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Religious Freedom in the United States: When You Come to a Fork in the Road, Take It

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Cover Page Footnote

I would like to extend my appreciation to Dr. Paul Babie, Associate Professor and Associate Dean at the University of Adelaide School of Law; Dr. David A. Dolph, Chair of the Department of Educational Leadership in the School of Education and Allied Professions at the University of Dayton; Dr. Ralph D. Mawdsley, at Cleveland State University; Dr. Ralph Sharp at East Central University in Ada, Oklahoma; and William E. Thro, General Counsel, University of Kentucky, for their useful comments on drafts of the manuscript. I would also like to thank Ann Raney of the Curriculum Materials Center at the University of Dayton for her help in locating materials cited in this article, my assistant, Elizabeth Pearn, for proofreading the manuscript and helping to prepare it for publication, and Mohamed Al-Hamdani, University of Dayton School of Law, Class of 2013, for his help in researching citations and commenting on a draft of the paper. Finally, I would be remiss if I did not offer my greatest thanks to my wife and love of my life, Debbie Russo, a fellow educator, for proofreading and commenting on drafts of this article in addition to everything else that she does for me in our life together.

RELIGIOUS FREEDOM IN THE UNITED STATES: “WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT”¹

*Charles J. Russo, M.Div., J.D., Ed.D.**

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“The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.”²

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¹ YOGI BERRA WITH DAVE KAPLAN, WHAT TIME IS IT? YOU MEAN NOW? ADVICE FOR LIFE FROM THE ZENNEST MASTER OF THEM ALL 33 (2002).

² Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) (affirming that the First Amendment protects independent contractors from the termination of or prevention of automatic renewals of at-will government contracts in retaliation for exercising their right to freedom of speech).

I. INTRODUCTION

As expansive as the Supreme Court's view of the First Amendment religion clauses has been, its jurisprudence has demonstrated that its rulings do not always achieve the outcomes desired by proponents of religious freedom.³ From the perspective of supporters of religious freedom, this realization lends credence to the preceding wry comment by Justice Scalia. This article details the Court's inconsistent treatment of Christianity, and people of faith broadly, especially in educational settings. These inconsistent judicial outcomes run the risk of increasingly marginalizing matters of faith and conscience in the public square.⁴ As discussed in this article, disputes over the status of religious freedom in the United States continue to be litigated at a brisk pace even as Americans continue to remain among the most religious people in the Western World.⁵

A long line of litigation has demonstrated the vitality, and resiliency, of the First Amendment, even if all do not agree with the results of the cases. A massive number of disputes have been litigated on a wide range of issues involving religion because the meaning of "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." is unclear.⁶ The Supreme Court eventually extended the reach of the First Amendment to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*.⁷ In the aftermath of *Cantwell*, the

³ For example, in the first of a pair of seemingly paradoxical rulings during the same term, the Supreme Court ignored the rights of a minority religion in upholding the dismissal of drug counselors who ingested peyote as part of a sacramental ritual in the Native American Church, a legally organized religious movement that was recognized by the federal government and various states; the Court ruled that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling government interest. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885–86 (1990). Concomitantly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 253 (1990), the Court protected the rights of Christian students to organize prayer and Bible study clubs in secondary schools in upholding the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071–4074 (2006). *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 253 (1990) (stipulating that officials in public secondary schools receiving federal financial assistance which permit non-curriculum related student groups to meet during non-instructional time cannot deny access to groups due to the religious, political, philosophical, or other content of their speech; officials can exclude groups if their meetings materially and substantially interfere with the orderly conduct of school activities). For an analysis of these two cases, see generally David L. Gregory & Charles J. Russo, *Let Us Pray (But Not "Them")! The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991).

⁴ As this article heads to press, the Supreme Court heard oral arguments in another dispute over the place, if any, of religion in the public market. *Town of Greece v. Galloway*, 681 F.3d 20 (2d Cir. 2012), cert. granted, 133 S. Ct. 2388 (2013) (over whether a town board can open its meetings with prayer). For a news report on the oral arguments, see, e.g., Matthew Lounsberry, *Justices Debate Attorneys Over Court's Role in Public Prayer: Town Residents Take Issue With Christians*, WASH. TIMES (D.C.), Nov. 7, 2013, at A01, available at 2013 WLNR 28083068.

⁵ For a comprehensive study on church attendance, see Olav Aarts et al., *Does Duration of Deregulated Religious Markets Affect Church Attendance? Evidence from 26 Religious Markets in Europe and North America Between 1981 and 2006*, 49 J. SCIENTIFIC STUDY OF RELIGION 657, 669 tbl.4 (2010).

⁶ U.S. CONST. amend. I.

⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 306–11 (1940) (reversing the convictions of Jehovah's Witnesses for violating a statute against the solicitation of funds for religious, charitable, or philanthropic

establishment and free exercise of religion protections afforded by the First Amendment restrained both the federal government and the states.⁸ These religion clauses have generated a greater amount of litigation involving religion, in particular, at the Supreme Court level than any other issue involving schooling. In addition, lower federal and state courts have resolved a plethora of cases involving religion issues and education both in K-12⁹ and higher education¹⁰ settings.

The vast range of legal issues arising under the religion clauses can be categorized under two broad, occasionally overlapping, lines of cases in which the Justices have often relied on the metaphor calling for a wall of separation between church and state.¹¹ In the first of these two lines of First Amendment cases, the Supreme Court is generally favorably disposed toward allowing public financial aid to be made available to religiously-affiliated, non-public primary and secondary schools¹² and their students as

purposes without prior approval of public officials). *But cf.* *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243, 250–51 (1833) (holding that the Bill of Rights was inapplicable to the states since its history demonstrated that it was limited to the federal government).

⁸ Although issues associated with the practice of religion are more likely to be covered by the Free Exercise Clause, such disputes are often referred to as Establishment Clause disputes.

⁹ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971). *Lemon* is arguably the most significant religion case, certainly in the context of elementary and secondary education. For a discussion of *Lemon*, see *infra* note 14 and accompanying text.

¹⁰ See *infra* note 13 and accompanying text.

¹¹ The “wall of separation” metaphor (with which the author disagrees) is typically credited to Thomas Jefferson’s letter of January 1, 1802 to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, 16 WRITINGS OF THOMAS JEFFERSON at 281 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds. 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.

16 WRITINGS OF THOMAS JEFFERSON at 281 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds. 1903).

The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute). For an alternative view on Jefferson’s perspectives, see Charles J. Russo, *Judicial “hostility to all things religious in public life” or Healthy Separation of Religion and Public Education?* 35 RELIGION & EDUC. NO. 2, 78 (2008) (noting in part that “Jefferson was neither hostile to nor sought to exclude the teachings of Jesus, and by extension, religion entirely from the marketplace of ideas, even though he called for separation between Church and State” insofar as he acknowledged the value of the teachings of Christ). However, the “wall of separation” metaphor originated with Roger Williams who coined the term more than 150 years before it was appropriate by Jefferson. Roger Williams, *Mr. Cotton’s Letter Lately Printed, Examined and Answered* (1644), reprinted in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (1963) (“and that when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes[s] of the world. . .”).

¹² The Supreme Court’s modern Establishment Clause jurisprudence with regard to state aid in the context of K–12 education evolved through three phases. During the first phase, which began in 1947 with *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (upholding a statute permitting reimbursement to parents for costs associated with sending their children to their religiously affiliated non-public schools) and ended in 1968 with *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 248–49 (1968) (upholding the loans of textbooks to students who attended religiously affiliated nonpublic schools), the Court enunciated the Child Benefit Test, a legal construct permitting publicly funded aid because it assists children rather than their religiously affiliated non-public schools. *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen* U.S. 236, 243 (1968). The second phase, which began with

well as to institutions of higher learning,¹³ a topic that is beyond the scope of this article. In these cases, the Court more often than not applies the tripartite test that the Justices enunciated in *Lemon v. Kurtzman*.¹⁴ This one-size-fits-all measure for disputes involving religion¹⁵ is used regardless of whether disputes involve aid, religious activities such as prayer, or who can serve as ecclesiastical leaders.

In the second line of cases involving the free exercise of religion, the majority of disputes took place in primary and secondary schools, with the Supreme Court fairly consistently applying the separationist perspective. In these cases the Justices prohibited such school-sponsored religious activities in K-12 settings as prayer¹⁶ and Bible reading¹⁷ at the start of the day, at graduations,¹⁸ or at sporting events¹⁹ in addition to forbidding

the Court's 1971 judgment in *Lemon* and its 1985 judgment in *Aguilar v. Felton*, 473 U.S. 402 (1985), represented the nadir of the Child Benefit Test in the eyes of its proponents as the Court largely refused to move beyond the limits it created in *Everson* and *Allen*. The Court's 1993 ruling in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) breathed new life into the Child Benefit Test, allowing it to enter the third phase that extends to the present. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (permitting the on-site delivery of special education services in religiously affiliated non-public schools).

¹³ See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (handed down on the same day as *Lemon*, largely upholding the Higher Education Facilities Act of 1963, a statute making federal funds available to religiously affiliated institutions of higher learning for construction of facilities); *Hunt v. McNair*, 413 U.S. 734, 749 (1973) (maintaining that insofar as religion was not pervasive in an institution, South Carolina was free to issue revenue bonds to benefit the church-related college because it did not guarantee the returns on the investment with public funds).

¹⁴ Under this test:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612–13 (internal citations omitted). Further, in examining entanglement and state aid to religiously affiliated institutions, the Court identified three additional factors to be taken into consideration: "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* at 615.

¹⁵ In addition to *Lemon*, the Court has applied two other tests. The "endorsement test" asks whether the purpose of a governmental action is to endorse or approve of a religion or religious activity. *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring) (upholding the display of a crèche on public property). The Court has also articulated a "psychological coercion test." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (disallowing prayer at a public school graduation). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–10 (2000) (using both tests to invalidate a school district's policy sanctioning student-led prayer prior to a high school football game).

¹⁶ *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

¹⁷ *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225–27 (1963).

¹⁸ *Tanford v. Brand*, 104 F.3d 982, 984–85 (7th Cir. 1997), *cert. denied*, 522 U.S. 814 (1997); see also *Chaudhuri v. Tennessee*, 130 F.3d 232, 239–240 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) (refusing to intervene in cases invalidating prayer at graduation ceremonies of public universities as they did not involve young students and attendance was voluntary). *Contra Lee*, 505 U.S. at 609; see also *Tilton*, 403 U.S. at 676 (upholding, on the same day as *Lemon*, the Higher Education Facilities Act of 1963, a statute making federal funds available to religiously affiliated institutions of higher learning for construction of facilities); see also *Hunt*, 413 U.S. at 749 (maintaining that insofar as religion was not pervasive in an institution, South Carolina was free to issue revenue bonds to benefit the church-related college because it did not guarantee the returns on the investment with public funds).

educators from posting the Ten Commandments in public school classrooms.²⁰ At the same time, the Court deferred to parents who wished to have their children released from their public schools early in order to receive religious instruction at other locations²¹ and allowed students to organize prayer and Bible study clubs during non-instructional hours.²²

It cannot be denied that the Supreme Court has given the religion clauses expansive interpretations. Yet, ongoing religious controversies in an increasingly secular American society²³ seem to suggest that the judiciary has “taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed”²⁴ in a way that imperils religious liberty. At present, a wide variety of religious disputes continue to swirl around the United States. The judicial disposition of these controversies has the potential to alter the fundamental calculus of religious freedom as applied to educational institutions and other faith-based facilities such as hospitals and private employers. The outcome of these disputes threatens to turn the First Amendment on its proverbial ear by limiting the free exercise of religion in an array of circumstances. Rather than rehash the well-examined lines of litigation in order to demonstrate the direction that judicial interpretations of the freedom of religion have protected, this article begins by examining two recent but disparate Supreme Court cases, handed down about a year apart, in which the Justices reached apparently irreconcilable positions before turning to a discussion of the status of religious freedom.

In the first dispute, *Christian Legal Society v. Martinez* (“CLS”), a bitterly divided Supreme Court affirmed that officials at a public law school in California could implement a policy requiring an on-campus religious group to admit all comers from the student body, including those who disagreed with its beliefs, as a condition to becoming a recognized student organization.²⁵ The second case, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (“*Hosanna-Tabor*”), resulted in a rare unanimous judgment in which the Court rejected the claim of the EEOC in a dispute with a Lutheran school in Missouri.²⁶ In so ruling, the Court upheld the ministerial exception, which

¹⁹ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317. Interestingly, the Court chose not to address the status of student-led prayer at public school graduation ceremonies. *Id.* at 301.

²⁰ *Stone v. Graham*, 449 U.S. 39, 42–43 (1980).

²¹ See *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

²² *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251–52 (1990).

²³ CARY FUNK & GREG SMITH, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (2012) (reporting on the decline in religious membership in the United States), available at <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>.

²⁴ *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting) (commenting on the Court’s majority opinion, which invalidated a state sodomy law applied to consenting adults).

²⁵ *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978–82 (2010), *reh’g denied on remand sub nom.* *Christian Legal Soc’y v. Wu*, 626 F.3d 483 (9th Cir. 2010).

²⁶ *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707, 710 (2012).

arose under Title VII of the Civil Rights Act of 1964.²⁷ This exception allows “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities” as long as organizational officials can demonstrate that doing so is justified by a bona fide occupational qualification (“BFOQ”).²⁸ Notably, the claim arose under the Americans with Disabilities Act²⁹ rather than Title VII.³⁰ Even so, in upholding religious liberty, the Court agreed that church leaders and, by extension, officials of faith-based institutions in general, retain the freedom to apply their religious values in making hiring decisions as to who can serve as or be identified as ministers.³¹

These two cases—one restricting religious freedom, the other protecting this essential right—reflect the growing tension as the United States finds itself at a fork in the road. The direction that the Supreme Court takes at this fork in the road will lead either to the strengthening of the long-held respect for religious freedom, a defining hallmark of American society, or lead to its diminishment. In this regard, religious freedom in the United States faces perhaps its greatest existential statutory and regulatory threats imposed by the federal government in light of the health mandates imposed by the Patient Protection and Affordable Care Act³² championed by President Obama, a topic that is discussed in more detail below.

Against this backdrop, the remainder of this article is divided into two substantive parts. The first section reviews the judicial analyses in *CLS* and *Hosanna-Tabor* to frame the current controversy on the status of religious freedom in the United States. The second part reflects on the effects of these cases and recent developments regarding the religion clauses of the First Amendment in relation to interrelated questions. Some of these questions are in the early stages of what promise to be lengthy judicial battles, most notably with regard to the health care mandate, involving the religious freedom of institutional employers, their employees, and students.

The article takes the position that there are individuals and groups who would like to impose their will by neutering, if not eliminating, organized religion, mainstream Christianity as represented by the Roman

²⁷ *Id.* at 705.

²⁸ 42 U.S.C. § 2000e-1 (2006).

²⁹ 42 U.S.C. §§ 12101–12377 (2006). For a full discussion of this far-reaching statute, see generally CHARLES J. RUSSO & ALLAN G. OSBORNE, SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT: IMPLICATIONS FOR EDUCATIONAL LEADERS (Corwin Press 2009).

³⁰ *Hosanna-Tabor*, 132 S. Ct. at 701.

³¹ For a comprehensive treatment of legal issues involving American non-public schools, see generally RALPH D. MAWDSLEY, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS (6th Ed. 2012).

³² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); see also Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Catholic Church, in particular, as an independent institution devoted to bringing about social and spiritual good in the public marketplace. The article finishes with a brief conclusion suggesting that, as these issues play out, the future of religious freedom in the United States hangs in the balance as the nation stands at a precipitous fork in the road with the option of either confirming or dismantling this deeply cherished first freedom.

II. RECENT SUPREME COURT CASES INVOLVING THE RELIGION CLAUSES

A. *Christian Legal Society v. Martinez*

1. Background

At issue in *CLS* was a disagreement that occurred on the campus of Hastings College of the Law, an institution in the University of California system, over its policy governing official recognition to on-campus student groups.³³ Recognized student organizations (RSOs) at Hastings are granted access to the use of the institutional name and logo along with access to funds, facilities, and channels of communication.³⁴ In return, RSOs must comply with the college's nondiscrimination policy, which, consistent with California state law, forbids discrimination on an array of criteria including religion and sexual orientation.³⁵ Hastings officials interpreted this policy as requiring RSOs to accept "all comers," meaning that they must allow all students to join and seek leadership positions regardless of their status or beliefs and whether these are consonant with organizational goals.³⁶

The dispute giving rise to the litigation in *CLS* arose at the start of the 2004-05 academic year when the Hastings campus branch of the Christian Legal Society ("Society") chose to affiliate with the national group and adopted its bylaws including the requirement that members and officers sign a "Statement of Faith."³⁷ This statement directs Society members to comply with its principles such as the belief that sexual activity should not occur outside of marriage between a man and a woman, whether heterosexual or homosexual.³⁸ The Society interprets its bylaws as excluding anyone from affiliation for engaging in "unrepentant homosexual conduct" or for having religious convictions different from those detailed in its Statement of Faith.³⁹

Hastings officials rejected the Society's application to acquire status

³³ *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978–81 (2010).

³⁴ *Id.* at 2979.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2980.

³⁸ *Id.*

³⁹ *Id.*

as an RSO because its organizational bylaws differed from the school's "all-comers" policy by excluding students based on religion and sexual orientation.⁴⁰ Officials thus prohibited the Society from meeting on campus and using school resources. The Society sought to enjoin enforcement of Hastings' policy, alleging that compliance would have violated its rights to speech, association, and religion.⁴¹ In refusing to enjoin the policy, a federal trial court in California decreed that the "all-comers" condition in the policy was reasonable and viewpoint neutral.⁴² The court added that the policy did not impermissibly impair the Society's right to expressive association and was not unacceptable because it did not require the group to admit members or limit speech.⁴³ The court posited that, if anything, the policy merely placed conditions on the use of school facilities and funds.⁴⁴ The court rejected the Society's free exercise claim and maintained that the neutral, generally applicable policy did not single out religious beliefs for different treatment.⁴⁵

On appeal, the Ninth Circuit affirmed that the "all-comers" policy was reasonable and viewpoint neutral.⁴⁶ Since the Ninth Circuit's judgment in *CLS* directly conflicted with a case from Indiana in which the Seventh Circuit upheld the rights of another campus branch of the Society to apply its membership rules, the Court agreed to hear an appeal to resolve this split.⁴⁷

2. Supreme Court Analysis

a. Majority

In a five-to-four judgment, a bitterly divided Supreme Court affirmed that the "all-comers" policy was constitutional.⁴⁸ Writing for the

⁴⁰ *Id.* at 2980–81. "As far as the record reflects, Ms. Chapman [Director of Hastings' Office of Student Services] made no mention of an accept-all-applicants policy" when CLS applied for registration as a RSO. *Id.* at 3002 (Alito, J., dissenting). Moreover, "[a] few days later, three officers of the chapter met with Ms. Chapman, and she reiterated that the CLS bylaws did not comply with 'the religion and sexual orientation provisions of the Nondiscrimination Policy and that they would need to be amended in order for CLS to become a registered student organization.' . . . On both of these occasions, it appears that not a word was said about an accept-all-comers policy." *Id.* (internal citations omitted).

⁴¹ *Id.* at 2981.

⁴² *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, No. C 04-04484, JSW, 2006 WL 997217, at *13–14 (N.D. Cal. May 19, 2006), *aff'd sub nom.* *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 130 S. Ct. 2971 (2010).

⁴³ *Id.* at *16.

⁴⁴ *Id.*

⁴⁵ *Id.* at *26.

⁴⁶ *Christian Legal Soc'y v. Kane*, 319 Fed. App'x. 645, 646 (9th Cir. 2009).

⁴⁷ *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006). For a commentary on this case, see Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration*, 33 J.C.U.L. 361 (2007).

⁴⁸ *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 130 S. Ct. 2971 (2010). See William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 EDUC. L. REP. 473 (2010), for a much more detailed commentary on this case.

majority, Justice Ginsburg was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor.⁴⁹ At the outset of its opinion, the majority was reluctant to deny access to campus facilities to student groups based on their viewpoints.⁵⁰ The Court acknowledged that it faced a novel question and framed the issue as 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?”⁵¹

After recounting the facts, in what the Supreme Court categorized access to facilities as a subsidy, the majority began its analysis by combining the Society’s freedom of speech and association claims in light of the Court’s limited public forum jurisprudence.⁵² In this regard, the Court failed to provide sufficient detail for those who are less familiar with the law. It is worth noting that in reviewing First Amendment claims, the Justices have identified three different forums.⁵³ The government’s regulatory power is most restricted in traditional public forums, such as parks, streets, and sidewalks.⁵⁴ This was inapplicable in *CLS*. The Court found that the non-public forum doctrine, the second forum, which typically applies in classrooms that are “not by tradition or designation a forum for public communication,” was equally inapplicable.⁵⁵

As to the third forum, the Supreme Court held that the appropriate standard was that of a “limited public forum,” property that the state, *qua* Hastings, opened for public use as a place for expressive activity.⁵⁶ The Court recognized that officials at public institutions can create such a forum either by express policy or by practice.⁵⁷ Following its review of cases in which the majority applied this analysis, the Court interpreted the “all-comers” policy as reasonable for two reasons.⁵⁸ First, the Justices were of the view that insofar as they ordinarily granted deference to educational leaders, school officials had the authority to establish such a policy.⁵⁹ Second, the Court divined that the reasons school officials provided for initiating the policy—such as affording leadership opportunities for students, forbidding discrimination based on status, and bringing individuals of all types together—were constitutional because they were legitimate and

⁴⁹ *Martinez*, 130 S. Ct. at 2977.

⁵⁰ *Id.* at 2978.

⁵¹ *Id.*

⁵² *Id.* at 2985.

⁵³ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67 (1988); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (discussing forum analysis).

⁵⁴ *Perry* 460 U.S. at 45.

⁵⁵ *Id.* at 46.

⁵⁶ *Martinez*, 130 S. Ct. at 2984.

⁵⁷ *Id.* at 2986.

⁵⁸ *Id.* at 2989–91.

⁵⁹ *Id.* at 2988–89.

non-discriminatory.⁶⁰

The Supreme Court determined that based on the off-campus alternative channels that were available to the Society after it lost its status as an RSO, the policy was reasonable.⁶¹ The Court next rejected the Society's concerns "as more hypothetical than real" that if it had to comply with the policy there would be no diversity of perspectives on campus and that individuals who were hostile to it could infiltrate its ranks in order to subvert its mission.⁶² The majority held that insofar as the policy allowed clubs to condition eligibility for membership and leadership positions on such qualifications as attendance at meetings, dues payment, and other neutral criteria, the Society's concerns were unfounded.⁶³

In concluding that the "all-comers" policy was constitutional, the Supreme Court remanded *CLS* for further consideration.⁶⁴ The Justices indicated that, since the lower courts failed to address whether Hastings officials selectively enforced the "all-comers" policy, the Ninth Circuit had to consider the extent to which the Society's argument may have still been viable.⁶⁵

b. Concurrences

Justices Stevens and Kennedy wrote separate concurrences. Justice Stevens, in the final case of his almost thirty-five years on High Court, authored a brief opinion in which he sought to rebut Justice Alito's dissent, which would have invalidated the policy as unconstitutional.⁶⁶ Justice Stevens responded that while the Society had the right to limit membership off campus, the First Amendment does not require Hastings' policy to permit the same.⁶⁷ In briefer concurrence, Justice Kennedy asserted that law school officials and the Society stipulated that there was no evidence of viewpoint discrimination in the policy.⁶⁸ Even so, he observed that the result may have been different had the Society been able to prove that the "all-comers" policy was designed or employed to infiltrate its membership or challenge its leadership in an attempt to stifle its perspective, an issue that may well arise in future litigation.⁶⁹

⁶⁰ *Id.* at 2989–91.

⁶¹ *Id.* at 2991.

⁶² *Id.* at 2992.

⁶³ *Id.*

⁶⁴ *Id.* at 2995.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2995 (Stevens, J., concurring).

⁶⁷ *Id.* at 2996.

⁶⁸ *Id.* at 2999 (Kennedy, J., concurring).

⁶⁹ *Id.* at 3000.

c. Dissent

Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, dissented vociferously.⁷⁰ At the outset of his lengthy dissent, Justice Alito expressed his concern that the majority imposed a significant restriction on religious freedom, especially since law school officials had not relied on the “all-comers” policy until the Christian group initiated its claims.⁷¹ Alito also remarked that the policy unreasonably infringed on the rights of those who were active in the organization because it placed a substantial burden on the religious freedom of the Society’s members, but no other group in a limited public forum that was supposed to be viewpoint neutral.⁷²

3. Remand

On remand, in a fairly brief opinion, the Ninth Circuit rejected Society’s remaining claims that Hastings officials violated their right to religious freedom.⁷³ The court refused to permit Society’s case to proceed, because its leaders failed to preserve their argument that university officials selectively applied the policy.⁷⁴ The court thus contended that the Society was not entitled to “a second bite at the appellate apple.”⁷⁵

B. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission

1. Background

The dispute in *Hosanna-Tabor* began when officials at a Lutheran elementary school in Michigan dismissed a “called” minister, rather than “contract” teacher.⁷⁶ In order to be eligible to serve in the higher role of “called” teachers, individuals are hired by voting members of the Hosanna-Tabor Lutheran Church congregation on the recommendations of its Boards of Education, Elders, and Directors.⁷⁷ Teachers who are “called” have to complete “colloquy” classes required by the Lutheran Church-Missouri Synod that focus on various aspects of the Christian faith.⁷⁸ Having completed their colloquies, qualified teachers receive certificates of

⁷⁰ *Id.* at 3000–01 (Alito, J., dissenting).

⁷¹ *Id.* at 3000.

⁷² *Id.* at 3013.

⁷³ *Christian Legal Soc’y v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010).

⁷⁴ *Id.* at 485.

⁷⁵ *Id.* at 488 (quoting *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996) (per curiam)).

⁷⁶ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008). For a more recent case involving another Lutheran school where the court relied on *Hosanna-Tabor*, see *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 672–74 (N.D. Ill. 2012) (rejecting a teacher’s age, sex, and marital status as precluded by the ministerial exception).

⁷⁷ *Hosanna-Tabor*, 582 F. Supp. 2d at 883.

⁷⁸ *Id.*

admission into both the teaching ministry and the Michigan District of the Lutheran Church-Missouri Synod; doing so means that Synod officials helped teacher candidates find jobs by placing their names on a list provided to schools in need of educators.⁷⁹ Teachers who are selected for jobs are named “commissioned ministers” and work on open-ended contracts and cannot be dismissed without cause.⁸⁰ Such teachers also have the chance to obtain special housing allowances on their income taxes as long as they engage in activities related to their ministries.⁸¹

Here, the teacher filed suit against the school claiming that officials dismissed her in retaliation for her threat to take legal action after she refused to resign in a disagreement over whether she could return to work due to her health problems, which included sleep apnea.⁸² As part of her claim, the teacher alleged that she was not a minister because she spent more than six hours of her seven-hour work day teaching secular subjects from secular textbooks which did not incorporate religion.⁸³

In the first round of litigation, a federal trial court granted the school’s motion for summary judgment in applying the ministerial exception to the case.⁸⁴ On appeal, the Sixth Circuit vacated the judgment in favor of the teacher, finding she was not a ministerial employee and that the claims of officials that her ADA discrimination charges involved church doctrine did not require judicial evaluation or interpretation of religious doctrine.⁸⁵ The Court granted certiorari⁸⁶ and, in turn, reversed in favor of school officials, upholding the ministerial exception.⁸⁷

2. Supreme Court Analysis

a. Majority Opinion

As a possible sign of how significantly he viewed *Hosanna-Tabor*, Chief Justice John Roberts authored the Court’s unanimous opinion.⁸⁸ After reviewing the facts and judicial history of the case, the Supreme Court cited the First Amendment religion clauses in full, remarking that although there

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 882–83.

⁸³ *Id.* at 882–84.

⁸⁴ *Id.* at 883.

⁸⁵ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 779–82 (6th Cir. 2010).

⁸⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

⁸⁷ *Id.* at 710.

⁸⁸ *Id.* at 699. The analysis of *Hosanna-Tabor* herein is adapted from a lengthier commentary on this case that focused on its application to higher education. See Charles J. Russo & Paul E. McGreal, *Religious Freedom in American Catholic Higher Education*, 39 RELIGION & EDUC. 116 (2012); see also Ralph D. Mawdsley & Allan G. Osborne, Jr., *Shout Hosanna: The Supreme Court Affirms the Free Exercise Clause’s Ministerial Exception*, 278 EDUC. L. REP. 693 (2012).

can sometimes be conflict between these clauses, there was none here because both forbid governmental interference with the determinations of church leaders over who can serve as ministers.⁸⁹

At the outset of its substantive analysis, the Supreme Court traced the history of religious freedom in the Anglo-American context from the Magna Carta in 1215 through the Founding Fathers and its own precedent.⁹⁰ Still, the Court commented that “[u]ntil today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.”⁹¹ At the same time, Justices conceded that the federal circuit courts had litigated the issue extensively since the enactment of Title VII.⁹² Reasoning that the ministerial exception is grounded in the First Amendment, the Court, rejecting arguments from the EEOC and Justice Department to the contrary, agreed that the exception should remain in place because the government has no place interfering with internal church operations.⁹³

The Supreme Court found that the ministerial exception is rooted in the First Amendment, deciding that the exception applied to bar the teacher’s ADA claim.⁹⁴ The Justices pointed out that they agreed with circuit court cases which extended the exception beyond the leaders of religious congregations to teachers.⁹⁵ The Court observed that officials treated the plaintiff as a minister because she underwent six years of religious training, and even if she did not teach religion most of the day, she held herself out as a minister.⁹⁶

The Supreme Court reviewed what it identified as the Sixth Circuit’s three errors in its rationale.⁹⁷ First, the Court specified that the Sixth Circuit undervalued the plaintiff’s title as minister.⁹⁸ Second, the Court was convinced that the Sixth Circuit placed too much emphasis on the fact that other teachers performed many of the same duties as the plaintiff.⁹⁹ Third, the Court emphasized that the Sixth Circuit improperly focused on the fact that the plaintiff-teacher spent a significant part of her workday engaged in secular duties.¹⁰⁰

Categorizing the perspective of the EEOC, but not the Sixth Circuit,

⁸⁹ *Hosanna-Tabor*, 132 S. Ct. at 702.

⁹⁰ *Id.* at 702–05.

⁹¹ *Id.* at 705.

⁹² *Id.*

⁹³ *Id.* at 702.

⁹⁴ *Id.* at 707.

⁹⁵ *Id.* at 707–09.

⁹⁶ *Id.*

⁹⁷ *Id.* at 708.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

as “extreme,”¹⁰¹ even though it disagreed with the latter’s focus on how much time the plaintiff spent on secular tasks, the Supreme Court described the issue as “not one that can be resolved by a stopwatch.”¹⁰² In other words, the Court was not swayed by how many hours the teacher devoted to secular, as opposed to religious, duties in carrying out her job. Since it believed that the teacher was an ordained minister within the meaning of the ministerial exception, the Court ruled that church officials could terminate her employment regardless of how much time she spent on secular responsibilities.¹⁰³

Rounding out its analysis, the Supreme Court acknowledged that the plaintiff and EEOC no longer sought her reinstatement, preferring to request front pay, back pay, other damages, and attorney fees.¹⁰⁴ Even so, the Court rejected these requests because they would have essentially have penalized the church in violation of the First Amendment.¹⁰⁵ Refusing to examine wider questions of employment discrimination, the Court concluded that “we hold only that the ministerial exception bars such a suit” as the teacher filed against her religious employer.¹⁰⁶ As such, the Court reversed the judgment of the Sixth Circuit and entered a judgment in favor of the church.¹⁰⁷

b. Concurrences

Justice Thomas, in a brief two-paragraph concurrence, would have gone further than the majority insofar as he would have deferred to religious officials in all matters over who is a minister.¹⁰⁸ Justice Alito, joined by Justice Kagan, indicated that the definition of what a minister is should be left to religious groups so that civil courts do not have to be asked to interpret church doctrine.¹⁰⁹

3. Later Developments

On the same day that it handed down *Hosanna-Tabor*, the Supreme Court rejected two additional challenges to the ministerial exception.¹¹⁰ Although these cases are of no precedential value, they do add to the

¹⁰¹ *Id.* at 709.

¹⁰² *Id.*

¹⁰³ *Id.* at 708–09.

¹⁰⁴ *Id.* at 709.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 710.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (Thomas, J., concurring).

¹⁰⁹ *Id.* at 715–16 (Alito, J., concurring).

¹¹⁰ See *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1246 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 1088 (2012); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 486–87 (Mich. Ct. App. 2008), *appeal after remand*, 787 N.W.2d 513 (Mich. Ct. App. 2010), *appeal denied*, 787 N.W.2d 507 (Mich. 2010), *cert. denied*, 132 S. Ct. 1088 (2012).

viability of the ministerial exception. In the first case, the Director of the Department of Religious Formation unsuccessfully sued the Roman Catholic Diocese of Tulsa, Oklahoma, for gender and age discrimination after being dismissed from her position.¹¹¹ In the second case, the Justices declined to hear the appeal in a dispute wherein a Director of Religious Education, who also taught mathematics, sued the Roman Catholic Diocese of Lansing after having alleged violations of the state's Whistleblowers' Protection Act and Civil Rights Act for retaliatory dismissal over charges unrelated to her duties as a religious educator.¹¹² In both instances, the Court agreed that the employees could not proceed because they were subject to the ministerial exception.¹¹³

III. DISCUSSION

Whether the attitude of the Supreme Court, and the American judiciary in general, reveals support for a healthy separation of church and state or, as reflected in Chief Justice Rehnquist's scathing dissent in *Santa Fe Independent School District v. Doe*, a case invalidating student-led prayer prior to the start of high school football games, an attitude "bristl[ing] with hostility to all things religious in public life,"¹¹⁴ is, of course, in large part, in the eye of the beholder.¹¹⁵

On the one hand, from a Christian perspective, and other people of faith, believers could easily view the reality as closer to hostility in light of some recent cases. For example, the Ninth Circuit rejected a challenge to Islamic religious practices in a social studies class in a public school in California.¹¹⁶ Also, the Second Circuit refused to disturb a policy permitting

¹¹¹ *Skrzypczak*, 611 F.3d at 1240–41.

¹¹² *Weishuhn*, 756 N.W.2d at 486–87.

¹¹³ *Id.* at 486; *Skrzypczak* 611 F.3d at 1243–46. See *Erdman v. Chapel Hill Presbyterian Church*, 286 P.3d 357, 360–67 (Wash. 2012) (relying partially on *Hosanna-Tabor* and rejecting the negligent supervision and retention claims that a church's former executive for stewardship - chief financial officer filed against the minister who supervised her work on the basis that civil courts must accept the rulings of hierarchical church governing bodies on questions of discipline, faith, or ecclesiastical rule, custom, or law).

¹¹⁴ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

¹¹⁵ For a commentary on the role of the judiciary, particularly as it relates to schooling, see Charles J. Russo, *Judges as Umpires or Rule Makers? The Role of the Judiciary in Educational Decision Making in the United States*, 10 EDUC. L.J. 33 (2009).

¹¹⁶ *Eklund v. Byron Union Sch. Dist.*, 154 F. App'x. 648, at *1 (9th Cir. 2005), *cert. denied*, 549 U.S. 942 (2006). At issue were materials including a simulation unit on Islamic culture in a social studies class that, among other things, required students to wear identification tags displaying their new Islamic names, dress as Muslims, memorize and recite an Islamic prayer that has the status of the Lord's Prayer in Christianity as well as other verses from the Qur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self-denial. Petition for Writ of Certiorari, *Eklund v. Byron Union Sch. Dist.*, No. 05-1539, 2006 WL 1519184, at *2–12 (U.S. May 31, 2006). Without addressing the merits of the claims, the court declared that the activities "'were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns.'" *Eklund*, 154 F. App'x. at *1 (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) to affirm that a curricular program did not violate the Establishment Clause or California Constitution because the classroom activities in which children discussed witches, created poetic chants, and pretended they were sorcerers did not equate to practicing or endorsing the "religion" of witchcraft).

educators in public schools in New York City to display a menorah along with a star and crescent in classrooms during the Christmas season, but not a manger scene.¹¹⁷ In the wake of these two illustrative cases, not to mention *CLS*, it may be difficult to avoid such an interpretation, at least with regard to Christianity.

On the other hand, from the perspective of proponents of religious freedom generally, it might be possible to view cases of this nature as allowing at least some religion in the public sphere in the United States, albeit in a way that arguably treats the dominant tradition, Christianity, differently from other faiths.¹¹⁸ Again, what the cases really demonstrate is that the interpretation one reaches largely depends on one's perspective.

In order to provide some framing of where the judiciary stands on the place of religion in the public square following the recent Supreme Court cases, this section considers three overlapping threats to religious freedom in the United States. The first part reflects on how religious institutions and private employers, two different groups that may not ultimately be treated the same, can preserve their faith-based identities when possibly being required to act against their consciences, in having to comply with the federal health care mandates (a proposition which a plurality of Americans reject as a threat to religious freedom)¹¹⁹ and recognize same-sex unions.

The conundrum associated with issues relating to religious freedom are all the more perplexing because granting conscience-based exceptions has deep roots in American history. In fact, the earliest example to what can be described as a conscience exemption, as applied to religious freedom, occurred in 1621 during the earliest days in the Plymouth Colony.¹²⁰ This

¹¹⁷ *Skoros v. City of New York*, 437 F.3d 1, 25 (2d Cir. 2006). For an analysis of this case, see generally Charles J. Russo, *Of Baby Jesus and the Easter Bunny: Does Christianity Still Have a Place in the Educational Marketplace of Ideas in the United States?* 16 EDUC. & L.J. 61 (2006).

¹¹⁸ Amid ongoing disputes over its place in public life, Christianity remains by far the dominant religious tradition in the United States. See Frank Newport, *In U.S., 77% Identify as Christian: Eighteen percent have no explicit religious identity*, GALLUP.COM (Dec. 24, 2012), <http://www.gallup.com/poll/159548/identify-christian.aspx> ("The large majority of Americans -- 77% of the adult population -- identify with a Christian religion, including 52% who are Protestants or some other non-Catholic Christian religion, 23% who are Catholic, and 2% who affiliate with the Church of Jesus Christ of Latter-Day Saints. Another 18% of Americans do not have an explicit religious identity and 5% identify with a non-Christian religion.").

¹¹⁹ See 46% Favor Allowing Religious Exemption for Contraceptive Mandate, 41% Oppose (Dec. 5, 2012), RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/december_2012/46_favor_allowing_religious_exemption_for_contraceptive_mandate_41_oppose.

¹²⁰ The dispute in Plymouth Colony arose when recent arrivals objected as a matter of conscience to having to work on Christmas day:

On the day called Christmas Day, the Governor called them out to work as was used. But the most of this new company excused themselves and said it went against the consciences to work on that day. So the Governor told them that if they made it a matter of conscience, he would spare them until they were better informed; so he led away the rest and left them. But when they came home at noon

conscience-based exception was adopted in Rhode Island.¹²¹

The second part examines whether religious groups, in light of cases such as *CLS*, particularly on college and university campuses, can be allowed to preserve their organizational autonomy by establishing their own membership rules in public institutions if they purportedly violate policies concerning such sensitive topics such as recognizing same-sex unions. The third part raises questions about individual desires as they conflict with church teachings and whether, for instance, government officials have, or should have, the authority to dictate what qualifies as a religious institution and who qualifies as religious leaders, the issue litigated in *Hosanna-Tabor*. A related consideration examines what can be done if private actors follow their own consciences in terms of providing services such as “health care” benefits to others if doing so violates their deeply held beliefs.

A. Religious Identity

1. Health Care

The signature piece of legislation in President Obama’s first term in office, the Patient Protection and Affordable Care Act (“ACA”),¹²² survived a challenge at the Supreme Court in *National Federation of Independent Business v. Sebelius*.¹²³ As a result, as of August 1, 2013, the health care

from their work, he found them in the street at play, openly; some pitching at bar, and some at stool-ball and such like sports. So he went to them and took away their implements and told them it was against his conscience, that they should play and others work. If they made the keeping of it a matter of devotion, let them keep their houses; but there should be no gaming or reveling in the streets. Since which time nothing hath been attempted that way, at least openly.

WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 1620-1647 at 97 (Samuel Eliot Morison, a new edition, Alfred A. Knof 1952).

¹²¹ According to the Charter of Rhode Island and Providence Plantations (1663):

[We] do[e] hereby publish, gra[u]nt, ord[ai]n[e] and declare, [t]hat our royal[I] will and pleasure is, that no[] person within the sa[i]d colony[], at any t[i]me hereafter shall be[] any wise molested, punished, disquieted, or called in question, for any differences in opinion[] in matters of religion, and do[] not actually disturb the civil[] peace of our sa[i]d colony; but that all and every[] person and persons may, from t[i]me to t[i]me, and at all t[i]mes hereafter, freely[] and fully[] have and enjoy[] his and their[] own[] judgments and consciences, in matters of religious concernments, throughout the tract of land[] hereafter mentioned, they behaving themselves peaceabl[y] and quietl[y], and not us[e]ing this libert[y] to l[i]centiousness[] and profaneness[], nor to the civil[] injury[] or outward disturb[]ance of others, any law[], statute, or clause therein conta[i]ned, or to be[] conta[i]ned, usage or custom[] of this realm[], to the contrary hereof, in any wise notwithstanding.

CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, VOL. VI, 3212–13 (Francis Newton Thorpe ed., 1906, Scholarly Press 1909).

¹²² Patient Protection and Affordable care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

¹²³ Nat’l Fed’n of Indep. Bus. V. Sebelius, 132 S. Ct. 2566, 2600 (2012). For an early commentary on this case, see Timothy P. O’Neill, *Harlan on My Mind: Chief Justice Roberts and the Affordable Health Care Act*, 3 CAL. L. REV. CIR. 170 (2012).

regulations¹²⁴ promulgated pursuant to the ACA obligate religious employers to provide reproductive-health or preventive services.¹²⁵

It is certainly difficult to disagree with the well-intended broad, if not utopian, purpose behind the ACA¹²⁶ to provide affordable health care to all individuals. Still, reducing costs may be a dubious proposition at best. President Obama's assertion in the 2013 State of the Union Address claims that the ACA will reduce health care costs¹²⁷ notwithstanding a recent contrary report issued by the nonpartisan Congressional Budget Office, a discrepancy unreported on by the media.¹²⁸

Turning specifically to the ACA's contraceptive mandates, supporters, such as Secretary Sebelius of the United States Department of Health and Human Services, maintain that what is being required is nothing new.¹²⁹ If anything, an explanatory preface contends that the application of the ACA is "consistent with the laws in a majority of states which already require contraception coverage in health plans, and includes the exemption in the interim final rule allowing certain religious organizations not to

¹²⁴ 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, 8725 (Feb. 15, 2012) (to be codified at 26 CFR §54; adopting the prior interim rule, 76 Fed. Reg. 46,621, 46,621 (Aug. 3, 2011)).

¹²⁵ For the official news release at which these interim final rules were made public, see Press Release, U.S. Dept. of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), available at www.hhs.gov/news/press/2012pres/01/20120120a.html.

¹²⁶ See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8456 (Feb. 6, 2013) (discussing of the rationale behind the ACA).

¹²⁷ Pres. Barack Obama, 2013 State of the Union Address (Feb. 13, 2013) in N.Y. TIMES, Feb. 12, 2013 ("Already, the Affordable Care Act is helping to slow the growth of health care costs."). *Contra* Mark Trumbull, *State of the Union 101: Has Obamacare Really Slowed Rise of Health Costs? The President's State of the Union Claim That Obamacare has Slowed the Rise of Health Costs Misses the Fact that Key Provisions Don't Kick in Until 2014 and That Slower Spending is Related to a Weak Economy*, CHRISTIAN SCI. MONITOR, Feb. 13, 2013.

¹²⁸ This report indicates that health costs continue to rise rather than decrease in the wake of the enactment of the ACA as the growth in this form of discretionary federal spending exceeds all other governmental expenditures. CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2013 TO 2023 1 (Feb. 2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43907-BudgetOutlook.pdf>; see also CONGRESSIONAL BUDGET OFFICE, CBO'S FEBRUARY 2013 ESTIMATE OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON HEALTH INSURANCE COVERAGE (Feb. 2013), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900_ACAInsuranceCoverageEffects.pdf. For a discussion of cost issues under the ACA, see Merrill Matthews & Mark E. Litow, *ObamaCare's Health-Insurance Sticker Shock: Thanks to Mandates That Take Effect in 2014, Premiums in Individual Markets Will Shoot up. Some may Double.*, WALL ST. J. ONLINE (Jan. 13, 2013), <http://online.wsj.com/article/SB10001424127887323936804578227890968100984.html>. Matthews and Litow explained the reason for increased health costs:

Health-insurance premiums have been rising—and consumers will experience another series of price shocks later this year when some see their premiums skyrocket thanks to the Affordable Care Act, aka ObamaCare. The reason: The congressional Democrats who crafted the legislation ignored virtually every actuarial principle governing rational insurance pricing. Premiums will soon reflect that disregard—indeed, premiums are already reflecting it.

Id.

¹²⁹ Press Release, U.S. Dept. of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), available at www.hhs.gov/news/press/2012pres/01/20120120a.html.

provide contraception coverage.”¹³⁰ This rhetoric aside, it is inexplicable why the revised regulations are so tone deaf when it comes to matters of religious freedom, particularly in light of the history of the conscience exemption.

The authors of the health care regulations ignored a lengthy history of respect for, and federal deference to, religious freedom as reflected in *Hosanna-Tabor* and other litigation at the Supreme Court.¹³¹ Amid considerable controversy, on February 1, 2013, the Obama Administration purportedly made changes to the original narrow definitions in the ACA and its accompanying regulations¹³² which granted conscience exemptions,¹³³ referred to as safe harbors,¹³⁴ only to houses of worship and monastic communities.¹³⁵

Officials at religiously affiliated educational institutions, hospitals, charities, and private employers, are denied conscience exceptions even under the revised regulations.¹³⁶ As a result, most religious employers must

¹³⁰ *Id.*

¹³¹ See *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 506–07 (1979) (refusing to extend the authority of the National Labor Relations Board to a dispute over collective bargaining in a Roman Catholic high school); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335–36 (1987) (recognizing the right of religious employers to select who is most qualified to work in their institutions and help to advance their missions).

¹³² See *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8456 (Feb. 6, 2013) (discussing the rationale behind the ACA).

¹³³ See generally DEPT. OF HEALTH AND HUMAN SERVS., GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING UNDER SECTION 2713 OF THE PUBLIC HEALTH SERVICE ACT, SECTION 715(A)(1) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND SECTION 9815(A)(1) OF THE INTERNAL REVENUE CODE (Aug. 15, 2012), available at <http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf> (detailing the safe harbor conscience exception). Note 1 of the Guidance states that, “[t]his bulletin was originally issued on February 10, 2012, to describe the temporary enforcement safe harbor. In reissuing this bulletin, CMS is not changing the February 10 policy; it is only clarifying three points” relating to these exceptions as applied to non-profit organizations. *Id.*

¹³⁴ In an ad hoc case, the government and a pro-life organization of Roman Catholic priests stipulated that the latter is entitled to a safe harbor. Stipulation of the Parties at ¶¶ 3–4, *Priests for Life v. Sebelius*, No. 1:12-cv-00753-FB-RER (E.D.N.Y. Dec. 21, 2012), available at <http://www.americanfreedomlawcenter.org/uploads/caseapps/de8a250dc76dd16941a32d184af0b75ae55fcb15.pdf>.

¹³⁵ According to the original regulation, “religious employers” were exempt from the contraceptive coverage mandate if they meet all of the following characteristics:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B).

¹³⁶ See e.g., proposed 45 C.F.R. § 147.131:

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under §147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such

provide female employees with preventive care and screenings for sterilizations¹³⁷ in addition to the use of abortion-inducing drugs known as abortifacients—drugs that are not contraceptive in nature as they cause post-conception abortions—as well as contraceptives along with “counseling” (that critics fear may promote these practices)¹³⁸ without imposing any cost-sharing requirements on plan beneficiaries.¹³⁹

Supporters of religious freedom who are critical of the health care mandates, most notably the United States Conference of Catholic Bishops,¹⁴⁰ view the proposed new regulations¹⁴¹ as little more than a

guidelines with respect to a group health plan established or maintained by a religious employer . . . with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a “religious employer” is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended.

(b) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

- (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under §147.130(a)(1)(iv) on account of religious objections.
- (2) The organization is organized and operates as a nonprofit entity.
- (3) The organization holds itself out as a religious organization.
- (4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services, for each plan year to which the accommodation is to apply, executed by a person authorized to make the certification on behalf of the organization, indicating that the organization satisfies the criteria in paragraphs (b)(1) through (3) of this section, and, specifying those contraceptive services for which the organization will not establish, maintain, administer, or fund coverage, and makes such certification available for examination upon request.

Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets, 78 Fed. Reg. 8474, 8474–75 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.131). In his response to the Administration’s new definition of an exempt “religious employer,” Archbishop Lori argues that the briefer description “maintains the same unacceptable division between places of worship, and religious organizations that focus on putting faith into action by serving the needy.” Letter from Archbishop William E. Lori, Chairman, USCCB Ad Hoc Comm. for Religious Liberty to 112th Cong. (Feb. 15, 2013), *available at* www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf.

¹³⁷ See Grace-Marie Turner, *No End To ObamaCare’s Hostility Toward Religion: Despite Some Changes, Obamacare Still Violates Religious Rights*, INVESTORS BUS. DAILY, Feb. 12, 2013 at A13 (“[T]he cost of sterilization surgery can be \$8,000 or more.”).

¹³⁸ See *Women’s Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women’s Health and Well-Being*, HEALTH RES. AND SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Sept. 30, 2013); *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456–01, 8458 (Feb. 6, 2013).

¹³⁹ 42 U.S.C. § 300gg–13(a)(4) (Supp. V 2011).

¹⁴⁰ *HHS Proposal Falls Short in Meeting Church Concerns; Bishops Look Forward to Addressing Issues with Administration* (Feb. 7, 2013), UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/news/2013/13-037.cfm>. On February 15, 2013, Most Reverend William E. Lori, Archbishop of Baltimore Chairman of the Bishops’ Ad Hoc Committee for Religious Liberty, sent a letter to Congress urging members to enact conscience protections to safeguard creeping encroachments against freedom of religion, especially as exemplified in the health care mandate. Letter from Archbishop William E. Lori, Chairman, USCCB Ad Hoc Comm. for Religious Liberty to 112th Cong. (Feb. 15, 2013), *available at* www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Letter-from-Archbishop-Lori-to-Congress.pdf. Otherwise, he wrote of his “fear that the federal

rewording of the original language, putting “old wine into new skins,”¹⁴² to use a Biblical metaphor. These opponents of the ACA concede that, while the revised regulations would expand the exemption mostly to cover religious organization that are closely affiliated with single religious congregations, they do little to safeguard Catholic and other religiously affiliated universities, schools, hospitals, and charitable organizations, not to mention that they leave the conscience rights of individual employers unprotected.¹⁴³

Concomitantly, officials such as Secretary Sebelius who are responsible for the recent tweaking of the regulations believe that “[i]ssuers generally would find that providing such contraceptive coverage is cost neutral because they would be insuring the same set of individuals under both policies and would experience lower costs from improvements in women’s health and fewer childbirths,” by requiring insurance companies to provide the benefits without receiving premiums or co-payments from patients.¹⁴⁴ Still, what the regulations apparently refuse to recognize is that insofar as insurance companies will have no option other than passing such costs along in premiums, religious institutions still run the risk of being forced to violate their values by having to pay for such objectionable costs while private employers are not even in the equation.

Proponents of the health care mandate root their position in part in an argument originating largely in *Griswold v. Connecticut*, wherein the Supreme Court struck down a state law forbidding the sale of contraceptives on the basis that it violated the marital right to privacy.¹⁴⁵ According to the Court, “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”¹⁴⁶ The Court then applied the same penumbra in a previously undiscovered constitutional right to abortion in *Roe v. Wade*.¹⁴⁷ These mandate supporters, including, most notably, President Obama and Secretary Sebelius, herself putatively a Roman Catholic, are apparently of the opinion that the right to what is

government’s respect for believers and people of conscience no longer measures up to the treatment Americans have a right to expect from their elected representatives.” *Id.*

¹⁴¹ Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43,330 (July 23, 2010) (to be codified at 29 C.F.R. Pt. 2590).

¹⁴² See *Matthew* 9:17 (“Neither is new wine put into old wineskins”); *Mark* 2:22 (“And no one puts new wine into old wineskins”); and *Luke* 5:37–39 (“And no one puts new wine into old wineskins; otherwise the new wine the new wine will burst the skins and will be spilled, and the skins will be destroyed. But new wine must be put into fresh wineskins. And no one after drinking old wine desires new wine, but says, ‘The old is good.’”).

¹⁴³ See Turner, *supra* note 137.

¹⁴⁴ Women’s Preventive Services Coverage and Religious Organizations, CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, <http://ccio.cms.gov/resources/factsheets/womens-preven-02012013> (last visited Jan. 14, 2014).

¹⁴⁵ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

¹⁴⁶ *Id.* at 483.

¹⁴⁷ *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

euphemistically referred to as “reproductive services” trumps religious freedom, the history of accommodation for people of faith in the United States notwithstanding.

The position of the supporters of the mandate is ultimately untenable because it fails to account for the deep tradition of religious freedom that is embedded in the fabric of American society and values. As eloquently stated by Cardinal Timothy Dolan of New York, the federal health care law mandate offers:

[S]econd-class status to our first-class institutions in Catholic health care, Catholic education and Catholic charities. The Department of Health and Human Services offers what it calls an 'accommodation,' rather than accepting the fact that these ministries are integral to our church and worthy of the same exemption as our Catholic churches.¹⁴⁸

Archbishop Charles Chaput of Philadelphia added that “[t]he White House has made no concessions to the religious conscience claims of private businesses, and the whole spirit of the 'compromise' is minimalist.”¹⁴⁹

The upshot of the health care reform mandate, and conceding that judicial developments are moving rapidly, is that employers, regardless of whether they are religious or operated by secular individuals of faith, face an existential threat to the free exercise of religion, leaving them with essentially three equally unpalatable options. First, employers who believe that having to pay for birth control medications, abortifacients, and counseling about abortion are immoral, face the prospect of being asked to cooperate with the grave evils associated with the birth control dimensions of the ACA by having to violate their deeply held religious beliefs and consciences¹⁵⁰ by having to fund these items for their employees.¹⁵¹ Second, employers can face the crushing financial obligations in the form of punitive measures including fines of \$100.00 per day per employee¹⁵² and annual tax assessments for noncompliance with the requirement of providing health insurance to employees,¹⁵³ actions which may ultimately lead to their

¹⁴⁸ Robert Pear, *Bishops Reject Birth Control Compromise*, N.Y. TIMES, Feb. 8, 2013 at A14.

¹⁴⁹ *Id.*

¹⁵⁰ For a state case concerning a conscience exception, see *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1175–76 (Ill. App. Ct. 2012) (holding that pharmacies were not required to exhaust administrative remedies by seeking a variance and whether pharmacies can be compelled to violate their religious beliefs is a question of law).

¹⁵¹ Press Release, U.S. Dept. of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), available at www.hhs.gov/news/press/2012pres/01/20120120a.html.

¹⁵² 29 U.S.C. § 1132(a) (2006) (civil enforcement actions by the Department of Labor and insurance plan participants); 26 U.S.C. §§ 4980D (b) (2006) (penalty of \$100 per day per employee for employers failing to comply with the coverage provisions of the HCA).

¹⁵³ 26 U.S.C. § 4980H (Supp. IV 2010).

closures and the discontinuation of the services that they offer. If the federal government can require these employers to act against their beliefs, then what is to stop officials from further trammeling American religious freedom by requiring, for example, Jewish butchers to sell meats that are not Kosher¹⁵⁴ or Muslim shopkeepers to sell food products that are not Halal? Third, employers can simply discontinue providing health insurance to employees.¹⁵⁵

Not surprisingly, opposition to the health mandate grows. To date, there are 91 cases and over 300 plaintiffs representing hospitals, universities, businesses, schools, and people all speaking with one voice to affirm the freedom of religion guaranteed in the Constitution.¹⁵⁶ These suits, which emerged in both federal and state¹⁵⁷ courts, involved not-for-profit religious institutions¹⁵⁸ as well as private individuals.¹⁵⁹ Further, private business owners have succeeded significantly more often than not, having

¹⁵⁴ In another question involving religious rituals, a federal trial court in New York, in a lengthy opinion, rejected the claim that the plan requiring informed parental consent for a form of circumcision known as oral suction infringed on the religious freedom of an ultra-Orthodox Jewish sect. *Cent. Rabbinical Congr. of the USA & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 12 Civ. 7590 (NRB), 2013 WL 126399, at *1 (S.D.N.Y. Jan. 10, 2013). The parental consent plan, introduced by the New York City Department of Health, was designed to prevent the risk of transmission of herpes insofar as the individuals who performed the circumcisions used their mouths to remove blood from the incisions. *Id.* For additional background on this controversy, see Sharon Otterman, *Consent Rule May Proceed for a Circumcision Ritual*, N.Y. TIMES, Jan. 11, 2013, at A20; Sharon Otterman, *Board Votes to Regulate Circumcision, Citing Risks*, N.Y. TIMES, Sept. 14, 2012, at A24 (reporting that two children who were circumcised via this method contracted, and died from, herpes-related complications while another two suffered brain damage).

¹⁵⁵ See, e.g., Rich Kirchen, *Survey: More Milwaukee-area Small biz see Dropping Health Plans With Reform*, BUS. J. MILWAUKEE, Nov. 1, 2012, available at 2012 WLNR 23351249 ("Approximately one in four Milwaukee-area employers with between 20 and 99 employees say they are either 'likely' or 'very likely' to drop their company's health plan in 2014 and let employees purchase individual insurance through new health-benefits exchanges . . .").

¹⁵⁶ *HHS Mandate Information Central*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral/> (last visited Nov. 5, 2013) (Adding that thus far 46 for-profit lawsuits have been filed over the HHS mandate. 33 have secured injunctive relief against the mandate, only six have been denied relief, one dismissed on procedural grounds, and one case is pending review. Of the 39 cases with rulings touching on the merits, the current scorecard is 33-6. 45 non-profit lawsuits have been filed against Secretary Sebelius over the HHS mandate. This includes lawsuits by religious organizations such as hospitals, charities, religious colleges, and Catholic dioceses. To date, 19 injunctions have been granted, and only 1 denied).

¹⁵⁷ See *Mo. Ins. Coalition v. Huff*, No. 4:12CV02354AGF, 2012 WL 6681688 (E.D. Mo. Dec. 21, 2012) (granting a temporary restraining order enjoining a state law requiring insurance companies to offer and issue policies excluding coverage for contraceptives where such coverage is contrary to the moral, ethical, or religious beliefs or tenets of the persons or entities seeking insurance on the basis that it was pre-empted by the federal health care mandates).

¹⁵⁸ For a case granting limited relief to a religious institution, see *Wheaton College v. Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012) (holding an appeal in abeyance pending further action by the administration). Although not named in this order, the case was joined by officials at a Catholic College in North Carolina, *Belmont Abbey College v. Sebelius*, 1:12-cv-01169-ESH (D.C. Cir. Sept. 20, 2012), <http://www.becketfund.org/wp-content/uploads/2012/09/Scan0052.jpg> (granting a motion for expedited consideration). For a case refusing to dismiss a challenge to the ACA based on the grounds of ripeness and standing, see *Roman Catholic Diocese of Forth Worth v. Sebelius*, CA No. 4:12-CV-314-Y (N.D. Tex. Jan. 31, 2013), <http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/order-denying-motion-dismiss-roman-catholic-diocese-forth-worth-v-hhs.pdf>.

¹⁵⁹ See *Kinder v. Geithner*, 695 F.3d 772, 778 (8th Cir. 2012) (rejecting a challenge to the Act filed by private individuals).

prevailed, at least temporarily, in most,¹⁶⁰ but not all, of the fourteen¹⁶¹ cases in which they sought injunctions alleging that compliance with the health care mandate violated their rights to the free exercise of religion under the First Amendment and the Religious Freedom Restoration Act (RFRA).¹⁶²

Under the RFRA, the United States “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁶³ In light of this statutory language, it is difficult to imagine that the regulations can survive judicial scrutiny based on how they have an impact on the free exercise of religion. To the extent that the impact of the ACA is hardly the least restrictive means possible for ensuring that birth control pills, for example, be made available to all women despite their minimal cost,¹⁶⁴ this is more a battle over whether the government can impose its will over religious organizations and employers of faith than it is about health care. If *Hosanna-Tabor* is to serve as any kind of precedent, albeit in a different

¹⁶⁰ For cases granting injunctions to private employers, see *Korte v. Sebelius*, No. 12 3841, 2012 WL 6757353, at *5 (7th Cir. 2012); *Grote v. Sebelius*, No. 13 1077, 2013 WL 362725, at *4 (7th Cir. 2013); *O’Brien v. United States Dep’t of Health and Human Servs.*, No. 12-3357, 2012 U.S. App. LEXIS 26633, at *4 (8th Cir. Nov. 28, 2012) (granting a stay pending an appeal); *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497, at *10 (8th Cir. Feb. 1, 2013); *Triune Health Group v. United States Dep’t of Health & Human Servs.*, 12 C 6756 (N.D. Ill. 2013) <http://www.becketfund.org/wp-content/uploads/2012/05/Triune-DCT-Doc-49-Order-Granting-Prelim-Injunction-1-3-13.pdf>; *American Pulverizer Co. v. United States Dep’t of Health and Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316, at *5 (W.D. Mo. 2012); *Legatus v. Sebelius*, No. 12 12061, 2012 WL 5359630, at *15 (E.D. Mich. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012); *Monaghan v. Sebelius*, No. 12 15488, 2012 WL 6738476, at *8 (E.D. Mich. 2012); *Sharpe Holdings, Inc. v. United States Dep’t of Health and Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *7 (N.D. Mo. 2012). For a case involving a not-for-profit religious publisher, see *Tyndale House Publishers, Inc. v. Sebelius*, No. 12 1635(RBW), 2012 WL 5817323, at *20 (D.D.C. 2012); see also *supra* note 156.

¹⁶¹ See *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12 6744, 2013 WL 140110, at *18 (E.D. Pa. 2013) (refusing to grant injunction to private for-profit employer); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293–96 (W.D. Okla. 2012) (rejecting the change that the mandate imposes a substantial burden on the firm’s exercise of religion even though non-compliance subjects employers to massive financial penalties), *appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (rejecting the charge that the mandate imposes a substantial burden on the firm’s exercise of religion even though non-compliance subjects employers to massive financial penalties), *appeal denied*, 133 S. Ct. 641 (2012); *Autocam Corp. v. Sebelius*, No. 12-2673, at 3 (6th Cir. Dec. 28, 2012), *available at* <http://www.becketfund.org/wp-content/uploads/2012/05/order-denying-injunctionAutocam-CA6.pdf> (denying the motion for an injunction pending appeal). A petition for certiorari was, however, recently filed in the United States Supreme Court, seeking review of the Sixth Circuit’s decision in *Autocam Corp.* See Howard Friedman, *Cert. Filed in Contraceptive Mandate Case*, RELIGION CLAUSE (Oct. 15, 2013, 12:46 PM), <http://religionclause.blogspot.com/2013/10/cert-filed-in-contraceptive-mandate-case.html>.

¹⁶² 42 U.S.C. §§ 2000bb–2000cc–4 (2006).

¹⁶³ 42 U.S.C. § 2000bb-1(b).

¹⁶⁴ See, e.g., Turner, *supra* note 137 (“Proponents of the mandate argued that birth control pills can cost several thousand dollars a year (even though a one-month prescription can be filled for \$9 at Walmart).”); Mark Zimmerman, *Catholic Leaders say Lawsuit Aims to Protect Religious Freedom*, CATH. STANDARD, May 22, 2012, *available at* 2012 WLNR 10837017 (“noting that with a prescription, birth control pills are readily available at major retailers for \$9 a month, and at no cost from various health care clinics.”).

factual context, the Court emphatically rejected the EEOC's attempt to impose its will on religious institutions.

In light of the unsuccessful challenge to the constitutionality of the entire ACA, the outcome of the suits disputing the health care regulations remains to be seen. Moreover, as the initial round of litigation is progressing, the battle over religious freedom is intensifying. In the first case to date to reach the Court, *Hobby Lobby Stores v. Sebelius*, on an interlocutory appeal from the Tenth Circuit, Justice Sotomayor, a President Obama appointee, refused to enjoin the enforcement of the regulations promulgated pursuant to the health care mandate.¹⁶⁵ The suit was filed by a for-profit employer with Christian ownership alleging that its sincerely-held religious beliefs, pursuant to the First Amendment and the RFRA, were violated by having to provide insurance coverage for specified drugs and devices designed to cause post-conception abortions.¹⁶⁶

On further review, though, the Tenth Circuit reversed in favor of Hobby Lobby.¹⁶⁷ In recognizing that the corporation was a "person" within the meaning of the RFRA and that it had protected rights under the Free Exercise Clause, the court was satisfied that its legal team demonstrated the substantial likelihood of success on the merits of its claims that the mandate violated its rights under the RFRA by placing a substantial burden on its right to exercise religious freedom. The federal government quickly filed a certiorari petition which the Supreme Court accepted, challenging the outcome in *Hobby Lobby*.¹⁶⁸

In *Hobby Lobby* the Tenth Circuit thus joined the District of Columbia¹⁶⁹ and the Seventh Circuit¹⁷⁰ to the contrary in granting orders to enjoin enforcement of the law. On the other hand, the Third¹⁷¹ and Sixth¹⁷² Circuits refused to enjoin the enforcement of the mandate. Given this split among federal appellate courts, this dispute is headed to a showdown at the Supreme Court, which will either confirm the centrality of religious freedom

¹⁶⁵ *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012).

¹⁶⁶ *Id.* at 642.

¹⁶⁷ *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1121–22 (10th Cir. 2013), *remanded to* 2013 WL 3869832 (W.D. Okla. 2013), *cert. granted*, 134 S. Ct. 678.

¹⁶⁸ *Id.*

¹⁶⁹ *Gilardi v. United States Dep't of Health and Human Servs.*, 733 F.3d 1208, 1224 (allowing the claims of the owners of a for-profit small business who were Catholic to proceed on the ground that they were likely to succeed on the merits of their RFRA claim to the ACA's contraceptive coverage mandate, but rejecting the allegations of the business corporations). The corporations quickly filed a petition for certiorari. Petition for Writ of Certiorari at 1, *Gilardi v. United States Dep't. of Health and Human Servs.*, No. 13-567, <http://media.aclj.org/pdf/gilardi-petition-for-certiorari-filed.pdf>; *see also* *Wheaton College v. Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012).

¹⁷⁰ *See Korte v. Sebelius*, No. 12 3841, 2012 WL 6757353, at *1 (7th Cir. Dec. 28, 2012) (granting a preliminary injunction two small for-profit businesses and their owners, finding that the organizations were persons qualified to raise the claims that the ACA violated their right to religious freedom).

¹⁷¹ *Conestoga Wood Specialties Corp. v. Sec. of United States Dept. of Health and Human Servs.* 724 F.3d 377, 389 (3rd Cir. 2013).

¹⁷² *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 633, (6th Cir. 2013).

and conscience rights in the United States or relegate believers to the margins, ignoring more than two hundred years of history.

The impact of the dispute involving Hobby Lobby, a retail store, on religious freedom, not to mention general respect for the law as the plaintiffs act the auspices of civil disobedience, may turn out to be all the more significant since the owners have engaged in what can be described as a game of high stakes poker. Put another way, Hobby Lobby owners upped the ante considerably when an attorney representing the company and a related corporation announced almost immediately that organizational officials would not comply with the health mandate, thereby risking paying up to \$1.3 million per day as of January 1, 2013,¹⁷³ a fine that has yet to materialize.

On one side of the battle brewing over religious freedom, the members of the American Catholic hierarchy, as a vanguard of faith-based organizations, are attempting to counter policies they believe to be harmful to religious liberty, however broadly this notion is defined.¹⁷⁴ The Bishops fear that the federal mandates threaten the missions and identities¹⁷⁵ of a multitude of faith-based institutions, especially those that are Roman Catholic, such as hospitals¹⁷⁶ and schools,¹⁷⁷ which offer great benefit for the common good. From the perspective of the Catholic Church, these disputes are arising at the very moment that the American judiciary appears to have fallen prey to the “dictatorship of relativism” of which Pope Benedict XVI warned.¹⁷⁸

The other side of the battle over this issue can be described as the

¹⁷³ Don Mecoy, *Retailer is Suing to Block Federal Health Care law Provision on Contraception Coverage*, THE DAILY OKLAHOMAN, Dec. 28, 2012, at 1A.

¹⁷⁴ *Bishops Urge Catholics to Pray for Life, Marriage, Religious Liberty*, U.S. CONF. OF CATH. BISHOPS (Dec. 6, 2012), <http://www.usccb.org/news/2012/12-212.cfm> (last visited Jan. 14, 2014).

¹⁷⁵ This issue remains in the forefront for Catholic institutions in particular. See Libby A. Nelson, *Catholic Colleges Consider Role of Trustees*, INSIDE HIGHER EDUC. (Jan. 30, 2012, 3:00AM), <http://www.insidehighered.com/news/2012/01/30/catholic-colleges-consider-role-trustees> (reporting on the January 29, 2012, comments of Rev. Joseph P. McFadden, Bishop of Harrisburg, Pa., chair of the United States Conference of Catholic Bishops' Committee on Catholic Education, that “It’s time for the laity [as members of boards of trustees] to step up to ensure that the Catholic faith continues into the third millennium[.]”).

¹⁷⁶ See *Catholic Health Care and Social Services*, U.S. CONF. OF CATH. BISHOPS (2012), <http://www.usccb.org/about/media-relations/statistics/health-care-social-service.cfm> (“629 Catholic hospitals account for 12.6% of community hospitals in the United States; 88,519,295 patients are assisted annually[.] [o]ne in six patients in the U.S. is cared for in a Catholic hospital[.] [t]here were nearly 19 million emergency room visits and more than 100 million outpatient visits in Catholic hospitals during a one-year period[.] [and] [m]ore than 5.5 million patients are admitted to Catholic hospitals annually . . .”).

¹⁷⁷ According to the most recent data available from the Private School Universe Survey, 1,718,351 of the 4,700,119 children who attend non-public schools in the United States are enrolled in catholic elementary and secondary schools. *Private School Universe Survey*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/surveys/pss/tables/table_2009_14.asp (last visited Jan. 14, 2014).

¹⁷⁸ Adelle M. Banks, *Evangelicals Hear Their Moral Language*, SUN HERALD, April 4, 2005, at B1, available at 2005 WLNR 22885649 (reporting that “[t]he day before Roman Catholic Cardinal Joseph Ratzinger became Pope Benedict XVI, he declared in a public Mass that a ‘dictatorship of relativism’ threatens the absolute truth claims of the church.”).

disingenuousness on the part of opponents of the Catholic Church. These media critics, who long failed to report that suits had been filed, arguably mischaracterized litigation challenging the mandate by alleging that “[t]he real threat to religious liberty comes from the effort to impose one church’s doctrine on everyone.”¹⁷⁹ Yet, the health care mandate is little more than the next skirmish in a continuing battle royale about whether sincerely and long held Judeo-Christian values are to be permitted to remain in the mainstream or whether they will be pushed to the periphery, only to be replaced by the relativistic goals of activist groups.

As evidence of the intensity that the battle over religious freedom may take on, at least one opponent filed suit against the Catholic Church, in particular,¹⁸⁰ in an attempt to deny it aid because of its pro-life positions with regard to abortion.¹⁸¹ Still, other opponents have sought to have the Catholic Church classified as a hate group in light of its stance with regard to homosexuality.¹⁸² The threat of governmental over-reaching through such statutes and regulations with the potential to force many faith-based services out of existence runs the risk of standing the constitutional guarantees of religious freedom, long-developed by the American judiciary, on their proverbial ears.

2. Same-Sex Unions

A second category of emerging threats to religious identity are surfacing as proponents of same-sex unions,¹⁸³ some of whom are

¹⁷⁹ Editorial, *The Politics of Religion*, N.Y. TIMES, May 28, 2012 at A16, available at 2012 WLNR 11193583.

¹⁸⁰ The Catholic Church is by no means alone in being singled out for criticism for its beliefs. For instance, the Southern Poverty Law Center has apparently demonstrated broadly anti-Christian attitudes without regard to particular denominations within Christianity in light of its difference of opinion with regard to a variety of issues. See Matt Barber, *Bloody Hands: The Southern Poverty Law Center*, TOWNHALL.COM (Feb. 11, 2013), <http://townhall.com/columnists/mattbarber/2013/02/11/bloody-hands-the-southern-poverty-law-center-n1509321/page/full/> (“‘The Southern Poverty Law Center has a long history of maliciously slandering pro-family groups with language and labels that incite hatred and undermine civil discourse,’ said Mat Staver, founder and chairman of Liberty Counsel.”); see also Katie Yoder, *Networks Ignore FRC Shooter’s Use of SPLC ‘Hate Map’*, MEDIA RESEARCH CENTER (Feb. 7, 2013, 3:47 PM), <http://www.mrc.org/articles/networks-ignore-frc-shooters-use-splc-hate-map> (detailing how the mainstream media failed to report that the map a man used to locate the headquarters of the Family Research Center in Washington, D.C., where he shot and injured a guard, was created at the SPLC; the map also identified the locations of the offices of groups with which the SPLC disagreed); Charlotte Allen, *King of Fearmongers: Morris Dees and the Southern Poverty Law Center, Scaring Donors Since 1971*, THE WEEKLY STANDARD, April 15, 2013, 18–25.

¹⁸¹ In re United States Catholic Conference, 885 F.2d 1020, 1031 (2d Cir. 1989); Abortion Rights Mobilization, Inc. v. United States Catholic Conference, 495 U.S. 918 (1990) (affirming that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

¹⁸² See *An Assault on Freedom of Religion: Discrimination is Wrong, Even Against Traditional Christian Beliefs*, WASH. TIMES, Jan. 23, 2013 at B02; see also Michelle Bauman, *White House Petitioned to Label Catholic Church a ‘Hate Group’*, CATHOLIC NEWS AGENCY (Jan. 4, 2013), <http://www.catholicnewsagency.com/news/white-house-petitioned-to-label-catholic-church-a-hate-group/>.

¹⁸³ For representative commentary in support of same sex unions from a faith-based perspective, see, e.g., Jeremiah H. Russell, *The Religious Liberty Argument for Same-Sex Marriage and its Effects*

vociferous,¹⁸⁴ and call for greater public recognition of and accommodation for homosexuality.¹⁸⁵ Since the Supreme Court has invalidated the Federal Defense of Marriage Act¹⁸⁶ and California's Proposition 8,¹⁸⁷ the protestations of some of its supporters to the contrary notwithstanding, the impact of these decisions may have far-reaching consequences for religious and secular organizations. To this end, it is conceivable that religious organizations, specifically, run the risk of having their rights trampled if they are required to recognize and accommodate these relationships despite their deeply and long-held beliefs that this lifestyle is inconsistent with their teachings.¹⁸⁸

Upon Legal Recognition, 7 RUTGERS J.L. & RELIGION 4 (2005); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995).

¹⁸⁴ While conceding that protesters such as these undoubtedly represent a small fringe minority, an egregious example of antipathy for Christian, specifically Roman Catholic, beliefs and sensitivities, occurred on December 10, 1989. Mike Dorning, *Religion, Gays, Politics Turn Parade Into Battle*, CHI. TRIB. 1 (Mar. 15, 1993), available at 1993 WLNR 4062014. Members of the AIDS-awareness group ACT-UP chained themselves to pews in St. Patrick's Cathedral and shouted down Cardinal O'Connor at a Sunday Mass before others "received" the Eucharist but spat it out on to the ground, desecrating the Sacrament by stepping on the consecrated hosts. *Id.* One can only wonder what kind of outrage this behavior might have stirred had it occurred in a house of worship of some other faith.

¹⁸⁵ For commentary on how same sex unions might impact education, see Charles J. Russo, *Respect for me but not for Thee: Reflections on the Impact of Same-Sex Marriage on Education*, 2011 BYU EDUC. & L.J. 471 (2011); Richard S. Myers, *Same-Sex Marriage, Education, and Parental Rights*, 2011 BYU EDUC. & L.J. 303 (2011).

¹⁸⁶ See *United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013) (finding the Act unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment by defining marriage as a union of one man and one woman as husband and wife and that it operated to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages, thereby placing a stigma on all who have entered into same-sex unions).

¹⁸⁷ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667–68 (2013) (striking down the voter-enacted state constitutional amendment defining a valid marriage as one between a man and a woman on the ground that its proponents lacked standing to sue), *on remand*, 725 F.3d 1140 (9th Cir. 2013) (dismissing the claim for lack of jurisdiction).

¹⁸⁸ This article, which focuses more on the impact of same sex relationships than its legal status, adopts the position consistent with the teachings of the Roman Catholic and other mainline Christian Churches through the centuries in accepting the Augustinian notion of "hat[ing] the sin but lov[ing] the sinner," ST. AUGUSTINE, CITY OF GOD 304 (Gerald G. Walsh, Demetrius B. Zema, Grace Monahan, Daniel Honan, trans., 1958). In other words, while this article recognizes that there is a no distinction between people as individuals and what they do in the privacy of their own homes, the author refuses to treat unions between two members of the same sex as being equal to marriage between heterosexual couples. Although it does not address same sex relationships directly, according to the Catechism of the Catholic Church ("The Catechism"):

Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. *Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered.'* They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved."

THE CATECHISM OF THE CATHOLIC CHURCH ¶ 2357(2d ed.) (emphasis added, internal citations omitted), available at <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/epub/index.cfm>.

Although not expressly repudiating same-sex unions, The Catechism makes it clear that marriage is a union of heterosexuals:

At best, it is disingenuous to claim that the disputes underlying some of the litigation discussed herein are about equality and have nothing to do with values. If anything, disagreements about topics such as same-sex unions, whether on college campuses, in elementary and secondary schools, or as they affect the religious freedom of churches and other religious organizations,¹⁸⁹ are every bit as value-laden as seeking to teach about practicing Christianity in public schools. The third section of this discussion, on individual desires versus Church teachings, raises additional questions, hypothetical and real, related to what might occur, and is happening, on issues such as same-sex unions and whether same-sex couples may enroll their children in faith-based schools.

As a precursor to the discussion in the next section, it is important to note that comments made herein are not intended as personal criticism of supporters of what is referred to as “same-sex marriage.” Rather, since there seems to be no reason to modify marriage as it has been lived through the ages as the basis of civil society, from the perspective of the mainline Judeo-Christian tradition, the author respects those whose ideas differ, but disagrees with their point of view. Further, consistent with the views of proponents of same-sex relationships, the author believes that while all persons are, of course, entitled to full respect and human dignity regardless of their sexual orientation, it is something altogether different to espouse the view that relationships between two persons of the same sex should be accorded the same legal status of marriage, particularly since doing so might have a significant impact on the status of how churches and other religious bodies can exercise their rights to religious freedom since such changes may leave them vulnerable to charges of discrimination.

B. Organizational Autonomy

It is curious that in a society which purportedly values diversity¹⁹⁰

Holy Scripture affirms that man and woman were created for one another: ‘It is not good that the man should be alone.’ The woman, ‘flesh of his flesh,’ his equal, his nearest in all things, is given to him by God as a ‘helpmate’; she thus represents God from whom comes our help. ‘Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.’ The Lord himself shows that this signifies an unbreakable union of their two lives by recalling what the plan of the Creator had been ‘in the beginning’: ‘So they are no longer two, but one flesh.’

Id. at ¶ 1605 (emphasis added) (internal citations omitted), available at <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/epub/index.cfm>.

¹⁸⁹ For an article seeking to bridge the gap in such disputes, see Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747 (2010).

¹⁹⁰ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (declaring that insofar as diversity is a compelling governmental interest, officials at the University of Michigan Law School could use race as a factor in admissions decisions pursuant to their race conscious admissions policy since the criteria were sufficiently narrowly tailored to achieve the compelling state interest of having a racially diverse student body); for a commentary on this case, see William E. Thro & Charles J. Russo, *The Constitutionality of Racial Preferences in K-12 Education After Grutter and Gratz*, 211 EDUC. L. REP. 537 (2006).

(at least in terms of such personal characteristics as race, gender, ethnicity, and sexual orientation), many in public life, especially on higher education campuses, are increasingly intolerant of a diversity of perspectives. Many of these critics seem unaccepting of views different from their own and that do not comport with prevailing orthodoxies of the day.

As demonstrated by the Supreme Court's *CLS* opinion, it is increasingly difficult for faith-based groups on campuses, and other environments seemingly hostile to ideas which differ from the perceived politically correct norms, to preserve membership rules and values grounded in their sincerely held religious beliefs as they seek to maintain a place in the "marketplace of ideas."¹⁹¹ Unfortunately, this difficulty is true throughout public education whether in elementary and secondary schools¹⁹² or in institutions of higher learning.

Especially in higher education, challenges have arisen in groups that seek to silence opposition by employing so-called "speech codes," often labeling ideas with which they disagree as hate speech.¹⁹³ These codes can be seen as a means of censoring others, obligating those with whom the rule-makers disagree to comply with policies on issues, including the recognition of same-sex unions, and punishing groups that fail or refuse to accede to prevailing politically correct cultural norms, denying them funding and access to campus facilities.¹⁹⁴

However, the Court agreed to take up another challenge to the use of race in admissions in *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *reh'g en banc denied*, 644 F.3d 301 (5th Cir. 2011) (upholding the use of race in admissions), *cert. granted*, 132 S. Ct. 1536 (2012) (Mem). For a pre-judgment commentary on this case, see Philip T.K. Daniel & Scott Greytak, *Requiem for Affirmative Action in Higher Education: Case Analysis Leading to Fisher v. University of Texas at Austin*, 279 EDUC. L. REP. 539 (2006).

¹⁹¹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831–32 (1995). The Court applied viewpoint neutrality in holding that a policy permitting university officials to authorize payment for printing the publications of student organizations applied to a Christian journal, since its speech was protected by the First Amendment:

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Id.

¹⁹² As noted, Congress enacted the Equal Access act to combat this concern. See *supra* note 3 for a discussion of the law and related litigation.

¹⁹³ See, e.g., Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765 (2009); David Schimmel, *Are "Hate Speech" Codes Unconstitutional? An Analysis of R.A.V. v. St. Paul*, 76 EDUC. L. REP. 653 (1992).

¹⁹⁴ See generally FOUNDATION FOR INDIVIDUALS RIGHTS IN EDUCATION, <http://thefire.org/> (last visited Jan. 14, 2014) (this organization is devoted to free speech on college and university campuses).

Many critics of the Christian worldview, or, for that matter, of any perspective, apparently fail to recognize that simply remaining silent in the face of ideas or speech with which they disagree does not necessarily mean assent. In like manner, proponents of dominant perspectives ought not to be permitted to preclude others from being allowed to engage in peaceful expressions¹⁹⁵ of their differing points of view.¹⁹⁶ In this regard, the Supreme Court has protected religious speech as a subset of First Amendment free speech¹⁹⁷ along with speech that can be viewed as offensive.¹⁹⁸

In protecting religious and other forms of peaceful speech, the Supreme Court has recognized that neither individuals nor groups may be discriminated against because others disagree with what they have to say. If anything, consistent with Justice Scalia's dissenting perspective in *Lee*,¹⁹⁹ it seems fair to ask what better places exist than educational institutions, whether colleges and universities or elementary and secondary schools, the very settings purportedly open to the pursuit of knowledge and designed to allow all sides to have their say openly, freely, and without recrimination. Of course, issues dealing with group identity and leadership qualifications present a different issue.

¹⁹⁵ Absent a reasonable forecast of material and/or substantial disruption, the fact that opponents disagree with an organization's views is an insufficient basis on to which restrict groups that may be unpopular. *See, e.g.*, *East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp.2d 1166, 1197–98 (D. Utah 1999); *Straights and Gays for Equality v. Osseo Area Schs.*, 540 F.3d 911, 916 (8th Cir. 2008) (allowing clubs consisting of students who are straight and gay to meet in public schools during non-instructional hours).

¹⁹⁶ *Lee v. Weisman*, 505 U.S. 577, 637–38 (1992) (Scalia, J., dissenting) (internal citations omitted), (disagreeing with “[t]he Court's notion that a student who simply *sits* in ‘respectful silence’ during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. . . . [S]urely ‘our social conventions,’ have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . It is fanciful enough to say that ‘a reasonable dissenter,’ standing head erect in a class of bowed heads, ‘could believe that the group exercise signified her own participation or approval of it.’ It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.”).

¹⁹⁷ *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (relying on the framework of freedom of speech, indicating that insofar as over 100 registered student groups used campus facilities at the University of Missouri-Kansas City, officials created a forum for the exchange of ideas such that they could not deny a religious group access to them solely because of the content of the speech of its members); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (applying viewpoint neutrality in ruling that a public school board could not deny a religious group access to district facilities as long as they were available to other organizations); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (reasoning that a school board violated a religious club's rights to free speech by engaging in impermissible viewpoint discrimination in refusing to allow it to use school facilities for its meetings because of their religious content even though other groups could cover the same issues at their meetings albeit from secular perspectives).

¹⁹⁸ *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (affirming that insofar as the speech of church members who picketed near the funeral of a soldier who was killed in Iraq based on their desire to communicate its belief “that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military” was of public concern, it was entitled to special protection under the First Amendment).

¹⁹⁹ *Lee*, 505 U.S. at 631–46 (Scalia, J., dissenting).

A recent example of campus intolerance toward religion surfaced at Tufts University in a manner reminiscent of *CLS*, where opponents attempted to deprive a Christian group of its campus status because organizational rules require group leaders to adhere to “basic biblical truths of Christianity” and reject gay lifestyles.²⁰⁰ While university officials subsequently reversed course and allowed faith-based student groups to retain the religious requirements for their leaders,²⁰¹ there is no reason to believe that similar controversies are unlikely to continue. Only months earlier, fourteen out of thirty Christian groups at Vanderbilt University left campus over the same issue,²⁰² prompting members of Congress to ask officials to exempt faith-based organizations from the institutional “all-comers policy” on the basis that it discriminates against religious beliefs.²⁰³

In *CLS* for that matter, Justice Ginsburg’s²⁰⁴ opinion ignored the fact that there were more than sixty campus RSOs at Hastings, many of which “were and are dedicated to expressing a message.”²⁰⁵ Yet, Justice Ginsburg joined Hastings officials in misrepresenting the position of the Society and asserted that all campus groups were obligated to accept all comers, “thus making *CLS* [the Society] the only student group whose application for registration has ever been rejected.”²⁰⁶ In refusing to take seriously the Society’s concerns that individuals who disagreed with its mission might take control of the organization, Justice Ginsburg summarily dismissed this fear “as more hypothetical than real”²⁰⁷ since those opposed to the religious group failed to make such an effort up to the date when the case was litigated.²⁰⁸ Consequently, in singling out a Christian organization to be ostracized, Justice Ginsburg and the majority did not even deem it appropriate to consider the fears of the group that held the minority position on campus by applying a rule that was not imposed on any other RSO, or perhaps suggest that opponents were free to form their own organizations in

²⁰⁰ See Katherine Landergan, *Group of Evangelicals at Tufts Fights a ‘De-recognizing’ Effort*, BOS. GLOBE, Oct. 27, 2012, available at 2012 WLNR 22802278 (reporting on efforts to de-recognize an evangelical student group because opponents objected to its religious views).

²⁰¹ Peter Schworm, *Tufts Shifts Course, Grants More Leeway to Student Religious Groups*, BOS. GLOBE, Dec. 7, 2012, available at 2012 WLNR 26033344.

²⁰² Andy Sher, *Social Issues Stole the Spotlight This Year in the Tennessee Legislature*, CHATTANOOGA TIMES, May 6, 2012, available at 2012 WLNR 9587648.

²⁰³ Elizabeth Bewley, *Members of Congress Target Vanderbilt Policy*, TENNESSEAN, May 8, 2012, available at 2012 WLNR 9663350; see also *Va. Passes Ban on Campus ‘All-Comers’ Policy*, CBN NEWS (Feb. 26, 2013), <http://www.cbn.com/cbnnews/us/2013/February/Va-Passes-Ban-on-Campus-All-Comers-Policy/> (noting that the legislature of Virginia enacted a law designed to ban all-comers policies, allowing campus groups to grant membership only to those who share their beliefs and missions).

²⁰⁴ For a more detailed critique of Ginsburg’s position, see GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* 10 (2012) (detailing how the culture of censorship prevalent on most campuses has resulted in the failure of institutions of higher learning to promote critical thinking in students).

²⁰⁵ *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 3002 (2010) (Alito, J., dissenting).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2992 (majority opinion).

²⁰⁸ *Id.*

which they were free to set their own rules.²⁰⁹

C. Individual Desires v. Church Teachings

In the wake of *Hosanna-Tabor*, another concern over preserving religious identity, however open-ended this concept may be viewed, focuses in part on who can serve as religious leaders in faith-based institutions, particularly churches and other charitable organizations. Coupled with attempts to impose secular values on religious institutions via health care mandates and challenges to institutional presence on campuses as evidenced in *CLS*, it probably should come as no surprise, even though it would have been incomprehensible a generation ago, that a federal agency (namely the EEOC) would attempt to interfere in the internal operations of a faith-based institution to delineate who can qualify as a religious minister.

The position of the EEOC in *Hosanna-Tabor* was astounding, because the actions of its officials in supporting the teacher amounted to questioning how ecclesiastical leaders define who qualifies to fill positions as ministers, priests, rabbis, or other formal leadership positions, cuts to the heart of what it means to lead religious institutions. In the process, the EEOC's *Hosanna-Tabor* perspective exacerbated the growing tension between the desires of individuals or small groups, and the sincere, long-held beliefs of institutional churches by placing secular government officials in the role of deciding who qualifies as religious leaders, trammeling the so-called "wall of separation."

It promises to be interesting to observe how other issues and scenarios are played out as well. For instance, what will happen if or when someone initiates litigation against the Roman Catholic Church on such bases as its refusal to ordain women or gays or its refusal to solemnize unions between members of the same sex? Moreover, it remains an open question whether governmental or public officials should have the authority to meddle in matters essentially doctrinal in nature.

Rather than treat concerns about governmental intrusion into doctrinal matters as a form of reduction to the absurd, it is worth acknowledging incidents of this nature that have occurred. For instance, in Canada, Human Rights Tribunals have sanctioned not only a Roman Catholic priest for teaching that homosexuality is a sin and that marriage is a

²⁰⁹ *Id.* In a 1996 case of dubious precedential value in the wake of *CLS*, the Second Circuit acknowledged that under the Equal Access Act, the students retained the right to select leaders who complied with the Christian club's religious standards and left the door open to the possibility that those who disagreed with the group's beliefs were free to form their own club. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 862 (2d Cir. 1996). For a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act*, 114 EDUC. L. REP. 359 (1996).

union between one man and one woman,²¹⁰ but also a Christian pastor for writing a letter to a local newspaper decrying the gay lifestyle, an order that has since been affirmed judicially.²¹¹ In like fashion, in the United States, controversies have arisen over whether religiously-affiliated K-12 schools can be obligated to accept students living with parents who are in same-sex unions,²¹² even though such a lifestyle violates the sincerely held religious beliefs that are taught in these schools.

At the intersection of religious and secular life, at least three disputes, and an emerging legislative issue, have arisen when companies refused to serve individuals who were entering same-sex relationships because they disagree on religious grounds. The first dispute involved a private photographer in New Mexico who was adjudicated of having violated state law because she refused to offer her services at the commitment ceremony of a same-sex couple.²¹³ Based on her religious beliefs, the plaintiff refused to work as a photographer for the couple because she disapproves of same-sex relationships.²¹⁴ The photographer maintained that forcing her to have to offer her services would violate her rights to the free exercise of religion.²¹⁵

On further review, the Supreme Court of New Mexico, in an opinion trammeling religious freedom, rejected the photographer's claims.²¹⁶ The court declared, most notably, that the state Human Rights Act did not violate either the photographer's rights to Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution even though she was made to act in a manner that was inconsistent with her

²¹⁰ Bob Ellis, *Homosexual Activists Driving Store out of Business*, AMERICAN CLARION (Dec. 7, 2012), available at <http://www.americanclarion.com/15186/2012/12/07/homosexual-activists-driving-store-out-of-business/>.

²¹¹ James Wood, *Redford on Human-Rights Hot Seat*, EDMONTON J., Nov. 12, 2012, at A4, available at 2012 WLNLR 23459464.

²¹² See, e.g., Evan Prieskop, *Christian Preschool Boots Child of Gay Couple*, COURTHOUSE NEWS SERVICE (Dec. 14, 2012), <http://www.courthousenews.com/2012/12/14/53132.htm>; Dave Bohon, *Homosexual Couple Sues Christian Preschool for Rejecting Son as Student*, THE NEW AMERICAN (Dec. 24, 2012), <http://www.thenewamerican.com/culture/faith-and-morals/item/14013-homosexual-couple-sues-christian-preschool-for-rejecting-son-as-student> (involving a controversy in New Mexico); Erica Meltzer, *Denver Archbishop Defends Sacred Heart of Jesus' Decision on Lesbians' Children at Boulder Preschool*, DAILYCAMERA.COM (March 9, 2010), http://www.dailycamera.com/ci_14640646; Lisa Wangsness, *O'Malley Post Cites 'Good of the Child': Cardinal Backs Hingham Catholic School Decision, Offers to Help Gay Couple*, BOS. GLOBE, May 20, 2010, at 1, available at 2010 WLNLR 10384021; see also Charlie Danaher, *Tolerance Goes Both Ways*, BOULDER, DAILYCAMERA.COM (March 13, 2010), http://www.dailycamera.com/ci_14665405; Electra Draper, *Chaput's Right-eous Stands*, DENVER POST, May 21, 2010, at A01, available at 2010 WLNLR 10556648 (concerning a dispute in Colorado).

²¹³ Elane Photography, LLC v. Willock, 284 P.3d 428, 432 (N.M. Ct. App. 2012), cert. granted, 296 P.3d 491 (2012). For a news analysis of this case, see George Will, *Advocates of Tolerance Sometimes Turn Into Bullies*, SPRINGFIELD (MO) NEWS-LEADER, Sept. 21, 2012, available at 2012 WLNLR 20126772.

²¹⁴ Elane Photography 284 P.3d at 432.

²¹⁵ *Id.* at 432-33.

²¹⁶ Elane Photography v. Willock, 309 P.3d 53, 77 (N.M. 2013), cert. petition filed, <http://www.adfmedia.org/files/ElanePhotoCertPetition.pdf> (Nov. 8, 2013).

sincerely held religious beliefs.

In a statement certainly leaving its author open to wide criticism and rhetorical questions leading to results that the judge may not like, the concurrence suggested that the plaintiffs:

[A]re compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. . . .

. . . A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins [plaintiffs] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.²¹⁷

In chilling judicial over-reaching, this jurist maintained that the judiciary has the authority to compel people of faith to compromise their beliefs, thereby incredibly abnegating more than two-hundred years of American jurisprudence concerning religious freedom. One can only wonder what happened to basic American freedoms in the “multicultural, pluralistic society” of which the judge wrote. Does he mean to say that religious freedom exists as long as all believe in the same thing, namely what the courts divine as appropriate?

The concurrence continued on to state:

[T]he [plaintiffs] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.²¹⁸

In fairness, could not the same question have been asked of the same-sex couple? In other words, could not the same-sex couple, rather than put the photographer in an uncomfortable position, have employed others who were willing to take pictures at their ceremony without having to violate their beliefs? More to the point: why is it that people of faith are the ones who are always expected to make the compromises with regard to their

²¹⁷ *Id.* at 79–80 (Bosson, J., concurring).

²¹⁸ *Id.* at 80.

sincerely held religious beliefs? Why is it that compromise does not work both ways? Why does “tolerance” of religious (or other) differences ultimately place believers in the position of having to make the draconian choice of being able to live out their values or be taken to court by illiberal advocates of purported openness and diversity of opinion?

Rather than face a similar outcome, the owner of a trolley company, whose firm in Baltimore made its vehicles available for hire as part of wedding festivities, announced that it would forgo what had been a profitable business activity. The owner decided to discontinue the operations of his business rather than run the risk of having to serve same-sex couples in the wake of a recently approved change in state law legalizing such relationships.²¹⁹

The third controversy arose in Washington. A florist faces litigation from the State Attorney General for violating state laws against discrimination and consumer protection²²⁰ as well as from the American Civil Liberties Union²²¹ under the same discrimination statute as in the first claim for refusing to sell flowers to a couple that was about to enter a same sex union because their lifestyle is inconsistent with her belief in Jesus Christ.²²²

1. An Emerging Legislative Issue

While wholeheartedly decrying unlawful discrimination in any form, a final emerging challenge to religious freedom, its uncertain status notwithstanding, albeit of a legislative nature is unresolved as this article heads to press. The Employment Non-Discrimination Act (ENDA), which has been consistently introduced in Congress since 1994²²³ has yet to gain passage.²²⁴ ENDA renders it illegal for organizations with fifteen²²⁵ or more employees to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual

²¹⁹ Erin Cox, *It's Back to the Barn for Wedding Trolleys*, BALT. SUN, Dec. 26, 2012, at A1, available at 2012 WLNR 27914985.

²²⁰ See Complaint, *Washington v. Arlene's Flowers, Inc.*, filed Apr. 9, 2013, available at http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/Arlen/Complaint%202013-04-09.pdf.

²²¹ See *ACLU Files Suit for Gay Couple Discriminated Against by Florist*, ACLU (Apr. 18, 2013), <http://www.aclu-wa.org/news/aclu-files-suit-gay-couple-discriminated-against-florist>.

²²² See Howard Friedman, *Washington State AG Sues Florist Who Refused to Sell Flowers for Gay Wedding*, RELIGION CLAUSE (April 10, 2013, 12:34 PM), <http://religionclause.blogspot.com/2013/04/washington-state-ag-sues-florist-who.html>.

²²³ S. REP. NO. 113-105, at *2 (2013) (Leg. Hist.), 2013 WL 5184039 (“On June 23, 1994, Senator Edward Kennedy (D-MA) introduced the Employment Non-Discrimination Act of 1994, S. 2238.”).

²²⁴ R. Holtzman Hedrick, *Is This the Beginning of ENDA (Employment Non-Discrimination Act)?*, NAT'L L. REV., Nov. 6, 2013, 2013 WLNR 27847786.

²²⁵ Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 5(A) (2013).

orientation or gender identity.”²²⁶

According to ENDA, “[t]he term 'gender identity' means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.”²²⁷ Further, ENDA states that “sexual orientation” means homosexuality, heterosexuality, or bisexuality,²²⁸ but fails to define these terms or what guidelines may serve to limit “orientation” to these descriptors.

ENDA raises concerns for the future of religious freedom because although the bill purportedly offers exemptions to religious organizations and employers with fewer than fifteen employees,²²⁹ it fails to offer BFOQs like Title VII. As such, ENDA’s presumably good intentions aside, since employers may well be subject to ambiguous terminology dealing with sexuality, it remains to be seen how this act plays itself out if it becomes federal law.

After rejecting an amendment intended to expand the protections afforded to religious organizations, the Senate approved ENDA. The bill does include a non-retaliation provision²³⁰ intended to protect religious employers penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer, or to prohibit the employer’s participation in programs or activities sponsored by that Federal, State, or local agency.²³¹ Speaker Boehner said that he would not bring ENDA up for a vote in the House of Representatives.²³²

At the same time, in what may fall under the principle of unintended consequences, should ENDA be enacted into law, it seems unlikely to protect the rights of parents as they direct the education of their children in

²²⁶ *Id.* § 4(a)(1).

²²⁷ *Id.* § 3(a)(7).

²²⁸ *Id.* § 3(a)(10).

²²⁹ According to the United States Senate Committee on Health, Education, Labor, and Pensions, ENDA “exempts from its coverage those religious institutions that are exempt under title VII’s prohibition on discrimination based on religion. Title VII’s language has been in effect since 1972, and thus the committee believes it is simple for organizations to understand who falls under the exemption.” S. REP. NO. 113-105, at *8 (2013) (Leg. Hist.) 2013 WL 5184039. Good intentions aside, in light of the litigation on point, some of which is discussed in this paper, it is hardly accurate to claim that it is simple for organizations to understand who falls under the exemption.

²³⁰ For a case dealing with this issue, see, e.g., *Abortion Rights Mobilization, Inc. v. United States Catholic Conference*, 495 U.S. 918 (1990) (refusing to disturb an order of the Second Circuit, on remand from the Supreme Court, which reasoned that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church on account of its pro-life teachings).

²³¹ S. 815, § 6(b). Jacqueline Klimas, *Senate Passes Gay-Rights Bill to Prevent Workplace Discrimination*, WASH. TIMES, Nov. 7, 2013, available at <http://www.washingtontimes.com/news/2013/nov/7/senate-passes-non-discrimination-bill/>.

²³² *Id.*; see also Donna Cassata, *Senate Advances Gay Rights Work Bill GOP-Majority House Will Pose Tougher Fight*, BOS. GLOBE, Nov. 6, 2013 at A, 2013 WLNR 27767059.

the face of governmental dictates with which they disagree.²³³ This lack of concern for parental wishes may be especially evident for those who enroll their children in faith-based schools in the hope of not having their young subjected to potential fights over the viability of their beliefs, and those of the institutions charged with educating their offspring, over adult sexuality in what should be educational environments rather than locations serving as laboratories for what is essentially social experimentation and engineering.

IV. CONCLUSION

To date, as reflected most recently in *Hosanna-Tabor*, the Supreme Court clearly and unambiguously rejected the Administration's argument that a government agency, the EEOC, had the power to dictate qualifications for ministers and other religious leaders insofar as it broadly deferred to church authorities on this quintessentially religious matter.²³⁴ However, it is unclear to what extent the United States Supreme Court is likely to continue to protect religious liberty, whether under the ACA or nascent concerns as represented by ENDA, under the religion clauses for those who allow their faith to be their guide when they enter into public life, especially if their values, regardless of whether they are deeply held religious beliefs, conflict with the emerging orthodoxies of the day.

As evidenced by the litigation surrounding the birth control mandates of the ACA and the status of same-sex relationships that are in the early stages of being played out even as the Supreme Court has addressed the latter, the United States is clearly at a fork in the road. The way which the nation turns at this fork suggests that the future of religious freedom in the United States may well hang in the balance.

The question is thus whether the American government, more particularly the executive and legislative branches, along with the judiciary, can steady the course by continuing to respect religious freedom in allowing believers to follow their consciences, which are rooted in their sincerely held religious beliefs. In the alternative, the question becomes whether politicians and jurists intend to take steps to blaze a new trail by requiring people of faith to become subservient to those who are willing to move the nation into a brave new secular world where religious freedom is marginalized at best.

²³³ The Supreme Court's words in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925): "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (upholding the rights of non-public schools to operate).

²³⁴ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).