to business reality—completely undermines any pretense of general applicability. Once a plaintiff overcomes *Smith*'s neutrality and general applicability hurdles, strict

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[212] *See, e.g.*, Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992) (arguing that "formal neutrality"—or no discrimination against religion—would cause religion to be overly regulated just like any other secular activity or institution); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120–21 (1990) (arguing that the Court largely ignores the historical and textual meaning of the Free Exercise Clause).

scrutiny virtually insures that a challenged measure will be found invalid.

D. Not All State Conscience Laws Are of Equal Value.

In spite of what has previously been said about the Governor's roughshod handling (or rather, ignoring) of the Illinois Health Care Right of Conscience Act, it cannot be denied that the Illinois law's broadest imaginable conscience protection was a major factor in the ultimate success of this litigation. It is hard to imagine a remotely similar result being possible under the conscience law of, say, North Carolina, as described above,[213] or similar narrow conscience clauses of other states. It is, of course, somewhat speculative to conclude that the Illinois law, with its soaring preamble about the rights of conscience may have influenced how courts resolved the free exercise and RFRA claims, but it certainly cannot have hurt.

E. Administrative Defects and Other Technical Claims Are Non-Starters.

Both the *Pace* and *Morr-Fitz* plaintiffs included claims in their original complaints that the promulgation of the Rule violated the Illinois Administrative Procedure Act. The *Menges* plaintiffs never had such a claim and the *Morr-Fitz* plaintiffs eventually dropped theirs, and for good reason. Such claims add little to a case in terms of getting the court's attention or, more importantly, in terms of winning on the merits. It is simply too easy for the defendant to correct any such technical difficulties. Even the most well-founded claim of this nature will only result in, at most, further delay in the process of obtaining a final adjudication on the merits.

CONCLUSION

Despite the undeniable success in protecting the conscience rights of health care professionals illustrated by the Illinois pharmacists' litigation recounted herein, the threats to conscience rights continue to loom and grow.[214] But as this review of the Illinois conscience litigation

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[213] *See supra* notes 15–19 and accompanying text.

[214] *See, e.g., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, HHS (Aug. 1, 2011), http://www.hhs.gov/news/press/2011pres/08/20110801b.html. This HHS proposed Interim Final Rule would mandate that religious employers provide for their employees coverage for services deemed morally objectionable by the employing religious institutions. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (proposed Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147). A recent regulation issued by the Department of Health and Human Services requires all faith-based employers to provide health-care coverage of contraceptives with few exceptions and only a one-year safe harbor from enforcement of the regulation. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services

shows, those threatened are not without recourse in our legal system. The creative and vigorous use of litigation of all kinds has been and will continue to be an important bulwark against both governmental and private encroachments upon what Illinois's Lincoln—if not Blagojevich—referred to as the "sacred and inviolable" right of conscience.

Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

ENFORCING A TRADITIONAL MORAL CODE DOES NOT TRIGGER A RELIGIOUS INSTITUTION'S LOSS OF TAX EXEMPTION†

*James A. Davids**

INTRODUCTION

In the article to which this paper responds,[1] Mr. Austin Caster appears to make the following arguments[2]: First, tax-exempt, religious

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† This Article is being published as a response to a companion piece authored by Mr. Austin Caster as part of an "Opposing Views Series" on the rights of religious employers. Opinions expressed in any part of the *Regent University Law Review* are those of individual contributors and do not necessarily reflect the policies and opinions of its editors and staff, Regent University School of Law, its administration and faculty, or Regent University.

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1 Austin Caster, *"Charitable" Discrimination: Why Taxpayers Should Not Have to Fund 501(c)(3) Organizations That Discriminate Against LGBT Employees*, 24 REGENT U. L. REV. 403 (2012). By the editor's agreement, this response is limited in page length to the companion article written by Mr. Caster. Therefore, some of the points raised by Mr. Caster must be addressed summarily. One such point is his claim that LGBT status is "immutable." *Id.* at 403 & n.5. If such a claim were true, there would be no ex-gays. How many ex–African Americans or ex–Asian Americans are there? A second matter is Mr. Caster's statement that tax-exempt status equates to "public funding." *Id.* at 404. The Supreme Court, in *Walz v. Tax Commission*, distinguished between government funding of religion through transfer of public revenues and tax-exempt status that results in the church simply not supporting the state. 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). The third matter is Mr. Caster's claim that the religious institutions that employed Mses. Naylor, Tadlock, and Howe were unjust in firing them. Caster, *supra*, at 404–06. In response, please note two points. First, there is no evidence that Ms. Naylor is a lesbian. Her employer, therefore, did not fire her for her sexual orientation but rather for her *public* disagreement with the position of her employer on gay marriage. Heterosexual employees of LGBT organizations that publicly disagreed with the LGBT position on Proposition 8 would, presumably, receive the same treatment as Ms. Naylor. Second, the events that triggered the termination of Mses. Tadlock and Howe were innocent enough—a wedding and birth announcement. Yet, they evidenced a profound disagreement with a moral teaching of Christianity that has existed for centuries. *See, e.g.*, *Leviticus* 20:13; *Romans* 1:27; *1 Corinthians* 6:9–10. If their religiously affiliated employers misled them by claiming that they would not enforce this doctrine then, presumably, they could use remedies like promissory estoppel. Without such representations or a state statute protecting them, the claims of Mses. Tadlock and Howe would suffer the same fate (dismissal) as Alicia Pedreira in *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757, 759, 762 (W.D. Ky. 2001), *aff'd in part, rev'd in part*, 579 F.3d 722, 734 (6th Cir. 2009), *cert. denied*, 131 S. Ct.

organizations that terminate the employment of LGBT workers on the basis of sexual orientation violate public policy and, therefore, should lose their tax exempt status;[3] second, the constitutional protection provided to religious organizations is limited and should be balanced against equal protection guarantees for LGBT employees;[4] third, it is a fundamentally unfair public policy to provide a social benefit to organizations that advocate positions contrary to a segment of taxpayers;[5] and finally, the United States should follow the example of other nations in protecting the employment of LGBT persons.[6] The following Part addresses the first three arguments.

2091 (2011), *and* 131 S. Ct. 2143 (2011) (dismissing Pedreira's discrimination claim against a former employer when the employer discovered her lesbian lifestyle, which was contrary to its employment policy as a religious organization).

2 In all good "debates," there are many points on which the "debaters" agree. For instance, this author agrees with Mr. Caster that the church and its affiliated organizations do much good in providing social services such as food pantries, shelter, and medical care for the poor. Caster, *supra* note 1, at 410. This author also generally agrees with the short history provided by Mr. Caster with respect to Sections 501(c) and 107 of the Internal Revenue Code. *See id.* at 408–10. We also generally agree that absent coverage for sexual orientation in Title VII of the Civil Rights Act (for which there is none), or in state or local laws (which are growing in number), the general "employment at will" doctrine allows employers to fire, and employees to resign, for any reason. *Id.* at 406. Finally, we agree that "only recently has protection for the LGBT community evolved." *Id.* at 407. This point of agreement in particular has huge implications as noted in Part I of this Article.

3 *See id.* at 411–14.

4 *See id.* at 414–20.

5 *See id.* at 420–26.

6 Although Mr. Caster titles his fifth section as a comparative view of how other nations handle conflicts between equality and religious liberty, his primary focus is on other nations' protection of LGBT employment rights. For instance, he notes the number of nations that prohibit employment discrimination against LGBTs (54 according to his source, but does that mean that the remaining 139 members of the United Nations do not?). *Id.* at 426. He also notes that our neighbor to the north has taken similar and additional action to protect LGBT rights, and that England has adopted the European Convention of Human Rights, Article 8(2) of which was used to strike down Northern Ireland's law against sodomy. *See id.* at 427–30. He concludes that the United States should "[adopt] the human rights norms followed in much of the rest of the world." *Id.* at 431. With respect to relying on foreign law, this author prefers the approach of Justice Scalia in his dissent in *Roper v. Simmons,* where he observed that those Justices relying on foreign law to establish a minimum age of eighteen to invoke the death penalty had failed to follow foreign law in establishing the right to an abortion on demand up to the point of viability (making the United States one of only six countries to do so), and had also failed to follow foreign precedent regarding public funding of religious schools (Netherlands, Germany, and Australia allow direct government funding of religious schools). 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting).

I. RELIGIOUS ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION SHOULD NOT LOSE THEIR TAX-EXEMPT STATUS.

Relying on *Bob Jones University v. United States*,[7] Mr. Caster argues that nonprofit organizations discriminating against LGBT employees should lose their tax-exempt status.[8] Yet, after reviewing the context of the *Bob Jones* case and its language severely limiting the propriety of tax-exempt status revocation,[9] it is little wonder why neither the Internal Revenue Service ("IRS") nor the Supreme Court has extended the sanction beyond private educational institutions that discriminate on the basis of race.

The balance of this Part briefly reviews the context and language of the *Bob Jones* decision. It then considers other areas of discrimination (gender, age, and disability) that Congress has prohibited for nearly fifty years but that neither the Court nor the IRS has declared a violation of "national fundamental public policy" for purposes of triggering revocation of tax-exempt status. This Part concludes that it will be decades, if ever, before the prohibition of sexual-orientation discrimination will constitute "national fundamental public policy" for revoking the tax-exempt status of those religious institutions that follow orthodox Christian principles with respect to sexual morality.

A. Bob Jones *Must Be Applied Very Narrowly in Light of the Unique Treatment Afforded Discrimination Against African Americans in Education by All Three Branches of Government over Three Decades.*

Given the space limitations of this response, a full recitation of the circumstances leading up to the extraordinary remedy in *Bob Jones University v. United States* is beyond the scope of this Article. Such an examination would reveal that after the seminal case of *Brown v. Board of Education*,[10] the Court's authority in ordering racial desegregation of public education was repeatedly challenged.[11] Confrontations in Little Rock, Arkansas were followed by closing public schools in the South to prevent integration, leasing and selling public school buildings to newly created private schools, inducing public school teachers to leave their

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7 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

8 Caster, *supra* note 1, at 403–04, 423–24.

9 Mr. Caster provides a glimpse of the extraordinary circumstances necessary for revoking the tax-exempt status of charitable institutions when he notes that this sanction is limited, according to the Court, to where there is "*no doubt* that the activity involved is contrary to a *fundamental public policy*." *Id.* at 424 (emphasis added) (quoting *Bob Jones*, 461 U.S. at 592).

10 347 U.S. 483 (1954).

11 For a history of the resistance to *Brown* in the South, see Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1436–40 (1973).

schools and teach in private schools, and adopting "freedom of choice" plans under which parents could choose which school in the district their children should attend (not surprisingly, few parents chose to send their children to the school predominated by the other race).[12] As a result of these and other efforts, Southern public schools remained segregated for a decade after *Brown*,[13] leading to more vigorous Court action.[14]

Improvement[15] was achieved not only through the efforts of the judiciary,[16] the executive branch,[17] and Congress,[18] but also, ironically, through opponents of school desegregation who left the Southern public schools en masse for private schools.[19] Many of these schools were

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[12] *Id.*

[13] *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9–10 (1994) (noting that the 1964 Civil Rights Act, passed ten years after *Brown*, was the more significant motivator for schools to desegregate).

[14] Throughout this period, the Supreme Court was relentless in achieving and improving racial balance in public schools. *See* Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–41 (1968) (holding that school choice plans are unconstitutional if they prolong segregation and, most importantly, confirming that school boards have an "*affirmative duty to take whatever steps* might be necessary to convert to a *unitary system* in which racial discrimination would be eliminated root and branch" (emphasis added)); Rogers v. Paul, 382 U.S. 198, 199 (1965) (holding that assigning African American students to a "Negro high school" on the basis of their race is unconstitutional); Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231 (1964) (holding that closing public schools to avoid integration is unconstitutional); Goss v. Bd. of Educ., 373 U.S. 683, 686–88 (1963) (holding that permitting students to transfer after desegregation is unconstitutional if it perpetuates school segregation). The vigor of the Court's effort to achieve racial integration in public education reached its zenith in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In *Swann*, the Court declared that federal district courts possessed broad authority to fashion remedies in desegregation cases, including altering attendance districts for schools and ordering busing where needed. *Id.* at 30–31.

[15] Racial balance in the South was measurably advanced by 1973, when ninety-one percent of Southern schools were desegregated. Hafter & Hoffman, *supra* note 11, at 1436.

[16] *See* discussion *supra* note 14.

[17] In the 1960s, the executive branch issued the following orders to combat racial discrimination: Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963), *reprinted in* 42 U.S.C. § 1982 (2006) (instituting a policy of equal opportunity in federal housing); Exec. Order No. 11,197, 3 C.F.R. 278 (1964–1965) (establishing the President's Council on Equal Opportunity); and Exec. Order No. 11,478, 3 C.F.R. 133 (1969), *reprinted as amended in* 42 U.S.C. § 2000e (2006) (instituting a policy of equal employment opportunity in the federal government).

[18] Perhaps the greatest influence for desegregation was Congress. In 1964, Congress enacted the Civil Rights Act, Title VI of which prohibited racial discrimination in schools receiving federal funds. Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2006)). This provision became increasingly important to public schools as federal funding mushroomed, starting with the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

[19] Authors who chronicled the "white flight" from Southern public schools to private schools noted that the "flight" "began when unitary school systems became required under *Green*'s affirmative duty to desegregate." Hafter & Hoffman, *supra* note 11, at 1441. In the

affiliated with Protestant churches, thereby obtaining use of tax-exempt church buildings.[20] They also individually benefited from state and federal tax exemptions,[21] which the IRS prior to 1970 freely granted to schools that discriminated in admissions on the basis of race.[22]

With this background, the Supreme Court granted certiorari to consider whether nonprofit private schools that discriminate on the basis of race should be tax-exempt.[23] Given the fact that one of the schools in the *Bob Jones* case had maintained a racially discriminatory admissions policy from its incorporation in 1963,[24] the outcome of the issue was hardly in doubt. Thirty years of judicial struggle dictated a result in which racial desegregation in education would be, in the eyes of the majority of the Supreme Court, a compelling state interest and thereby pass the strict scrutiny test required for the deprivation of religious free exercise.[25]

The Court's language exhibited the extraordinarily limited nature of the sanction it employed: Nonprofit organizations otherwise entitled to tax-exempt status will lose their privileged status "only where there can be *no doubt* that the activity involved is contrary to a *fundamental* public policy."[26] Regarding racial discrimination in education, Chief Justice Burger wrote, "[T]here can no longer be *any doubt* that racial

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mid-1960s before *Green*, there were roughly 25,000 students in these new private schools. This number grew exponentially to 535,000 by 1972. *Id.* The same study noted, "While direct and indirect state assistance to [private] schools was significant in facilitating their formation and maintenance, the central reason for their growth was not the availability of state support but rather the determination of white parents to avoid desegregation at any cost." *Id.*

20 *Id.* at 1447.

21 *See id.* at 1445–46.

22 Bob Jones Univ. v. United States, 461 U.S. 574, 577–78 (1983). In 1970, a federal district court preliminarily enjoined the IRS from granting tax-exempt status to Mississippi private schools that discriminated with respect to race in admissions. *Id.* at 578 (citing Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970)). Subsequently, the IRS determined that it could "'no longer legally justify allowing tax-exempt status . . . to private schools which practice racial discrimination,'" or "'treat gifts to such schools as charitable deductions for income tax purposes.'" *Id.* (quoting IRS News Release (July 10, 1970)). The IRS then formally revised its policy on tax exemption for racially discriminatory schools in Revenue Ruling 71-447, in which the IRS stated, in part, that based on the "national policy to discourage racial discrimination in education," the IRS would not consider a private school "charitable" within the meaning of Sections 501(c)(3) and 170 of the Internal Revenue Code. *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).

23 *Id.* at 577.

24 *Id.* at 583.

25 *Id.* at 604.

26 *Id.* at 592 (emphasis added); *see also id.* at 598 ("We emphasize . . . that these sensitive determinations [regarding withdrawal of recognition of tax exempt status] should be made *only* where there is *no doubt* that the organization's activities violate *fundamental public policy*." (emphasis added)).

discrimination in education violates *deeply and widely accepted* views of *elementary* justice."[27] The Court determined that "[a]n unbroken line of cases following *Brown v. Board of Education* establishe[d] *beyond doubt* . . . that racial discrimination in education violates *a most fundamental national* public policy,"[28] a position shared by both Congress and the executive branch.[29] From this language, it is clear that a nonprofit organization that otherwise meets the criteria for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code can lose its tax-exempt status if it adopts and follows an otherwise legal policy,[30] which, without doubt, violates fundamental national public policy as repeatedly demonstrated over decades by the executive branch, Congress, and the judiciary.[31]

As explained in further detail below, the formidability of these criteria are best evidenced by the fact that neither the IRS nor the courts have ever revoked the tax exemption of nonprofit organizations which discriminate on the basis of gender, age, or disability—all of which are protected under Title VII of the Civil Rights Act of 1964,[32] the Age Discrimination in Employment Act of 1967,[33] or the Americans with Disabilities Act of 1990.[34]

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[27] *Id.* at 592 (emphasis added).

[28] *Id.* at 593 (emphasis added).

[29] *Id.* at 594–95 ("Congress, in Titles IV and VI of the Civil Rights Act of 1964 . . . clearly expressed its agreement that racial discrimination in education violates a fundamental public policy. . . . The Executive Branch has consistently placed its support behind eradication of racial discrimination."). The Court went on to conclude,

> On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. . . . [Revenue Ruling 71-447] is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970.

Id. at 598.

[30] The IRS can also refuse to grant tax-exempt status, or can revoke it, if the mission or actions of a nonprofit organization are illegal. *See* Church of Scientology v. Comm'r, 83 T.C. 381, 443 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

[31] *Bob Jones*, 461 U.S. at 593 ("Over the past quarter of a century, *every* pronouncement of this Court *and myriad* Acts of Congress *and* Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." (emphasis added)).

[32] Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

[33] Age Discrimination in Employment Act of 1967, § 4(a), Pub. L. No. 90-202, 81 Stat. 602, 603 (codified at 29 U.S.C. § 623(a) (2006)).

[34] Americans with Disabilities Act of 1990, § 102(a), Pub. L. No. 101-336, 104 Stat. 327, 331–32 (codified as amended at 42 U.S.C. § 12112(a) (2006 & Supp. III 2009)).

B. Prohibiting Gender Discrimination Is Not a "Fundamental Public Policy" That Triggers Revocation of Tax-Exempt Status.

If there is any subgroup of the population that has suffered discrimination somewhat comparably to African Americans, it is women.[35] In fact, "although blacks were guaranteed the right to vote in 1870," women were forced to wait until 1920, when the Nineteenth Amendment passed.[36]

Using the tri-branch analytical approach followed by the Court in *Bob Jones*, the federal branch that led the movement against gender discrimination was Congress, which passed the Equal Pay Act in 1963 requiring that women receive equal pay for equal work in the workforce.[37] A year later, Congress enacted Title VII of the Civil Rights Act of 1964, which, of course, prohibits discrimination on the basis of sex in employment.[38] In 1978, Congress enacted the Pregnancy Discrimination Act, which amended Title VII to prohibit discrimination based on childbirth, pregnancy, or similar medical conditions.[39] Finally, in 1993, Congress added the Family and Medical Leave Act, which relieved females of the burden of taking time off work for family needs.[40]

With respect to education specifically, Congress addressed gender discrimination by enacting Title IX of the Education Amendments of 1972, which required that no person be excluded on the basis of sex from participation in educational programs or activities receiving federal financial assistance.[41] When the Supreme Court in *Grove City College v.*

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[35] As noted by Justice Brennan in *Frontiero v. Richardson*,

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

411 U.S. 677, 685 (1973).

[36] *Id.*

[37] Equal Pay Act of 1963, § 3, Pub. L. No. 88-38, 77 Stat. 56, 56–57 (codified at 29 U.S.C. § 206(d)(1) (2006)).

[38] Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

[39] Pregnancy Discrimination Act of 1978, § 1, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

[40] Family and Medical Leave Act of 1993, § 102(a), Pub. L. No. 103-3, 107 Stat. 6, 9 (codified at 29 U.S.C. § 2612(a) (2006)); *see also* Nevada Dep't of Human Servs. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding the constitutionality of the Family and Medical Leave Act).

[41] Education Amendments of 1972, § 901(a), Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681(a) (2006)). Please note, however, in this regard that the exceptions to Title IX include single-gender institutions; educational institutions controlled by a religious organization, if the provisions in Title IX are inconsistent with the

Bell narrowed the applicability of Title IX to those school programs funded specifically by the federal government,[42] Congress overrode a presidential veto to pass the Civil Rights Restoration Act of 1987, which broadened the scope of Title IX.[43]

Regarding the judicial branch, someone arguing that prohibiting gender discrimination is a "fundamental national public policy" would undoubtedly start with *Roberts v. United States Jaycees*.[44] In that case, the Court overrode the non-expressive[45] associational freedom of an all-male members club[46] by declaring that it "plainly serves compelling state interests of the highest order" to prohibit gender discrimination in private clubs where business contacts are made and deals are done.[47] Aside from private clubs, however, the Court has at times upheld laws that discriminate on the basis of gender. For instance, the Court upheld a federal law that requires men, but not women, to register for the draft.[48] Similarly, the Court upheld a statutory rape law that punishes a man for having sex with a woman under eighteen, but not punishing a woman for having sex with a man younger than eighteen.[49]

Fittingly for the *Bob Jones* precedent, some nonprofit, tax-exempt colleges continue to admit exclusively either women or men, and yet their tax-exempt status remains secure. The fact is that the Court treats cases involving race discrimination differently than gender

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institution's religious tenets; educational institutions training individuals for military services; and certain fraternities or sororities. *Id.* § 1681(a)(3)–(6).

[42] 465 U.S. 555, 572–74 (1984).

[43] Civil Rights Restoration Act of 1987, § 3(a), Pub. L. No. 100-259, 102 Stat. 28, 28–29 (codified as amended at 20 U.S.C. § 1687 (2006)); 134 CONG. REC. 4633, 4699, 4716, 4791 (1988).

[44] 468 U.S. 609 (1984).

[45] This factor distinguishes *Jaycees* from *Boy Scouts of America v. Dale*, 530 U.S. 640, 661 (2000) (holding that Congress cannot compel an organization to accept members when doing so "would derogate from the organization's expressive message"); *see also Jaycees*, 468 U.S. at 638 (O'Connor, J., concurring) (recognizing that expressive associational freedom is entitled to greater protection than non-expressive associational freedom).

[46] *Jaycees*, 468 U.S. at 613 (majority opinion).

[47] *Id.* at 623–26. In other cases, the Court had already upheld local and state laws prohibiting gender discrimination in private clubs that were considered places of public accommodation. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 4–5, 8 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 539, 549 (1987).

[48] Rostker v. Goldberg, 453 U.S. 57, 83 (1981) ("[W]e conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.").

[49] Michael M. v. Superior Court, 450 U.S. 464, 466, 475–76 (1981). California's "statutory rape" law upheld in *Michael M.* was later amended to prohibit sexual intercourse with any minor, whether male or female. CAL. PENAL CODE § 261.5 (West 2008 & Supp. 2012).

discrimination.[50] Even Congress has not consistently barred all gender discrimination when it had an opportunity to do so.[51] Therefore, even with a long history of prohibiting gender discrimination, neither the IRS nor the courts have found the eradication of gender discrimination to be, *without doubt*, a *fundamental national policy* as repeatedly demonstrated over decades by the executive branch, Congress, and the judiciary.

C. Prohibiting Age Discrimination Is Not a "Fundamental Public Policy" That Triggers Revocation of Tax-Exempt Status.

Elder Americans have not endured the same discriminatory treatment as African Americans and women in terms of voting, owning property, jury service, and other incidents of civil life in America. Elder Americans have, however, suffered discrimination in employment, which Congress addressed in the Age Discrimination in Employment Act of 1967 and its subsequent amendments.[52] Congress has also addressed inequitable treatment of federal assistance to the elderly.[53] Finally, Congress has passed numerous other laws benefiting the elderly, but these have not been in the nature of prohibiting discrimination.[54]

In spite of this attention by Congress, it is again doubtful that the prohibition of age discrimination is a "fundamental national public policy" because of the lack of judicial support. In *Massachusetts Board of Retirement v. Murgia*, an otherwise fit and healthy policeman challenged, on the basis of equal protection, a Massachusetts statute mandating police retirement at age fifty.[55] The plaintiff sought, among other things, a declaration by the Court that the Massachusetts law created a suspect class, thereby triggering strict judicial scrutiny of the statute.[56] The Court declined this request and chose instead the much

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[50] *See generally* Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that classifications based on race, national origin, or affecting fundamental rights are given the most exacting scrutiny, while discriminatory classifications based on sex or illegitimacy are subject to less scrutiny); *see also* United States v. Virginia, 518 U.S. 515, 532 n.6 (noting that the Court reserves "the most stringent judicial scrutiny" for race and national origin, rather than sex).

[51] Congress permitted gender as a bona fide occupational qualifications, along with religion and national origin. 42 U.S.C. § 2000e-2(e) (2006).

[52] Age Discrimination in Employment Act of 1967, § 4, Pub. L. No. 90-202, 81 Stat. 602, 603–04 (codified as amended at 29 U.S.C. § 623 (2006 & Supp. III 2009)).

[53] *See* Age Discrimination Act of 1975, § 303, Pub. L. No. 94-135, 89 Stat. 728 (codified at 42 U.S.C. § 6102 (2006)).

[54] *See Historical Evolution of Programs for Older Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. ON AGING (Nov. 15, 2011, 7:15 AM), http://www.aoa.gov/AoA_programs/OAA/resources/History.aspx.

[55] 427 U.S. 307, 308–11 (1976).

[56] *Id.* at 309–10.

less rigorous rational basis standard because elderly Americans have not "experienced a 'history of purposeful unequal treatment' [like African Americans] or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[57] The Court further stated that age is not immutable like race, since "even old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."[58]

D. Prohibiting Discrimination on the Basis of Disability Is Not a "Fundamental Public Policy" That Triggers Revocation of Tax-Exempt Status.

Other than perhaps race, there is no clearer example of congressional intent to eliminate discrimination than in the area of disability. Efforts began in 1948 when Congress passed a law prohibiting the U.S. Civil Service from employment discrimination based on physical handicap.[59] From that time forward, Congress has been consistently proactive in protecting the rights of the disabled.[60] Laws enacted by Congress to end disability discrimination include the Architectural Barriers Act,[61] the Rehabilitation Act of 1973,[62] the Education of the Handicapped Act—now known as the Individuals with Disabilities Education Act ("IDEA"),[63] the Developmental Disabilities Assistance and

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[57] *Id.* at 312–14.

[58] *Id.* at 313–14 (citation omitted); *see also* Vance v. Bradley, 440 U.S. 93, 95–98, 111–12 (1979) (using, once again, the rational basis test to uphold a federal law that mandated retirement at age sixty for workers employed in the Foreign Service).

[59] Act of June 10, 1948, ch. 434, 62 Stat. 351 (current version at 5 U.S.C. § 7203 (2006)).

[60] The information in this Section draws heavily upon the following sources: U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, A GUIDE TO DISABILITY RIGHTS LAWS (2005) and Michael Hatfield et al., Bob Jones University*: Defining Violations of Fundamental Public Policy* 52–62, *in* 6 TOPICS IN PHILANTHROPY (2000).

[61] Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4156 (2006)) (mandating that all federal buildings and all those financed by the federal government provide access to the physically handicapped).

[62] Rehabilitation Act of 1973, § 501, Pub. L. No. 93-112, 87 Stat. 355, 390–91 (codified as amended at 29 U.S.C. § 791 (2006)) (prohibiting federally funded programs or federal agencies from discriminating against the handicapped, including in employment issues such as hiring, placement, and promotion).

[63] The law, originally passed in 1970, the Education of the Handicapped Act, § 601, Pub. L. No. 91-230, 84 Stat. 121, 175 (1970) was strengthened in 1975 and renamed the Education for All Handicapped Children Act ("EAHCA"), Pub. L. No. 94-142, 89 Stat. 773 (1975). After further revisions in 1991, it is now known as the Individuals with Disabilities Education Act ("IDEA"), Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1482 (2006 & Supp. IV 2010)); *see also* 137 CONG. REC. 22,630–31 (1991).

Bill of Rights Act,[64] the 1984 Voting Accessibility for the Elderly and Handicapped Act,[65] the Air Carriers Access Act of 1986,[66] the 1988 amendment to the Fair Housing Act (amending Title VIII of the 1968 Civil Rights Act),[67] the Americans with Disabilities Act of 1990,[68] and the Telecommunications Act of 1996.[69]

Yet, as in the case of age discrimination, the lack of judicial support casts doubt on the proposition that prohibiting disability discrimination is a "fundamental national public policy." In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court determined that claims for disability discrimination are subject only to the lowest level of judicial review: rational basis scrutiny.[70] In part, the Court founded its rationale on the fact that law-making bodies had already taken proper steps to protect the rights of the disabled.[71] The Court reaffirmed in *Heller v. Doe*[72] and *Board of Trustees v. Garrett*[73] that only rational basis review is available for disability discrimination claims.

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[64] Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 95-602, 92 Stat. 3003 (1978) (codified as amended at 42 U.S.C. §§ 6000–6083 (1994)) (repealed 2000). Before being repealed in 2000, Congress had expanded this code section in 1986 to include the mentally ill via the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478.

[65] Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. §§ 1973ee to ee-6 (2006)).

[66] Air Carriers Access Act of 1986, § 2(a), Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 49 U.S.C. § 41705(a) (2006)) (prohibiting discrimination against individuals with a physical or mental impairment in providing air transportation).

[67] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3602, 3604–3606 (2006)).

[68] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)); *see also* U.S. DEP'T OF JUSTICE, *supra* note 60, at 1 ("The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.").

[69] Telecommunications Act of 1996, §§ 251(a)(2), 255, Pub. L. No. 104-104, 110 Stat. 56, 61–62, 75–76 (codified at 47 U.S.C. §§ 251(a)(2), 255 (2006)) (requiring manufacturers of telecommunications devices and providers to design equipment and services to accommodate people with disabilities).

[70] 473 U.S. 432, 441–42 (1985).

[71] *Id.* at 443–45.

[72] 509 U.S. 312, 321 (1993).

[73] 531 U.S. 356, 367–68 (2001).

E. Prohibiting Discrimination on the Basis of Sexual Orientation Is Not a "Fundamental Public Policy" That Triggers Revocation of Tax-Exempt Status.

1. Supreme Court

In *Bob Jones*, the Supreme Court was guided by "[a]n unbroken line of cases following *Brown v. Board of Education* [that] establishe[d] beyond doubt [the] Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[74] This unbroken line consisted of at least eight cases spanning from the 1954 *Brown* decision to the 1983 *Bob Jones* decision.[75]

Any search for a similar "unbroken line of cases" prohibiting sexual-orientation discrimination must come after the 1986 decision of *Bowers v. Hardwick*, where the Court, in a five-four decision, upheld the constitutionality of a Georgia anti-sodomy statute.[76] In *Bowers*, the issue presented was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,"[77] a right arguably within the penumbra of the right to privacy line of cases.[78] The Court determined that there was no such right, declaring that consensual sodomy was neither "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'"[79] nor "deeply rooted in this Nation's history and tradition."[80] In fact, according to the Court, deeply rooted in the nation's history and tradition was the proscription of sodomy, which was illegal at common law and in either all or most of the states when they ratified the Bill of Rights and the

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[74] Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

[75] *Id.* at 593–94. As part of this "unbroken line of cases," the Court in *Bob Jones* cited *Runyon v. McCrary*, 427 U.S. 160 (1976); *Norwood v. Harrison*, 413 U.S. 455 (1973); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964); and *Cooper v. Aaron*, 358 U.S. 1 (1958). Other cases establishing this view include *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968); *Rogers v. Paul*, 382 U.S. 198 (1965); and *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963).

[76] 478 U.S. 186, 187–89 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[77] *Id.* at 190.

[78] *Id.* at 190–92.

[79] *Id.* at 191–92 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

[80] *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted).

Fourteenth Amendment.[81] Finally, the Court rejected the argument that a sexual moral code could not serve as the state's reason for a law.[82]

Certainly an important case for the advancement of LGBT interests was *Romer v. Evans*, which addressed a challenge to the constitutionality of a Colorado constitutional amendment that prohibited all state and local government action designed to protect homosexuals.[83] Plaintiffs challenged the law on equal protection grounds, claiming that the amendment should be subject to strict scrutiny because it infringed on the right of gays and lesbians to participate in the political process.[84] The Court agreed that the amendment was unconstitutional but refused to find that homosexuality or homosexual behavior were fundamental rights.[85] Instead of finding homosexuality to be a protected class requiring strict judicial scrutiny, the Court applied the rational basis test, concluding that the constitutional amendment lacked a rational basis since there was no legitimate reason to deny LGBT persons the use of the political process available to everyone else.[86]

The Court in *Romer* did not, however, initiate an "unbroken line of cases" which, over twenty-five years, would help establish a fundamental national public policy prohibiting sexual-orientation discrimination. In fact, the advancement of LGBT interests suffered two setbacks after *Romer* when the Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[87] and *Boy Scouts of America v. Dale*[88] ruled that expressive freedom of association under the First Amendment protected the right of organizations to exclude LGBT persons *even when* this exclusion violated a state anti-discrimination statute.

The only candidate for initiating the potential quarter-century unbroken line of cases necessary for establishing a national fundamental public policy may be *Lawrence v. Texas*, which overruled *Bowers v. Hardwick*.[89] The *Lawrence* Court's five-Justice majority held that a state cannot prohibit consensual sodomy if done in the privacy of a bedroom.[90]

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[81] *Id.* at 192–93. Much of the historical record upon which Justice White relied in *Bowers* was subsequently refuted by Justice Kennedy in *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

[82] *Bowers*, 478 U.S. at 196 ("The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

[83] 517 U.S. 620, 624–25 (1996).

[84] *See id.* at 625.

[85] *Id.* at 625–26, 635–36; *see also id.* at 640 n.1 (Scalia, J., dissenting).

[86] *Id.* at 635 (majority opinion).

[87] 515 U.S. 557, 580–81 (1995).

[88] 530 U.S. 640, 644, 661 (2000).

[89] 539 U.S. 558, 578 (2003).

[90] *Id.*

That is, the right to privacy as guaranteed by the Due Process Clause protects the right of same-sex consenting adults to engage in sexual conduct in the privacy of their bedroom without government intervention.

In Justice Kennedy's opinion for the Court, he failed to find that LGBTs are a protected class such that there is a fundamental right to same-sex behavior. In addition, while the Court relied on privacy cases that applied strict scrutiny, it once again applied the rational basis test,[91] this time finding (contrary to *Bowers*) that a traditional sexual moral code is not an adequate reason for an anti-sodomy statute.[92]

Mr. Caster cites favorably the recent five-four decision in *Christian Legal Society v. Martinez*,[93] claiming that this case stands for the proposition that universities can withhold benefits from student organizations that commit sexual-orientation discrimination.[94] A closer look at the case, however, reveals that this was not the issue addressed by the Court.

The *Martinez* case involved one of the local chapters of the Christian Legal Society ("CLS") on the campus of the University of California, Hastings College of the Law. CLS requires its members and officers to sign a "Statement of Faith" and follow Judeo-Christian moral principles, one of which is to limit sexual activity to marriage between a man and a woman.[95] CLS interpreted this requirement as excluding from membership any person involved in "unrepentant homosexual conduct."[96] In the opinion of the Hastings Law School administration, this conflicted with the school's requirement that official student organizations not discriminate on the basis of religion or sexual orientation.[97] Hastings interpreted its non-discrimination requirement as mandating acceptance by official student organizations of "all

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[91] *See id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'"); *see also* Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1236 (11th Cir. 2004) (interpreting *Lawrence* as using rational basis review); Arizona v. Fischer, 199 P.3d 663, 669 (Ariz. Ct. App. 2008) (noting the application of the rational basis test in *Lawrence*).

[92] *Lawrence*, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (Stevens, J, dissenting) (footnote omitted) (citations omitted)).

[93] 130 S. Ct. 2971 (2010). The five-Justice majority decisions in *Lawrence* and *Martinez* are in marked contrast to the near unanimous decisions in the eight Supreme Court cases that constitute the "unbroken line of cases" relied upon in *Bob Jones*. *See supra* notes 74–75 and accompanying text.

[94] Caster, *supra* note 1, at 403–04, 425–26.

[95] *Martinez*, 130 S. Ct. at 2980.

[96] *Id.*

[97] *Id.* at 2979–80.

comers," allowing any student to participate regardless of status or beliefs.[98] Failure to admit "all comers" resulted in the loss of certain benefits, including funding from mandatory student-activity fees.[99]

The issue before the Court, therefore, was whether "a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students."[100] This issue, involving an "all-comers" policy which the Court found to be reasonable and viewpoint neutral,[101] is far different from the issue of whether the state can deny benefits to a religious organization that restricts its membership to heterosexuals.[102]

2. Congress

Unlike in the areas of race, gender, age, and disability discrimination, Congress has done little to advance the LGBT agenda until recently. Whereas for over forty years Congress has prohibited employment discrimination based on race, gender, age, and disability, it has failed to add a prohibition of sexual-orientation discrimination to Title VII.[103] The Employment Non-Discrimination Act ("ENDA"), which as H.R. 1397[104] and S. 811[105] would add sexual orientation to the list of prohibited employment discrimination, is languishing in Congress again this year just as it has done since 1994.[106]

Attorneys Hatfield, Milgram, and Monticciolo report that in the 1990s Congress actually *hindered* LGBT progress. They cite, for example, Congress's opposition to President Clinton's desire to end sexual-orientation discrimination in the military, resulting in the "Don't

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98 *Id.* at 2979.

99 *Id.*

100 *Id.* at 2978.

101 *Id.*

102 CLS, in fact, urged the Court to review the Hastings policy *as written* (prohibiting religious and sexual-orientation discrimination) and not as Hastings interpreted it (the "all-comers" requirement). The Court specifically refused to do so. *Id.* at 2982–84; *see also* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795 (9th Cir. 2011) (noting that the Supreme Court in *Martinez* declined to address the constitutionality of membership restrictions based on race, gender, religion, and sexual orientation), *cert. denied*, 80 U.S.L.W. 3381 (U.S. Mar. 19, 2012).

103 *See* 42 U.S.C. § 2000e-2 (2006) (failing to make sexual-orientation discrimination an unlawful employment practice).

104 H.R. 1397, 112th Cong. § 4 (2011).

105 S. 811, 112th Cong. § 4 (2011).

106 JODY FEDER & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2011); *see also* Hatfield et al., *supra* note 60, at 84 n.389.

Ask, Don't Tell" compromise.[107] Using its appropriation power, Congress also prevented the District of Columbia from enforcing its Domestic Partners Act, which would have extended health care and other benefits to unmarried adults living together.[108] Finally, in reaction to a District of Columbia court ruling that forced Georgetown University to accept a homosexual student group, Congress enacted the Nation's Capital Religious Liberty and Academic Freedom Act that permitted "religiously affiliated educational institutions to deny benefits and endorsement based on sexual preference."[109]

The LGBT movement made minor progress in 1994 when Congress designated "hate crimes" to include crimes against persons because of their sexual orientation for purposes of the Violent Crime Control and Law Enforcement Act of 1994.[110] The movement suffered a major blow, though, when Congress in 1996 passed, and President Clinton signed, the Defense of Marriage Act ("DOMA").[111] DOMA has two basic provisions: First, it relaxed the Full Faith and Credit Clause so that states are not required to give effect to same-sex marriages;[112] and second, it limited the terms "marriage" and "spouse" for purposes of federal law to a legal union between one man and one woman as husband and wife.[113]

During the George W. Bush administration, Congress did little to aid or hinder LGBT rights. Congress failed to pass ENDA, as noted above,[114] and it failed to enact the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act.[115] It also failed to repeal "Don't Ask, Don't Tell"[115] and DOMA.[117] On the other hand, Congress

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107 Hatfield et al., *supra* note 60, at 85.

108 *Id.*

109 *Id.* at 85–86.

110 *Id.* at 86.

111 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)). For a comprehensive review of the law and its history, see Joshua Baker & William C. Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1 (2011).

112 28 U.S.C. § 1738C (2006).

113 1 U.S.C. § 7 (2006).

114 *See supra* note 106 and accompanying text.

115 This Act would have authorized the Justice Department to investigate and prosecute violent crimes where the victims were selected because of their perceived race, color, religion, national origin, disability, gender, sexual orientation or gender identity. *See* S. 1105, 110th Cong. § 4(a) (2007); H.R. 1592, 110th Cong. § 4(a) (2007); *see also* Carter T. Coker, Note, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271, 282 (2011) (noting the defeat of the legislation in 2007 due to President Bush's threatened veto).

116 *See* H.R. 1246, 110th Cong. § 3 (2007).

117 *See S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 598 Before the S. Comm. on the Judiciary*, 112th Cong. 1

also failed to pass the Federal Marriage Amendment, which would have defined marriage as the union of a man and a woman, and would have prohibited the courts from ruling otherwise.[118]

During the first two years of the Obama administration when the Democrats controlled both houses of Congress, bills supported by LGBTs advanced. Congress passed the Don't Ask, Don't Tell Repeal Act of 2010[119] and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.[120] The LGBT legislative agenda remains full,[121] but its progress during the remainder of the 112th Congress is doubtful given the current composition of the House of Representatives.

3. Executive Branch

In reviewing executive branch actions for evidence of a fundamental national policy against race discrimination, the Court in *Bob Jones* looked almost exclusively at executive orders.[122] The Chief Justice cited two executive orders ("EOs") by Presidents Truman and Nixon, and one each by Presidents Eisenhower, Kennedy, Johnson, and Carter as evidence of the executive branch "consistently plac[ing] its support behind eradication of racial discrimination."[123] This consistency is missing with respect to EOs protecting LGBT rights.

Presidents prior to Bill Clinton generally did not advance LGBT issues. During President Clinton's term, he signed three EOs pertaining to LGBTs, the first being in 1995, which stated that agencies determining eligibility for access to confidential information must not make any inferences based on a person's sexual orientation.[124] In 1998, President Clinton signed a second EO, this time prohibiting discrimination in federal employment on the basis of sexual

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(2011) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (noting that the 2011 hearing was the "first ever Congressional hearing examining a bill to repeal . . . DOMA").

[118] S.J. Res. 40, 108th Cong. (2004). Although a majority of the House voted in favor of the Federal Marriage Amendment, it lacked the two-thirds approval required for a constitutional amendment. Likewise, the Senate had insufficient votes to invoke cloture. *See* Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 14, 2004, at A1.

[119] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

[120] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

[121] *See Federal Legislation*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/issues/pages/federal-legislation (last visited Apr. 6, 2012).

[122] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593–95 (1983).

[123] *Id.* at 594–95.

[124] Exec. Order No. 12,968, 3 C.F.R. 391 (1995); *see also* Hatfield et al., *supra* note 60 at 88.

orientation.[125] Two years later, he signed a third EO to "achieve equal opportunity in Federally conducted education and training programs and activities," specifically including sexual orientation as one of the categories covered by this non-discrimination policy.[126] President Clinton signed no additional EOs regarding LGBTs, and neither did President Bush nor has President Obama.

As indicated above, soon after his inauguration, President Clinton promised to end sexual-orientation discrimination in the military, but congressional opposition resulted in the compromise "Don't Ask, Don't Tell" policy.[127] President Clinton also started policy changes to end sexual-orientation discrimination in the executive branch.[128] Other actions taken by President Clinton on behalf of LGBT persons include the following: (1) supporting ENDA;[129] (2) creating advisory posts on HIV/AIDS;[130] (3) appointing LGBTs to federal posts;[131] (4) and declaring by presidential proclamation the first Gay and Lesbian Pride Month.[132]

President George W. Bush did not dismantle the LGBT changes that President Clinton put in place.[133] But generally, he worked against the LGBT agenda by the following actions: (1) supporting the Federal Marriage Amendment;[134] (2) opposing the *Goodridge* decision by which the Massachusetts Supreme Judicial Council legalized same-sex marriages in the state;[135] (3) opposing the extension of hate crime laws

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[125] Exec. Order No. 13,087, 3 C.F.R. 191 (1998).

[126] Exec. Order No. 13,160, 3 C.F.R. 279 (2000), *reprinted in* 42 U.S.C. § 2000d (2006).

[127] *See supra* note 107 and accompanying text; *see also* Mark Thompson, *'Don't Ask, Don't Tell' Turns 15*, TIME (Jan. 28, 2008), http://www.time.com/time/nation/article/0,8599,1707545,00.html.

[128] *See* Hatfield et al., *supra* note 60, at 87 & n.400.

[129] *Id.* at 88.

[130] *Id.* at 89.

[131] *Id.*

[132] Proclamation No. 7316, 3 C.F.R. 92 (2000).

[133] President Bush kept the Office of National AIDS Policy started by President Clinton. *See* DAVID FRUM, THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH 103 (2003); Mike Allen, *Bush Acts to Quell Flap on AIDS, Race: White House Says Chief of Staff Erred on Status of Two Offices*, WASH. POST, Feb. 8, 2001, at A1. He also did not revoke the EO adding sexual-orientation discrimination to the list of prohibited federal employment acts. *See* Sheryl Gay Stolberg, *Vocal Gay Republicans Upsetting Conservatives*, N.Y. TIMES, June 1, 2003, at 26. Finally, he did not repeal "spousal" benefits that President Clinton had started for LGBT federal employees. *See* FRUM, *supra*, at 104.

[134] Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 113, 117 (Feb. 2, 2005) ("Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.").

[135] After *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003) was decided, President Bush immediately announced his opposition to its outcome.

and threatening a veto if passed by Congress;[136] and (4) advocating abstinence-only programs which teach that "heterosexual marriage is the expected standard."[137]

President Obama has been much more receptive to LGBT issues than President Bush. The Human Rights Campaign, a leading advocate of LGBT issues in Washington, has listed seventeen administrative actions initiated by the Obama administration on behalf of the LGBT community.[138] In addition, President Obama has appointed more than one hundred openly-LGBT persons to administrative positions (some quite prominent).[139] He also restarted declaring June as LGBT Pride Month,[140] initiated adding the United States to a UN General Assembly statement calling for an end to criminal sanctions for sodomy,[141] and held a summit on bullying of LGBT youth at the White House.[142] Perhaps most significantly, he advocated for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and the Don't Ask, Don't Tell Repeal Act of 2010 and signed both bills into law.[143] His administration supported ENDA,[144] the Domestic Partnership Benefits and Obligations Act,[145] and the Respect for Marriage Act, which would

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See KARL ROVE, COURAGE AND CONSEQUENCE: MY LIFE AS A CONSERVATIVE IN THE FIGHT 374–76 (2010).

[136] Coker, *supra* note 115, at 282; *see also* Michael Jones, *The Ten Worst LGBT Moments of George W. Bush's Presidency*, CHANGE.ORG (Jan. 17, 2009, 10:20 UTC), http://news.change.org/stories/the-ten-worst-lgbt-moments-of-george-w-bushs-presidency.

[137] Jones, *supra* note 136.

[138] *Obama Administration Policy and Legislative Advancements on Behalf of LGBT Americans*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/obama-administration-policy-and-legislative-advancements-on-behalf-of-lgbt (last visited Apr. 6, 2012); *see also* Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (listing the actions taken by the Obama administration on behalf of LGBT issues).

[139] HUMAN RIGHTS CAMPAIGN, *supra* note 138; *see also* Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011); Proclamation No. 8387, 3 C.F.R. 81 (2009).

[140] Proclamation No. 8387, 3 C.F.R. 81, 82 (2009); Proclamation No. 8529, 75 Fed. Reg. 32,079 (May 28, 2010); Proclamation No. 8685, 76 Fed. Reg. 32,853 (June 7, 2011).

[141] Press Release, U.S. Dep't of State, UN Statement on "Human Rights, Sexual Orientation, and Gender Identity" (Mar. 18, 2009), http://www.state.gov/r/pa/prs/ps/2009/03/120509.htm; Letter Dated Dec. 18, 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations Addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008).

[142] Proclamation No. 8685, 76 Fed. Reg. 32,853 (June 7, 2011).

[143] *See supra* notes 119–20 and accompanying text.

[144] *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 12 (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission) (testifying on behalf of the Obama Administration in support of ENDA).

[145] Remarks on Signing a Memorandum on Federal Benefits and Non-Discrimination, 2009 DAILY COMP. PRES. DOC. 475 (June 17, 2009).

repeal DOMA.[146] The Obama administration also issued a memorandum directing the Secretary of Health and Human Services to begin rulemaking that requires hospitals receiving Medicare or Medicaid funds to not deny visitation privileges on the grounds of sexual orientation.[147] Finally, the Obama administration's leadership in the Department of Justice has informed Congress that the Department will no longer defend lawsuits challenging DOMA,[148] and the administration has issued a memorandum to department heads on international initiatives to advance the cause of LGBTs.[149]

Although the Obama administration may be the *beginning* of a consistent pattern of executive branch actions to counter LGBT discrimination, to date, the executive branch has demonstrated no such consistency. The executive branch's actions over the past twenty-five years do not evidence a commitment to eradicating LGBT discrimination necessary to achieve a "national fundamental public policy," the violation of which would result in revocation of tax-exempt status on "public policy" grounds under *Bob Jones*.[150] Establishing a national fundamental public policy requires the active participation of all three branches of the federal government. Congress must participate through legislation that spans decades. The Supreme Court must participate through an unbroken line of near unanimous cases. Finally, presidents must participate through one or more executive orders spanning decades.

Given the constant political winds blowing through each of the federal government's branches, it is readily understandable why the incredibly high "national fundamental public policy" barrier is so difficult to overcome. To date, the Court has found only one national fundamental public policy interest worthy of revoking tax-exempt status—race discrimination in education.[151] Although our nation has prohibited employment discrimination based on gender, religion, age, and disability for almost fifty years, neither the Court nor the IRS has

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[146] David Nakamura, *Obama Backs Repeal of Marriage Law*, WASH. POST, July 20, 2011, at A3.

[147] Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies, 2010 DAILY COMP. PRES. DOC. 267 (Apr. 15, 2010).

[148] Letter from Eric H. Holder, Jr., Att'y Gen. of the U.S., to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011); Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

[149] Memorandum on International Initiatives To Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, 2011 DAILY COMP. PRES. DOC. 933 (Dec. 6, 2011).

[150] Bob Jones Univ. v. United States, 461 U.S. 574, 597–98 (1983).

[151] *See supra* Part I.A–E.1.

ever found discrimination in these areas to be against national fundamental public policy.

4. Conclusion

The nation is currently very uncertain over what protection and benefits, if any, LGBT persons should receive over comparable members of society. This is demonstrated in each branch of government. The "unbroken line" of eight nearly unanimous Supreme Court cases over almost thirty years on the issue of race discrimination in education should be compared to the five-Justice majority opinion in the 2003 *Lawrence v. Texas* decision.[152] The extensive congressional record combatting race discrimination should be compared to the very ambiguous congressional record on LGBT issues.[153] Finally, the consistent presidential actions (as demonstrated most notably by EOs) in eradicating racial discrimination should be compared to the relative inaction by presidents other than Bill Clinton and Barack Obama on LGBT issues.[154]

In summary, prohibiting discrimination on the basis of sexual orientation does not enjoy the same status as prohibiting discrimination on the basis of gender, age, or disability. None of these three latter categories yet enjoy the distinction of a national fundamental public policy. All-male and all-female colleges are not in danger of losing their tax-exempt status, and neither is the Roman Catholic Church with its all-male priesthood. Accordingly, it is extraordinarily remote in the foreseeable future that the IRS or the judiciary would revoke, on the grounds of a national fundamental public policy, the tax-exempt status of those religious institutions that adhere to orthodox Christian beliefs on sexual morality and thereby treat conduct by LGBT employees differently.

II. THE FIRST AMENDMENT AND TWO FEDERAL STATUTES PROTECT THE EMPLOYMENT DECISIONS OF RELIGIOUS INSTITUTIONS.

Mr. Caster in Part III of his article acknowledges the First Amendment rights of religious organizations, but he claims that such rights are limited and should be balanced against the equal protection rights of LGBTs.[155] Since Mr. Caster implicitly recognizes the need for state action when making an equal protection claim, he asserts that tax-exempt status results in religious organizations becoming state actors

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[152] *See supra* Part I.E.1.

[153] *See supra* Parts I.A, I.E.2.

[154] *See supra* note 17 and Part I.E.3.

[155] Caster, *supra* note 1, at 414–15.

for equal protection purposes.[156] This painfully short (at least painful for this constitutional law teacher and enthusiast!) rebuttal in summary form addresses these issues.

A. First Amendment and Equal Protection Defenses for the Employment Decisions of Religious Institutions

The First Amendment's religion clauses protect not only citizens but also religious institutions from government interference.[157] As Mr. Caster observes, the free exercise rights of religious institutions are, however, not without limit.[158] Before 1990, the general rule in free exercise cases was that strict scrutiny applied if the governmental law or benefit *either* intentionally discriminated against religion *or* had a disparate impact on religion, meaning that the impact was disproportionally adverse to members of a religious group.[159] In *Employment Division v. Smith*, the Court changed this rule by eliminating a prima facie case based on disparate impact, holding that a neutral law of general applicability does not violate the Free Exercise Clause.[160]

As a reaction to *Employment Division v. Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA"), which restored strict scrutiny for disparate impact cases.[161] The Supreme Court in *City of Boerne v. Flores* ruled RFRA unconstitutional as applied to the states;[162] however, RFRA remains applicable to actions taken by the federal government.[163]

RFRA's continued viability for federal action means, of course, that any federal action directed at a person's or institution's free exercise of religion would ultimately require that the government prove it has a

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[156] *Id.* at 419–20.

[157] 1 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 59 (4th ed. 2006).

[158] Caster, *supra* note 1, at 414.

[159] Wisconsin v. Yoder, 406 U.S. 205, 218, 220 (1972) (citing Sherbert v. Verner, 374 U.S. 398 (1963)). Under strict scrutiny, the state must prove it has a compelling state interest, and the means it has employed is the least restrictive on religious freedom.

[160] 494 U.S. 872, 883–85 (1990). The Court subsequently held that strict scrutiny still applies in cases of intentional religious discrimination. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

[161] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb *to* 2000bb-4 (2006)).

[162] 521 U.S. 507, 536 (1997).

[163] *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 859 (8th Cir. 1998).

compelling state interest that overrides the practice based on religion, and that the means employed by the government is the least restrictive available to achieve its compelling state interest.[164] The *Bob Jones* Court determined that the IRS had satisfied this standard when it revoked the tax-exempt status of educational institutions that discriminated on the basis of race.[165] As discussed above, however, given the extraordinary history and context of racial segregation in education, the likelihood of the Court finding a similar compelling interest in areas other than racial discrimination is remote.[166]

The First Amendment and equal protection defenses available to religious institutions are best illustrated in *Colorado Christian University v. Weaver*, a Tenth Circuit case that involved the eligibility of students for state aid.[167] In that case, the State of Colorado had refused to provide aid to students attending Colorado Christian University ("CCU") because, according to the State, CCU was a "pervasively sectarian" institution, meaning its school policies adhered too closely to religious doctrine, its theology courses tended to "indoctrinate," and its faculty and students shared a single "religious persuasion."[168] Colorado had, however, provided aid to students attending a Catholic and Methodist college, the State having determined that those Christian colleges were not "pervasively sectarian."[169]

In *Colorado Christian*, the Tenth Circuit found such inquiry into a college's commitment to religious practice and doctrine an intrusive entanglement in church affairs, a violation of the requirement that the state remain neutral between "contested questions of religious belief or practice."[170] Moreover, it found that this entangling inquiry also resulted in unequal treatment between non-pervasively sectarian Christian colleges and CCU, triggering strict scrutiny review and a determination that Colorado did not have a compelling state interest to sustain its burden.[171] Similarly, a decision by the IRS to investigate and revoke the tax exemption of a religious organization that chooses to discipline one of its employees for violations of a sexual moral code based on orthodox scriptural reasons entangles the IRS in matters beyond constitutional

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[164] 42 U.S.C. § 2000bb-1 (2006).

[165] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

[166] *See* discussion *supra* Part I; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (noting the free exercise right of a religious institution to set moral standards and then enforce those standards with respect to its leaders).

[167] 534 F.3d 1245, 1250 (10th Cir. 2008).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1261, 1266.

[171] *Id.* at 1266–69.

bounds. Consequently, an adverse decision would treat comparable religious organizations unequally in violation of the Equal Protection Clause.

B. Tax-Exempt Status and "State Action"

Mr. Caster asserts, without any supporting authority, that the IRS's granting of tax-exempt status to a charity results in the organization becoming a state actor for Fifth and Fourteenth Amendment purposes.[172] He then laudably states that many scholars and cases disagree with this position, claiming that the diversity and often conflicting viewpoints among tax-exempt organizations demonstrate the lack of governmental endorsement.[173] The scholars cited by Mr. Caster are correct.

Almost always, tax-exempt organizations are private entities and, therefore, their actors are not subject to constitutional law principles like equal protection.[174] Yet, private organizations can become state actors if there is such a "close nexus between the State and the challenged action" that private action "may be fairly treated as that of the State itself."[175]

In their constitutional law hornbook, Professors Nowak and Rotunda addressed under what circumstances a government subsidy or aid could convert an otherwise private, tax-exempt organization into a state actor.[176] The distinction they drew is whether the aid is *generalized* (government services like police or fire protection that are available to all other persons or associations), or whether the subsidy is *specialized*.[177] They concluded that tax exemption is more generalized than specialized, and therefore, the mere receipt of tax-exempt status does not convert tax-exempt religious organizations into state actors.[178]

III. GRANTING TAX-EXEMPT STATUS TO A PLETHORA OF ORGANIZATIONS WITH DIFFERING VIEWS PROMOTES SOCIETAL DIVERSITY, EVEN THOUGH IT BENEFITS ORGANIZATIONS WITH WHICH SOME TAXPAYERS MAY DISAGREE.

Mr. Caster makes repeated reference to the fundamental unfairness of providing tax-exempt status (and taxpayer funding) to nonprofit organizations that discriminate against LGBT employees and that

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[172] Caster, *supra* note 1, at 419–20.

[173] *See id.* at 419 & n.104.

[174] BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 97–98 (9th ed. 2007).

[175] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).

[176] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 586–89 (7th ed. 2004).

[177] *Id.*

[178] *Id.* at 587.

advocate against issues that LGBTs favor (like gay "marriage").[179] In making this argument, Mr. Caster misses (ignores) the fact that the IRS policy of benignly granting tax-exempt status to a plethora of non-government organizations on differing sides of issues ensures diversity of organizations, promotes pluralism, and limits "governmental orthodoxy."[180]

A simple search in the IRS's Exempt Organizations Select Check database[181] shows the diversity of American society and the organizations that members of society have embraced to advance their beloved causes. The database contains thousands of tax-exempt organizations that are eligible for receiving tax-deductible donations. Organizations include the National Right to Life Committee and Planned Parenthood, the National Organization for Women and the National Center for Men, Atheists United and the Muslim Foundation, and the Freedom From Religion Foundation and the Christian Legal Society. The Knights of Columbus continues to enjoy tax-exempt status, and yet its members were engaged in a constitutional amendment battle about which Mr. Caster complains.[182] Also enjoying such status are the Human Rights Campaign Foundation, the Lambda Legal Defense and Education Fund, Inc., the National Center for Lesbian Rights, the National Organization of Gay & Lesbian Scientists, and the National Organization for Lesbians of Size. Since Mr. Caster appeals to "rational minds" in his article,[183] surely rational minds can agree that if the IRS grants tax-exempt status to organizations advancing the LGBT agenda through public education, the IRS should similarly provide tax-exempt status to those organizations advancing traditional, orthodox religious values through public education.

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[179] *See* Caster, *supra* note 1, at 403–04, 407–08, 410–14, 420–21, 430–31. Mr. Caster is not alone in not wanting to subsidize with tax dollars activity that he dislikes, as this author has similarly complained in the context of education. *See* James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory "Pervasively Sectarian" Test*, 7 AVE MARIA L. REV. 59, 78–79 n.85 (2008).

[180] In his concurring opinion in the *Bob Jones* case, Justice Powell emphasized "the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints." Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring). Such diversity leads to pluralism, with tax exemptions being "one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life." *Id.*

[181] The Exempt Organizations Select Check database can be accessed through the IRS's website at the following link: http://apps.irs.gov/app/eos/. The database, replacing what was formerly issued as IRS Publication 78, contains a comprehensive listing of the thousands of tax-exempt organizations eligible to receive tax-deductible contributions.

[182] *See* Caster, *supra* note 1, at 404 & n.7.

[183] *See id.* at 411.

CONCLUSION

Prior to accepting employment, a prospective employee should investigate the mission and vision of the prospective employer, determine what ethical and moral conduct standards apply, and assess whether the prospective employee's life decisions comply with the employer's mission and standards. If there is a conflict between the individual's life decisions and the employer's mission and ethical standards, then the prospective employee should find other employment. This is particularly true in the instance of religious institution employers, which have First Amendment protections that other employers do not have. Moreover, because of the arduous barrier created by the context and language of the Supreme Court's decision in *Bob Jones University v. United States*, those religious institutions that fire employees who violate ethical and moral conduct standards will not lose their tax-exempt status.

POLICIES, FRAMEWORKS, AND CONCERNS REGARDING SHARI'A TRIBUNALS IN THE UNITED STATES—ARE THEY KOSHER?

INTRODUCTION

Shari'a law has become the topic of much contemporary debate in the United States. The debate has largely revolved around the compatibility of shari'a law with American law and Western values.[1] One prominent American politician warned that proponents of shari'a law want to "impose Sharia on all of us," and, with that in mind, has called for a federal law precluding the application of shari'a as a "replacement for American law" in any court of the United States.[2] On a state level, Oklahoma recently attempted to amend its constitution so as to preclude the application of shari'a law in the courts of that state.[3] A recent report by national security experts went so far as to warn that shari'a is a threat to the integrity and the very existence of the United States of America.[4] In contrast, proponents of instituting shari'a law in the United

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[1] *See, e.g.*, Kai Hafez, *Islam and the West: The Clash of Politicised Perceptions*, *in* THE ISLAMIC WORLD AND THE WEST 3, 3 (Kai Hafez ed., 2000). Samuel Huntington hypothesized that the greatest conflicts of the modern world would be between civilizations rather than states. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFFAIRS, Summer 1993, at 22, 22, 39. Specifically, he stated that Islam as a civilization would fundamentally and literally clash with the West, because "Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic . . . cultures." *Id.* at 40. Scholars have criticized Huntington's theory based on the origin of this "clash." *See, e.g.*, SHIREEN T. HUNTER, THE FUTURE OF ISLAM AND THE WEST: CLASH OF CIVILIZATIONS OR PEACEFUL COEXISTENCE? 19, 168 (1998) (arguing that the clash is, on one hand, a power struggle and, on the other hand, a clash of faith and secularism rather than Islam and the West); FAWAZ A. GERGES, AMERICA AND POLITICAL ISLAM: CLASH OF CULTURES OR CLASH OF INTERESTS? 17 (1999) (asserting that politics and security concerns, from an American policy perspective, drive the conflict with Islam more so than culture and history). Most noteworthy, for present purposes, is one scholar's hypothesis that the clash between Islam and the West will unfold in the context of law. KATHLEEN M. MOORE, THE UNFAMILIAR ABODE: ISLAMIC LAW IN THE UNITED STATES AND BRITAIN 4 (2010) ("Law becomes the site where . . . the clash-of-civilizations thesis finds material support . . . .").

[2] Newt Gingrich, Address to the American Enterprise Institute for Public Policy Research, America at Risk: Camus, National Security and Afghanistan 13 (July 29, 2010), *available at* http://www.aei.org/files/2010/07/29/Address%20by%20Newt%20Gingrich07292010.pdf.

[3] *Oklahoma Voters Ban Judges from Using Islamic Law*, FOX NEWS (Nov. 2, 2010), http://www.foxnews.com/politics/2010/11/02/oklahoma-voters-ban-judges-using-islamic-law/. A preliminary injunction to the amendment was recently upheld by the Tenth Circuit. Awad v. Ziriax, No. 10-6273, slip op. at 3 (10th Cir. Jan. 10, 2012).

[4] *See* TEAM B II, CTR. FOR SEC. POLICY, SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITION ANALYSIS 3–4, 219 (2010).

States contend that it is neither inconsistent with nor threatening to the laws and values of the United States.[5] Regarding some of the United States's foundational principles, such as democracy and separation of powers, one imam stated, "Muslims are very enamored of these systems . . . because these principles and norms are completely in sync with the principles of the Quran and the teachings of the prophet."[6] While this controversy provides a general context for the following discussion, whether shari'a is fundamentally compatible with American law and policy is beyond the scope of this Note.

More narrowly, this Note addresses a key impetus that sparked the grander debate—the appearance of shari'a courts[7] in the West. The controversy over shari'a tribunals began in Canada when Muslim arbitration boards, acting under Canada's arbitration law, began settling civil and family disputes between Canadian Muslims in 2003.[8] Responses to the move were mixed, but ultimately, Canada decided against allowing shari'a courts to continue to make legally binding judgments.[9] Similarly, in 2008, Muslim arbitration tribunals began making judgments that are legally enforceable under Great Britain's arbitration statute.[10] As will be explained further, while the United States has similar legal mechanisms through which shari'a courts may attempt to operate, it has yet to publicly query the legality and desirability of allowing shari'a courts in the United States, or to decisively take a stand on the matter.

This Note argues that the United States must explore this issue and make an affirmative choice whether to allow shari'a courts to operate in the United States. Part I lays the foundation by defining, to the extent possible, shari'a law and the role that shari'a courts play in Muslim communities. Part II explores contemporary policy preferences in

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[5] *See Interview: Imam Feisal Abdul Rauf*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/muslims/interviews/feisal.html (last visited Apr. 6, 2012).

[6] *Id.*

[7] Shari'a "courts," as they exist in the West, are not equivalent to secular courts of law. More accurately, they are tribunals or panels, which, as will be discussed later in this Note, currently derive legal force from the arbitration process. *See* Richard Edwards, *Sharia Courts Operating in Britain*, THE TELEGRAPH (Sept. 14, 2008), http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html. However, to the extent that their judgments may be made legally binding, and to the extent that they often self-proclaim to be "courts," that term will be used in this Note interchangeably with the word "tribunal" with respect to shari'a adjudicators.

[8] James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL 1, 5–6 (2005).

[9] James Sturcke, *Sharia Law in Canada, Almost*, THE GUARDIAN (Feb. 8, 2008), http://www.guardian.co.uk/news/blog/2008/feb/08/sharialawincanadaalmost.

[10] Matthew Hickley, *Islamic Sharia Courts in Britain Are Now "Legally Binding,"* MAIL ONLINE (Sept. 15, 2008, 10:10 AM), www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html.

American court systems that create a legal climate favorable toward shari'a tribunals in the United States. It does this in the context of two trends in American court systems that provide an apt illustration of these policy preferences as they are likely to be applied in support of shari'a tribunals. Part III discusses the framework for religious courts in Great Britain and the United States. It then sketches the development of shari'a courts within that legal framework in Great Britain, and assesses the tenability of the same occurring within the United States of America. Finally, Part IV addresses key policy concerns that must be dealt with in the national debate with respect to shari'a tribunals. Ultimately, the United States must adapt its policies and laws to adequately address the concerns implicated by shari'a tribunals.

I. SHARI'A LAW AND SHARI'A "COURTS"

As a foundational matter, it is necessary to establish precisely what "shari'a law" means for purposes of legal analysis and what role shari'a courts typically play in Muslim communities. Shari'a law is most simply defined as Islamic law, but its composition and functions are far more complex.

The Quran is the primary source of shari'a and is considered by Islam to be the earthly impartation of the divine law, or the ideal legal order.[11] Hadiths, another source of shari'a, are collections of sayings and deeds that are attributed to Muhammad and are considered complementary to the Quran in substance and authority.[12] The Sunna, a collection of legal norms and traditions, are also regarded as authoritative and complementary to the Quran.[13] The Quran has been extensively interpreted and expounded by numerous Islamic jurists, which has resulted in eight competing schools of thought, each of which interprets and applies the religious text uniquely.[14] As a result, shari'a is substantively amorphous and may vary greatly depending upon the jurisprudential school of thought being employed.[15]

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[11] *See* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 23 (1955).

[12] IBN WARRAQ, WHY I AM NOT A MUSLIM 67 (1995).

[13] *Id.*; *see also* M. Cherif Bassiouni, *The* Shari'a*: Islamic Law: What Muslims in the United States Have in Common*, *in* IMMIGRANTS IN COURTS 98, 101 (Joanne I. Moore ed., 1999).

[14] *See* Joseph N. Kickasola, *The Clash over the Qur'an: Qur'anic Reinterpretation and National Reformation in Islam*, 6 REGENT J. INT'L L. 271, 278 (2008) (listing the eight schools of jurisprudence); Bassiouni, *supra* note 13 (noting that, in addition to other differences, the various Islamic jurisprudential schools of thought have "different priorities in the rules of interpretation" of the Quran); *see also* KHADDURI, *supra* note 11, at 35, 38 (recounting the complex development of the various schools of thought and relating that to the Sunni–Shi'i sectarian division).

[15] KHADDURI, *supra* note 11, at 34–41 (reviewing a variety of differences between the schools).

According to its followers, shari'a is meant to govern all relations between men, their Creator, and the state.[16] Shari'a is thus political in the sense that it purports to govern the way "society is organized," and to provide "the means to resolve conflicts among individuals and between the individual and the state."[17] In Islam, the divine law is not just an idealistic social order incapable of being fully and practically realized on earth.[18] On the contrary, it is meant to govern the religious, societal, and political lives of all persons on earth.[19] In that sense, it may not be relegated to the status of mere religious law, governing only the private spiritual pursuits of individuals and congregations, though that is unquestionably one of its key functions.[20] Shari'a law is more broadly considered by many Muslims to be the ultimate authority that should govern all aspects of society, politics, and religion.[21]

Within Muslim communities, shari'a courts are the interpreters and enforcers of shari'a law and are charged with making the ideal a reality.[22] In a number of countries, shari'a courts have full authority to make binding, enforceable legal judgments.[23] Elsewhere, shari'a courts can usually be found wherever Muslim communities exist. In some of these countries, shari'a courts rely merely upon voluntary individual and community compliance with their judgments, while in other countries, shari'a courts enjoy quasi-authority, whereby their judgments, though not automatically binding, can be affirmed and made enforceable by

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[16] *See* Bassiouni, *supra* note 13, at 100.

[17] *Id.* at 100–01.

[18] *See* KHADDURI, *supra* note 11, at 23–24.

[19] *See id.* It is noteworthy that there are now some Muslim groups who believe that shari'a is merely a personal moral code, governing the lives of individuals, rather than something that should be institutionalized and publicly enforced. For example, the Indian group "Muslims for Secular Democracy" advocates the "clear separation between religion and politics" and "between matters of faith and affairs of the state." MUSLIMS FOR SECULAR DEMOCRACY DECLARATION 2, *available at* http://www.mfsd.org/msddeclaration.pdf. However, these groups seem to be a minority.

[20] KHADDURI, *supra* note 11, at 23–24.

[21] *See id. But cf.* Kickasola, *supra* note 14, at 287–94, 311–12 (explaining that, following from the various interpretations of the Quran, there are disagreements among Muslims regarding whether, how, and to what degree shari'a should be imposed in society and politics).

[22] *See id.* at 24; *see also* Jessica Carsen, *Do Sharia Courts Have a Role in British Life?*, TIME (Dec. 5, 2006), http://www.time.com/time/printout/0,8816,1566038,00.html.

[23] Toni Johnson, *Sharia and Militancy,* COUNCIL ON FOREIGN REL., http://www.cfr.org/religion-and-politics/sharia-militancy/p19155 (last updated Nov. 30, 2010) ("In some nations, sharia's use is confined to narrow questions of religion and morality, in others it is the underpinning of legislation, and in still others it is the basis for all criminal and civil law."). Nigeria, Indonesia, and Pakistan are some of the countries where shari'a courts have binding authority. *See id.*

secular courts.[24] In countries such as Great Britain and the United States, arbitration provides the framework for shari'a courts' authority.

II. FAVORABLE POLICIES AND TRENDS IN U.S. COURT SYSTEMS

Proponents of shari'a tribunals in the United States are not without ground on which to stand. Two particular phenomena in American court systems exemplify current prevailing policy values with respect to the role of courts and notions of justice in the United States. If nothing more, these examples indicate that current policy preferences weigh in favor of specialized adjudicatory bodies and may be extended to include religious ones.

The first trend, often called "problem-solving courts," has become increasingly popular on both the federal and state levels to provide specialized venues for particular parties or particular issues.[25] Such courts may be tailored to deal specifically with, for example, drug or mental health cases.[26] While none of these special courts are specifically "religious," they do suggest a growing trend toward instituting specialized courts to deal with limited types of parties, issues, and legal questions. A second model that may bode well for establishing shari'a courts in the United States is the initiative of a handful of jurisdictions by which full faith and credit is exchanged between state and Native American tribal court judgments.[27]

A. Increasing Appeal of Special Courts in the United States

The recent inclination toward instituting specialized problem-solving courts on both the state and federal levels may be positive precedent in favor of welcoming shari'a courts to the United States. Pilot programs such as mental health courts, juvenile courts, domestic violence courts, sex offense courts, and drug courts have arisen throughout the country in response to the inundation of court dockets by disproportionate numbers of cases involving these particular types of issues or parties.[28]

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[24] *See* Carsen, *supra* note 22.

[25] GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 31–32 (2005) ("Hundreds of new judicial experiments have opened their doors. . . . All told, more than two thousand problem-solving courts are currently in operation, with dozens more in the planning stages.").

[26] COUNCIL OF STATE GOV'TS JUSTICE CTR., BUREAU OF JUSTICE ASSISTANCE, MENTAL HEALTH COURTS: A PRIMER FOR POLICY MAKERS AND PRACTITIONERS 3 (2008) [hereinafter PRIMER].

[27] Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, 2 J. CT. INNOVATION 225, 227–28 (2009).

[28] *See* PRIMER, *supra* note 26, at 2 (mental health courts launched to address overrepresentation of mentally ill defendants in the criminal justice system); LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV'TS JUSTICE CTR., MENTAL HEALTH

Citing the failure of "traditional court processes" to supply effective outcomes for individual defendants and communities, proponents of problem-solving courts advocate them as "alternative[s] to the status quo."[29] Many of these courts are designed to address the problems caused by certain categories of defendants cycling repeatedly through the justice system, straining local resources, and posing a continuing threat to the safety of the community.[30] Mental health courts, for instance, are instituted "with the hope that effective treatment will prevent participants' future involvement in the criminal justice system and will better serve both the individual and the community . . . ."[31] Another incentive for implementing special courts to facilitate these goals is that traditional judges and court staff do not possess specialized knowledge of the problems facing offenders and victims, such as substance addictions, mental illnesses, family dysfunctions, or domestic violence, and are thus ill-equipped to formulate constructive solutions for those parties.[32]

Although they target diverse populations, these special courts share some general characteristics, including extensive orientation with the target issues and participants, community involvement, collaboration between the community and the justice system, "individualized justice," and accountability.[33] As their various titles imply, each of these courts targets a specific subset of parties, usually criminal defendants, and seeks to tailor the justice process to the needs of those individuals and their communities.[34] What makes these courts more competent to deal with these cases than traditional courts is their ability to acquire expertise and training regarding the particular issues and individuals that they serve.[35] Most of these courts rely on voluntary participation by the target individuals and offer participants alternatives to traditional criminal-justice processes and punishments.[36] For instance, in lieu of

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COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 2 (2009) ("As of 2009, there are more than 250 mental health courts across the country, with many additional courts in the planning phase."); ROBERT V. WOLF, CTR. FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1 (2007) ("Today there are over 2,500 problem-solving courts in the United States.").

[29] COUNCIL OF STATE GOV'TS JUSTICE CTR., BUREAU OF JUSTICE ASSISTANCE, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 11 (2007) [hereinafter IMPROVING RESPONSES].

[30] PRIMER, *supra* note 26, at 2, 8.

[31] *Id.* at 8.

[32] WOLF, *supra* note 28, at 2.

[33] *Id.* at 2–7.

[34] *See, e.g.*, IMPROVING RESPONSES, *supra* note 29, at 2 (describing mental health courts' target populations); *see also* BERMAN, *supra* note 25, at 8 (describing drug courts' target populations).

[35] *See* WOLF, *supra* note 28, at 2.

[36] *See, e.g.*, PRIMER, *supra* note 26, at 4.

traditional criminal sentencing, specialized courts tailor incentives, sanctions, treatments (in drug and mental-health circumstances), as well as punishments and protective mechanisms (in domestic violence cases) to the individuals involved.[37] As one proponent advised, "[a]ll responses to participants' behavior, whether positive or negative, should be individualized," in order to promote rehabilitation and prevent recidivism.[38] Furthermore, instead of placing the entire responsibility for treatment on the justice system, problem-solving courts emphasize community involvement in the participants' treatment and supervision.[39] Finally, problem-solving courts seek to promote a sense of personal accountability and responsibility in each participant "by helping participants understand their public duties and by connecting them to their communities."[40]

One hurdle to instituting a specialized court in any given state or locality, and perhaps a reason for the lack of uniform incidence of special courts among jurisdictions, is the practicality and demand for such courts in each local context.[41] For example, insufficient local resources and lack of public support may present challenges to instituting specialized courts in some jurisdictions.[42] Then again, overrepresentation of certain types of individuals in the court system may actually fuel the demand for problem-solving courts in other jurisdictions.[43] As communities and policymakers increasingly look to the needs of the community in order to formulate innovative justice mechanisms, it is likely that more categories of populations and issues will be identified and that new types of specialized courts will emerge to address their particular needs. One study alludes to the possibility of gender or ethnic-specific alternative justice mechanisms, stating that "court teams should also pay special attention to the needs of women and ethnic minorities and make gender-sensitive and culturally competent services available."[44]

Although the existing special courts are not specifically religious, many of their characteristics and objectives would also serve as effective arguments in favor of instituting shari'a courts to promote justice for

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[37] *Id.*; *see also* BERMAN, *supra* note 25, at 7–8 (describing the strengthened protection domestic violence courts provide to victims as well as the additional supervision of batterers).

[38] IMPROVING RESPONSES, *supra* note 29, at 9.

[39] *See id.* at 11.

[40] PRIMER, *supra* note 26, at 6.

[41] *See id.* at 15 (noting that mental health courts may be impractical in some jurisdictions).

[42] *Id.*

[43] *See id.* at 2.

[44] IMPROVING RESPONSES, *supra* note 29, at 6.

Muslim Americans. As the Muslim American population increases, it may seem advantageous for communities harboring large concentrations of Muslims to institute special courts to address the particular issues faced by Islamic parties in the criminal justice system. For instance, specific challenges face immigrants who transition from Middle Eastern justice systems to the American court system, such as overcoming the notion that attorneys work only in the interest of the state; understanding unfamiliar concepts such as bail, plea bargaining, and the constitutional right against self-incrimination; as well as comprehending the myriad American legal proceedings.[45] Furthermore, language barriers may present yet another challenge to achieving full justice for Arabic-speaking defendants, since Arabic translators are generally scarce in the United States.[46] As a result of these realities, traditional judges and courts are unlikely to fully comprehend these issues, much less have the time or resources to fully educate themselves so as to be capable of effectively communicating and formulating constructive solutions for Muslim defendants or victims.

Special shari'a courts may be an attractive alternative for dealing with the challenges faced by Muslim parties in American court proceedings. Like drug courts or mental health courts, shari'a courts might theoretically be best-equipped to craft sentences and remedies that would be effective and understandable to Muslim parties. Shari'a courts would also provide a mechanism to involve the Muslim community in the treatment, punishment, and reintegration of parties into the community, as well as to address issues of personal responsibility and accountability to that community. Building on the model of specialized courts, it is thus foreseeable that shari'a courts might be advocated to address the particular needs of Muslim parties in the American justice system.

Of course, due to constitutional barriers against government entanglement with religion, a shari'a-court model could not exist in the same way that the specialized courts do, that is, as an arm of the judiciary.[47] Therefore, even though such specialized courts themselves are not plausible models for shari'a courts to follow, specialized courts represent a growing policy preference for adjudicatory bodies to be tailored to the "needs" of their constituencies. This growing policy preference may bolster the push for shari'a tribunals to be embraced in other frameworks.

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[45] *See* Mosabi Hamed & Joanne I. Moore, *Middle Easterners in American Courts, in* IMMIGRANTS IN COURTS, *supra* note 13, at 112, 112–16.

[46] *Id.* at 114.

[47] *See* U.S. CONST. amend. I; Lemon v. Kurtzman, 403 U.S. 602, 612–13, 615 (1971) (holding that the government action must have a secular purpose and may not excessively entangle with religion).

B. Full Faith and Credit for Tribal-Court Judgments by Local Jurisdictions

Another basis for advocating shari'a courts in the United States is exemplified by the approach of several states that have begun giving full faith and credit to the judgments of Native American tribal courts.[48] Propelled by the initiatives of tribal-state judiciary forums, these jurisdictions have experimented with expanding the constitutional principle of full faith and credit beyond the scope of state-to-state relations in order to promote conformity between the outcomes of state and tribal court judgments.[49] The mobilizing forums recognized the influence of tribal courts within Native American sub-communities and the need for state courts to work with those tribal units in order to achieve justice and to "help make the law work after it leaves the courtroom."[50] The reasons for such initiatives mirror the rationales for full faith and credit between states, namely that tribal members may live outside of or travel across the borders of the reservation, which makes it necessary for tribal-court judgments to be enforceable between the state and the reservation.[51] Without full faith and credit between tribal and state-court judgments, tribe members could escape tribal-court judgments merely by leaving the reservation and escape state-court judgments by fleeing to the reservation.[52]

To remedy this problem, Wisconsin adopted a statute by which tribal judgments are given full faith and credit as long as certain conditions are met. Those considerations include whether the tribe is organized under the Indian Reorganization Act, whether the court is a court of record, whether the judgment is a valid judgment, and whether the tribal court reciprocates full faith and credit to state-court judgments.[53] If those conditions are met, the recipient of a tribal-court judgment may apply for enforcement of the judgment in a Wisconsin state court, much like the process for having an arbitration award confirmed in a state or federal court.[54] A similar protocol adopted in New York presumes that full faith and credit will be given to judgments by an Oneida Indian Nation tribal court, absent the existence of a mitigating condition such as denial of due process to a party, lack of reciprocation

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48 Stenzel, *supra* note 27, at 225.

49 *Id.* at 226.

50 *Id.*

51 *Id.* at 227–28.

52 *See id.* at 228.

53 WIS. STAT. ANN. § 806.245 (West 1994 & Supp. 2010).

54 Stenzel, *supra* note 27, at 232; *see also* Federal Arbitration Act, 9 U.S.C. § 9 (2006) (describing the confirmation process for arbitration awards in federal court).

by the tribal court for state-court judgments, fraud in obtaining the judgment, or violation of a strong public policy of the state.[55]

Similar initiatives have been pursued in other states such as New Mexico and Minnesota, but have yet to achieve full recognition of tribal-court judgments.[56] Such initiatives have garnered the most success where they were driven by a pressing need or "animating purpose."[57] While some efforts have been more successful than others, together they reflect a broader concern among jurisdictions for congruence between the justice systems of the state and the justice systems of large minority communities within the state.[58]

The concentration of Muslim populations in the United States, resulting in substantial minority communities, may produce the same sorts of challenges that have motivated state and tribal officials to seek mutual recognition of court judgments. Muslim communities, even in America, handle many of their members' disputes "in-house" via local shari'a tribunals.[59] Furthermore, the religious legitimacy of shari'a courts "gives them a degree of cultural authority in the community that [secular] courts might not have."[60] As in the case of tribal-court judgments, if the judgments of shari'a courts are not applicable outside the community, the force of those decisions becomes toothless and, in effect, null. Clearly, Muslim communities do not yet possess the same legal status as Native American tribes, but the essence of the challenges to achieving justice in both communities may lead to the proposal of solutions such as full faith and credit for shari'a-court judgments.[61]

Another factor adding credibility to the shari'a-court/tribal-court analogy is that limitations, such as those imposed by the full faith and credit programs in Wisconsin and New York,[62] could be duplicated to ensure that shari'a courts are held accountable and to guarantee that state laws and vital public policies are not violated by the shari'a-court judgments. Requiring reciprocation of full faith and credit to state-court judgments may also be a way of preserving the predominance of state

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55 Stenzel, *supra* note 27, at 237.

56 *See id.* at 239, 243.

57 *Id.* at 247.

58 *See, e.g., id.* at 238–44.

59 *See* YVONNE YAZBECK HADDAD & ADAIR T. LUMMIS, ISLAMIC VALUES IN THE UNITED STATES: A COMPARATIVE STUDY 59 (1987) (describing how imams in the United States often serve as judges and provide dispute resolution in their communities).

60 Carsen, *supra* note 22 (discussing shari'a courts in Britain).

61 One problem cited by shari'a-court supporters is that ethnic minorities in secular courts are less likely to feel that they have been judged justly and fairly, resulting in a poor regard for the state legal system. Community shari'a courts, it is argued, are a potential remedy for that concern. *Id.*

62 *See* Stenzel, *supra* note 27, at 231–32, 237.

law within Muslim American communities, as in Native American tribes. Of course, the key difference between the Native American tribal courts and Islamic courts is that the Native Americans have a level of territorial sovereignty from which their courts' jurisdiction arises.[63] Muslims, of course, have no territorial sovereignty within the United States, and it is far-fetched to imagine the United States abdicating such sovereignty to them or to any other religious group. The phenomenon with tribal courts is still instructive with respect to the perceived value of promoting a justice system that is tailored to the local population. On one hand, the tribal-court initiatives stem from some level of necessity, due to the fact that Native Americans have a level of territorial sovereignty that the state will not transgress and the need to enforce legal judgments across the border.[64] On the other hand, the initiatives seem to aim at producing just results that are also culturally relevant, effective, and sustainable.

Both phenomena—the development of pilot programs, such as special courts, and the extension by some jurisdictions of full faith and credit to tribal judgments—are indicative of a trend in American law toward more individualized and culturally relevant approaches to justice. With these trends in mind, when a specific locale consists primarily of a religious community, Muslim or otherwise, an argument may be made that the local laws should bend to accommodate the needs of individuals in that community and their notions of justice.[65] These two models, special courts and tribal-state full faith and credit agreements, lend credibility to calls for shari'a tribunals in the United States.

III. ARBITRATION IN THE WEST: A FRAMEWORK FOR RELIGIOUS ADJUDICATION IN THE UNITED STATES

In 2007, the Archbishop of Canterbury made the controversial declaration that allowing shari'a law to be enforced in Great Britain

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[63] *See* S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 662–63 (2010) (noting that Native American tribes have jurisdiction over their members and arguably over non-Native Americans on Native American land due to their territorial authority).

[64] *See* Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1408 (1985) ("If tribal court decisions are not recognized and enforced by state courts, tribal courts are effectively made impotent.").

[65] *See* Barbara Bradley Hagerty, *Religious Laws Long Recognized by U.S. Courts*, NPR (Sept. 8, 2010), http://www.npr.org/templates/story/story.php?storyId=129731015. ("Right now Islam is expanding in the United States. . . . Now suppose that Muslims become a majority in a particular state; I think then the state laws would reflect Islamic law." (internal quotation marks omitted)).

"seems unavoidable."[66] Although viewed as a controversial argument at the time, his statement was in reality a logical statement of fact. Because of Britain's existing laws, there was no question as to the foundational policy: The issue was not *whether* shari'a courts should be allowed in Britain, but *when* shari'a followers would finally avail themselves of the existing legal mechanism.[67] The Archbishop's words were still hanging in the air when the Muslim Arbitration Tribunals of Great Britain announced they were beginning to participate in the arbitration process.[68]

Shari'a courts have not yet developed in the United States to the same extent that they have in Britain, but since the U.S. arbitration framework closely parallels Great Britain's, similar results should not be surprising. This Part explores the structure of arbitration in Great Britain and the modern emergence of shari'a courts within that framework. It then discusses the United States's own arbitration system, and how it has accommodated religious tribunals. Ultimately, the framework for religious arbitration and the previously explored policy preferences and trends are amenable to shari'a tribunals being able to operate in the United States as they do in Britain.

A. Religious Courts in Britain

Great Britain has long allowed ecclesiastical courts of various denominations to settle civil disputes between willing parties.[69] Before the nineteenth century, even to the twelfth century, ecclesiastical courts throughout Britain settled private disputes regarding religious matters as well as non-religious matters such as will, probate, and behavioral disputes.[70] Following the ecclesiastical court model, Jewish courts began settling disputes between British Jews in accordance with Jewish law around the beginning of the eighteenth century.[71] Though state-run ecclesiastical courts were eventually abolished, the Jewish rabbinical courts became even more entrenched in English society and still play an important and legitimate role in the lives of British Jews to this day.[72]

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[66] Nick Tarry, *Religious Courts Already In Use*, BBC NEWS (Feb. 7, 2008, 16:36 GMT), http://news.bbc.co.uk/2/hi/7233040.stm.

[67] Shari'a tribunal decisions can be enforced in Britain under the Arbitration Act of 1996. Hickley, *supra* note 10.

[68] The Muslim Arbitration Tribunal was established for England and Wales in 2007. MUSLIM ARBITRATION TRIBUNAL, http://matribunal.com/ (last visited Apr. 6, 2012).

[69] *See* Polly Botsford, *Sharia Unveiled*, LAW SOCIETY GAZETTE (Feb. 28, 2008), http://www.lawgazette.co.uk/features/sharia-unveiled.

[70] *Id.*; M. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 109–10 (Archon Books 1964) (1942).

[71] *See About the London Beth Din*, THE UNITED SYNAGOGUE, http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/about_us/ (last visited Apr. 6, 2012).

[72] *Id.*

Beth Din rabbinical courts are the continuing legacy of religious courts in England.[73] Under Great Britain's modern arbitration laws, two parties may contract to have civil disputes between them settled by a rabbinical court.[74] The Beth Din courts may then hear parties' cases and issue judgments using Jewish law, which are in turn enforceable in British courts of law.[75] To that extent, Jews in Britain may freely choose between secular litigation or religious arbitration to settle certain types of disputes.[76] Furthermore, Britain does not require Beth Din courts to apply only British law when settling disputes, but allows them instead to apply Jewish law to the extent that it does not conflict with British law or public policy.[77] If such a conflict does exist, British courts may vacate the arbitration award rather than enforce it.[78] In addition, Beth Din may only decide a limited range of disputes, including civil matters such as financial or contractual disputes.[79] But family law and criminal law matters are beyond the competency of rabbinical courts in Britain and religious courts in general.[80] In such cases as divorce, the Jewish law is not an alternative to British law.[81] In order for a Jewish couple to be legally divorced, obtaining a religious divorce (referred to as a *get*) from a Beth Din court will not suffice; the couple must also obtain a civil divorce from the state.[82]

In 2008, following the model of the Beth Din courts, a handful of Islamic Arbitration Tribunals began issuing dispute settlements under the British Arbitration Act.[83] These tribunals, as well as numerous others, had already been operating and deciding disputes between Muslim parties for years, but up until that time, their judgments were

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73 *See id.*

74 Clare Dyer, *Jewish Beth Din Could Be Archbishop's Model*, THE GUARDIAN (Feb. 8, 2008), http://www.guardian.co.uk/politics/2008/feb/09/uk.religion2/print.

75 *Id.*

76 *Id.*

77 Innes Bowen, *The End of One Law for All?*, BBC NEWS (Nov. 28, 2006, 12:12 GMT), http://news.bbc.co.uk/2/hi/uk_news/magazine/6190080.stm.

78 An English court of appeal overturned an award by the Beth Din, which purported to grant a man £500,000 under a smuggling "deal" with his father, because such a deal was illegal and would not have been enforceable if originally brought in the English courts. Dyer, *supra* note 74.

79 THE CTR. FOR SOC. COHESION, THE BETH DIN: JEWISH LAW IN THE UK 1 (2009), *available at* http://www.socialcohesion.co.uk/files/1236789702_1.pdf.

80 *Id.* In England and Wales, family and criminal law matters may not be resolved by arbitration. Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 4 (Eng. & Wales), *available at* http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf (amending the Equality Act of 2010).

81 Dyer, *supra* note 74.

82 *Id.*

83 Hickley, *supra* note 10.

not legally enforceable in British courts of law.[84] Previously, the force of the tribunals' judgments depended entirely on voluntary submission and self-policing (or community-policing) by the parties involved.[85] The change occurred when the tribunals decided to tap into Britain's arbitration mechanism.[86] The Arbitration Act of 1996 allows the decisions of any arbiter conforming to the Act's procedural requirements to be enforced, as long as the recipients of the judgment mutually and voluntarily agreed that the tribunal's judgment would be binding.[87] The shari'a tribunals discovered that by conforming with Britain's Arbitration Act,[88] they could issue enforceable judgments in the same way Beth Din courts do. Like Beth Din and all other arbiters, shari'a tribunals in Britain are not authorized to settle family law or criminal matters.[89]

This recent integration of shari'a courts into the British legal system should hardly come as a surprise, given the historical precedents of Jewish and ecclesiastical courts in Great Britain. Considering the large and still-growing British Muslim population and the long-established legitimacy of religious arbiters in Britain, such as Beth Din, it was foreseeable that British Muslims would seek for their own laws and courts to achieve comparable legal competency. Although controversial, the Archbishop's statement of inevitability was merely the recognition of a logical reality: Equality would seem to dictate that Great Britain's Muslim courts be accorded the same privilege of enforceability under the arbitration laws that is enjoyed by the Jewish and Christian religious panels.[90]

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[84] MOORE, *supra* note 1, at 105.

[85] *Id.*

[86] Hickley, *supra* note 10.

[87] MOORE, *supra* note 1, at 105; Arbitration Act 1996 c. 23, § 1(b) (Eng., Wales, & N. Ir.).

[88] *See* Arsani William, Note, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England*, 11 STAN. J. INT'L REL., no. 2, 2010, at 40, 43.

[89] Arbiters like shari'a tribunals and Beth Din are not permitted to decide family or criminal matters. *See, e.g.*, THE BETH DIN: JEWISH LAW IN THE UK, *supra* note 79, at 1; Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 4 (Eng. & Wales), *available at* http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf.

[90] It is noteworthy that the same argument was made when the shari'a debate was taking place in Canada. Like Great Britain, Canada had also permitted Jewish and Christian ecclesiastical courts to make legally binding judgments via Canada's Arbitration Act, and it was argued that fairness required the same for Canadian Muslims. William, *supra* note 88, at 42.

B. Religious Arbitration in the United States

Ecclesiastical tribunals also have historical roots in the United States. Rabbinical and Christian arbiters, for example, have long enjoyed legitimacy in the United States.[91] As in Britain, arbitration is the vehicle through which religious "courts" operate in the United States.

The Federal Arbitration Act ("FAA") defines the procedural framework with which arbiters, whether religious or secular, must conform in order for their judgments to be enforceable in U.S. courts.[92] Most states also have arbitration statutes, based on the Uniform Arbitration Act ("UAA"),[93] that permit parties to opt for civil dispute settlement through arbitration rather than litigation.[94] The arbitration process is a highly favored method of alternative dispute resolution in the United States, both because it honors the principle of freedom of contract and because it provides a means of efficiently resolving disputes without burdening the already clogged court dockets.[95]

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[91] *See* Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the* Beth Din *Precedent*, 25 J.L. & RELIGION 379, 381–82 (2010) ("As a result of [the] long-established Jewish presence in the United States, as well as the system of religious courts . . . that the Jewish immigrants brought with them, a significant body of case law has developed in which the secular courts have been called on to enforce or vacate decisions adjudicated under Jewish law by rabbinical Jewish courts in the United States."); Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583, 585, 588 (1999) (describing a method of Christian dispute resolution in the United States called "conciliation" which dates back to the 19th century).

[92] *See* Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2006).

[93] *See* UNIF. ARBITRATION ACT (amended 2000), *available at* http://www.nccusl.org/Act.aspx?title=Arbitration Act (2000). The 2000 version of the UAA has been adopted in fourteen states and the District of Columbia, and the 1956 version was adopted in forty-nine states. *Legislative Fact Sheet - Arbitration Act*, U. L. COMMISSION, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Arbitration Act (2000) (last visited Apr. 6, 2012).

[94] *See, e.g.*, ALASKA STAT. § 09.43.010 (2010); 42 PA. CONS. STAT. ANN. § 7303 (2007); VA. CODE ANN. § 8.01–581.01 (2007).

[95] *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("Noting that the California rules were 'manifestly designed to encourage resort to the arbitral process,' and that they 'generally fostered the federal policy favoring arbitration,' we concluded that such an interpretation was entirely consistent with the federal policy 'to ensure the enforceability, according to their terms, of private agreements to arbitrate.'" (citations omitted) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 & n.5 (1989))); Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397, 400 (2009) ("Only a true failure in procedural fairness may lead to a viable appeal. In other words, arbitration personifies due process and justice. It enables society to resolve disputes and to prosper by dedicating its resources to other activities. . . . Parties in the marketplace should be at liberty to agree to any exchange to which they mutually consent and which complies with the minimal requisites of public policy.").

A valid agreement to arbitrate a dispute requires that both parties freely enter the agreement and voluntarily agree to be bound by the arbiter's decision.[96] Parties to an arbitration agreement may also include a "choice of law" provision designating the law that they wish to be applied to their case, such as Jewish law or the law of another country or state.[97] While the parties are free to choose a law other than a federal or state law to govern the arbitration, the chosen law may not operate as an evasion of otherwise mandatory state or federal laws or policies.[98] In other words, the chosen religious law must not undermine the policies and laws of the land.[99] Under the UAA, arbiters have considerable discretion in the arbitration proceeding itself.[100] An arbiter may have conferences with the parties prior to the hearing and may make judgments on the admissibility of evidence.[101] Under the FAA, within a year after an award has been issued, either party may seek to have the award confirmed by a court, at which point the award will be legally enforceable.[102]

A secular court may, in certain limited circumstances, review and vacate an arbitration award instead of enforcing it.[103] The FAA provides courts limited power to review the judgments of an arbiter to ensure that the parties to the arbitration received a fair, just, and equitable judgment.[104] Statutory grounds for vacating an arbiter's award under the

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[96] Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167 (2004) ("The FAA requires courts to apply contract-law standards of consent to arbitration agreements . . . .").

[97] *See* Kristine M. Paden, Case Note, *Choice of Law, Choice of Forum and Arbitration Clauses Override U.S. Security Rights*: Riley v. Kingsley Underwriting Agencies, Ltd., 6 TRANSNAT'L LAW. 431, 442 (1993). A noteworthy difference between choice-of-law clauses in litigation and in arbitration is that a court will only consider the law of another territorial jurisdiction, such as another state or country. An arbiter, however, may consider a religious or non-territorial "law." For this reason, arbitration may be particularly attractive to religious groups and individuals seeking to be judged by a religious standard. *See generally* Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 169–87 (2007).

[98] Paden, *supra* note 97, at 443.

[99] *Id.*

[100] *See* UNIF. ARBITRATION ACT § 15(a) (amended 2000).

[101] *Id.*

[102] Federal Arbitration Act, 9 U.S.C. § 9(a) (2006).

[103] *Id.* § 10(a).

[104] *See* BETH DIN OF AMERICA, RULES AND PROCEDURES OF THE BETH DIN OF AMERICA 1, *available at* http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf. (last visited Apr. 6, 2012) ("These Rules . . . are designed to provide for a process of dispute resolution . . . which are in consonance with the demands of Jewish law that one diligently pursue justice . . . . This will be done in a manner consistent with the requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America.").

FAA and UAA include partiality or corruption of the arbiter, fraud or corruption in obtaining the award, awards that exceed the scope of the arbiter's authority, or "any other misbehavior by which the rights of any party have been prejudiced."[105] These grounds are strictly construed, however, and are only met in extraordinary circumstances.[106] Additionally, courts have developed narrow common-law grounds for vacating arbitration awards, such as manifest disregard for the law by the arbiter and awards that violate public policy,[107] but even these grounds are narrowly construed and rarely found to be met.[108] Because of the voluntariness of the arbitration process, courts are highly deferential to arbitration awards.[109]

Courts' power of review is particularly limited with respect to the judgments of religious tribunals due to the constitutional prohibition on government entanglement with religion.[110] According to the religious question doctrine, courts may not decide disputes involving religious doctrine or interpretation.[111] For instance, shari'a law and Jewish law are not appropriate standards for consideration in federal- or state-court judgments.[112] In fact, the principle that state and federal court judges

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[105] Federal Arbitration Act § 10(a); *see also* UNIF. ARBITRATION ACT § 23(a) (amended 2000).

[106] Hall St. Assocs., v. Mattel, Inc., 128 S. Ct. 1396, 1400 (2008) (holding that the grounds for vacation outlined in the FAA are exclusive); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1767 (2010) ("Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error. 'It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice' that his decision may be unenforceable." (citations omitted) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)) (internal quotation marks omitted)).

[107] *See, e.g.*, Am. Postal Workers Union AFL-CIO v. U.S. Postal Serv., 682 F.2d 1280, 1284 (9th Cir. 1982) (noting that arbitrators' conclusions are not upheld when they manifestly disregard the law); Diapulse Corp. of Am. v. Carba, LTD., 626 F.2d 1108, 1110–11 (2d Cir. 1980) (recognizing that an arbitration award may be set aside if it violates public policy).

[108] *See, e.g.*, Brown v. Rauscher Pierce Refsnes, Inc. 796 F. Supp. 496, 503 (M.D. Fla. 1992) (noting that "'[o]nly after it is determined that there could be no proper basis for the award, should a court consider looking beyond the statute to determine the applicability of court made standards for the vacatur of an arbitration award'" and "that a district court considering vacatur of an arbitration award should proceed along a slender and carefully defined path." (quoting Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992))).

[109] *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 690 (Cal. 2000) (noting that voluntariness is a "bedrock justification" for arbitration).

[110] *See supra* note 47 and accompanying text.

[111] Jones v. Wolf, 443 U.S. 595, 602 (1979).

[112] *See, e.g.*, Klagsburn v. Va'ad Harabonim of Greater Monsey, 53 F. Supp. 2d 732, 739 (D.N.J. 1999) (declining to issue an opinion on the merits of a defamation claim against an association of Orthodox rabbis because it would require the court to "delve dangerously

may not decide cases based on religious laws has recently been reiterated in the precise context of considering shari'a law.[113] Since courts are not competent to decide religious matters, the Supreme Court has developed a policy of deferring to the judgment of the highest authority in the religious hierarchy of the relevant religious body.[114]

Yet, courts may review a religious arbitration award to the extent that it can "apply neutral principles of law," such as property or contract principles, "to determine disputed questions that do not implicate religious doctrine."[115] Under the neutral principles doctrine, a court may, for instance, enforce the parties' agreement to arbitrate, even if the designated arbitrator is religious.[116] But in reviewing the substance of the award, the court may not consider the religious basis for the award.[117] Therefore, when arbitration is religious in nature, neutral grounds for substantive review are likely to be sparse. While judicial review and vacation of an arbitration award is possible, it is a rarity that parties should not count on, especially where the arbitration is of a religious nature. Ironically, as explained in this Part, arbitration awards based on religious law are enforceable by the same state and federal courts that are themselves prohibited from considering religious laws. In this manner, the current system essentially provides a back door for state enforcement of religious law, with limited potential for appeal or review.

Within this framework, religious arbiters, such as rabbinical courts, have long operated in the United States of America. The Beth Din of America operates very similarly to its British counterpart, settling civil

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into questions of doctrine and faith"); El-Farra v. Sayyed, 226 S.W.3d 792, 793–94 (Ark. 2006) (declining to issue an opinion on the merits of a defamation claim by an Islamic minister against an Islamic center because determination of the claim would involve consideration of ecclesiastical issues); S.D. v. M.J.R., 2 A.3d 412, 422 (N.J. Super. Ct. App. Div. 2010) (reversing a trial court judgment that took into consideration the defendant's religious beliefs and excepted him from an applicable state statute on that basis). *But see* Odatalla v. Odatalla, 810 A.2d 93, 96–97 (N.J. Super. Ct. Ch. Div. 2002) (enforcing a Mahr agreement contained in the parties' Islamic marriage license because it could be enforced under neutral principles of secular contract law without consideration of religious principles).

[113] *E.g.*, *El-Farra*, 226 S.W.3d at 793–94; *S.D.*, 2 A.3d at 422.

[114] *Jones*, 443 U.S. at 604 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976)).

[115] Encore Prods. v. Promise Keepers, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (quoting *Jones*, 443 U.S. 595).

[116] *See* Grossman, *supra* note 97, at 186.

[117] *See supra* note 47 and accompanying text; *see also* Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 445–46 (2006) (describing the First Amendment implications that arise with judicial review of faith-based arbitration).

disputes between parties who voluntarily agree to submit their disputes to arbitration and who select Beth Din as the arbiter.[118] The scope of subject matters that may be heard by these religious courts is strictly civil, including commercial, religious, familial, and other private disputes.[119] Beth Din judgments also must conform to the policies of the forum in which they are to be enforced. As the rabbinical court explains, "Cases are decided under Jewish law, through the prism of contemporary commercial practice and secular law."[120]

As in Britain, the American arbitration framework has made it possible for shari'a courts to operate in the United States. It would not work to allow Christians and Jews to utilize the arbitration process but not allow Muslims to do so as well. Shari'a courts may operate within the same parameters as the rabbinical courts or any other arbiter in the United States, and their judgments may be applied "[n]o different from how religious laws and customs are already applied."[121] Currently, the network of shari'a tribunals in the United States seems less extensive than in Great Britain,[122] but some shari'a tribunals, such as the Texas Islamic Court,[123] have already begun operating in the United States.

In answer to concerns about shari'a in the United States,[124] proponents of shari'a tribunals contend that the regulations contained in the FAA and UAA, together with the potential for judicial review of arbitration awards, limited as it is, are sufficient to ensure that shari'a arbitration results do not contravene U.S. law or oppress Muslim Americans.[125] According to these advocates, shari'a courts will be no

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[118] BETH DIN OF AMERICA, AGREEMENT TO ARBITRATE, *available at* http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf.

[119] Beth Din of America, *Arbitration and Mediation*, BETHDIN.ORG, http://www.bethdin.org/arbitration-mediation.asp (last visited Apr. 6, 2012).

[120] *Id.*

[121] Hagerty, *supra* note 65 (quoting American Jewish Committee religion law expert Marc Stern).

[122] *See* Steve Doughty, *Britain Has 85 Sharia Courts: The Astonishing Spread of the Islamic Justice Behind Closed Doors*, MAIL ONLINE (June 29, 2009, 10:25 AM), http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (describing eighty-five operating shari'a courts in Britain as an "astonishing" figure compared to what was commonly thought to be the number of functioning tribunals); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1249 (2011) ("Muslim communal groups have recently begun pursuing initiatives to institute a network of Islamic arbitration courts around the United States; however, no such network currently exists." (footnotes omitted)).

[123] *See* Jabri v. Qaddura, 108 S.W.3d 404, 407, 413–14 (Tex. App. 2003) (upholding an arbitration agreement choosing the Texas Islamic Court as the site for arbitration).

[124] *See infra* Part IV (detailing policy concerns over the use of shari'a in the United States).

[125] *See* Hagerty, *supra* note 65.

more dangerous than Christian or Jewish courts have been. "So we're not going to see hand chopping off [or] polygamous marriage," says one proponent.[126] "The U.S. court wouldn't do it. It's contrary to public policy, and they would refuse to apply that particular [award based on shari'a law]."[127]

Indeed, those guarantees, in combination with the interest in favor of treating Muslims equally with Christians and Jews under arbitration laws, make it unlikely that shari'a courts will be categorically denied equal status to rabbinical courts in American arbitration. Legally, there is no strong argument for disallowing shari'a arbitration.

In terms of policy, however, there is room to reevaluate where the law is and where it should be with regard to shari'a tribunals.[128] Given that the FAA and UAA regulations on arbitration are hands-off at best, and that the judiciary's power of review is confined to little more than procedure, a cautious and well-informed approach to shari'a tribunals is warranted.

IV. POLICY CONCERNS WITH EMBRACING SHARI'A TRIBUNALS IN THE UNITED STATES

It is obvious that, under the status quo, shari'a arbitration is legal in the United States. In addition to current trends in favor of specialized courts and personalized justice that weigh on the side of adjudicatory bodies, such as shari'a tribunals, being tailored to serve particular populations, the arbitration mechanism provides a ready framework within which shari'a tribunals may authoritatively adjudicate according to the customs of Muslim communities. Despite the legality of religious arbitration and the existence of a procedural framework designed to ensure conformity of arbitration awards with domestic law and policy, caution is still in order.

First, consistency and predictability are values of the secular legal system that may be sacrificed in a religious tribunal, which may employ one or any number of religious doctrinal interpretations. Second, the manifest danger that individuals may be coerced into submitting to these tribunals undermines the protections to which those persons are entitled under U.S. law. Further, such tribunals risk allowing an alternative, parallel justice system to compete with, undermine, and delegitimize the law of the land. The British experience demonstrates that these concerns are not merely speculative. This Part explains why American law and policy makers must carefully consider whether or how

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126 *Id.*

127 *Id.*

128 *See infra* Part IV.B.

shari'a tribunals should be allowed to continue to operate in the United States.

A. Implications of Shari'a Arbitration on the Rule of Law

While consistency and judicial accountability are central values in a rule-of-law system, neither value is furthered by religious arbitration. Consistency is problematic when judgments are based on religious law because of the multiplicity of diverse interpretations that may derive from any given religious text. For instance, as noted earlier, at least eight schools of thought exist within Islam.[129] Such plurality may facilitate subjectivity in the decisions of religious arbiters and inconsistency between them. Moreover, such decisions have little or no predictive value, and are in that way inconsistent with the rule of law, which the U.S. legal system otherwise exemplifies.

Moreover, the substance of arbitration awards is more or less shielded by the limitations on judicial review of such awards.[130] Religious tribunals are particularly veiled from scrutiny by the constitutional constraints against courts considering religious matters.[131] Particularly since arbiters are given quasi-judicial authority, such a result does not reconcile easily with traditional judicial values in America.

As one commentator stated, "The issue of religious communities having their own set of rules, even their own courts governing areas such as marriage and divorce within the secular state, is a complex one, not least because each community has many voices and, naturally, they are not all seeking the same thing."[132] Multiplicity of interpretations is in fact a common characteristic of major text-based religions, including Christianity,[133] Judaism,[134] and Islam.[135] In Great Britain, Muslims who are opposed to shari'a tribunals have criticized British policymakers for failing to take into account the "major differences over the interpretation and implementation of Sharia" between different schools of

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[129] *See supra* note 14 and accompanying text.

[130] *See supra* note 47 and accompanying text.

[131] *See supra* Part III.B.

[132] Botsford, *supra* note 69.

[133] *See* MICHAEL P. SCHUTT, LAW AND THE BIBLICAL TRADITION: SELECT BIBLIOGRAPHY FOR CHRISTIAN LAW STUDENTS 3–4 (2001).

[134] *See* Jonathan Romain, *Why Britain Needs An Alternative Beth Din*, JEWISH CHRON. ONLINE (Aug. 28, 2008, 2:27 PM), http://www.thejc.com/judaism/judaism-features/why-britain-needs-alternative-beth-din (contrasting Orthodox and Reformed rabbinical courts).

[135] *See* Bassiouni, *supra* note 13, at 101–02. Notably, some of the most important differences between the two major Islamic jurisprudential schools of thought relate to divergent interpretations of the primary Islamic text, the Quran. *Id.*

jurisprudence.[136] With multiple schools of Islamic jurisprudence, clearly no single interpretation of shari'a law will fit all Muslims.

Minority Muslim sects in particular fear that legitimization of any single interpretation or school of thought through arbitration would result in the marginalization or oppression of minorities by more "hard-line" majority sects.[137] Of course the other side of the argument is that parties to arbitration must voluntarily agree to arbitrate in the first place and that they also have the freedom to choose what law or religious discipline they wish to have applied as well as the specific arbiter they wish to have preside over the proceedings.[138] However, as will be discussed shortly, a problem with arbitration within Muslim communities is that women and other vulnerable individuals are being coerced into submitting to shari'a arbitration.[139] In such cases, it is even less likely the individual will have any meaningful control over which law is applied or which arbiter is chosen. Although duress is a ground for vacating an arbitration award,[140] the coercion itself may not be readily ascertainable since the court cannot examine religious matters that may play into psychological coercion. More likely, a party coerced to submit to arbitration in the first place would never even try to exercise her right to appeal to court due to continuing coercion, further shielding the arbiter and the coercive parties from scrutiny.

Even where an individual has had a meaningful opportunity to specify the law to be applied in his arbitration, due to courts' limited power of review, there is no practical way to ensure that the chosen law is actually applied. The religious question doctrine prevents courts from examining the religious components of the arbitration proceeding, such as the religious principles that were (or were not) applied. For instance, a party may contract for an arbitration to be governed by the Hanbali school of jurisprudence,[141] but a court is powerless to ensure that the arbiter actually employed Hanbali jurisprudence in his judgment.[142] While arbitration awards are generally given deference based on the principle of freedom of contract, in the case of religious tribunals, there is no way to guarantee that a person got what he contracted for.

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[136] *British Muslims for Secular Democracy (bmsd) Reaction Over Lord Philip's Views About the Incorporation of Sharia Law in Britain*, BRITISH MUSLIMS FOR SECULAR DEMOCRACY (Apr. 7, 2008), http://www.bmsd.org.uk/articles.asp?id=18.

[137] *Id.*

[138] *See supra* notes 96–97.

[139] *See infra* Part IV.B.

[140] Federal Arbitration Act, 9 U.S.C. § 10(a) (2006).

[141] The Hanbali school is characterized by an "austere" life which prohibits its followers from taking positions in the State and from accepting gifts from supporters. KHADDURI, *supra* note 11.

[142] *See supra* note 111.

Unlike courts, arbiters are not arms of the state and consequently are not publicly accountable for their decisions. For instance, arbitration awards, unlike decisions by a court, are not systematically published for public review.[143] Yet, some argue that permitting shari'a arbitration may be a solution to the problems of inconsistency and accountability.[144] Rather than viewing inconsistency as a reason to preclude secular legitimization of shari'a courts, these proponents contend that legal recognition might actually serve as an incentive for shari'a courts to unify and to streamline their diverse interpretations.[145] This would also facilitate publicizing unethical shari'a-court judgments and would promote greater public and legal accountability for such proceedings.[146] On the other hand, some argue that because of the lack of accountability or potential for appellate review, religious arbitration curtails an individual's right to due process of law.[147] Ultimately, the American justice system does not exist to improve religious discipline but to protect the rights of individuals. That end of law should not be compromised in the context of arbitration, particularly where arbitration awards are to be given legal force.

B. Assimilation or Apartheid?: The Problem of Coercion and Evasion of the Law in Parallel Justice Systems

Another key consideration with respect to shari'a arbitration is the problematic nature of parallel or alternative justice systems. Advocated under the guise of giving equal representation to religious minorities, state enforcement of religious-court judgments may actually have the effect of curtailing the fundamental civil rights of individuals within those religious communities.[148] For instance, although arbitration requires "voluntary" agreement by both parties in order for the arbiter's judgment to be binding, Muslim parties may face pressures from their families and communities to submit to shari'a tribunals rather than seek relief in civil courts, effectively robbing them of any "voluntary" choice in the matter.[149] These Muslims may be told, for instance, that appealing to a secular court when a shari'a tribunal is available would be sinful and perhaps even punishable. Psychological coercion may also be used to force individuals to relinquish their rights to a hearing in court and to

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[143] *See* Amy J. Shmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) ("[A]rbitration proceedings generally are private and do not produce published opinions that courts infuse into public law.").

[144] William, *supra* note 88, at 46.

[145] *Id.*

[146] *See id.*

[147] *See* Grossman, *supra* note 97, at 208.

[148] *See* William, *supra* note 88, at 43.

[149] *See id.* at 44.

submit instead to shari'a arbitration. For instance, Muslim women have been particularly vulnerable to such psychological coercion by their families and communities or by their abusive husbands in domestic violence cases.[150] In other situations, Muslims may not have a meaningful choice in deciding to arbitrate if they are not made aware of their right to litigate or at least their right not to submit to shari'a arbitration.[151] Consequently, Muslims that move to the United States with the expectation of liberation from oppressive religious regimes may actually find themselves still bound in similarly coercive situations.[152]

Even when a person's submission to shari'a arbitration is truly voluntary, if that individual is a woman, she may nevertheless be denied true justice by the court's judgment. Because shari'a law treats women as unequal to men, women may be disadvantaged in shari'a-court proceedings in which a man is the opponent.[153] Furthermore, the community and familial pressures to submit to shari'a law are even more severe for Muslim women living in a male-dominated community.[154] Although the argument for accommodating shari'a tribunals appeals to sensibilities of fairness and tolerance, such accommodation could effectually isolate a vulnerable segment of the population and deprive them of equal justice under law.[155]

Similarly, allowing shari'a tribunals may be advocated as a welcoming gesture to remedy the fact that many Muslims "tend to come here with a little bit of a guest mentality."[156] However, embracing shari'a tribunals may have precisely the opposite effect—encouraging segregation and "ghettoization" of Muslim communities rather than integration to American society.[157] Facilitating shari'a courts in the United States may in fact work against helping Muslim Americans feel like stakeholders in the mainstream legal system.[158] It may also result in unbridled forum shopping, whereby individuals may choose the system

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[150] EQUAL AND FREE, ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL SUMMARY BRIEFING 1–2 [hereinafter BRIEFING], http://equalandfree.org/download-file/downloads/ArbitrationBill_SummaryBriefing.pdf (last visited Apr. 6, 2012).

[151] *See id.* at 2.

[152] *See British Muslims for Secular Democracy*, *supra* note 136.

[153] *See* Bassiouni, *supra* note 13, at 109.

[154] William, *supra* note 88, at 43–44.

[155] Bowen, *supra* note 77; *see also* William, *supra* note 88, at 45 ("While the case for multiculturalism is appealing, it is overly outweighed by the pressing concern concerning discrimination against women.").

[156] *Interview: Imam Feisal Abdul Rauf*, *supra* note 5.

[157] MOORE, *supra* note 1, at 108 ("Parallel justice systems would in effect be a denial of inclusion and basic rights.").

[158] *See British Muslims for Secular Democracy*, *supra* note 136 (expressing concern that the incorporation of shari'a law in Britain will only create harmful social barriers).

of law that they believe will procure them the most favorable outcome.[159] Moreover, while the preference for arbitration reflects a strong interest in relieving the burden on overextended court dockets, the interest in guaranteeing individuals a fair and just adjudication of their rights must surely be stronger. Cumulatively, the negative characteristics of a parallel shari'a-law justice system outweigh any potential benefits that may be achieved. At a minimum, if such tribunals are to exist, the arbitration framework must be more tightly regulated and the opportunity for appeal and substantive review of arbitration awards must be extended.

C. British and Canadian Responses to the Problems Posed by Shari'a Tribunals

A number of these very concerns have manifested among the shari'a tribunals operating in Britain.[160] First, some shari'a tribunals falsely purported to be "courts" with inherent legal authority, rather than merely arbitration panels whose judgments are subject to affirmation or vacation by secular courts.[161] There has also been evidence that shari'a tribunals have, on a number of occasions, exceeded their authority by purporting to decide cases that are reserved for state courts.[162] For instance, although the scope of an arbiter's authority is limited to settling civil disputes, British Muslim tribunals boast of having decided at least six cases of domestic violence in 2008 alone.[163] The tribunals also purported to "settle" a criminal stabbing case in 2006.[164] Advocates of women's rights in Britain also fear that Muslim women are being coerced into submitting to shari'a arbitration and are then being discriminated against under shari'a law during the proceedings.[165]

To address these concerns, Baroness Cox, member of the House of Lords, introduced a bill that would amend the Arbitration Act and several other English laws, thus affecting the parameters and requirements for religious arbitration.[166] The bill proposes amendments

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159 William, *supra* note 88, at 46; *see also* Doughty, *supra* note 122.

160 *See* Christopher Hope, *Plans to Curb Influence of Sharia Courts to be Unveiled*, THE TELEGRAPH (June 8, 2011, 6:30 AM), http://www.telegraph.co.uk/news/uknews/law-and-order/8561979/Plans-to-curb-influence-of-sharia-courts-to-be-unveiled.html; EM v. Sec'y of State for the Home Dep't, [2008] UKHL 64, [6] (appeal taken from Eng.), *available at* http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd081022/leban.pdf.

161 BRIEFING, *supra* note 150, at 1.

162 *See id.* at 1–2.

163 Hickley, *supra* note 10.

164 BRIEFING, *supra* note 150, at 2.

165 *Id.* at 1–2; Hope, *supra* note 160.

166 Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] (Eng. & Wales), *available at* http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf (amending the Equality Act of 2010).

to the Arbitration Act of 1996 and several other acts to explicitly prohibit sex discrimination in arbitration and mediation proceedings.[167] Specifically, it prohibits treating a man's testimony as more weighty than a woman's or treating men and women unequally with respect to property rights,[168] both of which are allowed, or even required, under shari'a.[169] Under the proposed amendment to the Family Law Act, courts may set aside arbitration awards if it finds evidence that one party's consent to arbitrate was not "genuine."[170] When assessing the sincerity of a party's consent, courts would be encouraged to look especially at whether the party was informed of her legal rights, including the right to litigate rather than submit to arbitration or mediation.[171] Courts would also be encouraged to examine whether "any party was manipulated or put under duress, including through psychological coercion, to induce participation in the mediation or [arbitration] process."[172] One provision seeks to prevent intimidation of domestic abuse victims from testifying.[173] Another provision of the proposed amendment would clarify that British courts have exclusive jurisdiction over criminal and family matters, and thus, those cases may not be arbitrated.[174] Finally, the bill would penalize, with a sentence of imprisonment up to five years, anyone who "falsely purports to be exercising a judicial function or to be able to make legally binding rulings, or . . . otherwise falsely purports to adjudicate on any matter which that person knows or ought to know is within the jurisdiction of the criminal or family courts."[175] Baroness Cox's proposed approach would permit shari'a tribunals to continue arbitrating disputes in Britain but would aim to impose more government regulation and oversight so as to ensure equality and legality in the proceedings.

In contrast, Ontario, Canada amended its arbitration laws in 2006 so as to effectively end religious arbitration in Canada.[176] The amended act provides that only Canadian law may be chosen to govern an

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[167] *Id.* cl. 1(2).

[168] *Id.* cls. 1(2), 3(2).

[169] In certain Quranic interpretations the testimony of a man is worth twice that of a woman, and a man inherits twice as much property. *See, e.g.*, WARRAQ, *supra* note 12, at 309–11.

[170] H.L. Bill [72], cl. 5(2).

[171] *Id.*

[172] *Id.*

[173] *Id.* cl. 6(2).

[174] *Id.* cl. 4(2).

[175] *Id.* cl. 7(2).

[176] DENIS MACEOIN, SHARIA LAW OR 'ONE LAW FOR ALL?' 7 (David G. Green ed., 2009), *available at* http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf.

arbitration proceeding, thereby excluding religious laws.[177] Additionally, the arbitration must be conducted by approved, specially trained arbiters. The amendment was the culmination of Canada's own debate over the advisability of allowing shari'a arbitration. Most notable in opposition to permitting shari'a tribunals in Canada were Muslim women who said they came to Canada precisely in order to escape shari'a law.[178]

The British and Canadian experiences, and their respective approaches to shari'a tribunals, may be instructive for the United States, which has yet to adopt a specific posture toward domestic shari'a tribunals. Most importantly, they demonstrate that the policy concerns raised in this Note are legitimate and should be squarely addressed in the national debate. Ultimately, an informed and coherent policy with respect to shari'a tribunals must be developed for the United States, and it must be one that ensures true justice, equality, and respect for the rule of law.

CONCLUSION

Shari'a tribunals are legal in the United States under current federal and state arbitration laws. This result is bolstered by contemporary policy trends among American court systems, which promote courts that are tailored to serve narrow subsets of the population. However, that should not be the end of the discussion. The policy values and justifications underlying U.S. arbitration laws and recent court trends must be weighed against the policy problems entailed in shari'a arbitration. The experiences of our neighbors in the West demonstrate the reality of these concerns. First, it is imperative that America continue to engage in national debate about the place of shari'a courts in the United States. Second, lawmakers and policymakers must explore different solutions and ultimately develop a practical and well-reasoned approach toward shari'a tribunals in the United States. Two possible approaches have been tested in Great Britain and Canada, respectively.

The Canadian "all-or-nothing" approach to barring shari'a courts entails disabling the vehicle for all religious arbitration. Because Christian, Jewish, and Muslim tribunals operate through the same arbitration mechanism, any effort to challenge the operation of shari'a tribunals in the United States will have to challenge other religious tribunals as well. For instance, disallowing shari'a courts to enforce judgments through arbitration would require that the same privilege be retracted from rabbinical courts, a measure that would be painful and

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[177] *Id.*

[178] *Id.* at 6–7.

contentious considering the longstanding legitimacy rabbinical courts have enjoyed in the United States. Moreover, disallowing shari'a tribunals in the United States would require critical reevaluation of contemporary policy values that support the religious-arbitration and special-court movements. While relieving overloaded court dockets may be a strong interest, the guarantee of freedom and the rule of law must not be sacrificed in its favor.

The approach currently being considered in Great Britain represents a less extreme approach that attempts to address the key concerns raised by shari'a courts, while still allowing them to operate legally. These measures have yet to be adopted and implemented in Great Britain, so it cannot yet be said whether the measures adequately address the problems presented by shari'a courts. But since current U.S. policies favor specialized courts that serve narrow populations and relieve the burden on judicial dockets, the British approach seems most likely to succeed in the United States. Under this approach, shari'a courts could still operate in the United States, thereby relieving some strain on the courts and also providing services particularly relevant to Muslim communities. However, the approach would call for more clearly defined and limited parameters to ensure the integrity and transparency of the process. Furthermore, measures promoting accountability of shari'a judges and their rulings must be put in place to ensure conformity with the law. Religious tribunals may be beneficial, but priority must be given to preserving the rights and liberties of American citizens and to upholding the rule of law.

Even though shari'a tribunals are technically legal, serious concerns exist. Americans must not shift to auto-pilot and allow shari'a courts to operate unchecked. Americans must cautiously weigh the policies in favor of shari'a tribunals against the serious concerns that they implicate. Proponents of shari'a courts must also critically evaluate the impact of such courts upon Muslim Americans and be transparent about those risks and how best to address them. Together, Americans must affirmatively decide on an approach that preserves the integrity of the legal system, that protects the American people, and that best serves American policies and values.

Amy S. Fancher

SNYDER V. PHELPS: APPLYING THE CONSTITUTION'S HISTORIC PROTECTION OF OFFENSIVE EXPRESSION TO RELIGIOUSLY MOTIVATED SPEECH

INTRODUCTION

Just over one year ago, the United States Supreme Court decided in *Snyder v. Phelps* that the First Amendment protects the right of religious minority groups to express unpopular views on controversial public issues in a manner that most Americans would consider harmful, hateful, and offensive.[1] In rare form, eight Justices from diverging ideological backgrounds united together in reaching a nearly unanimous decision in favor of the religious group's freedom of speech,[2] despite the Court majority's express disagreement with the group's message and the means by which it was communicated.[3] Likewise, as the Supreme Court was considering the issue on appeal, a remarkably diverse group of advocates arose in support of the religious group's constitutional right to freely express its fringe viewpoints without being penalized with millions of dollars in state tort damages.[4]

On one side of the historic dispute was Fred Phelps, a self-described "primitive" Baptist preacher,[5] who has gained notoriety in recent years for using military funerals as a platform to share his radical religious

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[1] 131 S. Ct. 1207, 1220–21 (2011).

[2] Chief Justice Roberts wrote the majority opinion in *Snyder* and was joined by Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* at 1212. The lone dissenting opinion was authored by Justice Alito, who would have held that given the facts and circumstances of the case, the First Amendment did not shield the church group's protest speech from tort liability. *Id.* at 1228 (Alito, J., dissenting).

[3] Throughout its opinion, the Court described the church's expression as "hurtful," "fall[ing] short of refined social or political commentary," and a negligible contribution to public discourse. *Id.* at 1217, 1220 (majority opinion). The Fourth Circuit Court of Appeals more aptly criticized the speech as "utterly distasteful," "offensive," "rude," and "repugnant." Snyder v. Phelps, 580 F.3d 206, 222–24, 226 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). Like the Supreme Court and the Fourth Circuit, the author of this Comment does not agree with Westboro Baptist Church's ideology or the way the church advances its sincerely held religious views. The author, however, does recognize the serious nature of the constitutional issues implicated in *Snyder* and the important precedent the Court's decision will set for securing the broad right to free expression for religious-minority groups in years to come.

[4] Groups submitting amicus briefs on behalf of Phelps and Westboro Baptist Church included the American Civil Liberties Union, Foundation for Individual Rights in Education, Liberty Counsel, Reporters Committee for Freedom of the Press, Rutherford Institute, Scholars of First Amendment Law, and the Thomas Jefferson Center for the Protection of Free Expression.

[5] Roger Chapman, *Phelps, Fred*, *in* 2 CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES 429, 429 (Roger Chapman ed., 2010).

views.[6] Phelps and members of the Westboro Baptist Church argued that the First Amendment guarantees the unqualified right to publicly express their hateful views on America, homosexuality, the Catholic Church, and a host of other topics.[7] On the other side of the case was Albert Snyder, a sympathetic father of a deceased marine who brought multiple state tort claims against Phelps and his church in 2006, alleging physical, mental, and emotional harm caused by the group's demonstration around the time of his son's funeral.[8]

In the year since *Snyder* was decided, surprisingly little scholarship has been written to reflect on the important consequences of the Court's decision and its clear move contrary to the international trend of regulating and even criminalizing so-called "hate speech."[9] This Comment seeks to fulfill this perceived gap in scholarship by analyzing the outcome of the *Snyder* decision within the context of other historic U.S. Supreme Court cases upholding the broad free speech rights of unpopular minority groups under the First Amendment.

Part I provides a brief overview of American free speech jurisprudence, focusing specifically on the Supreme Court's preservation of the broad First Amendment right to free expression for hateful and disfavored minority groups. Part II surveys various laws and regulations that have been implemented domestically and abroad to suppress hate speech at the expense of individual rights to freedom of belief and

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[6] According to a website maintained by Westboro Baptist Church, the group has conducted more than 400 protest demonstrations at military funerals since 1991. *About Westboro Baptist Church*, GODHATESFAGS, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (last visited Apr. 6, 2012).

[7] *Snyder*, 131 S. Ct. at 1214, 1216–17, 1220.

[8] *Id.* at 1213–14.

[9] In the last year, the majority of published scholarship reflecting on *Snyder* appears critical of the Supreme Court's decision in favor of the religious group's free speech or, at best, views the case as an afterthought of already well-established First Amendment principles. *See, e.g.*, Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 42–43 (2011) (referring to the case as "anticlimactic" and "easy"); Alan Brownstein & Vikram David Amar, *Afterthoughts on* Snyder v. Phelps, 2011 CARDOZO L. REV. DE NOVO 43, 43, http://cardozolawreview.com/content/denovo/Brownstein-Amar_2011_43.pdf (stating that the case "added little to the development of free speech doctrine" and questioning the Supreme Court's role in the resolution of the case); Deana Pollard Sacks, Snyder v. Phelps*: A Slice of the Facts and Half an Opinion*, 2011 CARDOZO L. REV. DE NOVO 64, 66, http://cardozolawreview.com/content/denovo/POLLARD-SACKS_2011_64.pdf (arguing that the Supreme Court "may have sent the wrong message to society about the boundaries of malicious civil misconduct perpetrated by speech"); Jeffrey Shulman, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in* Snyder v. Phelps, 2011 CARDOZO L. REV. DE NOVO 35, 35, http://cardozolawreview.com/content/denovo/Shulman_2011_35.pdf (criticizing the Supreme Court's refusal to consider the Internet "epic" in reaching its conclusion in favor of Phelps).

expression. Finally, Part III concludes with a review of the *Snyder* case and the Supreme Court's analysis upholding the constitutional right to communicate unpopular and offensive religiously motivated speech.

I. IN DEFENSE OF FREE SPEECH: HISTORY OF THE AMERICAN APPROACH

A. The Bedrock of Free Speech: "Freedom for the Thought That We Hate"

The Founders of the United States who penned the Declaration of Independence, the Constitution, and the Bill of Rights envisioned a society where citizens had the right to speak their minds freely without government suppression.[10] In fact, the First Amendment to the U.S. Constitution guarantees this right by declaring, "Congress shall make no law . . . abridging the freedom of speech."[11] Over the years, courts have had numerous occasions to interpret the proper scope of the First Amendment's free speech protection.[12] The Ku Klux Klan, Nazis, civil-rights activists, war protesters, and religious leaders all have sought protection from the judiciary to communicate their unpopular, unpatriotic, and sometimes outright "hateful" messages.[13]

In response, the Supreme Court has stayed true to the principle that "debate on public issues should be uninhibited, robust, and wide-open,"[14] consistently granting equal legal protection to all types of expression—popular or unpopular, patriotic or unpatriotic, and endearing or hateful. Through these difficult cases, the Court has developed a strong, principled precedent for freedom of speech and has maintained the democratic vision of America's Founders that all people are created equal with certain fundamental rights, including the freedom of speech, which human government can neither give nor take away.[15]

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[10] *See* CRAIG R. SMITH & M. JOEL BOLSTEIN, ALL SPEECH IS CREATED EQUAL 2 (1986). Government protection of free speech, however, did not actually originate in the United States. *See* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 4–5 (1985) (revealing that governments as early as ancient Athens recognized some form of legally protected freedom of speech).

[11] U.S. CONST. amend. I.

[12] WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 21 (1984) ("[T]he free speech clause of the first amendment has been invoked in literally thousands of cases. In the cases handled by the Supreme Court alone, it has been addressed several hundred times. . . . [T]hese adjudicative refinements of the free speech clause present quite an impressive jurisprudence of free speech in America.").

[13] *See* discussion *infra* Part I.B.

[14] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[15] *See* THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776) (speaking of equal rights of the American people under the "Laws of Nature and of Nature's God" and of the British government's "destructive" abuses of these rights).

Formed in the fires of political revolution, America has thrived for more than two centuries as a land where people have the right to freely express their viewpoints in a marketplace of ideas.[16] Just four years after the First Amendment's Free Speech Clause was incorporated against the states,[17] Justice Oliver Wendell Holmes opined in a historic dissent, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but *freedom for the thought that we hate*."[18] This ideal has since become the bedrock of the American legal system's commitment to protect and preserve free speech and free expression.

B. The American Approach: "Uninhibited, Robust, and Wide-Open"

Since the early formation of the American judicial system, courts have been bound by the axiom of the First Amendment that the government must not support any law abridging the freedom of speech.[19] During a few regrettable points in history, the United States has ignored this hallmark of democracy, due in large part to fear or greed for political power.[20] In time, however, the "supreme law of the land" has resolved these controversies properly in favor of a liberal allowance for free speech and free expression under the First Amendment. The Supreme Court in *New York Times Co. v. Sullivan* echoed the resounding protection for free speech in the First Amendment by recognizing that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[21]

Although there have been a significant number of First Amendment disputes before the Supreme Court over the past 200 years,[22] the cases featured below especially highlight the great lengths to which the Court has gone in preserving the right to freedom of speech, even guaranteeing that right to some of the most villainous groups in American history.

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[16] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the "free trade in ideas" as a key principle in American constitutional theory).

[17] Gitlow v. New York, 268 U.S. 652, 666 (1925) (extending the First Amendment guarantee of free speech to the states via the Due Process Clause of the Fourteenth Amendment).

[18] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (emphasis added).

[19] U.S. CONST. amend. I.

[20] *See* TEDFORD, *supra* note 10, at 45–52, 68 (recounting the Alien and Sedition Acts of 1798, the Alien Registration Act of 1940, the Internal Security Act of 1950, and the search for "subversion" by Senator Joseph McCarthy during the late 1940s and early 1950s).

[21] 376 U.S. 254, 270 (1964).

[22] VAN ALSTYNE, *supra* note 12, at 21.

1. Free Speech for the Ku Klux Klan

Despite their ill-famed reputation as radical bigots, the Ku Klux Klan's ongoing fight for free expression has in some respects paved the way in preserving free speech for all Americans.[23] For instance, in the 1969 case of *Brandenburg v. Ohio*, the Supreme Court sided with the Klan in a First Amendment challenge to Ohio's syndicalism statute.[24] The law forbade the advocacy of violence as a means to political reform and prohibited the assembly of groups formed to teach or advocate such violence.[25] A local news station had filmed a private rally in which a Klan leader was featured wearing Klan regalia, burning a cross, and giving a speech full of hateful, racist comments to other Klan members.[26] The leader's words openly advocated the use of violence to foster white supremacy.[27]

Instead of upholding the conviction of the Klan leader under the Ohio law, the Court issued a surprising analysis in favor of the free speech rights of the Klan. Drawing on established precedent from similar cases, the Court reasoned,

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[28]

To pass constitutional muster, the Court explained that the state's speech restriction must distinguish "mere advocacy" of violence from actual "incitement to imminent lawless action."[29] From a purely pragmatic perspective, the twist of fate in favor of the Klan is probably best explained as a knee-jerk reaction by the Court, fearing the possibility that promulgation of similar laws in the future would eventually severely encroach upon the free speech rights of mainstream America.

To this day, the Klan continues to boast in its radical crusade for free speech.[30] Meanwhile, the strict *Brandenburg* test remains the legal

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[23] Martin Gruberg, *Ku Klux Klan*, *in* 2 ENCYCLOPEDIA OF THE FIRST AMENDMENT 646, 647–48 (John R. Vile et al. eds., 2009).

[24] 395 U.S. 444, 448–49 (1969) (per curiam).

[25] *Id.* at 444–45.

[26] *Id.* at 445–46.

[27] *Id.* at 446–47.

[28] *Id.* at 447.

[29] *Id.* at 448–49.

[30] *The Ku Klux Klan*, KU KLUX KLAN, LLC, http://kukluxklan.bz/ (last visited Apr. 6, 2012) ("Even today when a Klansman speaks, he is exercising [his rights under] the Constitution, keeping strong and immutable the peoples [sic] right to speak and publish

measuring rod in American courts for many controversies concerning free speech. The lesson to be learned from *Brandenburg* is that violent speech or even speech advocating the overthrow of the government is protected by the First Amendment, until such speech is directed to and is likely to produce imminent lawless action.[31]

2. Free Speech for the Nazis

Less than a decade after *Brandenburg*, the Supreme Court arrived at another significant conclusion protecting the free speech rights of a notorious hate group: the National Socialist Party of America, more commonly known as the "Nazis." In *Collin v. Smith*, the Supreme Court secured the rights of uniformed Nazi activists to march, parade, and disseminate hateful propaganda in the Chicago suburb of Skokie, Illinois by declining to hear an appeal of the decision by the Seventh Circuit Court of Appeals that favored the Nazis' right to free expression.[32] The context of the Court's decision is important because of the nearly 70,000 people residing in the Village of Skokie, a substantial number were Jewish Holocaust survivors.[33]

With the aid of the American Civil Liberties Union ("ACLU"), the Nazi group and its leader brought suit against the Village of Skokie, arguing that the local ordinances were unconstitutional violations of the First Amendment.[34] While a skeptical American public closely monitored the proceedings, the ACLU felt the sting of defending the hate group.[35] Most people in America did not seem to view the case as a matter of freedom of speech, but instead as a hate group's abuse of liberty and a government license to inflict harm on others.[36]

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their ideas. Whether in the public streets or the halls of Congress as long as our voice can be heard, then every citizen may be heard. Silence the Klansman, and America will be silenced, this can only happen at the hands of despotic rulership. Today rights not exercised are often rights denied, our brave and noble politicians figure a right not used is a right un-needed.").

[31] *Brandenburg*, 395 U.S. at 447.

[32] 578 F.2d 1197, 1201–02 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[33] *Id.* at 1199 n.2; *see also* Geoffrey R. Stone, *Remembering the Nazis in Skokie*, HUFFINGTON POST (Apr. 19, 2009, 3:33 PM), http://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html (estimating that about 40,000 of 70,000 Skokie residents were Jewish and approximately 5,000 were Holocaust survivors).

[34] *Collin*, 578 F.2d at 1201; Lee C. Bollinger, Tolerance and the First Amendment 2–3 (1986).

[35] *See* BOLLINGER, *supra* note 34, at 2–3 (describing how 30,000 members abandoned the ACLU, costing the civil liberties organization an estimated half a million dollars in annual revenue).

[36] *Id.*

Aryeh Neier was Executive Director of ACLU at the time of the Skokie controversy.[37] In his book entitled *Defending My Enemy*, Neier detailed ACLU's paradoxical position in the Skokie litigation.[38] When asked how Neier, a Jew, could defend Nazi freedom,[39] Neier explained that the ACLU's protection of free speech for the Nazis was in reality their best strategy to overcome the Nazis' agenda of hate and oppression.[40] According to Neier, "Defending [our] enemy [was] the only way to protect a free society against the enemies of freedom."[41]

Meanwhile, the Village of Skokie argued that the display of the Nazi slogans promoted hatred against persons of Jewish faith or ancestry and that the Constitution does not protect speech that promotes racial or religious hatred.[42] The Village further complained that the marches were meant to intentionally inflict psychic trauma and emotional distress on Jews and Holocaust survivors.[43]

The case was eventually appealed to the Supreme Court; however, the Court refused to disturb the Seventh Circuit's holding that the Skokie ordinances restraining the hate group were unconstitutional.[44] Recognizing that "First Amendment rights are truly precious and fundamental to our national life,"[45] the Seventh Circuit had set aside its natural inclination to sympathize with the Holocaust victims and reluctantly reasoned that the Nazi demonstrations were "within the ambit of the First Amendment."[46]

As it turned out, the Nazis never marched in the Village of Skokie as they had originally planned.[47] Instead, Jewish Defamation League members showed up to express their own views on the Nazi hate regime, with approximately 2,000 spectators there to observe.[48] In hindsight, the outcome of the Skokie controversy represents a fundamental tenet of American free speech jurisprudence: Even the most hateful and unpopular speech should be granted the same legal protection as popular

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37 ARYEH NEIER, DEFENDING MY ENEMY 1 (1979).

38 *Id.* at 1–4.

39 *Id.* at 4.

40 *Id.* at 1–2.

41 *Id.* at 2.

42 Collin v. Smith, 578 F.2d 1197, 1204–05 (7th Cir. 1978).

43 *Id.* at 1205.

44 *Id.* at 1207, *cert. denied*, 439 U.S. 916 (1978).

45 *Id.* at 1201.

46 *Id.* at 1201–02 (reasoning that the Nazi slogans were not obscenities, fighting words, or libel—three forms of expression which may constitutionally be restricted).

47 NEIER, *supra* note 37, at 51.

48 *Id.*

opinions from society's majority groups.[49] In our free society, hateful and offensive forms of expression should be combated by society's moral voices, not cut off by government-mandated silence.

3. Free Speech for the Unpatriotic

The companion cases of *Texas v. Johnson*[50] and *United States v. Eichman*[51] established that the First Amendment guarantee of freedom of speech extends even to extremely unpatriotic forms of expression, or "hate speech" against the United States.[52]

In *Texas v. Johnson*, the Supreme Court held that burning the American flag during a protest rally was constitutionally protected expression.[53] Near the end of a political protest outside the 1984 Republican National Convention, a protester set fire to an American flag in front of Dallas City Hall while his fellow protesters chanted, "America, the red, white, and blue, we spit on you."[54] While no one was physically injured or threatened with injury, several witnesses testified that the flag burning "seriously offended" them.[55]

The Supreme Court's reasoning in protecting the protester's unpatriotic expression was driven by a "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[56] Ignoring the dissent's view that the American flag's unique position as the symbol of the Nation justifies a government prohibition against flag burning,[57] the majority instead

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[49] *Collin*, 578 F.2d at 1210 ("The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."); *see also* Stone, *supra* note 33 ("The outcome of the Skokie controversy was one of the truly great victories for the First Amendment in American history. It proved that the rule of law must and can prevail. Because of our profound commitment to the principle of free expression even in the excruciatingly painful circumstances of Skokie more than thirty years ago, we remain today the international symbol of free speech.").

[50] 491 U.S. 397 (1989).

[51] 496 U.S. 310 (1990).

[52] *Id.* at 319; *Johnson*, 491 U.S. at 420.

[53] 491 U.S. at 399.

[54] *Id.* (internal quotation marks omitted).

[55] *Id.*

[56] *Id.* at 414.

[57] *Id.* at 422 (Rehnquist, J., dissenting).

emphasized that education and more speech would be the proper tools in combating the evil of flag burning.[58]

Congress responded to the Supreme Court's holding in *Johnson* by passing the 1989 Flag Protection Act.[59] One year later, the Court in *United States v. Eichman* was once again faced with the question of whether burning the American flag was a protected form of expression under the First Amendment.[60] The Court rejected the government's argument that flag burning was outside the scope of the First Amendment.[61] Finding instead that the government's interest in defending the Flag Protection Act was "related to the suppression of free expression,"[62] the Court struck down the Flag Protection Act as unconstitutional.[63]

Notably, in both *Johnson* and *Eichman*, the Supreme Court recognized that while unpatriotic speech may be offensive or hurtful to most people in society, the speech is nevertheless entitled to protection from government suppression under the Constitution.[64]

4. Free Speech for Racists

In 1992, the Supreme Court heard yet another difficult case involving the proper scope of the constitutional right to free speech and free expression. In *R.A.V. v. City of St. Paul*, a unanimous Court upheld

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[58] *Id.* at 419 (majority opinion) ("'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))).

[59] Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2006)) (prohibiting the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States").

[60] 496 U.S. 310, 312 (1990) ("[W]e consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment.").

[61] *Id.* at 318.

[62] *Id.* at 314 (internal quotation marks omitted).

[63] *Id.* at 312 (affirming the district court's holding that the Flag Protection Act was unconstitutional).

[64] *See id.* at 318 ("We are aware that desecration of the flag is deeply offensive to many."); Texas v. Johnson, 491 U.S. 397, 399, 420 (1990) (noting that several witnesses were "seriously offended" by the flag burning, yet holding that the expression itself was constitutional).

the free speech rights of racist bigots,[65] further solidifying the "uninhibited, robust, and wide-open"[66] American approach to free speech.

The City of St. Paul had enacted the Bias-Motivated Crime Ordinance, making it a misdemeanor to display a symbol on public or private property, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[67] A young man was charged under the St. Paul ordinance for burning a cross inside the fenced yard of a neighboring African-American family's lawn.[68]

The Minnesota Supreme Court upheld the defendant's conviction, reasoning that the ordinance was limited to prohibiting "fighting words" and was therefore a valid constitutional regulation of expression.[69] The court further concluded that "the ordinance was not impermissibly content based" because it was "a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order."[70]

The U.S. Supreme Court reversed the Minnesota Supreme Court's decision on appeal, holding the St. Paul ordinance was facially invalid under the First Amendment.[71] The Court reasoned that the ordinance was unconstitutional because it imposed special prohibitions on speakers who express views on disfavored subjects, such as "race, color, creed, religion or gender."[72] In other words, the ordinance unconstitutionally advanced actual viewpoint discrimination.[73] The Court rejected the argument that the ordinance's content discrimination was justified as a narrowly tailored means to serve a compelling state interest in protecting the basic human rights of groups historically discriminated against, and instead, the Court maintained that other adequate, content-neutral alternatives could have been used.[74]

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[65] 505 U.S. 377, 381 (1992) ("[W]e nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.").

[66] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[67] *R.A.V.*, 505 U.S. at 380.

[68] *Id.* at 379–80.

[69] *Id.* at 380–81.

[70] *Id.* at 381 (internal quotation marks omitted).

[71] *Id.* at 391.

[72] *Id.*

[73] *Id.* at 391 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination.").

[74] *Id.* at 395–96 ("St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

Like other historic cases where the Supreme Court chose to uphold the free speech rights of minority hate groups, *R.A.V.* recognizes that although the act of cross burning may be perceived as harmful and offensive by society, hate groups are nevertheless equally entitled to express their views under the broad free speech protection of the First Amendment.[75]

C. Narrowly Tailored Exceptions

After an overview of the landmark cases featuring the "uninhibited, robust, and wide-open" American approach to free speech, one may be under the impression that the United States lacks any legal restrictions on speech. This is certainly not the case. Courts have excluded various forms of speech from First Amendment protection when they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[76] Even if speech is of adequate social value, reasonable time, place, and manner restrictions on speech are appropriate,[77] as long as the restrictions are content-neutral, "narrowly tailored" to serve a compelling governmental interest, and "leave open ample alternative channels for communication."[78] The government must, however, avoid limiting speech based solely on its content or the viewpoint of the speaker.[79]

The following discussion outlines the historic cases that have birthed the narrowly tailored exceptions to the otherwise broad free speech protection of the First Amendment.

1. Fighting Words

In *Chaplinsky v. New Hampshire*, the Supreme Court upheld the conviction of a Jehovah's Witness who had been charged with breaching the peace in violation of the following public law:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or

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[75] *Id.* at 396 (labeling the cross burning "reprehensible" yet entitled to protection under the First Amendment).

[76] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[77] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (clarifying the legal standard applicable to time, place, and manner restrictions on speech).

[78] *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted).

[79] *R.A.V.*, 505 U.S. at 391.

> exclamation in his presence and hearing *with intent to deride, offend or annoy him* . . . .[80]

The appellant, a Jehovah's Witness, was convicted for causing a street riot after distributing unwelcome religious literature on a Saturday afternoon on a busy city street.[81] In the Court's opinion, the Appellant's use of threatening "fighting words" directed to law enforcement justified his conviction, given the context.[82] In its analysis, the Court was careful to qualify the meaning of the term "offensive" in the statute as "[s]uch words, as ordinary men know, are likely to cause a fight."[83] The precise meaning of the term supported the ultimate purpose of the statute, which was to prevent breaching the peace[84]—not to prevent hurting people's feelings.

Fifty years later, in *R.A.V. v. City of St. Paul*, the Supreme Court qualified its holding in *Chaplinsky*: "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[85]

Thus, in cases implicating the "fighting words" doctrine, the focus of the analysis is not on whether the particular *content* is emotionally harmful or offensive, but rather on whether the *mode* of communicating the particular idea creates an impermissible safety concern to the public.

2. Defamatory Falsehoods

Defamatory falsehoods are another common exception to the broad free speech protection of the First Amendment. In *New York Times Co. v. Sullivan*, perhaps the most famous free speech case in U.S. history, the Supreme Court held that constitutional protections for speech and press require

> a federal rule that prohibits [an offended] public official from recovering damages for a defamatory falsehood relating to his official conduct unless [the public official] proves that the statement was made with "actual malice"—that is, with knowledge that [the

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[80] 315 U.S. at 569 (emphasis added).

[81] *Id.* at 569–70.

[82] *Id.* at 574 ("Nor can we say that [the statute] . . . substantially or unreasonably impinges upon the privilege of free speech. . . . [T]he appellations . . . are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.").

[83] *Id.* at 573 (internal quotation marks omitted).

[84] *Id.* ("Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace." (internal quotation marks omitted)).

[85] 505 U.S. 377, 393 (1992).

> statement] was false or with reckless disregard of whether it was false or not.[86]

In *Sullivan*, the New York Times had carried a full-page advertisement soliciting funds to support the legal defense of Martin Luther King, Jr.[87] The sponsors of the ad later stipulated that some of the ad's assertions were inaccurate portrayals of the police's activities in Montgomery, Alabama.[88] Sullivan, one of the elected police commissioners in Montgomery, was awarded $500,000 at trial after suing the New York Times and the ad's sponsors under Alabama defamation law.[89] Recognizing the "importance of the constitutional issues involved,"[90] the Supreme Court heard the *Sullivan* case to resolve questions regarding the proper balance between the protection of free expression under the First Amendment and legitimate claims for reputational injury caused by false and defamatory statements.[91]

The *Sullivan* Court imposed the strict, "actual malice" standard because of the weighty constitutional "safeguards for freedom of speech and of the press."[92] The *Sullivan* decision emphasizes that any exception to the "uninhibited, robust, and wide-open" First Amendment protection for free speech must be strict and narrowly tailored.

3. Obscenities

Legally obscene speech has long been excluded from First Amendment protection.[93] In *Miller v. California*, the Supreme Court issued a three-prong analysis to determine whether a particular form of expression qualifies as legally obscene.[94] Under the Court's narrow, three-part test, legally obscene expression must (1) appeal to the average person's prurient (shameful, morbid) interest in sex; (2) depict sexual conduct in a "patently offensive way" as defined by community standards; and (3) "taken as a whole, lack[] serious literary, artistic, political, or scientific value."[95]

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[86] 376 U.S. 254, 279–80 (1964).

[87] *Id.* at 256–57.

[88] *Id.* at 258 ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery.").

[89] *Id.* at 256.

[90] *Id.* at 264.

[91] *Id.* at 264–65.

[92] *Id.* at 264, 283.

[93] *See, e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957). *See generally* Rosen v. United States, 161 U.S. 29 (1896).

[94] 413 U.S. 15, 24 (1973) (modifying the Supreme Court's previous obscenity test set forth in *Roth*).

[95] *Id.*

Remarkably, *Miller* teaches that even when evaluating certain low-utility forms of expression such as pornography,[96] the Supreme Court has refused to grant the federal government a great deal of power in regulating speech.[97] On the contrary, the *Miller* Court praised the historic value of the First Amendment's broad free speech protection[98] and therefore granted states the power to control legally obscene speech at the local level.[99]

II. THREATS TO FREE SPEECH: CAMPUS SPEECH CODES AND THE INTERNATIONAL HUMAN RIGHTS MOVEMENT

In its unwavering commitment to free speech, the United States has distinguished itself from nearly every other government in the world, including some of America's closest political allies.[100] Western democracies such as Australia, Canada, South Africa, and the United Kingdom all have enacted legislation or signed international conventions forbidding so-called "hate speech."[101] Likewise, global human rights declarations have limited individual freedom of expression by regulating speech that may be deemed harmful or offensive to others.[102] Indeed, one global human rights organization has reported, "The United States stands virtually alone in having no valid statutes penalizing expression that is offensive or insulting on such grounds as race, religion or ethnicity."[103] Before analyzing these international speech-regulating trends, however, this Comment takes pause to consider an emerging threat to free speech within America's own borders: speech codes at public colleges and universities.

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[96] *Id.* at 34–35 (explaining that the "commercial exploitation of obscene material" lacks the "serious literary, artistic, political, or scientific ideas" to equate with expression that facilitates the "free and robust exchange of ideas and political debate").

[97] *Id.* at 30.

[98] *Id.* at 20 (citing *Roth*, 354 U.S. 476 (1957)).

[99] *Id.* at 25.

[100] Adam Liptak, *Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment*, N.Y. TIMES, June 12, 2008, at A1 ("The First Amendment really does distinguish the U.S. . . . from the rest of the Western world." (internal quotation marks omitted)).

[101] *Id.* ("Canada, England, France, Germany, the Netherlands, South Africa, Australia and India all have laws or have signed international conventions banning hate speech. Israel and France forbid the sale of Nazi items like swastikas and flags. It is a crime to deny the Holocaust in Canada, Germany and France.").

[102] *See* discussion *infra* Part II.B.1.

[103] SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 4 (1994) (quoting *"Hate Speech" and Freedom of Expression: A Human Rights Watch Policy Paper* (Human Rights Watch/The Fund for Free Expression, New York, N.Y.), Mar. 1992, at 7) (internal quotation marks omitted).

A. Campus Hate Speech Codes

Speech codes at public colleges and universities have presented the most visible attack on the free speech rights of Americans in recent decades. Not long after the enormous legal victory for free speech in *Collin* in 1978,[104] campus speech codes regulating discriminatory hate speech began cropping up throughout the United States.[105] According to one estimate, as many as sixty percent of all colleges and universities by 1990 had adopted some school-wide prohibition of hate speech and another eleven percent were considering similar measures.[106]

Generally, speech codes were argued as justifiable on three grounds: "educational purposes, the limited protection provided certain kinds of speech, and the rights of the victim."[107] Proponents of outlawing hate speech in public schools offered a novel civil rights argument for courts to consider: Is First Amendment protection of free speech outweighed by the "equal protection" provision of the Fourteenth Amendment?[108] Pitting the Constitution against itself (the First Amendment versus the Fourteenth Amendment) was quite a clever strategy because the Supreme Court's reasoning in past speech cases had emphasized the weight to be given to the Constitution over inferior laws.

Notwithstanding these arguments, campus hate speech codes have not fared well in the federal courts.[109] The courts' refusal to validate campus speech codes reaffirms—at least for now—America's national commitment to generally unrestricted free speech.[110]

B. The International Human Rights Movement

The greatest opposition to the "uninhibited, robust, and wide-open" American approach to free speech has not come from within. While America has upheld the broad free speech rights of its citizens (even in

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[104] *See* discussion *supra* Part I.B.2.

[105] WALKER, *supra* note 103, at 127.

[106] *Id.* Although not every university discrimination code that was reported contained a hate speech provision, many did. *Id.*

[107] Alex Aichinger, *Campus Speech Codes*, *in* 1 ENCYCLOPEDIA OF THE FIRST AMENDMENT, *supra* note 23, at 237, 237.

[108] *See* WALKER, *supra* note 103, at 128.

[109] *See, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. 1995) (holding university discrimination-harassment policy was unconstitutionally vague and overbroad and not a valid prohibition of fighting words); UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding university system's rule was overbroad and unduly vague and did not meet requirements of "fighting words" doctrine); Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding university policy was overbroad and "so vague that its enforcement would violate the due process clause"); *see also* WALKER, *supra* note 103, at 128–29.

[110] WALKER, *supra* note 103, at 129.

cases of unpopular and hateful forms of expression, as described above), the international community, including many Western democracies, has taken opposite measures to criminalize the expression of ideas that may be deemed harmful or offensive to others.

Commentators have speculated as to the various reasons why America and the international community have diverged on this issue. Some say that the U.S. approach to free speech is based on an "individualistic view of the world."[111] Others have argued that Americans generally fear "allowing the government to decide what speech is acceptable."[112] History also offers a potential explanation. Countries like Israel, Austria, Germany, and South Africa with histories of horrible oppression may feel that the best way to remedy human rights violations is to limit the ability of citizens to harm one another by legally restricting free expression.[113] Inspired by these regulations that were intended to promote human rights, some scholars in the United States have argued that America should likewise follow the apparent international trend of outlawing hate speech.[114] As discussed in detail in Part III of this Comment, an overwhelming majority of the Supreme Court rejected this approach outright in the recent case of *Snyder v. Phelps*.[115]

The following examples illustrate a number of these international laws proscribing hate speech akin to what the Supreme Court recently declared as protected forms of First Amendment expression.

1. United Nations

The United Nations ("UN") is an international organization of nearly 200 member states that are expressly dedicated to the preservation of human rights.[116] The Universal Declaration of Human Rights ("UDHR")[117] and the International Covenant on Civil and

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[111] Liptak, *supra* note 100.

[112] *Id.*

[113] *Id.*

[114] *See, e.g.*, Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1599–1600 (2010); Thomas J. Webb, *Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 446 (2011).

[115] *See* discussion *infra* Part III.

[116] U.N. Charter pmbl.; Press Release, Dep't of Pub. Info., U.N. Member States, U.N. Press Release ORG/1469 (July 3, 2006).

[117] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Political Rights ("ICCPR")[118] are two of the UN's most historic codifications of these efforts.[119]

Although the UDHR and the ICCPR laudably defend certain civil rights of mankind, both restrict the rights of those who wish to freely express themselves through "offensive" expression. While Article 19 of the UDHR declares that "[e]veryone has the right to freedom of opinion and expression,"[120] Article 29 of the same declaration warns that these rights may be limited at the government's discretion on the basis of "morality, public order and the general welfare in a democratic society."[121]

The ICCPR similarly flounders in unequivocally guaranteeing free expression. Articles 18 and 19 of the ICCPR praise freedom of thought and expression,[122] but Article 20 is quick to qualify this right: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[123] A UN committee has since interpreted Article 20 to be a mandate on signatory states to adopt hate speech legislation.[124] Several UN member states, including the United States, have placed reservations on Article 20 of the ICCPR.[125] When the United States ratified the ICCPR in 1992, it refused to be bound by any international provision that violated the U.S. Constitution's First Amendment guarantee of free expression.[126]

So, although the international community may argue that these conventions are sufficient safeguards of individual freedom, the First Amendment to the U.S. Constitution guarantees without reservation something much greater: "Congress shall make *no* law . . . abridging the freedom of speech."[127]

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[118] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

[119] *See generally* WALKER, *supra* note 103, at 87 (noting that between World War II and the 1980s, the UN was responsible for producing twenty-one documents geared toward protecting human rights).

[120] Universal Declaration of Human Rights, *supra* note 117, art. 19.

[121] *Id.* art. 29.

[122] International Covenant on Civil and Political Rights, *supra* note 118, arts. 18, 19.

[123] *Id.* art. 20.

[124] WALKER, *supra* note 103, at 89.

[125] *Id.*

[126] *Id.*

[127] U.S. CONST. amend. I (emphasis added).

2. United Kingdom

In Great Britain, hate speech is a criminal offense under the country's 1986 Public Order Act.[128] The Act makes it illegal to stir up racial hatred by using "threatening, abusive or insulting words or behaviour" or by "display[ing] any written material which is threatening, abusive or insulting."[129] In addition to race, the Act was amended to prohibit offensive expression based on religion[130] and sexual orientation.[131]

The potential dangerous effects of this law were illustrated in April 2010 when a forty-two-year-old street preacher in the U.K. was charged for violating Section 5 of the Public Order Act after talking with shoppers on a public street about why he believed homosexuality was a sin based on Scripture.[132] According to a BBC news report, the preacher was confronted by a community support officer of the government who was admittedly offended by the preacher's expression due to the officer's own sexual orientation:

> "He told me he was homosexual," Mr[.] Mcalpine said.
>
> "I said 'the Bible says homosexuality is a sin'. He said 'I'm offended by that and I'm also the LGBT liaison officer within the police'.
>
> "I said 'it is still a sin'."
>
> He said three uniformed police officers then appeared and accused him of using homophobic language.
>
> "I'm not homophobic, I don't hate gays," Mr[.] Mcalpine said. "Then they said it is against the law to say homosexuality is a sin. I was arrested. It's crazy isn't it?"[133]

Within weeks, charges against the preacher were dropped after public outcry at the events.[134] A spokesman for the Christian Institute that supported the preacher's legal defense commented on the arrest: "Dale is an ordinary, everyday Christian with traditional views about sexual ethics. Some people will agree with him, others will disagree. But

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[128] Public Order Act, 1986, c. 64 (Gr. Brit.). One can infer from the title of the Public Order Act that the British approach to limiting free expression resembles the UN's position in the ICCPR that governments may restrict speech when deemed necessary to preserve the "public order."

[129] *Id.* § 18.

[130] Racial and Religious Hatred Act, 2006, c. 1 (Eng. & Wales).

[131] Criminal Justice and Immigration Act, 2008, c. 4, § 74, sch. 16 (Gr. Brit.).

[132] *Charge Against 'Gay Sin' Preacher Dropped*, BBC (May 17, 2010, 15:49 UK), http://news.bbc.co.uk/2/hi/uk_news/england/cumbria/8687395.stm; *see also Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality Is a Sin*, DAILY MAIL (May 1, 2010, 11:59 PM), http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html.

[133] *Charge Against 'Gay Sin' Preacher Dropped*, *supra* note 132.

[134] *Id.*

it's not for the police to arrest someone just because others may disagree with what is said."[135]

Even a veteran gay-rights campaigner in the U.K. criticized the government's actions and urged the police to adopt new regulations for similar encounters in the future: "Although I disagree with Dale Mcalpine and support protests against his homophobic views, he should not have been arrested and charged. Criminalisation is a step too far."[136] Months later, British police admitted in an out-of-court settlement that the preacher's detention was a wrongful arrest, unlawful imprisonment, and breach of human rights.[137] Nevertheless, the Christian Institute is active in petitioning the U.K. government for an amendment to the Public Order Act to prevent similar instances in the future.[138]

3. Canada

Canada's divergence from the U.S. approach of preserving broad free speech and free expression rights began as early as the 1960s when legislation was adopted in Canada at the federal and provincial levels outlawing hate speech.[139] The national bans are now promulgated by the Canadian Constitution,[140] the Criminal Code of Canada,[141] and the Canadian Human Rights Act.[142] These staunch prohibitions of hate speech have consistently withstood legal challenges before the Canadian Supreme Court, which has justified such laws as necessary measures to protect human rights.[143]

In this purported attempt to protect human rights, Canadian hate speech laws have actually weakened revered political freedoms, such as

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[135] *Christian Preacher on Hooligan Charge After Saying He Believes That Homosexuality is a Sin*, *supra* note 132 (internal quotation marks omitted).

[136] *Charge Against 'Gay Sin' Preacher Dropped*, *supra* note 132 (internal quotation marks omitted).

[137] Brian Hutt, Second 'Homosexuality is a Sin' Preacher Awarded Damages for Wrongful Arrest, CHRISTIAN POST (Dec. 20, 2010, 11:13 AM), http://www.christianpost.com/news/second-homosexuality-is-a-sin-preacher-awarded-damages-for-wrongful-arrest-48137/.

[138] *Id.*

[139] See Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 326 (2009).

[140] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.). The fundamental freedoms of Article 2 are restrained by Article 1's "reasonable limits prescribed by law."

[141] Criminal Code, R.S.C. 1985, c. C-46, §§ 318–320 (Can.) (outlawing "hate propaganda").

[142] Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 13 (proscribing "hate messages").

[143] Mahoney, *supra* note 139, at 328.

freedom of speech, press, and religion. For instance, in 2010, the University of Ottawa made headlines when it sent a threatening letter to political pundit, Ann Coulter, who had been invited to speak at the Canadian university by a conservative student group.[144] The letter urged Ms. Coulter to avoid engaging in political discussion that could be viewed as "[p]romoting hatred against any identifiable group."[145] The letter warned, "[Such speech] would not only be considered inappropriate, but could in fact lead to criminal charges."[146]

Unfortunately, Ms. Coulter is not the only one to fall prey to Canada's restrictive speech regulations. Other recent victims include a youth pastor who claimed homosexuality is unbiblical[147] and a journalist who republished a cartoon depicting the prophet Mohammad.[148]

These examples illustrate that Canada's pride in "protecting" human rights through speech legislation is unfounded. The true byproduct of such laws is the suppression of minority viewpoints.

4. Sweden

One final illustration of this apparent international trend can be seen in Sweden's treatment of a Christian pastor who was jailed in 2004 for preaching a sermon from his church pulpit regarding a biblical perspective on homosexuality.[149] Pastor Åke Green was charged under a law enacted by the Swedish Parliament that made it a criminal offense to threaten or use words of "disrespect" against people identifying as homosexual.[150] Under the law, one could be imprisoned up to two years for ordinary violations of the statute and up to four years for aggravated violations (those deemed "especially offensive").[151]

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[144] Protest Forces Coulter to Skip College Speech, NEWSDAY, Mar. 25, 2010, at A13.

[145] *Id.*

[146] *Id.*

[147] Michael Brendan Dougherty, *Canada's Speech Impediment: Our Northern Neighbors Learn the Limits of Free Expression*, AM. CONSERVATIVE, June 30, 2008, at 16, 16.

[148] *Id.* at 17.

[149] Dale Hurd, *Swedish Pastor Sentenced for 'Hate Speech,'* CBN (Sept. 10, 2004), http://www.akegreen.org/Links/L14/L14.html.

[150] Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 805 B1050-05 (Swed.).

[151] BROTTSBALKEN [BrB] [CRIMINAL CODE] 16:8 (Swed.), *available at* http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf. In January of 2003, the Swedish Parliament passed an amendment to the country's hate speech law to include incitement against homosexuals as a group as a criminal offense and to provide harsher punishments for aggravated violations. Proposition [Prop.] 2001/2002:59 Hets mot folkgrupp, m.m. [government bill] (Swed.). As the amendment was being considered by the legislature, an article was published in *Christianity Today* predicting what would one day be the reality of the Åke Green case. *See* Tomas Dixon, *'Hate Speech' Law Could Chill*

Pastor Green was convicted of the offense at the trial court and appealed his case all the way to the Swedish Supreme Court.[152] There, Pastor Green was finally acquitted of the charge after the court reasoned that, while Pastor Green's preaching constituted criminal hate speech under Swedish law, in all likelihood, the European Court of Human Rights would eventually overturn the conviction.[153] As of the time of this writing, although Pastor Green's conviction for preaching his sermon on homosexuality was overturned, the same law that Pastor Green was charged under still remains in effect.

III. *SNYDER V. PHELPS*: THE LATEST AMERICAN FREE SPEECH SHOWDOWN

In *Snyder v. Phelps*, the U.S. Supreme Court recently held that a radical preacher and his followers had the constitutional right to express anti-American, anti-Catholic, and anti-homosexual "hate speech" near the funeral of a deceased marine.[154] Similar to historic Supreme Court cases ruling in favor of the constitutional rights of the Ku Klux Klan, the Nazis, and other notorious hate groups, the Supreme Court reasoned in *Snyder* that the religious group's offensive expression was fully protected by the First Amendment[155]—contrary to the apparent global trend of regulating or silencing such unpopular forms of expression.[156]

This Part begins with a summary of the relevant facts in the *Snyder* case, followed by the Supreme Court's legal analysis favoring the constitutional right of religious minority groups to communicate unpopular and offensive "hate speech."

A. Factual Summary of Snyder v. Phelps

Fred Phelps, the named defendant in *Snyder v. Phelps*, is the founding pastor of Westboro Baptist Church in Topeka, Kansas.[157] Phelps and his small, radical congregation have gained notoriety over

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Sermons, CHRISTIANITY TODAY (Aug. 5, 2002, 12:00 AM), http://www.christianitytoday.com/ct/2002/august5/15.22.html.

[152] *Swedish Anti-Gay Pastor Acquitted*, BBC (Nov. 29, 2005, 9:49 GMT), http://news.bbc.co.uk/2/hi/europe/4477502.stm.

[153] Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p.805 B1050-05 (Swed.) ("Under these circumstances, it is likely that the European Court, in a determination of the restriction of Åke Green's right to preach his Biblically-based opinion that a judgment of conviction would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention on Human Rights."); *see also Sweden Overturns Hate-Speech Conviction*, UPI.COM (Feb. 12, 2005, 7:54 AM), http://www.upi.com/Top_News/2005/02/12/Sweden-overturns-hate-speech-conviction/UPI-19621108212841/.

[154] 131 S. Ct. 1207, 1217, 1219, 1220 (2011).

[155] *Id.* at 1220.

[156] *See* discussion *supra* Part II.B.

[157] *Snyder*, 131 S. Ct. at 1213.

the last fifty years for their views espousing God's hatred and punishment of the United States for its tolerant stance toward homosexuality.[158] Most recently, Phelps and his Westboro congregation have taken to traveling across the United States to picket memorial services of American soldiers who have lost their lives serving in Iraq and Afghanistan.[159] In addition to these frequent national protests, Westboro also maintains several Internet web pages designed to publicly broadcast their protest activities and to educate the public regarding their views on corruption in the United States and abroad.[160]

In early 2006, Phelps and several of his family members who attend Westboro Baptist Church arrived in Westminster, Maryland to picket the funeral of deceased marine, Matthew Snyder, who died in the line of duty serving in Iraq.[161] The group's purpose in picketing the funeral was to spread their sincere religious belief that "God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military."[162] Both parties stipulated that during the group's protest outside of the church where Snyder's funeral was held, Phelps and his fellow church members were supervised by local police at all times, stayed approximately 1,000 feet from the church building, and complied with all other relevant local ordinances.[163]

Despite the lawful nature of their protest, the religious group showed no discretion in expressing their hateful views toward America, homosexuality, and the Catholic Church. They displayed signs with generalized messages like "God Hates the USA," "Pope in Hell," and "God Hates Fags," as well as several signs arguably more closely directed toward the deceased marine such as "You're Going to Hell," "God Hates You," and even "Thank God for Dead Soldiers."[164]

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[158] *Id.*

[159] *Id.*

[160] *See, e.g.*, GODHATESFAGS, http://www.godhatesfags.com (last visited Apr. 6, 2012); GODHATESTHEWORLD, http://www.godhatestheworld.com (last visited Apr. 6, 2012); JEWSKILLEDJESUS, http://www.jewskilledjesus.com (last visited Apr. 6, 2012); PRIESTSRAPEBOYS, http://www.priestsrapeboys.com (last visited Apr. 6, 2012); SIGNMOVIES, http://www.signmovies.net (last visited Apr. 6, 2012); THEBEASTOBAMA, http://www.beastobama.com (last visited Apr. 6, 2012); WBC BLOGS, http://blogs.sparenot.com/index.php?blog=1 (last visited Apr. 6, 2012).

[161] *Snyder*, 131 S. Ct. at 1213.

[162] *Id.*

[163] *Id.*; Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

[164] *Snyder*, 131 S. Ct. at 1213. After the funeral, when the Westboro group returned home to Kansas, one of the church members wrote and published on the church's infamous website a self-styled written "epic," which recounted the story of the group's protest at Snyder's funeral, interspersed among lengthy Bible quotations. *Id.* at 1214 n.1. Although the epic was at issue at the trial court and the Fourth Circuit, Snyder did not present

Albert Snyder, the father of deceased marine Matthew Snyder, sued Phelps and Westboro Baptist Church under several Maryland state tort theories, including invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy.[165] Although Mr. Snyder did not physically see Westboro's picket signs at his son's funeral, he claimed that viewing the protest covered on the news later that evening caused him severe and permanent physical and emotional injury.[166] Mr. Snyder, who appeared visibly shaken and distressed throughout trial, testified that he had "one chance to bury [his] son" and that Westboro's protest at the funeral "took the dignity away from it."[167] Describing the emotional injury allegedly resulting from the church's protest, Mr. Snyder stated, "[S]omebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal."[168]

A jury initially awarded Mr. Snyder a total of $10.9 million in compensatory and punitive damages on the three tort claims.[169] In its post-trial opinion, the district court remitted the total damages to $5 million but upheld the jury's verdict on the grounds that Maryland's interest in protecting its citizens from tortious conduct outweighed Westboro Baptist Church's First Amendment rights to freedom of religion and freedom of speech.[170]

Phelps and his church appealed the trial court's ruling to the Fourth Circuit, arguing that their picket signs at the funeral and Internet "epic" posted on the church's website were forms of speech fully protected by the First Amendment.[171] The Fourth Circuit reversed the decision of the district court in holding that the funeral demonstration and Internet

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arguments before the Supreme Court regarding the epic, so it was not a factor in the Court's ultimate analysis of the case. *Id.*

[165] *Id.* at 1214. Albert Snyder's original suit also included tort claims for defamation and publicity given to private life. The district court awarded Phelps and his church summary judgment on the defamation claim because their speech was "essentially . . . religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." *Snyder*, 533 F. Supp. 2d at 572–73. The "publicity given to private life" claim was also dismissed because the defendants had not made public any private information. *Id.*

[166] *Snyder*, 131 S. Ct. at 1213–14. Expert witnesses for Mr. Snyder testified at trial that, among other things, Mr. Snyder's injuries included the worsening of his diabetes and severe depression, which prevented him from undergoing a normal grieving process. *Id.* at 1214.

[167] *Snyder*, 533 F. Supp. 2d at 589.

[168] *Id.*

[169] *Snyder*, 131 S. Ct. at 1214.

[170] *Snyder*, 533 F. Supp. 2d at 581, 593–95, 597.

[171] *Snyder*, 131 S. Ct. at 1214.

"epic" were immune from tort liability under the First Amendment because the group's expression related to their views on matters of public concern.[172] The Supreme Court granted certiorari to resolve the dispute and ultimately upheld the Fourth Circuit's decision to relieve Phelps and his church of all liability arising from the tort claims.[173]

B. The Supreme Court's Analysis in Favor of Phelps's Free Speech

When considering the constitutional issues on appeal from the Fourth Circuit, the Supreme Court held that Phelps and Westboro Baptist Church indeed were immune from tort liability for their protest speech around the time of Matthew Snyder's funeral.[174] In its well-reasoned opinion, the Court rejected the district court's balancing of the church's First Amendment right to free speech and free expression with Snyder's right to privacy and his right to be free from intentional, reckless, or extreme and outrageous conduct.[175]

The majority's analysis in *Snyder* resembles the Court's aggressive efforts over the years to safeguard unpopular, offensive, and even hateful forms of expression under the auspices of a broad First Amendment right to free expression.[176] Unlike many other controversial cases before the Court in times past, however, the decision in *Snyder* was nearly unanimous across ideological lines, with eight Justices boldly securing the church's constitutional right to communicate religiously motivated "hate speech" and only one Justice authoring a lone dissenting opinion in favor of the offended plaintiff.[177]

1. Intentional Infliction of Emotional Distress

The Supreme Court began its analysis of the case with the intentional infliction of emotional distress claim brought by Snyder. Citing *Hustler Magazine, Inc. v. Falwell*,[178] the Court recognized that the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech" can serve as an absolute defense in state tort suits.[179] In determining whether the First Amendment would immunize Phelps and his church from tort liability, the Court first considered whether the church's speech was primarily

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[172] *Id.*

[173] *Id.* at 1220–21.

[174] *Id.* at 1220.

[175] *See id.* at 1219.

[176] *See* discussion *supra* Part I.B.

[177] *Snyder*, 131 S. Ct. at 1212.

[178] 485 U.S. 46 (1988).

[179] *Snyder*, 131 S. Ct. at 1215.

directed to a matter of public or private concern based on all the relevant circumstances of the case.[180] Drawing on a series of precedents, the Court noted that speech on matters of public concern is afforded greater constitutional protection than speech on purely private matters due to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[181] In deciding whether speech is of public or private concern, the Court recognized that it must examine the "content, form, and context" of the speech "as revealed by the whole record."[182]

Applying these rules to the facts of the *Snyder* case, the Court concluded that given the content and context of the messages surrounding Matthew Snyder's funeral, Phelps and his congregation were clearly speaking on matters of public concern: "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[183] And although a few of the church's picket signs could be interpreted as speaking directly to Matthew Snyder and his family, "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[184] The Court recognized that although the church's speech could be considered hurtful and offensive to many, "Westboro conducted its picketing peacefully on matters of *public* concern at a *public* place adjacent to a *public* street" and because of the elevated constitutional protection available to speech on important public matters under the First Amendment, Phelps and his church were consequently shielded from civil liability in the case.[185]

The Court was careful to recognize what was likely the true issue underlying Mr. Snyder's suit—his disagreement with the viewpoint expressed by Phelps and his church during the protest.[186] In fact, at the

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[180] *Id.*

[181] *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).

[182] *Id.* at 1216 (quoting Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)) (internal quotation marks omitted).

[183] *Id.* at 1217.

[184] *Id.*

[185] *Id.* at 1218–19 (emphasis added). The Court recognized, though, that states wishing to give military families like the Snyders the opportunity to respectfully bury their loved ones may enact reasonable time, place, and manner restrictions on funeral protests. *Id.* at 1218.

[186] *Id.* at 1219 ("The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.").

same time the church was picketing before Matthew Snyder's memorial service, an even greater number of individuals and groups turned out in support of the deceased marine and to combat the Westboro demonstration. Church parishioners, school children, and a group of "Patriot Riders" displayed signs that read "God Bless America" and "God Loves You" even closer to the church than Westboro.[187] Notably, of course, Mr. Snyder did not bring suit against those supporters for disturbing the funeral or causing him emotional distress in the course of expressing their views at the memorial service.

In the end, the Supreme Court arrived at the principled conclusion that Mr. Snyder could not justifiably bring a claim against Phelps and his church for intentional infliction of emotional distress due to contempt for Westboro's views and its disagreeable message. Instead, the Court rightfully chose to reinforce its historic position that speech on public issues in the United States cannot be restricted simply because it is upsetting to, or arouses contempt in, the listener.

2. Intrusion upon Seclusion and Civil Conspiracy

In addition to the tort claim for intentional infliction of emotional distress, Mr. Snyder also argued that Phelps and Westboro Baptist Church should be liable for violating Maryland tort law concerning intrusion upon seclusion and civil conspiracy.[188] The Court likewise rejected this invitation because the church's actions in protest of Matthew Snyder's funeral did not rise to the level necessary to meet the Court's strict standard for granting relief on these claims in times past.[189] Essentially, Mr. Snyder asserted that even if the church's speech was generally entitled to First Amendment protection, the church should nevertheless be held liable in tort for intrusion upon seclusion since Mr. Snyder was allegedly a "member of a captive audience" at his son's funeral.[190] Citing precedent, the Court rightfully disagreed:

> In most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[191]

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[187] *Id.*; Brief for Respondents at 6, *Snyder*, 131 S. Ct. 1207 (No. 09-751).

[188] *Snyder*, 131 S. Ct. at 1219.

[189] *Id.* at 1219–20.

[190] *Id.*

[191] *Id.* at 1220 (alteration in original) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975)).

In rejecting Mr. Snyder's captive-audience argument, the Court noted its history of applying that theory "only sparingly" in past cases to protect unwilling listeners from protected speech.[192] Moreover, the majority emphasized the fact that the church remained a respectable distance away from the memorial service and that Mr. Snyder could only see the tops of the church's picket signs, at most, as he was driving to the funeral.[193] On these facts, there was no reasonable argument that the church's demonstration in any way interfered with the service itself or that Mr. Snyder was a member of a captive audience for purposes of the tort claim.[194]

Having found that the First Amendment prevented Mr. Snyder from recovering on the intentional infliction of emotional distress and intrusion upon seclusion claims, the Court in turn refrained from finding Phelps and his church liable for civil conspiracy on the same torts.[195]

CONCLUSION

In *Snyder v. Phelps*, an eight-Justice majority of the Supreme Court concluded its opinion with an important caution regarding the value of free speech in the United States, which undoubtedly led to its resounding decision in favor of the First Amendment rights of the fringe, religious minority group:

> Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. . . .
>
> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. *On the facts before us, we cannot react to that pain by punishing the speaker.* As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[196]

The *Snyder* controversy resembles divides in times past concerning the proper bounds of the constitutional guarantee of free speech and free

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[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* ("Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.").

[196] *Id.* (emphasis added).

expression. Westboro Baptist Church's demonstration around the time of Matthew Snyder's funeral was repulsive, like the Klan's demonstration in *Brandenburg*;[197] anti-religious, like the Nazis's demonstration in *Collin*;[198] unpatriotic, like the protesters' demonstration in *Johnson* and *Eichman*;[199] and appalling, like the racists' demonstration in *R.A.V.*[200] Yet, the Supreme Court's decision to relieve Phelps and his church of liability for their words was not a foreign concept—literally. The Court rightly reasoned that the church's speech was within the purview of the "uninhibited, robust, and wide-open" speech protection of the First Amendment because the speech, although offensive, was intimately connected with the church's sincerely held religious views on matters of public concern.

Unlike the international community, which has begun imposing greater restrictions on speech that is perceived as harmful or offensive to society in a failed attempt to promote human rights, the U.S. Supreme Court's principled position in *Snyder* aligns with the traditional American solution to resolving disputes on controversial public issues—more speech, not less.

J. Michael Martin

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197 *See* discussion *supra* Part I.B.1.

198 *See* discussion *supra* Part I.B.2.

199 *See* discussion *supra* Part I.B.3.

200 *See* discussion *supra* Part I.B.4.

TUITION TAX CREDITS AND *WINN*: A CONSTITUTIONAL BLUEPRINT FOR SCHOOL CHOICE

INTRODUCTION

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1]

The Supreme Court recently paved the way for a new avenue of school choice, refusing to strike down an Arizona tax-credit program that allows Arizonans to direct a portion of their state income tax payments to organizations that support private schools, including religiously-affiliated schools.[2] In *Arizona Christian School Tuition Organization v. Winn*, a sharply divided Court held that the respondents, Arizona taxpayers, did not have legal standing to challenge the program's constitutionality under the Establishment Clause.[3] Writing for the five-four majority, Justice Anthony Kennedy distinguished Arizona's tax-credit program from a government subsidy for religious schools, which taxpayers would have had legal standing to challenge.[4] In her first dissenting opinion, Justice Elena Kagan argued that Arizona's tax credit was for all practical purposes a government subsidy that supported religious schools, and thus respondents should be able to challenge the tax-credit program under the Establishment Clause.[5]

Although *Winn* was decided on standing grounds, its consequential holding established a constitutional blueprint for state school choice programs.[6] This Comment attempts to gauge the impact of the Court's decision. Part I details the Arizona tax-credit program, the procedural history leading to the Court's decision in *Winn*, and the applicable Supreme Court legal standing and Establishment Clause jurisprudence.

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1 U.S. CONST. amend. I.

2 Jess Bravin, *Private-School Tax Break Is Upheld*, WALL ST. J., Apr. 5, 2011, at A3.

3 131 S. Ct. 1436, 1439–40 (2011); *see also* Adam Liptak, *Tax Credit Is Allowed for Religious Tuition*, N.Y. TIMES, Apr. 5, 2011, at A16.

4 *Winn*, 131 S. Ct. at 1447–49.

5 *Id.* at 1450–52 (Kagan, J., dissenting).

6 *See Tuition Tax Credits*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/educ/school-choice-scholarship-tax-credits.aspx (last visited Apr. 6, 2012) (noting that Arizona, Florida, Georgia, Indiana, Iowa, Oklahoma, Pennsylvania, and Rhode Island have tuition tax-credit programs); *see also* Jess Bravin, *Private-School Tax Break Is Upheld*, WALL ST. J. (Apr. 5, 2011), http://online.wsj.com/article/SB10001424052748703712504576242992744305366.html ("Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island already have such measures on the books, and similar proposals are pending in at least 11 other states."); Richard Komer, *School Choice Is Here to Stay*, WALL ST. J., Aug. 29, 2011, at A17 (noting that Oklahoma also passed a tuition tax-credit scholarship program).

Part II discusses the Court's majority and dissenting opinions, while briefly acknowledging the concurring opinion. Part III then argues that, even if a challenger were able to establish standing, Arizona's and similar state tax-credit programs do not violate the Establishment Clause. Part IV analyzes the impact of the Court's decision on education reform. Finally, this Comment concludes that *Winn* is a step forward for school reform.[7]

I. BACKGROUND

Arizona's Constitution, like many other state constitutions, bars direct government aid to religious schools, including in the form of vouchers.[8] To get around this, Arizona enacted a law that allows individual taxpayers to take a dollar-for-dollar tax credit up to $500 for donations to private school scholarship funds known as school tuition organizations ("STOs").[9] To qualify as an STO, a charitable organization must be nonprofit, make scholarships available to students of more than one school, and allocate at least ninety percent of its annual revenue to provide student scholarships for children attending qualified schools.[10] In Arizona, more than fifty STOs distribute approximately $50 million dollars annually to fund approximately 27,000 scholarships for students attending private schools, at least two-thirds of which are religious schools.[11]

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[7] *See All Things Considered* (NPR radio broadcast Apr. 4, 2011), *available at* http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=135121183&m=135121263 (reporting that, according to school choice advocate Timothy Keller of the Institute for Justice, the ruling will embolden other states to take similar action).

[8] ARIZ. CONST. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."); Cain v. Horne, 202 P.3d 1178, 1184–85 (Ariz. 2009) (holding that a school voucher program was unconstitutional under this provision of the Arizona Constitution). For a discussion of state constitutional provisions barring direct or indirect aid to religious schools, see Nicole Stelle Garnett, *A* Winn *for Educational Pluralism*, 121 YALE L.J. ONLINE 31, 31–37 (2011), http://yalelawjournal.org/2011/05/26/garnett.html.

[9] ARIZ. REV. STAT. ANN. § 43-1089(A)(1) (2010–2011); *see also* Liptak, *supra* note 3; *All Things Considered*, *supra* note 7. The Arizona State Legislature recently amended the law to effectively double the amount of tax credits available. 2012 Ariz. Sess. Laws 4 (effective June 30, 2012).

[10] *Winn*, 131 S. Ct. at 1440–41 ("A 'qualified school,' in turn, was defined in part as a [school] that did not discriminate on the basis of race, color, handicap, familial status, or national origin." (citing § 43-1089(G)(2))). The provision is now codified at § 43-1089(H)(2).

[11] *See* OFFICE ECON. RESEARCH & ANALYSIS, ARIZ. DEP'T REVENUE, INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2010, at 3 (2011), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2010.pdf; Editorial, *'A Huge Victory for Choice,'* N.Y. SUN (Apr. 4, 2011), http://www.nysun.com/editorials/a-huge-victory-for-choice/87288/; *All Things Considered*, *supra* note 7.

A group of Arizona taxpayers challenged the tax-credit program, arguing that it violated the Establishment Clause, incorporated to the states by the Fourteenth Amendment.[12] The Arizona Supreme Court rejected the taxpayers' claims on the merits.[13] The respondents then filed the present action in the United States District Court for the District of Arizona.[14] The Ninth Circuit reversed the district court's dismissal for failure to state a claim, ruling that the respondents had sufficiently alleged that the Arizona tax-credit program violated the Establishment Clause because it lacked religious neutrality.[15] The Ninth Circuit held that the respondents had standing under *Flast v. Cohen*, a Supreme Court case that carved out a specific standing exception for taxpayers challenging state government's religious spending.[16] The Ninth Circuit also noted that, as applied, Arizona's tax-credit program violated the Establishment Clause because it carried with it the "*imprimatur* of government endorsement."[17] The Supreme Court granted certiorari.[18]

To frame the Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, this Part first examines the Court's standing jurisprudence relevant to taxpayer Establishment Clause challenges and, second, the Court's applicable Establishment Clause jurisprudence.

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[12] *Winn*, 131 S. Ct. at 1440–41 ("Respondents alleged that [the Arizona law] allows STOs 'to use State income-tax revenues to pay tuition for students at religious schools,' some of which 'discriminate on the basis of religion in selecting students.'"); Bravin, *supra* note 2 ("The Arizona law doesn't bar discrimination on religious grounds, and the taxpayer plaintiffs alleged that many of the schools benefiting from the tax credit required adherence to a particular faith.").

[13] Kotterman v. Killian, 972 P.2d 606, 625 (Ariz. 1999) (en banc) ("We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution."); *see also* Shannon E. Trebbe, Cain v. Horne*: School Choice for Whom?*, 51 ARIZ. L. REV. 817, 817 (2009) (noting that although the Arizona Supreme Court later unanimously held in *Cain v. Horne* that school voucher programs providing state funding for the private education of disabled and foster children violated the Arizona Constitution, the court reaffirmed its previous decision in *Kotterman v. Killian*, upholding a tax-credit program that gave taxpayers a dollar-for-dollar tax credit for donations to their choice of private school scholarship programs). The United States Supreme Court denied certiorari. Kotterman v. Killian, 528 U.S. 921 (1999); Rhodes v. Killian, 528 U.S. 810 (1999).

[14] *Winn*, 131 S. Ct. at 1440–41.

[15] Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 652, 658 (9th Cir. 2009) (denying motion to rehear en banc).

[16] Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1008 (9th Cir. 2009), *overruled by Winn*, 131 S. Ct. at 1439.

[17] *Winn*, 586 F.3d 649, 660–61 (9th Cir. 2009) (quoting *Winn*, 562 F.3d at 1013–14).

[18] Ariz. Christian Sch. Tuition Org. v. Winn, 130 S. Ct. 3350 (2010).

A. Standing Jurisprudence

To bring a suit contesting a law's constitutionality, a plaintiff must have legal standing.[19] This requires the plaintiff to suffer an "injury in fact" as a result of the challenged government action.[20] In *Flast v. Cohen*, the Supreme Court carved out an exception so that taxpayers have standing to challenge taxing and spending policies that violate the Establishment Clause.[21] The Court has noted that this is a "narrow exception" to "the general rule against taxpayer standing"[22] and has declined to extend it beyond Establishment Clause challenges.[23] The Court further limited this exception in *Hein v. Freedom from Religion Foundation, Inc.*, holding that taxpayers lacked standing to challenge the constitutionality of the White House's faith-based initiatives because the program stemmed from the executive branch rather than the legislative branch.[24]

B. Establishment Clause Jurisprudence

If a plaintiff had standing to challenge a law under the Establishment Clause, the Supreme Court traditionally relied on a three-prong test set forth in *Lemon v. Kurtzman*[25] to determine whether that law violated the Establishment Clause.[26] Under the *Lemon* test, a government action "must have a secular legislative purpose"; "its principal or primary effect must be one that neither advances nor

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[19] Allen v. Wright, 468 U.S. 737, 750–51 (1984) (citing Valley Forge Christian Coll. v. Am. United for Separation of Church & State, 454 U.S. 464, 472 (1981)).

[20] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing *Allen*, 468 U.S. at 756).

[21] Flast v. Cohen, 392 U.S. 83, 102 (1968) (noting that two conditions must be met to establish taxpayer standing: (1) a "logical link" between the taxpayer status "and the type of legislative enactment attacked"; and (2) a "nexus" between taxpayer status and "the precise nature of the constitutional infringement alleged").

[22] Bowen v. Kendrick, 487 U.S. 589, 618 (1988).

[23] *See, e.g.*, Hein v. Freedom From Religion Found., 551 U.S. 587, 609 (2007) (plurality); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226–28 (1974); United States v. Richardson, 418 U.S. 166, 175 (1974).

[24] *Hein*, 551 U.S. at 609.

[25] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[26] MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS 186 (2d ed. 2009) (recognizing that the Supreme Court has nonetheless disregarded the *Lemon* test in recent years). Among the current members of the Court, Justice Scalia is perhaps best known for criticizing the *Lemon* test and the Court's inconsistent application of Establishment Clause jurisprudence over the years. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397–400 (1993) (Scalia, J., concurring).

inhibits religion"; and it "must not foster 'an excessive government entanglement with religion.'"[27]

Applying this test, the Court struck down a state tax deduction for tuition paid at religious and other private schools, holding that its primary effect was to advance religion, which was fatal under the second prong of the *Lemon* test.[28] But the Court has upheld the constitutionality of property tax exemptions for religious organizations,[29] state-issued tax-exempt bonds provided to sectarian institutions,[30] and a state tax deduction for expenses incurred by attending religious or other private schools under the *Lemon* test.[31]

The Court, however, has since shied away from the *Lemon* test, although never blatantly rejecting it.[32] Instead, the Court has adopted the neutrality/private choice analysis from *Zelman v. Simmons-Harris*.[33] In *Zelman*, the Court upheld a Cleveland voucher program even though some of the money went to Catholic schools, holding that it was not tantamount to establishing religion because parents could decide how to use the vouchers.[34] The Court labeled the voucher program a "neutral program of private choice" that benefited "a broad class of individuals defined without reference to religion," and neither favored one religion over another, nor favored religious organizations over non-religious organizations.[35]

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[27] *Lemon*, 403 U.S. at 612–13. The three-part test announced in *Lemon* derived from the Court's Establishment Clause precedents in *Board Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970).

[28] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–94 (1973).

[29] *Walz*, 397 U.S. at 666–67, 680.

[30] Hunt v. McNair, 413 U.S. 734, 735–36 (1973).

[31] Mueller v. Allen, 463 U.S. 388, 390–91 (1983).

[32] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is *neutral* with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." (emphasis added)); Mitchell v. Helms, 530 U.S. 793, 809 (2000); Agostini v. Felton, 521 U.S. 203, 234–35 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986); *see also supra* note 26 and accompanying text (recognizing that the Supreme Court has disregarded the *Lemon* test in recent years).

[33] *See Zelman*, 536 U.S. at 654–55; KAUFMAN & KAUFMAN, *supra* note 26, at 209.

[34] *See Zelman*, 536 U.S. at 643–48, 662–63; Editorial, *Supreme School Choice*, WALL ST. J., Apr. 5, 2011, at A14. *See generally* Ira C. Lupu & Robert W. Tuttle, Zelman's *Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

[35] *Zelman*, 536 U.S. at 653, 655.

II. DISCUSSION

In *Winn*, the Supreme Court held that a group of Arizona taxpayers did not have legal standing to challenge an Arizona law giving state income tax credits for contributions to STOs, organizations that provide scholarships to students attending private schools, the majority of which are religious schools.[36]

In general, taxpayers do not have legal standing in federal court.[37] But the respondents, Arizona taxpayers, relied on the exception carved out in *Flast v. Cohen* granting taxpayers legal standing to challenge taxing and spending policies that violate the Establishment Clause.[38] The majority rejected this argument, however, and distinguished the case from *Flast*, holding that the respondents could not take advantage of the narrow exception carved out in *Flast* because the Arizona tax credit was not the equivalent of government expenditures intended to subsidize religion.[39]

A. Justice Kennedy's Majority Opinion

A tax credit, according to Justice Kennedy's majority opinion, does not amount to a government subsidy of religion because private taxpayers are directing their own money, pre-government collection.[40] This is distinguishable because, in the case of tax expenditures, the resulting subsidy of religion is directly traceable to government spending.[41]

Justice Kennedy explained, "A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience."[42] He added, "When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment."[43] Justice Kennedy also reasoned that any financial

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[36] Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011).

[37] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) ("On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers.").

[38] *Winn*, 131 S. Ct. at 1440, 1445; *see also* Geoffrey R. Stone, *Eviscerating the Establishment Clause*, HUFFINGTON POST (Apr. 6, 2011, 3:12 PM), http://www.huffingtonpost.com/geoffrey-r-stone/eviscerating-the-establis_b_845646.html.

[39] *Winn*, 131 S. Ct. at 1447; *see also* Bravin, *supra* note 2.

[40] *Winn*, 131 S. Ct. at 1447 ("When Arizona taxpayers choose to contribute to STOs, they spend *their own money*, not money the State has collected from respondents or other taxpayers." (emphasis added)).

[41] *Id.* ("When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures.").

[42] *Id.*

[43] *Id.*

injury alleged as a result of a tax credit "remains speculative," while any financial injury alleged from tax expenditures is "direct and particular."[44] Thus, according to the majority opinion, the distinction between tax credits and governmental expenditures refuted the respondents' assertion of standing.[45]

B. Justice Kagan's Dissent

In her first dissent as a member of the Supreme Court, Justice Elena Kagan called the distinction between tax credits and tax expenditures "arbitrary."[46] Justice Kagan reasoned, "Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy."[47] In the fiery dissent, Justice Kagan argued that the "novel" distinction "has as little basis in principle as it does in our precedent."[48] Justice Kagan noted that the Court had faced the identical situation five times, resolving each prior case without questioning the plaintiffs' legal standing under *Flast*.[49] The consequence of the majority opinion, she suggested, would enable the government "to end-run *Flast*'s guarantee of access to the Judiciary."[50] Now, Justice Kagan wrote, the government needs only to subsidize through the tax system to avoid taxpayer challenges to the state funding of religion.[51] In making her dissent, she scolded the majority for eviscerating "our Constitution's guarantee of religious neutrality."[52]

C. Justice Scalia's Concurrence

In his concurring opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, urged the majority to overturn *Flast* and eliminate the narrow exception created by the Warren Court giving standing to taxpayers wishing to challenge taxing and spending laws that allegedly violate the Establishment Clause.[53] Justice Scalia labeled *Flast* "misguided" and "an anomaly in our jurisprudence, irreconcilable with

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[44] *Id.*

[45] *Id.*

[46] *Id.* at 1450 (Kagan, J., dissenting); *see also* Editorial, *Justice Kagan Dissents*, N.Y. TIMES, Apr. 10, 2011, at WK9 ("The court's ruling is another cynical sleight of hand, which will reduce access to federal courts while advancing endorsement of religion."); Garrett Epps, *Justice Elena Kagan Speaks to America's Main Street*, ATLANTIC (Apr. 6, 2011, 1:40 PM), http://www.theatlantic.com/national/archive/2011/04/justice-elena-kagan-speaks-to-americas-main-street/236865/.

[47] *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

[48] *Id.*

[49] *Id.* at 1452–53.

[50] *Id.* at 1450.

[51] *Id.*

[52] *Id.* at 1451.

[53] *Id.* at 1449–50 (Scalia, J., concurring).

the Article III restrictions on federal judicial power that our opinions have established."[54]

III. ANALYSIS

In *Winn*, the Court pared down, to the absolute minimum, a taxpayer's right to challenge government programs that provide financial aid to religion.[55] The majority opinion did everything but overturn *Flast v. Cohen*, leaving only a crack in the door to judicial access for taxpayers wishing to challenge the constitutionality of government taxing and spending under the Establishment Clause.[56]

Although the distinction between tax credits and tax expenditures is perhaps a bit "novel," as suggested by Justice Kagan,[57] the undecided issue in the case remains the most intriguing: whether the Arizona tax-credit program violates the Establishment Clause. This Part argues that such dollar-for-dollar state income tax-credit programs, currently existing in eight states,[58] and pending in several more, do not violate the Establishment Clause.[59]

The First Amendment limits government action; it says nothing about private, individual choices.[60] The Arizona tax-credit program falls on the side of private, individual action and thus does not violate the

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[54] *Id.* at 1450.

[55] *See* Lyle Denniston, *Opinion Recap: The Near-End of "Taxpayer Standing,"* SCOTUSBLOG (Apr. 4, 2011, 11:26 AM), http://www.scotusblog.com/2011/04/opinion-recap-the-near-end-of-taxpayer-standing/ ("While the Court left in the books its most important ruling on 'taxpayer standing,' the 1968 precedent in *Flast v. Cohen*, that ruling appeared to stand alone, in stark and even threatened isolation."); Editorial, *High Court Ruling on Arizona Program Sets a Bad Precedent*, L.A. TIMES (Apr. 7, 2011), http://articles.latimes.com/2011/apr/07/opinion/la-ed-tuition-20110407.

[56] *See* Denniston, *supra* note 55 ("The Ninth Circuit Court ruled that the program would fail constitutionally if it actually went to trial, but now there is no apparent candidate eligible to pursue such a challenge."); Editorial, *supra* note 55 ("The decision might seem technical, but it will make it harder in the future for taxpayers to challenge programs that breach the wall between church and state."); *see also* discussion *supra* Part II.A.

[57] *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

[58] *See* ARIZ. REV. STAT. ANN. § 43-1089 (2010–2011); FLA. STAT. ANN. § 220.1875 (West Supp. 2012); GA. CODE ANN. § 48-7-29.16 (West 2009 & Supp. 2011); IND. CODE ANN. § 6-3.1-30.5 (LexisNexis Supp. 2011); IOWA CODE § 422.11S (2011); OKLA. STAT. ANN. tit. 68, § 2357.206 (West Supp. 2012); PA. CONS. STAT. ANN. § 8705-F (West Supp. 2011); R.I. GEN. LAWS § 44-62-1 (2010). As previously noted, the Arizona law was recently amended to effectively double the amount of tax credits available. 2012 Ariz. Sess. Laws 4 (effective June 30, 2012).

[59] Notably, Stanford University Professor of Law, Michael McConnell, has suggested that, given the current Court's conservative leaning and more accommodating view of church and state, the *Winn* decision "probably does not change the ultimate outcome of any cases." *See All Things Considered*, *supra* note 7.

[60] *See* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 333–36 (2000).

Establishment Clause.[61] As urged by the American Center for School Choice, the Arizona tax-credit program does not "establish" or "endorse" religion; instead, it is a program that empowers individual taxpayers "to provide enhanced educational opportunities to children through a religion-neutral tax-credit."[62] As the *Winn* majority opinion noted, "When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers."[63] The fact that twenty-five of the fifty-five STOs chose to limit their scholarships to religious schools is not the result of government action, but rather reflects private, market-based decisions.[64]

Furthermore, the neutrality of the Arizona tax-credit program is the beginning and end of the analysis.[65] In *Zelman*, the Supreme Court upheld an Ohio voucher program because the program permitted participation of all schools within the district, religious and non-religious, and provided benefits to all families, without reference to religion.[66] The Arizona tax-credit program, which is available to students attending religious or non-religious institutions, is no different.[67] Moreover, the Arizona religion-neutral tax-credit program is far removed from the New York tuition reimbursement program that the Court struck down in *Committee for Public Education and Religious Liberty* v.

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[61] *See* Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 662 (9th Cir. 2009) (denying motion for rehearing en banc) (O'Scannlain, J., dissenting) ("In every respect and at every level, these are purely private choices, not government policy.").

[62] Brief Amicus Curiae of the American Center for School Choice in Support of Petitioners at 3, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (No. 09-987); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) ("We believe that the program challenged here is a program of true private choice, consistent with *Mueller, Witters,* and *Zobrest,* and thus constitutional.").

[63] *Winn*, 131 S. Ct. at 1440, 1447.

[64] *See* Brief of Amici Curiae States of Michigan, Florida, Indiana, Louisiana, New Jersey, Pennsylvania, South Carolina, & Utah in Support of Petitioner at 11–12, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (No. 09-991) [hereinafter Brief for States] ("[I]n a different community this same program could just as easily result in a total dearth of funding for religious schools." (citing *Winn*, 586 F.3d at 662) (O'Scannlain, J., dissenting)); *see also Zelman*, 536 U.S. at 656–57 ("But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities." (citing NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T EDUC., PRIVATE SCHOOL UNIVERSE SURVEY: 1999–2000, at 2–4 (2001))).

[65] Brief for States, *supra* note 64, at 6–7.

[66] *Zelman*, 536 U.S. at 653 (noting that the only preference in the Ohio voucher program was for low-income families who received higher funding and who were given priority admission).

[67] ARIZ. REV. STAT. ANN. § 43-1089(H)(3) (2010–2011) ("'School tuition organization' means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend *any* qualified school of their parents' choice." (emphasis added)); *see also supra* Part II (discussing the Arizona tax-credit program).

Nyquist,[68] which served functionally and "unmistakably" to provide financial support to religious schools while prohibiting participation from parents of public school enrollees.[69] In stark contrast, the Arizona tax-credit program, as the respondents readily admitted, is religion-neutral; therefore, under *Zelman*, it does not violate the Establishment Clause.[70]

IV. IMPACT

Since the Arizona tax-credit program began in 1997, it has become the third-largest and third-longest running school choice program in the country, spurring a growing number of identical tax-credit mechanisms across the country.[71] Although the Supreme Court did not decide whether the Arizona tax-credit program violated the Establishment Clause, *Winn* essentially shut the door to litigants wishing to challenge the constitutionality of the tax-credit mechanisms, effectively upholding them.[72] Even if a plaintiff were able to establish standing, in light of the Court's recent Establishment Clause jurisprudence, particularly *Zelman v. Simmon-Harris*, the Court would be unlikely to find the program unconstitutional.[73] Thus, as a result of *Winn*, tax-credit programs in seven states, in addition to Arizona, and those that are on the verge of passing in several other states are likely to stand.[74] This Part argues

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[68] 413 U.S. 756 (1973).

[69] *Zelman*, 536 U.S. at 661 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973)).

[70] *See* Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1018 (9th Cir. 2009).

[71] *See* Press Release, Am. Fed'n for Children, AFC Applauds U.S. Supreme Court Ruling on Arizona Tax Credits (Apr. 4, 2011), http://www.federationforchildren.org/articles/261; *see also supra* note 6 and accompanying text (noting that seven states, in addition to Arizona, have instituted tax-credit programs and that legislation to create tax-credit programs is pending in several more states).

[72] *See* Denniston, *supra* note 55 ("[T]here is no apparent candidate eligible to pursue such a challenge."); *see also* Editorial, *supra* note 55; Liptak, *supra* note 3; Stone, *supra* note 38.

[73] Nina Totenberg, *High Court OKs Ariz. Tax Credit for Religious* Schools, NPR (Apr. 4, 2011), http://www.npr.org/2011/04/04/135121183/supreme-court-rules-for-arizona-tax-credit ("But Stanford University law professor Michael McConnell says these decisions 'probably [do] not change the ultimate outcome of any cases,' given the current Supreme Court's more accommodating view of church and state."); *see also Zelman*, 536 U.S. at 653.

[74] *See* Bravin, *supra* note 2 ("The ruling appears to clear a path for other states to offer similar tax breaks in response to advocates of giving parents disenchanted with public schools assistance to send their children to religious schools."); Andrew J. Coulson, *Victory! Supreme Court Upholds Education Tax Credits*, CATO INST. (Apr. 4, 2011, 11:56 AM), http://www.cato-at-liberty.org/victory-supreme-court-upholds-education-tax-credits/ ("With this ruling, the way forward for the school choice movement is clearer than it has ever been. Education tax credits — both the scholarship form operating in Arizona and the direct form operating in Illinois and Iowa — allow for universal access to the education

that the impact of the Court's decision—effectively upholding tax-credit programs—is a step forward for education reform.

Critics of Arizona's tax-credit program, including Justice Kagan in her dissent in *Winn*, argue that the tax-credit program has diverted $350 million from the Arizona State Treasury to private schools.[75] But there is no evidence that state legislatures would pass along those funds to public schools if the respondents had successfully sought an injunction against the Arizona tax-credit program.[76] Moreover, this amount does not account for the financial burden lifted from the public schools as a result of STOs, which grant approximately 27,000 scholarships[77] for students to attend private schools, an estimated 11,697 of whom would otherwise have no choice but to attend public schools.[78] Additionally, the average value of an STO scholarship is far less than the average cost of educating an Arizona public school student, constituting a *net gain* in government savings per student.[79] With budget cuts to state education coffers becoming the norm across the country, the Arizona tax-credit

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marketplace without forcing any citizen to subsidize instruction that violates their convictions.").

[75] *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1458 (2011) (Kagan, J., dissenting); Bravin, *supra* note 2.

[76] *Winn*, 131 S. Ct. at 1444 (majority opinion); *see also All Things Considered*, *supra* note 7.

[77] *See* ARIZ. DEP'T REVENUE, *supra* note 11, at 3; Editorial, *supra* note 11; Press Release, *supra* note 71.

[78] *See Winn*, 131 S. Ct. at 1444; Vicki E. Murray, *An Analysis of Arizona Individual Income Tax-credit Scholarship Recipients' Family Income, 2009–10 School Year* 4–5 (Harvard Kennedy Sch. Program on Educ. Policy and Governance, Working Paper PEPG 10-18, 2010) (citing statistics by the Goldwater Institute and Charles M. North, a Baylor University economics professor); *see also* Mueller v. Allen, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.").

[79] *See Winn*, 131 S. Ct. at 1444 ("Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss."); Brief of Cato Institute et al. as Amici Curiae in Support of Petitioners at 15, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (No. 09-988) (noting the average STO scholarship is less than one-fourth of per-pupil funding available to charter schools and one-fifth of the funding available to traditional public schools); Brief for Petitioner Garriott at 38, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (No. 09-987) (noting that the average value of an STO scholarship is far less than the average per pupil spending in Arizona's public schools); TOM HORNE, ARIZ. DEP'T EDUC., SUPERINTENDENT'S ANNUAL REPORT FOR FISCAL YEAR 2008–2009, at 54 (2010), *available at* http://www.ade.az.gov/AnnualReport/AnnualReport2009/Vol1.pdf; *see also* Dan Lips & Lindsey Burke, *School Choice Gaining Momentum*, HERITAGE FOUND. (Feb. 19, 2009), http://www.heritage.org/research/education-notebook/school-choice-gaining-momentum ("A fiscal analysis mandated by the state legislature found that Florida's corporate scholarship tax credit saved taxpayers $39 million in 2007.").

program provides a blueprint for much-needed and financially-sustainable education reform.[80]

Although critics of the Arizona tax-credit program argue that the program benefits children of wealthy families, scholars from Harvard University's Program on Education Policy and Governance recently published a report that debunks this myth.[81] According to the report, the median family income of families with scholarships from STOs was $55,458, almost $5,000 less than the statewide median family income and almost $5,000 less than the median incomes of their home neighborhoods, as estimated using student addresses.[82]

Further, more than two-thirds of families with scholarships from STOs had incomes that were below $75,467, qualifying them for Arizona's corporate income tax-credit scholarship program.[83] Thus, in addition to limiting the financial burden on public schools, the Arizona tax-credit program grants cash-strapped parents a choice in the education of their children that otherwise would be unavailable to an estimated 11,697 students.[84]

CONCLUSION

The phenomenon of school choice has swept across the country. Charter schools, virtual schooling, homeschooling, vouchers, and many other options are now available to parents seeking an alternative to the educational status quo.[85] In *Winn*, the Supreme Court effectively upheld the constitutionality of Arizona's tax-credit program, paring down

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[80] *See* Brief for Petitioner Arizona Christian School Tuition Organization at 31, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (No. 09-987); Carrie Lips & Jennifer Jacoby, *The Arizona Scholarship Tax Credit: Giving Parents Choices, Saving Taxpayers Money*, POLICY ANALYSIS, no. 414, Sept. 17, 2001, at 1, *available at* www.cato.org/pubs/pas/pa414.pdf.

[81] *See* Murray, *supra* note 78, at 1 ("These student-level data show there is no factual basis for claims that the individual income tax-credit scholarship program fails to help poor and lower-income students.").

[82] *Id.* at 1, 14–15.

[83] *Id.* at 1, 15.

[84] *Id.* at 4–5; *see also* Lindsey Burke, *Supreme Court Throws Out Challenge to Arizona Tuition Tax Credit Program*, THE FOUNDRY (Apr. 4, 2011, 3:09 PM), http://blog.heritage.org/2011/04/04/supreme-court-throws-out-challenge-to-arizona-tuition-tax-credit-program/ ("The Arizona Tuition Tax Credit Program has successfully provided school choice options to low- and middle-income students who would otherwise be relegated to schools that do not meet their needs.").

[85] *See* Dale Basset, *On School Choice We Must Look to the US*, THE TELEGRAPH (Apr. 26, 2011, 3:43 PM), http://www.telegraph.co.uk/news/politics/8474348/On-school-choice-we-must-look-to-the-US.html (noting that advocates of school choice "have been winning the debate in America for several years"); Burke, *supra* note 84 ("School choice—whether tuition tax credit programs, vouchers, virtual school, homeschooling, or the many other options offered across the country—ensures that families have access to an education that best meets their children's needs.").

judicial access to the bare minimum for litigants wishing to challenge similar programs in federal court. As a result, tax-credit programs already present in eight states, and pending in several others, will remain a viable policy option for state lawmakers.

As this Comment argues, tax-credit programs are a positive step for education reform: first, because they lift some of the financial burden off public schools, and, second, because they provide low and middle-income families educational opportunities otherwise unavailable. Thus, each state should institute financially-sustainable education reform patterned after Arizona's successful tax-credit program.

Bruce R. Van Baren[86]

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