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TEXAS REVIEW
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PREFACE

I could not be more proud to finish the end of my tenure as the *Texas Review of Law & Politics*'s Editor in Chief with such a strong issue. Professor Gerard Bradley surveys today's challenges to religious liberty and argues that such challenges are different from the past not merely in terms of *degree*, but in *kind*. Attorneys David Bumgardner and Keyavash Hemyari defend Texas's use of municipal utility districts against a growing chorus of critics. First Liberty Institute lawyers Justin Butterfield and Stephanie Taub critique the Department of Health and Human Services "transgender mandate," and argue that government should provide conscience protections for religious people who are unwilling to violate their faith. Professor James Davids explores the contours of religious colleges' rights under the "ministerial exception" doctrine. Professor M.C. Mirow makes some groundbreaking insights into the newly discovered Patriot Constitution of 1812. Finally, Professor Kevin Pybas examines Supreme Court Justice John Paul Stevens's religion jurisprudence and rebuts Justice Stevens's most friendly interpreters.

The publication of this issue could not have happened without the support of five important groups. First, the authors, who have been a joy to work with. Second, the *Review*'s Steering Committee, which has offered guidance and mentorship along the way. Third, the Editorial Board for its engaged management of the submissions, editing, and publication processes. Fourth, the Articles Editors for their front-line leadership in preparing these six articles for publication. Finally, to our 47 Staff Editors who spent countless hours carefully editing and Bluebooking.

It has been an honor serving as the *Review*'s Volume 21 Editor in Chief. For 20 years, the *Texas Review of Law & Politics* has been at the forefront of influencing law and politics according to conservative and libertarian principles. I am grateful that my team and I had the opportunity to carry this torch for the past year. Thank you to everyone in the *TROLP* family, and I wish the *Review* many more decades of success.

Aaron F. Reitz
Editor in Chief

TODAY'S CHALLENGES TO RELIGIOUS LIBERTY IN HISTORICAL PERSPECTIVE

GERARD V. BRADLEY*

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INTRODUCTION

Many people say that religious liberty in our country is now under attack more than ever before.[1] That's true as far as it goes, and in what follows I shall supply some reasons why I think so. But the chief aim of this Article is not to try to establish that religious liberty is in its most parlous state ever, as if some common threat-level metric is higher today than it was, say, a hundred or fifty years ago. As a matter of fact, Mormons and Native Americans in the late-nineteenth century faced government actions more hostile to their religious beliefs and practices than anything confronting believers today.[2] United States' "Indian" policy then included a concerted effort to wean Native Americans altogether of their inherited religious beliefs.[3] Uncle Sam literally scattered the Church of Jesus Christ of Latter-Day Saints (LDS) to secure the Mormons' renunciation of plural marriage.[4] Even America's Catholics, especially when the bulk of them were recent immigrants or children thereof, have been perennial targets of discrimination on religious grounds, chiefly because a large percentage of their fellow Americans held that being a Catholic was simply incompatible with being an American.[5] Government policies from the founding all the way down to Supreme Court Establishment Clause cases in the 1970s reflected this mistaken

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* Gerard V. Bradley is Professor of Law at the University of Notre Dame, and a Senior Fellow of the Witherspooon Institute. Note that portions of this Article appear in Gerard V. Bradley, *New Challenges to Religious Liberty*, IRISH ROVER (Mar. 18, 2016), https://irishrover.net/2016/03/new-challenges-to-religious-liberty/ [https://perma.cc/N2Y5-GYHW].

1. *See, e.g.*, Jay Alan Sekulow, *Religious Liberty and Expression Under Attack: Restoring America's First Freedoms*, THE HERITAGE FOUND. (Oct. 1, 2012), http://www.heritage.org/civil-society/report/religious-liberty-and-expression-under-attack-restoring-americas-first [https://perma.cc/9U5D-FYYL] ("All across America, religious institutions and individuals are being subjected to increasing restrictions on their free exercise of religion and freedom of speech—a crackdown that can be seen in a variety of different contexts . . . ."); David French, *The Left's Attack on Religious Liberty Could Break America*, NAT'L REVIEW (Dec. 15, 2015, 4:30 PM) http://www.nationalreview.com/article/428559/lefts-attack-religious-liberty [https://perma.cc/QK52-YZVV] (describing recent attacks on religious liberty and noting, "I could write thousands of words about how the radical has become mainstream . . . but that piece has been done to death.").

2. *See infra* notes 9–60 and accompanying text.

3. *See* LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 396–99 (1928) (criticizing the government's approach to religious education of Native American students).

4. *See* Anti-Polygamy Act of 1887, ch. 397, 24 Stat. 635 (1887) (repealed 1978) (dissolving the incorporation of the Church of Latter Day Saints and seizing its property).

5. *See* LYMAN BEECHER, PLEA FOR THE WEST 61 (Cincinnati, Truman & Smith, 2d ed. 1835) ("The Catholic system is adverse to liberty, and the clergy to a great extent are dependent on foreigners opposed to the principles of our government, for patronage and support.").

belief.[6]

By some obvious metrics, these campaigns were worse than what is happening now.

Nevertheless, by some other obvious common metrics what's happening now is worse than ever. We shall explore the Native American, LDS, and Catholic episodes in Parts I through III of this Article partly to indicate the comparative magnitude of the present challenge. The larger reason for doing so is, however, to put what is happening today in boldest relief, to show in Parts IV and V how today's challenges to religious liberty are different in *kind* more than in *degree* than these three earlier episodes, and from any other era or episode in American history.

For what happened before happened to a particular church or sect. In the Mormon and Native American cases, each targeted group was insular, geographically isolated, and with no footprint in the wider society.[7] What's happening now is happening on Main Street and to mainstream believers. And it is happening to *religion*. Traditional Christians who morally object to abortion and same-sex marriage are most commonly put to the test today.[8] But they are casualties in an even wider conflict. Americans today are engaged, wittingly for the most part, in an unprecedented contest over the meaning and value of religious liberty, not for this or that discrete group in specified measure, but for *all* believers. Parts IV and V tell this sobering story.

What's happening to religious liberty today is a cause as well as an effect of epochal changes in our society's understanding of the nature and sociopolitical importance of religion. These

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6. *See* Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (discussing and disavowing the prejudiced "pervasively sectarian" exclusion adopted in 1973, which all but restricted government aid to Catholic schools); *see generally* JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003) (accounting for the persistence and bases of anti-Catholic prejudice in America).

7. *See* MERIAM, *supra* note 3, at 86–95 (discussing the Native Americans' resistance to assimilation and their designated reservation territories); Patricia A. Lynott, *The Deseret Alphabet of Nineteenth-Century Mormon Education*, 26 AM. EDUC. HIST. J. 20, 20 (1999) ("It must also be remembered that the Mormons of Utah were isolated from mainstream American society, both geographically and ideologically.").

8. *See generally* Nina Bahadur, *People Who Are Anti-Abortion Are Also Sexist, Worrying Study Finds*, HUFFINGTON POST (May 13, 2015, 4:20 PM), http://www.huffingtonpost.com/2015/05/13/anti-abortion-people-could-also-be sexist_n_7260342.html [https://perma.cc/H9GM-NG88] (linking objections to abortion with sexism); John Shore, *Is Every Christian Who's Against Gay Marriage Necessarily a Bigot?*, HUFFINGTON POST (May 23, 2014, 6:28 PM), http://www.huffingtonpost.com/johnshore/is-every-christian-whos-against-gay-marriage-necessarily-a-bigot_b_5374429.html [https://perma.cc/FSD7-GRHE] (arguing that those who are against gay marriage are by default bigots).

changes will be felt most keenly by believers who adhere to the common morality of Christians and Jews and to the moral truths recorded in the Old Testament, such as the Ten Commandments. However, these changes will not be felt by them exclusively, or even mainly, and the wider effects will not be limited to religious liberty. Because Americans have always had a robustly religious culture which has been an essential, and important, part of our political life, the path upon which we trod will eventually, as Parts VI and VII explain, transform our whole political culture.

I. ABRIDGEMENT OF RELIGIOUS LIBERTY ***THEN***

In which specific ways were the depredations against America's Native American populations and LDS *more* egregious than the challenges today?

Today's incursions upon religious liberty are sometimes coercive. But they are not violent. Kim Davis (the Kentucky county clerk who conscientiously refused to sign marriage licenses for same-sex couples[9]) will be followed by other believers into custody. But no Wounded Knee or "Utah War" is in the offing. Both Native American and Mormon travails were protracted. They spanned decades of turmoil; in the Native American case, they lasted the century between the advent of President Grant's "Peace Policy" in 1870 and enactment of the "American Indian Religious Freedom Act" in 1978.[10] No one can say confidently how long the current crucible will last. But its red-hot phase began very recently, during the Obama Administration in 2013.[11]

9. Sarah Kaplan & James Higdon, *The Defiant Kim Davis, the Ky. Clerk Who Refuses to Issue Gay Marriage Licenses*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses/ [https://perma.cc/KKJ2-S4Y7].

10. *See generally* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christinaizaiton Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (discussing the United States government's varying efforts to suppress Native American ideals).

11. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam). The Bush Administration was, by any plausible measure, friendlier than its successor has been in allowing religious expression and the contributions of religion to public life. Of course, one could rightly say that it has fallen to the Obama Administration to work through the relationship between religious liberty on the one hand and the legalization of same-sex marriage and mandated support for abortifacients under rules adopted pursuant to the Affordable Care Act on the other. Of course, too, the HHS "contraception" mandate was the free initiative of the Obama Administration, which also vigorously promoted same-sex marriage. In any event, the Obama Administration pursued a remarkably unfriendly policy towards religious persons and institutions in these two theaters of operation. *See, e.g.*,

Although not exactly a measure of religious persecution, both the LDS and the Native Americans were beleaguered minorities in an indifferent, if not hostile, wider American society. Those holding to a biblical morality today face steep challenges. But they are not total cultural outliers or pariahs. Far from it.

It is worth special mention that suppression of plural marriage is not, in my judgment, unjust, even where its practice is rooted in a putative revelation. Our federal government pursued that objective in the second half of the nineteenth century, however, by unjust means. Those means included statutes which effectively made Mormons an outlaw people and their church a criminal conspiracy. The federal law upheld by the Supreme Court in *Davis v. Beason*[12] in 1890, for example, stripped those who were bigamists or polygamists of the rights to vote and to hold public office.[13] That law similarly disqualified *anyone* who belonged to *any* association which taught that *anyone* should enter a plural marriage.[14] So *every* Mormon was stripped of precious political rights.

Sound government policy would not have accorded legal status to plural marriages and would have taken reasonable steps to discourage it. But something like a contentious tolerance would have been preferable to the nuclear option that the government in fact chose. Uneasy tolerance should also have been acceptable even to those convinced—as was the Supreme Court—that monogamy was the truth about marriage and the foundation of sound social order. Then again, the government's scorched-earth policies were more an attempt to subdue the stubbornly independent Mormon people—that is, to establish effective political authority over them—than they were to eradicate plural marriage.[15] It was more about conquering Zion that it was about

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). The spate of cases initiated by religious employers against "mandated" coverage of contraceptives and abortifacients were then later returned to lower courts for settlement. *See* DEAN REUTER & JOHN YOO, LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 41–56 (2016) (giving examples of the Obama Administration's rough treatment of religious liberty, especially involving traditional Christians. The Obama Administration was party to an unusually intense conflict over religious liberty, as inferred partly from the conduct of its two predecessors. President Clinton signed the Religious Freedom Restoration Act (RFRA) in 1993, after its nearly unanimous approval in Congress. President Obama regularly opposed, often unsuccessfully, reliance upon RFRA by religious persons and groups in cases where believers seek relief from legal burdens stemming in one way or another from progressive views about sexual identity and sexual freedom.).

12. 133 U.S. 333 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620 (1996).

13. *Id.* at 346–47.

14. *Id.*

15. *See* Derek H. Davis et al., *Staking Out America's Sacred Ground: The Baptist Tradition*

domestic-relations law.[16]

In the late-nineteenth century, Uncle Sam regarded those who lived on Indian reservations as his wards.[17] By most measures reservation residents were indeed heavily government dependent.[18] The core judgment supporting federal policy toward them was this: on or off the reservation, the only alternative to significant acculturation was isolation, ennui, and atrophy.[19] There is some truth in that judgment, and in the further judgment (also near the heart of government thinking) that tribal culture, as well as certain aspects of Native American religion, were incompatible with that needed acculturation.

The postcard-sized version of the government's objectives was to wean the Native Americans of their "communistic" tribal ways and of their "pagan" religion.[20] It is true that many tribes could scarcely integrate surrounding notions of private property and free enterprise with their much more communal, and modest, economic aspirations.[21] There was also much to regret in Native American religion. The Ghost Dance enthusiasm which swept through many reservations in the 1880s and 1890s, including Pine Ridge at the time of the Wounded Knee massacre, was an intoxicating mix of apocalyptic visions and racism.[22] Besides, the broader pantheistic (perhaps, panentheistic) cosmology upon which most Native American spirituality depended truly impeded their effective participation in American society and politics.[23]

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of Religious Liberty, *in* TAKING RELIGIOUS PLURALISM SERIOUSLY: SPIRITUAL POLITICS ON AMERICA'S SACRED GROUND 112 (Barbara A. McGraw & Jo Renee Formicola eds., 2005).

16. *Id.*

17. David Wallace Adams, *Fundamental Considerations: The Deep Meaning of Native American Schooling, 1880–1900*, 58 HARV. EDUC. REV. 1, 8 (1988).

18. *Id.* at 5.

19. *See* JON REYHNER & JEANNE EDER, AMERICAN INDIAN EDUCATION: A HISTORY 95 (2004) (discussing the isolation from white communities as children were acculturated through education).

20. *See* LINFORD D. FISHER, THE INDIAN GREAT AWAKENING: RELIGION AND THE SHAPING OF NATIVE CULTURES IN EARLY AMERICA 217 (2012) (mentioning the United States government's efforts to legally abolish tribal influence).

21. *See* MERIAM, *supra* note 3, at 831 (describing the obstacles missionaries faced in converting Native Americans, who held to a central economic system shared among community members); *see also* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 799 (2004) (mentioning the socialist attributes of Native American society).

22. *See* Julian Rice, *"It Was Their Own Fault for Being Intractable": Internalized Racism and Wounded Knee*, 22 AM. INDIAN Q. 63, 68–71 (1998) ("[The Ghost Dance's] founder . . . preach[ed] a non-violent religion that promised to banish the white man from the continent, to bring back the ancestors of the dancers, as well as the animals, the grass, and the trees that the white man had destroyed. Each tribe adopted a ritual dance to realize [this] dream.").

23. *See* Dussias, *supra* note 10, at 773 (stating that the U.S. government viewed Native

It is perhaps an interesting question whether and in what ways the Native Americans would have been better off if the United States, once having conquered them, made no effort to assimilate them to the surrounding culture. But one need not answer it to criticize what our government did. Even if one holds that, in principle, aggressive acculturation was needed and just, one should still offer no excuse for our government's callousness and occasional use of unjust force on the reservations. More to the point, ambient disrespect for Native American religion spilled over into disrespect for *them*, and for *their* right to decide for *themselves* what to believe and profess, even if what they would affirm and deny left them in a debilitated, not nearly assimilated, condition. This was one great defect in government policy towards the Native Americans: a too-muscular, impatient acculturation program, fueled by an ample helping of gross prejudice, which violated the rights of Native Americans to manifest the religion which they conscientiously affirmed.[24]

One particular tranche of these violations consisted of Protestant-promoted government actions intended to keep the Catholic Church off as many reservations as possible, precisely to impede Native American access to that faith, even for those who were already communicants.[25] The gravest—and on any account of it, simply indefensible—incursion on Native Americans' religious liberty was denying parents their right to direct the upbringing of their children, especially with regard to their religious upbringing.[26] Native American children often were separated—sometimes, forcibly—from parents and sent to Christian boarding schools.[27] For a time at the turn of the centu-

American religious dances and ceremonies as contrary to American virtues such as the individual accumulation of property).

24. *See* MERIAM, *supra* note 3, at 822 (discussing President Grant's "Peace Policy" in 1869, which reflected missionary efforts from various faith practices to convert the Native Americans). This was also true of nineteenth-century government policies towards Catholic immigrants, especially non-English speaking ones, though less muscular and more patient than with Native Americans. Leonard P. Liggio & Joseph R. Peden, *Social Scientists, Schooling and the Acculturation of Immigrants in 19th Century America*, 2 J. LIBERTARIAN STUD. 69, 75–76 (1978).

25. *See* REYHNER & EDER, *supra* note 19, at 128 (discussing the intermingling of Protestantism and government workings as compared to the distanced Catholic teachings and practices).

26. *Id.* at 74 ("The experiment in education was decidedly an ethnocentric one. Through education, Indians were to lose their heritage, in particular, their native religion and language.").

27. *Id.* at 71, 168, 177 (explaining the separation of children from parents and a loss of culture as a consequence).

ry, the stated government policy was that, because Native Americans were wards, government officials and not parents would decide which schools Native American children would attend.[28]

II. ABRIDGEMENT OF LIBERTY *NOW*

According to some *other* obvious metrics, challenges to religious liberty are worse *now* than ever.

The numbers of LDS and Native Americans directly affected back then were few, perhaps a million or so put together.[29] Even Catholics, who were also victims of widespread social and economic prejudice throughout the nineteenth century, were just a respectable minority.[30] But the denominations and churches, which until a few decades ago held that abortifacients should not be used and that same-sex couples could not marry, included up to 90% of America's churchgoers.[31] To this minute, many Americans hold these positions, not as rules or standards or ideals, but as moral truths, knowable by reason but also divinely confirmed and sanctioned.[32]

The cutting edge of the LDS conflict was small and precise. Abandoning plural marriage was a recognized terminal point of the government's program, the obvious price of peace.[33] This

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28. *See generally* THE AMERICAN MIDWEST: AN INTERPRETIVE ENCYCLOPEDIA 1039 (Richard Sisson et al. eds., 2007) (showing the government's establishment of government schools furthering acculturation).

29. *See generally* Matthew Bowman, *Mormonism*, ORE AM. HIST. (Mar. 2016), http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-326 [https://perma.cc/RH7D-R3QT].

30. I say "respectable" here to denote numerical size, not social standing.

31. *See* R. Albert Mohler, Jr., *Can Christians Use Birth Control?*, THE CHRISTIAN POST (June 6, 2012, 8:19 AM), http://www.christianpost.com/news/can-christians-use-birth-control-76132/#YGt3Mt3PMdVpZBrB.99 [https://perma.cc/3VJ5-4UT2] (stating that after the 1960s, "[m]ost evangelical Protestants greeted the advent of modern birth control technologies" with thoughtless acceptance, while noting that "a majority of the nation's Roman Catholics indicate a rejection of their Church's teaching" prohibiting the use of birth control); *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (May 12, 2016), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/ [https://perma.cc/Q2ZD-5HJN] (noting that in 2016, 64% of white mainline Protestants and 58% of Catholics supported same-sex marriage, while in 2001, only 38% of white mainline Protestants and 40% of Catholics supported same-sex marriage).

32. *See* Mohler, *supra* note 31 (stating that a "growing number of evangelicals" are beginning to see birth control as morally problematic and that evangelicals must "nurture a new tradition of moral theology, drawn from Holy Scripture and enriched by the theological heritage of the church"); PEW RESEARCH CTR., *supra* note 31; *see also Marriage*, GALLUP, http://www.gallup.com/poll/117328/marriage.aspx [https://perma.cc/G5WA-RUSJ] (last visited Mar. 25, 2017).

33. *See* Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89, 100–01 (2015) (discussing the relations between the federal government and Mormon leaders and fundamental policy differences between the two groups).

was not true of the Native Americans, of course,[34] (although some naïve people back then thought that the assimilationist project would take just one generation[35]). Their expectation was this: yank Native American children from their parents, lodge them in government schools, wait for them to marry and raise the next generation, and the job of "Americanizing" the native peoples would be done.[36] This same belief in the character-molding prowess of public schools supported the government's hostile attitudes towards Catholic schools, which were thought to perpetuate immigrant customs and an un-American religious system.[37]

LDS renounced the practice of plural marriage, Utah's statehood followed, and Mormons became (so to speak) Americans.[38] All things considered, the Native American case was a one-off thing, a perfect storm of dependence, cultural estrangement, mutual hostility, and good intentions gone awry. It is scarcely a template for anything that might happen again. Catholics threw up a parochial school system, which by the mid-twentieth century, was educating several million children a year.[39] Government policies hostile to their educational philosophy were, fortunately, ineffective.

The LDS and Native Americans interacted chiefly with the national—not the state or local—government, for the Constitution assigns to the national government the principal responsibility for dealing with the tribes, and the Mormons operated from around 1850 in the *territories*, superintendence of which was also

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34. *See* Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 508 (2000) (discussing the fact that Native Americans are still allowed to marry according to their customs if they are members of a recognized tribe).

35. *See* HENRY E. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION, 1860–1890, 19 (1963) (ebook) (noting that in the 1860s the aim was to require Native Americans "within a few decades to adopt political, social, and economic institutions which it had taken western European civilization thirty centuries to develop").

36. RICHARD H. PRATT, AMERICANIZING THE AMERICAN INDIANS 260–71 (Francis Paul Prucha ed., 1973).

37. Josh Zeitz, *When America Hated Catholics*, POLITICO (Sept. 23, 2015), http://www.politico.com/magazine/story/2015/09/when-america-hated-catholics-213177 [https://perma.cc/GUZ8-CE47].

38. *The Manifesto and the End of Plural Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (last updated Mar. 18, 2014), https://www.lds.org/topics/the-manifesto-and-the-end-of-plural-marriage?lang=eng&old=true [https://perma.cc/FWH7-TXAZ].

39. Timothy Kirchoff, *Reflections on Catholic Institutions in America: Part I*, ETHIKA POLITIKA (Nov. 25, 2016), https://ethikapolitika.org/2016/11/25/reflections-catholic-institutions-america/ [https://perma.cc/7PGM-V6YN].

assigned by the Constitution to Congress.[40] They lived in discrete, isolated pockets of land, some very large, but all demarcated in any event as this or that reservation, or as Utah territory.[41] Believers now are threatened by the unsympathetic actions at every level of government. Federalism helps them some. It is better for a conservative Christian wedding planner to be in Alabama than in New York or California.[42] But they have federal courts and federal law in Alabama, too. In a way unimaginable to anyone in the nineteenth century, one national statute or administrative rule or executive action on, say, sexual-orientation or gender-identity nondiscrimination in hiring and retention of staff, could threaten the viability of countless religious employers across the land.[43]

Neither the Mormons nor the Native Americans maintained large-scale public institutions of health care, education, and charity.[44] I intend here no slight to the admirable web of care which suffused their communities. My point is that these services were parochial. They had no extramural profile and were not targets for government attacks. Starting even before the Civil War, Catholics erected more ecumenical social-service institutions, even though many of these good works originated from concerns to keep the faithful's faith safe from Protestant-inflected public agencies.[45] These also became targets of gov-

40. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 206–10 (1984) (discussing the sources and impact of federal authority over Native American decision-making process); *see also* L. Rex Sears, *Punishing the Saints for Their "Peculiar Institution": Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581, 589–95 (2001) (discussing and elaborating on the multitude of federal bills affecting Mormon populations in the territories).

41. Sears, *supra* note 40, at 585–87.

42. *Cf.* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

43. Ryan Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, THE HERITAGE FOUND. (Nov. 30, 2015), http://www.heritage.org/civil-society/report/ sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom [https://perma.cc/2DMH-STUM] (discussing how SOGI laws "would impose ruinous liability on innocent citizens for alleged 'discrimination' based on subjective and unverifiable identities," and that SOGI laws thus "threaten the freedom of citizens, individually and in associations, to affirm their religious or moral convictions").

44. *See generally* Ron Rood & Linda Thatcher, *Mormon Settlement: Brief History of Utah*, UTAH HIST. TO GO, http://historytogo.utah.gov/facts/brief_history /mormonsettlement.html [https://perma.cc/EDS9-3476] (last visited May 18, 2017) (discussing the general structure and development of Utah's large-scale public institutions); STAN JUNEAU, HISTORY AND FOUNDATION OF AMERICAN INDIAN EDUCATION 5–6 (Walter Fleming & Lance Foster revs., 2001) (discussing the structure used by Native Americans to have a decentralized educational system emphasizing oral history by the tribal elders).

45. Kirchoff, *supra* note 39.

ernment hostility but, again, to little practical effect.[46]

Today's ubiquitous religious social-service and educational institutions make big targets. Big government stalks these big targets.[47] Now the camel's nose is under everyone's tent. The butcher, the baker, and the candlestick-maker can all try to run from moral complicity in abortion and same-sex marriage. But they cannot hide.

The asymmetry of Christian moral life multiplies the effects of chasing them down. Many millions of Christians today hold to what the tradition since the Apostolic Era taught: namely, that abortion, for example, is absolutely morally excluded.[48] These persons do not judge that doing a few abortions (or performing even one same-sex wedding) is morally acceptable, because doing so keeps them in play to do many live births (or a hundred weddings uniting a woman and a man). Christians typically judge that abortion and same-sex weddings (and some other acts) *must never be done.*[49]

Many millions of Christians know that Saint Paul taught in *Romans* that no one may do evil so that good may come of it.[50] The magistrate is no exception; the moral truths of the Decalogue recognize no exception for the statesman. Christians recognize that they must suffer privation and even punishment rather than do wrong. Christian moral life is, in other words, like a sailing ship: even a tiny imperfection in the structure can be disastrous.[51] The Titanic missed all the icebergs but one.

Many of our judges and other public officials have forgotten, or forsaken, this asymmetry when it comes to matters of sexual morality and reproductive freedom, even though the notion that no one should be forced to act against conscience on capital

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46. *See generally* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 63–66 (2d ed. 1996).

47. Peter Jesserer Smith, *ACLU Uses Abortion As Lever to Shut Down Catholic Agencies' Work with Minors*, NAT'L CATHOLIC REGISTER (July 1, 2016), http://www.ncregister.com/daily-news/aclu-uses-abortion-as-lever-to-shut-down-catholic-agencies-work-with-minors [https://perma.cc/GEX6-HABF].

48. *The Didache*, EARLY CHRISTIAN WRITINGS, http://www.earlychristianwritings.com/text/didache-roberts.html [https://perma.cc/7M95-5DMJ] (last visited May 18, 2017).

49. *Part Three, Section Two, Chapter Two: "You Shall Love Your Neighbor as Yourself,"*, CATECHISM OF THE CATHOLIC CHURCH, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm [https://perma.cc/Z5JS-8ZFU] (last visited Mar. 25, 2017).

50. *See Romans* 3:8.

51. *See* Ralph F. Wilson, *Ship as a Symbol of the Church (Bark of St. Peter)*, EARLY CHRISTIAN SYMBOLS, http://www.jesuswalk.com/christian-symbols/ship.htm [https://perma.cc/F8B4-XZXS] (last visited May 18, 2017).

punishment[52] or killing in war[53] remains strong. To take just one of many possible examples of this selective amnesia on the new morality of sex: in the course of affirming a monetary penalty against a Christian couple who operated a modest wedding venue in rural New York, the appellate court first observed that requiring them to host same-sex weddings "does not compel them [the Giffords] to endorse, espouse, or promote same-sex marriages," notwithstanding that the Giffords said that it would, and that sound moral analysis confirms that they would be complicit in celebrating what was, in their conscientious judgment, an immoral sexual relationship.[54] The court then further observed that the "Giffords remain free to express whatever views they may have on the issue of same-sex marriage"[55]—as if the opportunity to publish editorials in praise of non-violence would salve the conscience of a pacifist who was conscripted and sent into combat, or of an FBI interrogator who was ordered to torture a terrorism suspect, or of a prison warden commanded by the governor to pull the switch on a convicted murderer.

For Christians, and for many other believers as well as for some nonbelievers, head-on collision with *one* legally required, morally obnoxious duty—whether to certify a candidate to be euthanized, or to pay for one abortion, or return one guilty verdict in a death-penalty case, or dispense one prescription of "ella," or help celebrate and thus morally ratify one same-sex wedding, or knowingly promote even one unmarried couples' sexual intercourse by giving them a bed or a condom or a how-to-do-it talk—threatens to scuttle the whole moral life.[56] So too on the grander scale: some Catholic agencies have decided to close rather than place a child for adoption by a same-sex couple.[57]

52. *See, e.g.*, 18 U.S.C. 3597(b) (2006) (extending protection to "any employee" of any state or federal government agency regarding executions or any "participation [in an execution if it] is contrary to the moral or religious convictions of the employee").

53. *See* Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 130 (2012) ("[T]he nation's history of military draft laws shows an ongoing effort to find ways to accommodate at least some individuals who object to being forced to kill. That protection has never been complete or absolute. But the overall arc of this history shows a longstanding effort to protect conscientious objectors to military service, with steadily broader protections being introduced over time.").

54. Gifford v. McCarthy, 23 N.Y.S.3d 422, 432 (N.Y. App. Div. 2016).

55. *Id.*

56. *See James* 2:10 ("For whoever keeps the whole law but fails in one point has become guilty of all of it.").

57. *See* Joseph R. LaPlante, *Tough Times for Catholic Adoption Agencies*, OUR SUNDAY VISITOR (May 7, 2014), https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/Arti

More institutional martyrs like these are sure to follow.

Religious institutional ministries still perform an enormous service to the American people, often to the least and most neglected among us. Catholic institutions supply about one-sixth of the hospital beds in this country, for example, and there are currently about 220 Catholic colleges and universities in the United States.[58] Services provided by religious organizations often very largely resemble those provided by anyone else; one might well say that "there is no such thing as a Catholic appendectomy."[59] But sometimes the effectiveness of a service depends upon engaging the free choices and motivations of the client or patient (in substance-abuse counseling, for instance, or in arranging for the adoption or foster care of a severely handicapped infant). Then the religious element of the transaction can be, and very often is, a decisive value added. An appendectomy perfumed in a spiritual environment by persons with religious motivations *is* a different experience than the same operation in a county hospital, and it is *better* for many people who choose it.[60]

Government actions which force these conscientious ministries out of business gravely harm the common good. It won't necessarily be that the sheriff will padlock the food pantry or the rural health clinic, where the religiously minded operators run afoul of the unyielding demands of government regulators. Government contracting and grant regulations will instead increasingly exclude recipients who are out of step with the new morality; without these contracts, many will wither and die. Licenses will be denied or not renewed, and tax benefits will be threat-

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cleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx [https://perma.cc/N9RE-7P89] ("For Catholic organizations to comply is to violate Church doctrine. 'In the name of tolerance, we're not being tolerated,' Bishop Thomas J. Paprocki of the Diocese of Springfield, Ill., told the New York Times when Illinois dioceses stopped adoption services rather than comply.").

58. *See Facts-Statistics*, CATHOLIC HEALTH ASS'N OF THE U.S. (last updated Jan. 2016), https://www.chausa.org/About/about/facts-statistics [https://perma.cc/AEA3-7WFH]; *Catholic Higher Education*, ASS'N OF CATHOLIC COLLS. & UNIVS., http://www.accunet.org/i4a/pages/index.cfm?pageid=3789 [https://perma.cc/LLB8-RB6A] (last visited Feb. 25, 2017).

59. Brian Yanofchick, *Physicians and the Mission of Catholic Health Care: Catholic Imagination at Work*, HEALTH PROGRESS 10, 10 (2008) https://www.chausa.org/docs/default-source/health-progress/mission-and-leadership—-physicians-and-the-mission-of-catholic-health-care-catholic-imagination-at-work-pdf.pdf?sfvrsn=0 [https://perma.cc/5X9P-6Z7F].

60. *See* Gerard Bradley, *Institutional Ministries and the Church's Temporal Mission*, *in* THE CONSCIENCE OF THE INSTITUTION 94–102 (Helen M. Alvaré ed., 2014) (providing a more full account of the contributions of religious institutional providers of social services to the political common good).

ened. Professional schools will find a way to say no to those who appear to be recusants. And so on. Besides the injustices done to many good people, this ideological purge of some professions and trades, of a good deal of government service, and of the nongovernmental public sector could itself transform our society.

III. ABRIDGEMENT OF CATHOLICS' RELIGIOUS LIBERTY

Catholics suffered from religious discrimination, including violations of parents' rights to direct the education of their children, for as long as the Native Americans did. In the mid-nineteenth century, Catholic children were expelled from common schools for conscientiously refusing to read from the King James Bible.[61] Later, Catholic orphans were often placed by hostile government actors with Protestant adoptive parents.[62] Starting in 1971,[63] the Supreme Court created a body of Establishment Clause doctrine for the unmistakable purpose of preventing sympathetic state governments from trying to save Catholic schools, most of them in the urban Northeast and Midwest, from financial ruin and closure, because these schools did not serve what the Court considered to be proper public purposes.[64] Catholics have been maligned by their countrymen (as were Mormons) for a specific theological tenet, namely, their allegiance to a "foreign prince," which too many Protestants would not accept was a spiritual, and not a political, fealty.[65] Even so: Catholics' trials were never so egregious as those of LDS and the Native Americans.

In some interesting ways, anti-Catholicism's path through American history was structurally similar to that of present challenges. Both the historical campaign against Catholics and the

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61. Donahoe v. Richards, 38 Me. 379, 380 (Me. 1854); JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS 43–46 (2004); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300 (2001).

62. PAULA F. PFEFFER, ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 102 (E. Wayne Carp ed., 2005).

63. Lemon v. Kurtzman, 403 U.S. 602 (1971).

64. *See* Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (discussing and disavowing the prejudiced "pervasively sectarian" exclusion adopted in 1973, which all but restricted government aid to Catholic schools).

65. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION 52 (J. Cockin ed., W. Popple trans., Huddersfield, J. Brook 1796) ("[A]ll those who enter into [the Catholic Church], do thereby, *ipso facto*, deliver themselves up to the Protection and Service of another prince.").

campaign today have roots in a deeply ideological, if not sectarian, conception of American public life.[66] In both cases, elites managing the campaign did not fully recognize or publicly admit it. Past elites were not forthcoming about the deeply Protestant character of American institutions, including public schools.[67] Today's elites are wont to obscure (perhaps partly to themselves) their deeply secularistic, and even anti-religious, biases by talking incessantly about pluralism, neutrality, and equality.[68] The chief forms of persecution in each case were legally enforced exclusions, social ostracism, and cultural criticism. America's recurring spasms of anti-Catholicism were largely about public funding of, and denial of other legal benefits for, Catholic institutions which were rarely threatened frontally with legal threats of closure.[69] So too today, though the funding mechanism is now just one of several potent weapons. In each case, the targets were somewhat protected by one of the two great political parties, while the other arraigned the protector precisely for being subservient to religious zealots whose beliefs made them ill-fitted to the demands of American citizenship.[70] Then, the Democrats were the Catholic-friendly party, a fact that the Republicans regularly advertised to American voters.[71] Now it tends in the opposite direction; at least the Republicans today officially (in their national platform, for example) take positions on abortion, mar-

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66. THE BOISI CENTER PAPERS ON RELIGION IN THE UNITED STATES, SEPARATION OF CHURCH AND STATE 9 (2007), http://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-ChurchState.pdf [https://perma.cc/VAT7-ZH9E].

67. *See* TRACY FESSENDEN, CULTURE AND REDEMPTION: RELIGION, THE SECULAR, AND AMERICAN LITERATURE 66 (2007) ("The assumption that education in America proceeded in a steadfastly secular direction ill equips us for seeing not only how Protestant the character of public schooling remained throughout the nineteenth century, but also how vaunted secularization of public education was made an instrument for maintaining its Protestant character.").

68. *See* François Boucher, Religious Institutional Pluralism and the Neutrality of Public Services (Sept. 2012) http://www.cevipof.com/rtefiles/File/pluralisme%20papers/FB%20Secular%20neutrality%20and%20religious%20institutional%20pluralism.pdf [https://perma.cc/K9CT-S6MP] ("According to [secularism's] answer to religious pluralism, the equality between adherents to different faiths requires the state to abstain from recognizing religious identities and requires that citizens refrain from expressing their religious views in the public sphere.").

69. *See generally* Steven K. Green, *"Blaming Blaine": Understanding the Blaine Amendment and the "No-Funding" Principle*, 2 FIRST AMEND. L. REV. 107 (2003).

70. *Id.* at 111–12.

71. Richard G. Bacon, *Rum, Romanism and* Romer*: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 3 (discussing how the influx of Catholic immigrants greatly influenced the electoral politics in America, which was evident from anti-Irish Catholic strains that ran through the Republican party).

riage, and religious liberty decidedly more in line with what the Church teaches about those important matters.[72]

Catholics have long been numerous enough to be more than victims, however. They have been culture-forming agents, too, in a way that neither Mormons nor Native Americans were or could be. As government actors and Protestant leaders tried to assimilate Catholics, Catholics tried to convert American culture. As the United States tried to change Catholics, Catholics tried to change it. Both sides succeeded, up to a point. Any adequate account of religious liberty in America must thus take account of Catholicism, *both* as a negative reference point for Protestant majorities *as well as* for the ways in which Catholics shaped our conception of religious freedom.

I shall here mention just two. The first has to do with the infamous "Blaine Amendments" of the late-nineteenth century, which characteristically cut off public funding to all "sectarian" institutions.[73] They were aimed at Catholic entities, even though their reach was broader than that.[74] But cutting off (or forestalling in the first place) public funds did little to slow the explosive growth of the Catholic institutions, which became pillars of the subculture that helped to preserve the faith of America's working-class population of Catholics for a hundred years.[75] This stubborn, massive Catholic edifice of mediating institutions—occupying public space but almost wholly outside government control—called into being a whole body of church–state law about institutional ministries.[76] These institutions and that body of law cemented a fruitful civil partnership between church and state, each working in its own way for the common good.

Here is a second salutary legal effect: ecclesiastical institutions

72. Anne Hendershott, *Catholics Beginning to Move away from the Democratic Party*, CATHOLIC WORLD REPORT (Oct. 8, 2014, 7:48 PM), http://www.catholicworldreport.com/Blog/3414/catholics_beginning_to_move_away_from_the_democratic_party.aspx [https://perma.cc/3NC3-KZLF].

73. *See generally* ANTHONY R. PICARELLO, JR., U.S. COMM'N ON CIVIL RIGHTS, THE BLAINE AMENDMENTS & ANTI-CATHOLICISM (2007).

74. *See generally id.*

75. *See generally* DOROTHY M. BROWN & ELIZABETH MCKEOWN, THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE (1997) (considering the roughly one-hundred-year period from the Civil War to World War II and documenting the remarkable growth and ability of Catholic charities to provide for their own and combat government encroachment on local affairs).

76. *See* Charles E. Curran, *The Catholic Identity of Catholic Institutions*, 58 THEOLOGICAL STUD. 90, 90–91 (1997), (discussing Catholic institutions in healthcare, higher education, and social service); *see also* Kirchoff, *supra* note 39 (discussing legal challenges to the policies of Catholic institutions).

were the focal point of that religious liberty which was codified in the early state constitutions and then in the Bill of Rights, if for no other reason that opinions about an "established" church were central to the debate about religious liberty.[77] As early as the second quarter of the nineteenth century, however, Protestant revivalism displaced ecclesiastical and even doctrinal concerns with an emphasis on religious "experience."[78] Protestantism flourished even as the churches declined. America's dominant religion began to split into public moralism on the one hand and an affair of the heart in hearth and home on the other.

But Catholics took dogma, doctrine, and religious authority very seriously. The inner life of the Church was complex and highly structured. Catholics understood religious liberty as essentially a triangular concept: man, church, state.[79] As Catholic numbers exploded and as their churches began to appear all across the country, *ecclesiastical* liberty, including the creation of a novel legal status—the corporation *sole*—and the roots of what today is called the "ministerial exception" to certain employment nondiscrimination laws, were reinvigorated as part of our religious-liberty law.[80]

IV. RELIGIOUS-LIBERTY CHALLENGES TODAY DIFFER IN KIND FROM THOSE BEFORE

An attentive reader might object at this point: has not the analysis so far been about matters of *degree*? Are we not stuck in linear thinking about common metrics? What is different in *kind* about the present challenge to religious liberty?

Fair enough. So far, I have described what amount to surface manifestations of underlying transformative forces, the audible

77. Steven Alan Samson, *Religious Liberty in the Early American Republic*, 3 W. AUSTL. JURIST 27, 43–51 (2012).

78. Peter Dobkin Hall, *The Decline, Transformation, and Revival of the Christian Right in the United States*, *in* EVANGELICALS AND DEMOCRACY IN AMERICA: RELIGION AND POLITICS 249–79 (Steven Brint & Jean Reith Schroedel eds., 2009).

79. Pope Paul VI, *Declaration on Religious Freedom*, THE HOLY SEE (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html [https://perma.cc/HQ9H-KVUS].

80. *See* Summer E. Allen, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, 40 PEPP. L. REV. 545, 648–70 (2013) (describing the role of the Catholic Church in establishing the Ministerial Exception in American common law); *see also* James B. O'Hara, *The Modern Corporation Sole*, 93 DICK L. REV. 23, 23–32 (1988) (describing the role of the Catholic Church in establishing the corporation sole in American common law).

sounds of tectonic plates shifting under our social life. These observable effects are indeed more or less commensurable; they *are* matters of degree. Down below is an emergent, largely coherent set of ideas and norms which, when it all bubbles up to the surface, will not so much limit religious liberty as it will redefine it, perhaps nearly out of existence. And that is a real difference in kind.

Let me explain, beginning with some judicial quotations.

Justice Kennedy in *Hobby Lobby*[81] said that free exercise of religion is "essential" to preserving the "dignity" of those who choose to "striv[e] for a self-definition shaped by their religious precepts."[82] This same liberty anchors Justice Kennedy's opinion for the *Obergefell*[83] Court: "The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[84] In the 1992 reaffirmation of *Roe v. Wade*,[85] the joint opinion writers in *Planned Parenthood v. Casey*[86] declared that a woman's abortion decision "originate[s] in the zone of conscience and belief," and must be settled by "her own conception of her spiritual imperatives."[87] Anthony Kennedy coauthored that opinion.[88]

President Obama—later heavily involved with Supreme Court nominations, but then the junior Senator from Illinois—described religion as each one's "narrative arc," which "relieve[s] a chronic loneliness."[89] Religion provides an "assurance that somebody out there cares about them, is listening to them—that they are not just destined to travel down that long highway towards nothingness."[90] This religion sounds much like Obergefell's marriage, which Justice Kennedy asserted "responds to the universal fear that a lonely person might call out only to find no one there."[91]

81. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
82. *Id.* at 2785 (Kennedy, J., concurring).
83. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
84. *Id.* at 2600 (citing United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).
85. 410 U.S. 113 (1973).
86. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
87. *Id.* at 852.
88. *Id.* at 833.
89. Senator Barack Obama, Keynote Address at the Call to Renewal's Building a Covenant for a New America Conference (June 28, 2006), *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html [https://perma.cc/M6Z4-BM5L].
90. *Id.*
91. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

These proof texts suggest what a wider canvas of authoritative judicial, political, and academic interventions would confirm: religious liberty is morphing into a more gauzy spiritual autonomy, which is itself migrating towards an encompassing project of individual self-invention and presentation. Religious liberty is being assimilated to the broader freedom of "conscience" or "dignity" or "identity" of the acting person. Religious liberty in the new dispensation is really one subdivision, or set of exercises, of the indivisible Great Liberty, the mega-right given authoritative expression twenty-four years ago in *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[92]

This absorption is unprecedented. Nothing in previous campaigns against LDS, Native Americans, or Catholics called into question our society's basic understanding of what religion is and is about, or the basic components of religious liberty. Much less did any prior episode even faintly anticipate the takeover of either religion or religious liberty by a romanticized project of self-creation *ex nihilo*.

The novel project at hand nonetheless signals a dramatic remapping of our social world. The boundary lines on the new chart divide human activity into two basic realms. The first is "public" life, defined expansively to include not only law and political affairs, but also "the marketplace, [and the worlds] of commerce, of public accommodation."[93]

In *Elane Photography*,[94] the New Mexico Supreme Court ruled in favor of a lesbian couple who asserted that, under the state law outlawing discrimination on grounds of sexual orientation in all "public accommodations," a wedding photographer was bound to shoot video at their "commitment ceremony."[95] Concurring in that result, Justice Bosson recognized that the photographers—the Huguenins—acted out of a sincere Christian belief that the ceremony celebrated an immoral sexual relationship, and that memorializing it in pictures made them complicit in the immorality.[96] Justice Bosson wrote that the Huguenins are "free

92. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).
93. Elane Photography, LLC v. Willock, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring).
94. 309 P.3d 53 (N.M. 2013).
95. *Id.* at 59.
96. *Id.* at 78 (Bosson, J., concurring).

to think, to say, to believe, as they wish; they may pray to the God of their choice and follow these commandments in *their personal lives* . . . ."[97] In the world of "the marketplace, of commerce, of public accommodation," however, they must "compromise."[98] They "have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different."[99] They must adhere to the "glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people"; this is "the price of citizenship."[100]

Public space where "citizens" gather is to be governed by a secular orthodoxy from which only mental reservation is permitted. In this secularized realm, religion may still supply motivation for some people, and a common stock of phrases and images for many more. (President Obama greeted the Pope in 2015 by declaring: "What a beautiful day the Lord has made."[101] To another guest he might have said: "It's nice outside.") But religion may not supply cognizable reasons or plausible arguments for public policy. In a 2006 talk, then-Senator Obama explained how "[d]emocracy demands that the religiously motivated translate their concerns into universal . . . values."[102] The reasons were two: religion, he said, does not allow for compromise, and it is not subject to argument or amenable to reason.[103] Religion is, evidently, irrational. "To base one's life on such uncompromising commitments may be sublime, but to base our policy making on such commitments would be a dangerous thing," Senator Obama concluded.[104]

Anyone might still carry around in his or her head a panoply of religious motivations and pictures of the world, which the carrier holds as orthodox, and even as true. As Justice Alito wrote in his dissent in *Obergefell*: "[T]hose who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as

97. *Id.* at 91 (emphasis added).
98. *Id.* at 92.
99. *Id.*
100. *Id.*
101. President Barack Obama, *Remarks by President Obama and His Holiness Pope Francis at Arrival Ceremony*, THE WHITEHOUSE, OFFICE OF THE PRESS SEC'Y (Sept. 23, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/23/remarks-president-obama-and-his-holiness-pope-francis-arrival-ceremony [https://perma.cc/6VGB-ACJM].
102. Senator Barack Obama, *supra* note 89.
103. *Id.*
104. *Id.*

bigots and treated as such by governments, employers, and schools."[105] Orthopraxy is obligatory.

Orthopraxy in public and commercial life tends in our society to engender an orthodoxy. Even if at first religious people go along for fear of sanction or just for the sake of conformity to legal rules, what people do settles social expectations and customary norms of behavior. Before long, the legal norms are part of the cultural furniture. It is then not long before a "consensus" about what is truly owed to other persons "evolves." A mainstream belief about what justice entails is born; those who would do otherwise are not only legally restrained, they also become the subjects of social censure and stigma. This dynamic movement from doing to believing is promoted especially when legal norms are introduced, justified, and enforced with heavy moral ballast. The legal norms most depressive of religious liberty today have been defended as imperatives of "gender equality,"[106] "women's health,"[107] "sexual self-determination,"[108] and "equal dignity"[109] for "equal love."[110] The "contraceptive mandate"[111] and satellite issues of "reproductive freedom"[112] are all promoted as defenses in a "war on women."[113]

How quickly this whole dynamic can play out on the ground is clear from the case of same-sex relationships. In the decade and a half before *Obergefell* was decided in 2015, homosexual relationships moved, in both law and in popular opinion, from the margins of criminality and moral obloquy to decriminalization and tolerance, then to broad acceptance and affirmation, and finally to equal respect as marriages.[114] Those who now hold what was

105. Obergefell v. Hodges, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting).

106. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014).

107. *E.g.*, Korte v. Sebelius, 735 F.3d 654, 725 (7th Cir. 2013) (Rovner, J., dissenting).

108. *E.g.*, Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1434 (2006).

109. *E.g.*, *Obergefell*, 135 S. Ct. at 2608.

110. *E.g.*, Elizabeth M. Glazer, *Civil Union Equality*, CARDOZO L. REV. DE NOVO 125, 136 (2012).

111. *E.g.*, *Burwell*, 134 S. Ct. at 2779.

112. *E.g.*, Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005).

113. Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL'Y & L. 343, 360 (2014).

114. *See* KARLYN BOWMAN ET AL., PUBLIC OPINION ON SAME SEX MARRIAGE: ANATOMY OF A CHANGE 1, AMER. ENTER. INST. (June 2015) https://www.aei.org/wp-content/uploads/2015/06/Same-Sex-Marriage-Special-Report_June-2015.pdf [https://perma.cc/6M45-5HDB] ("When the National Opinion Research Center asked the first question on same-sex marriage in 1988, only 12 percent agreed that homosexual

the dominant view just a few years ago have become objects of cultural scorn and legal recrimination.[115]

V. THE CURRENT CHALLENGE TO RELIGIOUS LIBERTY AFFECTS AMERICANS ASYMMETRICALLY

The story told by Judge Edith Jones, in the penultimate sentences of her courageous dissent from the Fifth Circuit's denial of en banc rehearing in an HHS mandate case, is an instructive paradox. In the past decade, Jones wrote, her court found a "substantial burden" under the Religious Freedom Restoration Act in nine cases.[116] The nine involved:

> possession of eagle feathers for Native American worship; a Sikh's wearing of a 3-inch kirpan (dagger); a Native American prisoner's possession of a lock of hair; a Muslim inmate's beard; long hair on a Native American high school student; Santeria practitioners' keeping and slaughtering four-legged animals; kosher food in prison; worship in a particular prison setting; and possession of stones by Odinists in prison.[117]

"Yet when these institutions' beliefs are predicated on a long history of Christian moral theology concerning complicity in immoral conduct," Jones added that "the panel here declared their concerns too 'attenuated' to merit legal protection."[118]

Judge Jones's accounting is instructive, for it indicates unmistakably that the chief protagonists of today's story—traditional Christians—are being abandoned by our law of religious freedom. Her accounting paradoxically suggests, though, that religious liberty might still be alive and well (enough), at least for some claimants in some contexts.

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couples should have the right to marry one another. In 2014, 56 percent gave that response. Other long trends on the topic confirm a pattern of increasing support for same-sex marriage over the past two decades, though levels of support vary.").

115. *See* Brandon Ambrosino, *Being Against Gay Marriage Doesn't Make You a Homophobe*, THE ATLANTIC (Dec. 13, 2013) https://www.theatlantic.com/national/archive/2013/12/being-against-gay-marriage-doesnt-make-you-a-homophobe/282333/ [https://perma.cc/3TF6-83CK] (noting the differences between those opposed to gay marriage and those who are "anti-gay" and calling for the popular vilification of the former to stop).

116. E. Tex. Baptist Univ. v. Burwell, 807 F.3d 630, 634 (5th Cir. 2015) (Jones, J., dissenting from denial of rehearing en banc).

117. *Id.*

118. *Id.*

In fact, the Obama Administration took broadly pro-religion positions in some Supreme Court cases, specifically those involving legislative prayer,[119] prisoners' beards,[120] and secondary rules implementing religious nondiscrimination in the workplace.[121] The Obama Administration also regularly exploited a cluster of sexual-equality and sexual-identity issues, especially effective access (of women) to reproductive services and (of non-heterosexuals) to marriage, with the conscious aim of leading religious freedom into the maws of the one great liberty of self-definition.[122]

What is going on?

There are some non-ideological explanations for this seeming inconsistency. One is that the Administration evidently shares the basic viewpoint which has animated the Supreme Court since it invigorated the Religion Clauses starting in *West Virginia State Board of Education v. Barnette.*[123] The Justices have largely understood their work to be corrective of an often-callous politics, a process loaded (if you will) in favor of "mainstream" or "dominant" religions; that is, courts understand their task to be to protect religious "minorities" (like those listed by Judge Jones) from indifferent Christian "majorities." This dynamic self-understanding is clearly at work even in Justice Scalia's near-apology for the Court's abandonment of the "compelling-state-interest" test for neutral laws in *Smith*[124]: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in, but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[125]

Another partial explanation is that the *Sherbert*[126] test restored by the Religious Freedom Restoration Act (RFRA) has always

119. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). The United States filed an amicus brief in support of the legislative-prayer practice. Brief for the United States as Amicus Curiae Supporting Petitioner, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696).

120. *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853 (2015).

121. *See, e.g.*, EEOC v. Abercrombie & Fitch, Inc., 135 S. Ct. 2028, 2032 (2015) (holding that an applicant must show that her need for accommodation due to religious practice was a "motivating factor" in the employment decision).

122. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

123. 319 U.S. 624 (1943).

124. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

125. *Id.* at 890.

126. Sherbert v. Verner, 374 U.S. 398 (1963).

been sensitive to numbers. It tilts against "majorities." An obvious contraindication for recognizing conscientious exemptions to generally applicable laws is the number of potential beneficiaries in view. Too many (religious) pacifistic objectors would defeat a draft. Too many (religious) tax resisters would sink the Treasury. Too many (religious) exceptions to a public-school curriculum would undermine the purposes of common schools.

The Obama Administration's reasoning behind the narrow exemption it provided to churches from the "contraceptive" mandate, and its defense against RFRA-mandated expansion of it in litigation across the country, is a perfect illustration of this tilt. The United States repeatedly justified the narrow exemption, not as the result of a cogent chain of reasoning about the nature of religion and liberty or anything of the sort, but rather because, in its view, the number of women who might be deprived of easy free access to "contraception" was miniscule or zero.[127] In other words, the government reasoned that the female employees and dependents of objecting churches were likely to share their employer's moral objections to "contraception," and thus be uninterested in it anyway.[128] Not so with the vastly greater number of employees and dependents at religious hospitals, universities, and other institutional ministries, where hiring practices often include few, if any, tests for faithfulness to the parent organization's religious and moral teachings.[129] The Obama Administration's opposition to a larger accommodation was therefore a simple numbers game: more exemptions would lead to too many women cut off from the benefit which the Administration fervently desired to put in every woman's hands.[130]

The chief explanation of the apparent paradox, however, lies elsewhere. Cases in which sincere believers are aggrieved ("burdened") by the operation of rules rooted in, and presumptively justified by, the internal regularities of government systems, ad-

127. *See* David G. Savage, *U.S. Supreme Court Dives Back into the Fight over Contraceptives and Obamacare*, L.A. TIMES (Nov. 6, 2015, 12:45 PM), http://www.latimes.com/nation/la-na-supreme-court-contraceptives-20151106-story.html [https://perma.cc/D9QQ-5TDU] ("From the start, the Obama administration said churches, synagogues and other houses of worship were exempt from the healthcare law's requirement. But the administration refused to extend the full exemption to religiously affiliated schools, hospitals and other groups because those institutions may have hundreds of employees who do not share the religious view of their employers.").

128. Brief for Petitioner at 52, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

129. *Id.*

130. *See* Savage, *supra* note 127.

ministrative efficiency, or uniformity for its own sake continue to evoke traditional sympathy for the lonely dissenting believer. Zoning regulations and prisons are classic examples.[131] But these cases are now sharply distinguished from those involving burdens upon believers, where relieving that burden would, at least by assertion, impose a burden upon specifiable other persons. Where that transferred load conveys "dignitary" harm—that is, where it evinces the believer's moral disapproval of another's act or choice—the traditional sympathy for believers vanishes. In fact, it is shifted to the "demeaned" or "insulted" other. The same-sex wedding cases are classic examples.

In the former set of cases involving the lonely dissenting religious person, believers line up against diffuse governmental interests. In the latter cases involving burdens on believers and alleged dignitary harm, believers face off against their alter egos, against persons who would also exercise a valuable right. In the same-sex wedding cases, for example, Christian service providers seek to exercise the *same* right as the marrying couple would exercise.[132] There stand two parties—let's call them "plaintiff" and "defendant"—each exercising the one right of self-definition, albeit under their "religion" and "sexuality" subheadings. The paradox thus finally evaporates because the critical eye sees that the apparent "inconsistency" between two lines of religious-liberty cases is illusory. Though grouped together (for now) under the same generic heading of religious liberty, and handled mostly under the same statutes (RFRA, and state counterparts), the prison case and same-sex wedding cases are really more like apples and oranges.

Today's frank conflicts between exercises of the *Casey* mega-right are not so much the framework of the present crisis. Nothing in pre-*Smith* Free Exercise law was geared to deal with head-on collisions between persons exercising the same generic liberty

131. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (After the Catholic Archbishop of San Antonio was denied a building permit to enlarge a church, he challenged the permit denial under the Religious Freedom Restoration Act of 1993 (RFRA). The Court held that RFRA exceeded Congress's power. The ruling was superseded by the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), as stated in *Burwell v. Hobby Lobby Stores, Inc.*, 134 U.S. 2751, 2761 (2014).); *see also* Holt v. Hobbs, 135 U.S. 853, 857 (2015) (holding that "[t]he Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a 1/2-inch beard in accordance with his religious beliefs").

132. *See* State v. Arlene's Flowers, Inc., 389 P.3d 543, 552 (Wash. 2017) ("Stutzman argues that because the WLAD protects both sexual orientation and religion, it requires that courts balance those rights when they conflict.").

of self-definition. That "compelling-interest, least-restrictive-means" test was conceived, and operated for decades, to deal with dispensations for individuals and small groups from administrative rules and regulations, to give believers a break from bureaucratic inertia.[133] It was not geared up to resolve conflicts between persons exercising their right to moral autonomy.

In the space once occupied in our political–legal culture by religious liberty we now find something quite different, namely, a presumptive right to live out one's truest sense of self, passions, and deepest commitments, whatever they happen to be. No one, including religious persons, has a right to impose one's self upon another self. Thus, no one may rightly impede (in no recondite or technical sense) anyone else from exercising the same right due to one's own worldview; doing so would be unfair, imperialistic, and seemingly would conscript another into one's own mental universe. For reasons having to do with the peculiar evolution of our society's controlling conceptions of "autonomy," "identity," "self," religion, and sex, we have come to a point where someone seeking to avoid complicity in another's immoral actions *injures* that other person, even where that person (or couple) suffers no practical complication whatsoever. The Giffords and the Huguenins are Christians[134]; hence, it is apparent that they would show their love for others by exemplifying for them the requirements of moral truth and thus of true human flourishing. The law says that they "demean" those same others, and thus the law treats them as wrongdoers, and even as unfit to run a business.[135]

Justice Kennedy appeared to do believers a favor in *Obergefell v. Hodges* when he wrote for the Court that "[m]any who deem same-sex marriage to be wrong reach that conclusion on *decent*

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133. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 U.S. 2751, 2760–61 (2014) (discussing past cases governed by RFRA).

134. Penny Starr, *NY Court: Farmers to Be Re-Educated, Pay Fines for Not Hosting Homosexual Wedding*, CNS NEWS (Jan. 26, 2016, 2:56 PM), http://www.cnsnews.com/news/article/penny-starr/ny-court-farmers-be-re-educated-pay-13000-fines-not-hosting-homosexual [https://perma.cc/2N9Z-FSLZ]; Conor Friedersdorf, *Refusing to Photograph a Gay Wedding Isn't Hateful*, THE ATLANTIC (Mar. 5, 2014), https://www.theatlantic.com/politics/archive/2014/03/refusing-to-photograph-a-gay-wedding-isnt-hateful/284224/ [https://perma.cc/5M9J-87RX].

135. One truth in this way of construing the matter is that believers in these cases affirm an objective moral norm, according to which they reckon that to comply with the law would make them complicit in others' moral wrongdoing, be it an abortion or a same-sex wedding. The marrying same-sex couple typically carries no brief against the heterosexual identity or choices of the Giffords or the Huguenins.

and honorable religious or philosophical premises."[136] Indeed, they do. But then Justice Kennedy added that when such a "sincere" view "becomes enacted law," the "necessary consequence is to put the imprimatur of the state itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[137]

These judges hold that legal protection of conscientious religious objection is tantamount to giving an imprimatur to a "demeaning" opinion of gay men and lesbians, as if there is no difference between laws limiting marriage to opposite-sex couples and laws which make allowance for "decent and honorable" personal unbelief in same-sex marriage. But this is surely mistaken. It does not follow from *Obergefell.* Besides, in no case so far reported has there been an allegation that the objector objects to serving gay or lesbian people. In a few cases, it is demonstrably the contrary. One example is Baronelle Stutzman, a Washington (state) florist who served two gay customers for nine years, but demurred only when she was asked to work on their upcoming wedding.[138] The conscientious refusals in all the same-sex wedding cases so far reported have been precisely to a particular *act,* and not to any person or character trait or opinion.[139]

The imposition upon objecting believers in these cases is especially fraught. Generally speaking, making it impossible for someone to perform an act required by one's religion—say, assembling with others for formal prayer—is bad. But it is generally not as bad as pressuring someone to perform an act which that person judges to be against their conscience. Taking away a prisoner's prayer rug or beads is, again, prima facie unjust. But at least the intervention of brute force or factual impossibility does not engage the prisoner's deliberation or choice, and so cannot corrupt his conscience; that is, break down his integrity as a thinking, choosing, acting person.

In our tradition, judges have not treated claims of religious freedom not to conform—whether they involve the Amish, the Jehovah's Witnesses, Muslims, or Christians—to be transparent for the substantive convictions of the claimant, much less for the

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136. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (emphasis added).

137. *Id.*

138. Baronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story,* SEATTLE TIMES (Nov. 12, 2015, 4:11 PM), http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/ [https://perma.cc/4PJE-DWHK].

139. *See, e.g.,* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

truth of these convictions.[140] On the contrary: judicial opinions on civil liberties, including those involving religion, almost ritually include a disclaimer: vindicating one's right to be free to act (or speak or perform) is *not* to be construed as an endorsement of the act (or speech or performance) so liberated.[141]

The bases of these religious-freedom cases have rather been that the religious conviction in play happens to be the sincere belief of someone or some community, and that it is a good thing for our polity to protect religion and to promote conscientious decision making, so that persons can direct their own lives and live them with some moral integrity.[142]

A pure example of the inner logic of the emergent norm—and a gauge of where our society might be going, at least concerning public officials—is the case of a Wyoming municipal judge.[143] A panel of the Wyoming Commission on Judicial Conduct and Ethics recommended in 2015 that Ruth Neely be removed from both her position as a circuit-court magistrate and as a municipal judge because she publicly expressed her religious opinion that marriage is the union of a man and a woman.[144] Judge Neely was never asked to perform a same-sex marriage and so never refused to do one.[145] In fact, she is not

140. *See* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.").

141. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 408 (1989) (holding the Free Speech Clause protects an individual's right to burn the American flag, and stating that "[t]he State's position, . . . amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption.") (footnote omitted); Cohen v. California, 403 U.S. 15, 24–25 (1971) (holding the Free Speech Clause protects an individual's right to display the F Word on a jacket in a public place, and stating that "[t]o many, the immediate consequence of [the broad freedom of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.").

142. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."); United States v. Seeger, 380 U.S. 163, 184 (1965) (quoting *Ballard*, 322 U.S. at 86).

143. Ben Neary, *Wyoming Supreme Court Hears Arguments in Judge Ruth Neely Case*, WYO. TRIBUNE EAGLE (Aug. 18, 2016) http://www.wyomingnews.com/news/wyoming-supreme-court-hears-arguments-in-judge-ruth-neely-case/article_0c11e1e0-64d3-11e6-8c8f-6f7213621ed1.html [https://perma.cc/52QS-RMSM].

144. Pete Williams, *Wyoming Judge Faces Removal for Refusing Same-Sex Marriages*, NBC NEWS (Aug. 17, 2016) http://www.nbcnews.com/news/us-news/wyoming-judge-faces-removal-refusing-same-sex-marriages-n632906 [https://perma.cc/E5KC-CQ2J].

145. *See* In re Neely, 390 P.3d 728, 749 (Wyo. 2017) ("The Commission found that

required to perform weddings at all: as a magistrate, she is authorized but not required to solemnize marriages, and as a judge she is not even empowered to do that![146]

The Commission admitted in the Conclusions of Law section of its December 31, 2015 order that it would remove Judge Neely because of her "statements" expressing her religious opinion about marriage.[147] This is to say that she would be removed for possessing, or at least for being known to possess, the religious belief of her church that marriage is a relationship which by its natural orientation towards procreation is limited to unions of a man and a woman.[148] In other words, Judge Neely is unfit because she is a Lutheran.

VI. THE MEANING AND VALUE OF RELIGION AS A GUIDE TO RELIGIOUS LIBERTY

I wrote in the Introduction that what's happening to religious

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Judge Neely's announcement that she would not perform same-sex marriages violated Rule 1.2 by giving 'the impression to the public that judges, sworn to uphold the law, may refuse to follow the law of the land.'") (quoting WYO. CODE OF JUDICIAL CONDUCT, Rule 1.2, Cmt. 5). Consequently, it is not necessary to consider a different situation, where a public servant's religious beliefs and unwillingness to act in violation of them would interfere so substantially with the performance of his or her duties that recusal-and-referral is no longer a feasible practical accommodation. There is no allegation here of anything like such a substantial nonperformance of assigned duties. Nor could there be: given the highest recorded claim about the percentage of America's population which is same-sex attracted, no one authorized to perform marriages (apart, perhaps, from those in a few especially cosmopolitan metropolitan areas) would have cause to decline more than 5–7% of requests to officiate. In no imaginable situation could such a rate of recusal or referral constitute a *substantial* failure to perform one's job.

146. *Id.* at 748. The Commission referred to Comment 2 (to Rule 2.2), specifying that a judge must "interpret and apply" the law without regard for her personal opinion about the justness of the law. But nowhere did the Commission identify any violation of this provision, and Judge Neely did not dispute that the law recognizes same-sex marriage. In fact, the Commission distorted the obvious meaning of these provisions—which is that a judge must perform with integrity all the duties which she undertakes to perform—to mean instead that no judge may ever seek to recuse herself from performing a duty because of a conflict in conscience (at least where the judge holds a conscientious view of which the Commission disapproves). But no rule of judicial conduct in Wyoming—or anywhere else, for that matter—requires every judge to perform every task that comes across the transom.

147. *See id.* at 735.

148. The only other ground for removing Judge Neely alleged by the Commission are that her statements could undermine public confidence in the judiciary, and that they bear "the appearance of impropriety." *Id.* at 749. These assertions are almost certainly false; it is rather more likely that removing a judge because she is a Christian will lead to a widespread loss of faith in the judiciary. In any event, the only possible sense of these charges refers to a negative popular reaction to continuing Judge Neely in office. But this hypothesized reaction cannot lawfully supply the basis for removing Judge Neely. Notably, the Wyoming Supreme Court recently affirmed most of the Commission's reasoning, although it did not go so far as to relieve Judge Neely of her office, instead ordering public censure. *Id.* at 732.

liberty today is a cause as well as an effect of epochal changes in our society's understanding of the nature and sociopolitical importance of religion.[149] That is to say that the meaning and value of religious liberty is tied to the ambient meaning and value of religion and that the relationship between them is dialectical. No doubt most of what explains any society's way of being religious—its dominant understanding of what religion is about and what it is for—has little to do with law. Most of any explanation for why religion takes the form it does in a given society has to do with the history of faith in that place (Christian, Islamic, Hindu, and so on), and with a host of other forces working upon it.

Law nevertheless is a non-negligible explanatory factor. Over time the space that law provides to religion will tend to privatize faith, or not. Over time what the law presupposes about the nature of religion—as cognitive apprehension of reality, or not—will function as one effective teacher of religion. And the law certainly contributes mightily to believers' understandings of what justice requires in dealing with persons of different faiths, or none.

In religious-liberty cases today, the felt injustice of permitting objecting providers to pass on same-sex weddings calls for an articulated rationale. That rationale has centered to date upon the assuredly subjective (ineffable, non-rational) nature of religious belief. An English judge (named Law, it so happens) gave thematic expression to this development, in an opinion which backed the dismissal of a Christian relationship counselor who could not endorse the same-sex acts of his potential clients.[150] Justice Law said that any exemption on religious grounds would be "unprincipled," because it would "give effect to the force of subjective opinion" (read: religion) and thus could not "advance the general good on objective ground."[151]

Here then lies one more difference in *kind* between then and now. This difference affects those who believe, and also those who engage the religious question, which is to say, then, just about everyone. What is the quest about? What is the substance of this thing called "religion"? Is it about me, and my dreams, my depths? Or is it about reality, visible and invisible, the truth about all that there is? For it seems intuitively likely that the

149. *See supra* notes 8–9 and accompanying text.
150. *See* McFarlane v. Relate Avon Ltd. [2010] EWCA Civ 880 (Eng.).
151. *See id.*

meaning and value of religious liberty depends quite a bit on the meaning and value of religion.

While people can be, and in America have been, free to decide *what* to believe, it is not the same for the "metaphysics" of religion. Individuals and even religious congregations do not readily choose to define—in a stable, sustainable way—the *nature* of *what* their beliefs are *about*. Culture supplies that. In America that means that civil law, which so mightily influences—as well as reflects—culture, contributes to that supply.

As John Finnis aptly wrote, it seems that the dominant view of religion today is that its "status and immunities are as instances . . . of the only really basic human good, the only intrinsically worthwhile end at stake, setting for oneself one's stance in the world."[152] Even considered as an important aspect of each one's self-determination, today that term connotes "not so much" a form of "shaping up as best one can to what one judges in conscience to be reason's demands," but rather the "bundling of one's *strong desires*, one's 'deep concerns,' most considerable when most *passionate*."[153]

The foundation of value when it comes to religion is the same as that for any other aspect of one's identity. It is not the adequacy of any religion's content to what there is—seen and unseen. The value of religion lies not in the truth about anyone's obligations to a greater-than-human source of meaning and value. The metric of worth is rather a certain authenticity.

Vocabularies of self-definition and self-fulfillment stalk today's believers. That conception of religion already prevails in our law, in the academy, and in much of popular religion on the airwaves. It has found its way into even the more traditional churches. The cultural critic Philip Rieff wrote in 2005 that "the orthodox are in the miserable situation of being orthodox for therapeutic reasons."[154] It is the main reason why the non-church of those who are "spiritual" but "not religious" is the fastest growing denomination in America.[155] Each one's experi-

152. John Finnis, *Religion and State: Some Main Issues and Sources*, 51 AM. J. JURIS. 107, 113 (2006).

153. *Id.* (emphasis in original).

154. Richard John Neuhaus, *RJN: 7.10.06 Philip Rieff Has Died at Age 83 . . .*, FIRST THINGS (July 10, 2006), https://www.firstthings.com/web-exclusives/2006/07/rjn-philip-rieff-has-die [https://perma.cc/4THF-PPL8].

155. *See "Nones" on the Rise*, PEW RESEARCH CTR. (Oct. 9, 2012), http://www.pewforum.org/2012/10/09/nones-on-the-rise/ [https://perma.cc/B7K5-RAS6] (noting that "[t]he number of Americans who do not identify with any religion

ence is the measure of his or her religion, and not the other way around.

This subjectivist turn in religion decapitates religious liberty. At least it makes impossible that religious liberty institutionalized by the founders and thematized by James Madison, in probably the most famous defense of our first freedom, one adopted as authoritative by the Supreme Court in 1947.[156] In his *Memorial & Remonstrance* Madison wrote in favor of religious liberty "[b]ecause we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.'"[157] It is unalienable because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men.[158]

The whole inward turn in the metaphysics of religion makes religion, understood as an account of what there is, including divine realities, which men come to embrace by sifting and evaluating evidence, and finally judging on the basis of critical reason, practically inaccessible to people.

VII. THREE TRANSFORMATIONS CAUSED BY A SUBJECTIVIST DEFINITION OF RELIGION

Let's finally consider three of the many diverse transformations being wrought by the subjectivist turn in our culture's understanding of religion that have to do, not precisely with the flourishing of religion and its adherents, but with our whole political culture.

One. "Religious liberty" has always been an indelible fixture of our political culture, a rhetorical untouchable which everyone had to endorse as our cherished "first freedom."[159] Never mind

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continues to grow at a rapid pace," but that "[t]wo-thirds of them say they believe in God (68%) . . . while more than a third classify themselves as "spiritual" but not "religious" (37%) . . . . While the ranks of the unaffiliated have grown significantly over the past five years, the Protestant share of the population has shrunk. . . . The Catholic share of the population has been roughly steady" over the past two decades.).

156. Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 63–72 (1947) (stating Madison's defense in an Appendix to the Court's opinion).

157. *Id.* at 64.

158. *Id.*

159. *See* Charles C. Haynes, *History of Religious Liberty in America*, NEWSEUM INST. (Dec. 26, 2002), http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-religion/religious-liberty-in-america-overview/history-of-religious-liberty-in-america/ [https://perma.cc/LZ6K-LSJU] ("Religious liberty in America is a key part of

that it was not literally so; our First Amendment was actually the third of twelve submitted by Congress to the states in September 1789.[160] Third became first because the first two proposed amendments failed of ratification[161] (until 1992, when one of those first two—prohibiting congressional salary increases save where election of a new House intervenes—was finally ratified by the required thirty-eighth state[162]).

We have in any event effectively adopted the Religion Clauses as expressive of our "first freedom." There is something more here than pride of place. That something more has been identified by many politicos and pundit, scholars and even a few saints. Here is one authoritative expression of a constant theme of American political discourse. In his 2011 World Day of Peace Message (*Religious Freedom, the Path to Peace*) Pope Benedict located religious freedom at the base of "all fundamental rights and freedoms, since it is their synthesis and keystone."[163] He said (here quoting Saint John Paul II) that it was "the litmus test for the respect of all the other human rights."[164] So to say: *religious liberty is the linchpin of civil liberty*. Now personal autonomy, with religious liberty folded within it, is the linchpin—the "heart"—of constitutional civil liberty.

Two. From the founding until the day before yesterday, Americans believed that our experiment in liberty depended in an *essential* way upon the religiosity of the people. This is Federalist Two,[165] Washington's Farewell Address,[166] and countless other

the boldest and most successful experiment in freedom the world has known. The strength and diversity of religion in the United States is due almost entirely to the full protection of religious liberty, or freedom of conscience, guaranteed by the Constitution. . . . Religious liberty has been called America's 'first liberty' because freedom of the mind is logically and philosophically prior to all other freedoms protected by the Constitution.").

160. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1137, 1146, 1160 (1991).

161. *Id.* at 1137.

162. BRITANNICA EDUCATIONAL PUBLISHING, THE U.S. CONSTITUTION AND CONSTITUTIONAL LAW 108 (Brian Duignan ed., 2013).

163. Pope Benedict XVI, World Day of Peace Message: Religious Freedom, the Path to Peace (Jan. 1, 2011).

164. *Id.*

165. *See* THE FEDERALIST NO. 2, at 12 (John Jay) (Ian Shapiro ed., 2009) ("With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion . . . who . . . have nobly established general liberty and independence.").

166. President George Washington, Farewell Address (1796) ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.").

political speeches, election sermons, and reflective essays by persons of all faiths—and even of none—up to the 1960s. Tocqueville wrote that religion "should therefore be considered as the first" of America's political institutions,[167] a sentiment which has reverberated ever since in Americans' understanding of themselves as a self-governing free people. It is reflected even in the LDS and Native American assimilationist campaigns. The civic template was then, however, *Protestantism* as our republican religion.[168] This limited conception was shaken and finally broken in the twentieth century by the many millions of undeniably patriotic Catholic Americans.[169] After World War II what was commonly called "tri-faith" America sustained the tradition of political and religious symbiosis launched by Madison in Federalist Ten.[170]

The Cold War called forth a renewed and more inclusive account of American's religious–political identity, as recent books by Will Inboden,[171] Kevin Schultz,[172] and Jonathan Herzog[173] convincingly show. (Yes, President-elect Dwight Eisenhower really did say, on December 22, 1952, at the Waldorf-Astoria Hotel, that "our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[174]) The civil-rights, anti-war, and pro-life movements continued this tradition, though with this important variation: religion was no longer quite the bulwark of the republic, but the prophetic conscience of the nation. Even so, public religion was an important component of our political culture until, when? The nineties? Later still?

This whole notion that public well-being depends upon pri-

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167. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Harvey C. Mansfield and Delba Winthrop trans., Univ. of Chicago Press 2002) (1835).

168. *See supra* notes 25–39 and accompanying text.

169. *See* Gerald P. Fogarty, *Public Patriotism and Private Politics: The Tradition of American Catholicism*, 4 U.S. CATH. HISTORIAN 1, 1, 47 (1984) (noting that American Catholics achieved "new-found acceptance in society" just prior to the Civil Rights Era, following a "long history of Catholics having to prove they could be loyal Americans").

170. *See generally* KEVIN SCHULTZ, TRI-FAITH AMERICA: HOW CATHOLICS AND JEWS HELD POST-WAR AMERICA TO ITS PROTESTANT PROMISE (2011); *see generally* THE FEDERALIST NO. 10 (James Madison) (noting that religious differences create factions, and that factions are inevitable, and arguing that the political solution to factions is a large republic).

171. WILLIAM INBODEN, RELIGION AND AMERICAN FOREIGN POLICY 1945–1960 (2008).

172. SCHULTZ, *supra* note 170.

173. JONATHAN P. HERZOG, THE SPIRITUAL–INDUSTRIAL COMPLEX: AMERICA'S RELIGIOUS BATTLE AGAINST COMMUNISM IN THE EARLY COLD WAR (2011).

174. P. Henry, *'And I Don't Care What It Is': The Tradition-History of a Civil Religion Proof Text*, 49 J. AM. ACAD. RELIGION 35, 41 (1981).

vate virtue has now been repudiated. Henceforth it is conformity in public, and carnival in private. That's the price, and the reward of "citizenship." Under the influence of the Mystery Passage[175] and its extravagant exaltation of each one's mental universe, one even wonders how any notion of genuine common good is possible.

Three. Yale theologian George Lindbeck wrote in his magisterial book, *The Nature of Doctrine*, that "the privatism and subjectivism that accompanies the neglect of communal doctrines leads to weakening of social groups (*Gemeinschaften)* that are the chief bulwarks against chaos and against totalitarian efforts to master chaos."[176]

Lindbeck had in mind the manner in which a religious community, wrapped tightly around a distinctive narrative history of its own, anchored a safe space between persons and government. That is true enough, as is the following related but different point about the political importance of religious communities which are organically integrated, and not an agglomeration of like-spirited individuals (as if a church was little more than a spiritual club). Churches can, and throughout American history have, mounted critiques of political and legal projects, as well as of economic institutions and practices, more powerful and effective than spiritual clubs could or did, and of a sort which will be nearly inconceivable for a nation of atomized religious subjects.[177]

This huge difference owes to *more* than the distinctive moral authority of churches and religious leaders, which is lately so much dissipated. The difference owes to *more* than the organizational and financial resources of the churches, although those

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175. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

176. GEORGE A. LINDBECK, THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE 77–78 (1984).

177. *See, e.g.*, Allison Calhoun-Brown, *Upon This Rock: The Black Church, Nonviolence, and the Civil Rights Movement*, 33 PS: POL. SCI. & POL. 169, 169 (2000) ("Given the connection between the black church and the civil rights strivings of African-American people, the role the church played during the Civil Rights Movement and its relationship to nonviolent social change has been a subject of particular interest."); Fogarty, *supra* note 169, at 1 ("On May 3, 1983, the American bishops issued their pastoral letter, 'The Challenge of Peace: God's Promise and Our Response.' The letter ushered in a new era in the history of American Catholicism, for it marked a departure from past practice of support for government policy and of silence on political issues, except those which pertained to education or family life.").

have been and remain considerable. The difference owes to *more* than particular denominational histories and traditions, such as "peace" churches and others which honor a "preferential option for the poor." The difference owes to this too: persons embedded in persisting and sometimes transnational religious communities which profess timeless moral truths ultimately rooted in God's plan for humankind, so that these embedded persons see themselves as *in* the world but not *of* it—are far more likely to speak truth to power than are so many unencumbered selves, no matter how "cosmopolitan" and "progressive" they fancy themselves to be.

DODGING MUD SLINGERS: AN ANALYSIS AND DEFENSE OF TEXAS MUNICIPAL UTILITY DISTRICTS

DAVID BUMGARDNER & KEYAVASH HEMYARI*

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INTRODUCTION

The most common form of government in the United States is the special district.[1] The United States has around 40,000 special districts, and special districts spend over $100 billion every year.[2] In March 2016, political commentator and television host John Oliver dedicated an entire episode to special districts in an attempt to educate his audience on the unique entity. "Think of a special district like a cult," Oliver cautioned; it can "take your money and you may not even be aware that you are in one."[3] Texas, like the rest of the country, relies heavily on special districts, using special-purpose districts to provide a variety of services, such as "water conservation, toll roads, hospitals, libraries, utilities and fire control efforts."[4] Oliver is not alone in his criticism: special-purpose districts in Texas have been subject to much criticism in recent years, with critics citing lack of voter accountability and growing debt.[5]

Even in light of the recent attention that special districts have received in the media, the process involving special districts remains obscure. Often, the loudest critics have only a cursory understanding of why special districts are employed, how they work,

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1. ROBERT D. EBEL, THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT FINANCE 178 (2012).

2. CARMA HOGUE, U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012 1 (2013), www2.census.gov/govs/cog/g12_org.pdf [perma.cc/NDB9-GFG4]; Jethro Nededog, *John Oliver Explains One of the Sneakiest Ways Politicians Rip off Americans*, BUSINESS INSIDER (Mar. 7, 2016, 10:51 AM), www.businessinsider.com/last-week-tonight-john-oliver-on-special-districts-2016-3 [perma.cc/4MXJ-9ZBU].

3. Melisa Locker, *John Oliver Dedicates a Special Episode of* Last Week Tonight *to Special Districts*, TIME (Mar. 7, 2016), http://time.com/4249255/john-oliver-last-week-tonight-special-districts/ [perma.cc/ZNG6-X7ZE].

4. *Special Purpose Districts*, TEXAS COMPTROLLER'S OFFICE, www.comptroller.texas.gov/transparency/local/special-purpose.php [perma.cc/3TES-5E24] (last visited Feb. 24, 2017).

5. Steve Miller, *How a Few Rent-A-Voters in a Vacant Lot Lead to Millions in Bonds for Taxpayers*, HOUS. PRESS (Mar. 8, 2016, 5:00 AM), www.houstonpress.com/news/how-a-few-rent-a-voters-in-a-vacant-lot-lead-to-millions-in-bonds-for-taxpayers-8223400 [perma.cc/6EPY-4KAT] (discussing the ways in which special districts are able to issue millions in state bonds while being largely unaccountable to the state's citizenry); *see, e.g.*, Cindy Horswell, *In Area MUD Elections, Handful of Voters Decide $1 Billion in Bonds*, HOUS. CHRONICLE (Nov. 1, 2015, 8:36 PM), www.houstonchronicle.com/news/houston-texas/houston/article/In-area-MUD-elections-handful-of-voters-decide-6604289.php [perma.cc/53GR-7QMJ] (reporting on special districts approving millions in taxpayer bonds through the votes of only a handful of citizens).

and whether they are beneficial. This Article reviews Texas's most popular form of special district, the municipal utility district ("MUD"), and illustrates its importance in the Texas economy.

MUDs are a form of special district used primarily as a vehicle for population and economic growth in Texas.[6] Most Texans have heard or seen the end result of MUD formation, with little behind-the-scenes knowledge of how or why MUDs are utilized. There are roughly 1,100 special districts in Texas today, and a majority of them were created in undeveloped land owned by developers outside of city limits.[7] Notable examples include The Woodlands, Clear Lake City, and Sugar Land: these are all successful MUDs with significant economic growth and success.[8] Proponents of the Texas MUD system will reference the abovementioned communities as evidence of Texas's strong economy and surging population growth. But, is this truly the case?

There are many critics of the Texas MUD process. These opponents will point to negative effects of the MUD system, citing urban sprawl, growing local debt, and lack of transparency as reasons to rethink how Texas uses special districts.

Unfortunately, critics have failed to fairly analyze both sides. This Article discusses the Texas MUD system as a vehicle for urban growth, arguing that the Texas MUD is a beneficial form of government that efficiently and quickly provides financing. Furthermore, the MUD system of government embodies Texas's ideals of local government and just taxation. Thus, this Article argues in favor of MUDs by: (1) illustrating the inherent difficulties of urban-growth financing; (2) discussing the Texas MUD process; (3) highlighting the economic and political benefits that the Texas MUD system provides; and (4) responding to common criticisms of the Texas MUD system.

I. IDENTIFYING THE PROBLEMS: ISSUES ASSOCIATED WITH URBAN DEVELOPMENT

Throughout its history, Texas has experienced many periods

6. *See* JOE B. ALLEN & DAVID M. OLIVER, JR., TEXAS MUNICIPAL UTILITY DISTRICTS: AN INFRASTRUCTURE FINANCING SYSTEM 3 (2014), www.legis.state.tx.us/tlodocs/83R/handouts/C2102013022110301/e1679693-0fc0-4fdb-92eb-45c54db5758f.PDF [perma.cc/256K-QUXT] (highlighting the usefulness of MUDs in developing new communities).

7. *Id.* at 2.

8. *Id.* at 2–3.

of rapid population growth.[9] More recently, in the first part of the twenty-first century, Texas again experienced large population growth, and ranked as the number one destination for United States migrants.[10] During times of rapid growth, a response that quickly creates new housing communities solves the surge of housing prices due to a lack of proper supply.[11] To accommodate new communities in unincorporated areas, "[m]assive capital outlays must be made in order to provide quality water, sewer, drainage, and other municipal services."[12] However, Texas quickly discovered that finding the capital necessary to finance large projects is often too difficult, prompting developers and financiers to help.[13]

Historically, both private and public attempts to finance these projects have failed.[14] In the late 1800s and early 1900s, Texas struggled to find the capital to finance large-scale projects.[15] Due to the lack of private capital, local general governments such as cities and counties were the primary providers of these utilities. However, general governments were "unwilling or unable to finance these large capital outlays" due to inherent problems associated with urban growth.[16] Texas discovered that, without an alternate means of financing growth in undeveloped areas, there are both public and private constraints that inhibit quick, efficient urban growth.

A. Public Constraints

One reason that local general governments, such as cities and counties, often fail to provide the financing necessary for new communities is the problem of redistribution. In order for a city to fund the development of an unincorporated area, the gov-

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9. *United States & Texas Populations 1850–2016*, TEX. ST. LIBR. & ARCHIVES COMM'N, www.tsl.texas.gov/ref/abouttx/census.html [perma.cc/K53H-7UAG] (last visited Feb. 24, 2017).

10. Dylan Baddour, *Texas Still Where More People Are Moving*, HOUS. CHRONICLE (Sept. 21, 2015, 10:10 AM), www.chron.com/news/houston-texas/houston/article/Texas-still-where-more-people-are-moving-6518068.php [perma.cc/28RR-W9YE].

11. *See, e.g.*, Mike Rosenberg, *Seattle-Area Home Prices Surge to New High*, THE SEATTLE TIMES (June 28, 2016, 6:50 AM), www.seattletimes.com/business/real-estate/seattle-home-prices-surge-to-new-high/ [perma.cc/H26Z-BTND].

12. ALLEN & OLIVER, JR., *supra* note 6, at 1.

13. *See* TEX. CONST. art. III, § 52 interp. commentary (West 2007) (noting that "[i]n the early days of Texas, private capital for large scale investments was scarce").

14. *Id.*

15. *Id.*

16. ALLEN & OLIVER, JR., *supra* note 6, at 1.

ernment has to engage in a form of wealth redistribution by taxing citizens of one area to pay for services used in a different area.[17] Naturally, property owners will protest this form of redistribution and elected officials will be cautious of "passing on infrastructure costs to taxpayers living in areas already developed who may only tangentially benefit from [the new subdivisions]."[18]

Furthermore, even when cities or counties are able to convince one community to expend resources for the benefit of another, states often have strict state constitutional or statutory limitations on debt and spending.[19] For example, in Texas, "[l]awmakers must adhere to a number of restrictions when approving state spending."[20] Texas's constitution limits cities to $1.50 per every $100 to provide for a wide variety of improvements.[21] Simply put, this restriction makes it very difficult for Texas general municipalities to invest in infrastructure that would allow for urban growth.[22] In fact, these restrictions eventually led the Texas legislature to develop another method of financing urban development.[23] Ultimately, these limitations have inhibited local general governments from providing the financing required to develop new communities in times of rapid population growth.

Perhaps the most restrictive public constraint and reason for an alternate method of financing urban growth stems from cities or counties simply refusing to increase their housing supply. Beginning in the 1970s, an idea known as "smart growth" became popular in many academic circles.[24] The idea was to calculate and plan for growth as a response to growing urban sprawl, a phenomenon that many see as having negative effects on human

17. Janice C. Griffith, *Special Tax Districts to Finance Residential Infrastructure*, 39 URB. LAW. 959, 963 (2007).

18. *Id.*

19. *See generally* TEX. HOUSE RESEARCH ORG., STATE FIN. REPORT, NO. 83-1 (2013), www.hro.house.state.tx.us/pdf/focus/Restrict83-1.pdf [https://perma.cc/8TWJ-5VHA].

20. *Id.* at 1.

21. TEX. CONST. art. XI, § 4.

22. *See* TEX. CONST. art. III, § 52 interp. commentary (West 2007) (noting that "the constitution recognized only three entities which could collect taxes and expend public money, namely, the state, counties, and cities and towns, and all of these were so severely limited in the rate of tax they could levy that large scale permanent improvements . . . were out of the question").

23. *See generally* TEX. CONST. art. III, § 52.

24. David B. Resnik, *Urban Sprawl, Smart Growth, and Deliberative Democracy*, 100 AM. J. PUB. HEALTH 1852, 1853 (2010).

health and the environment.[25]

Smart-growth policies, where implemented, have inhibited growth and made housing largely unaffordable.[26] An examination of cities that have engaged in smart-growth policies invariably results in an examination of cities with less stable and less affordable housing.[27] While the goals of smart growth are often noble, the results are always the same: housing supply is restricted and home prices rise much more than the historical range.[28] In contrast, nearly all less restrictively regulated markets have experienced home prices within the historical range.[29]

California, particularly the Bay and greater Los Angeles areas, offers insight into the effects of smart growth. The Bay and greater Los Angeles areas consistently have the most expensive housing in the United States.[30] San Francisco, which in 2015 had the most unaffordable housing of any major United States city, has restricted land use and development since the 1970s.[31] This invokes a classic economics lesson on the basic supply-and-demand curve and its relationship to price—when demand grows faster than supply, prices will rise. Not surprisingly, since the implementation of smart-growth policies, San Francisco has experienced rising prices at unprecedented levels.[32] Proponents of smart growth do not dispute that smart growth inhibits urban growth, but instead insist that limiting growth is a social good.[33]

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25. *See* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 59 (1999) (asserting that "[u]rban sprawl causes many direct and indirect societal and environmental harms").

26. Wendell Cox, *The Costs of Smart Growth Revisited: A 40 Year Perspective*, NEW GEOGRAPHY (July 8, 2011), www.newgeography.com/content/002324-the-costs-smart-growth-revisited-a-40-year-perspective [perma.cc/83RW-3C3E].

27. *See* H. Sterling Burnett, *Smart Growth Policies Worsen Housing Crash*, THE HEARTLAND INSTITUTE (Sept. 25, 2015), https://www.heartland.org/news-opinion/news/smart-growth-policies-worsen-housing-crash [https://perma.cc/NLF7-JNDX] (stating that "California, Florida, Hawaii, Oregon, Vermont, and Washington, all adopted some type of restrictive land-use policy over the last 30 years, and all experienced some of the largest losses, in terms of home affordability").

28. Cox, *supra* note 26.

29. *Id.*

30. Kathryn Vasel, *The Most Expensive Housing Market Is . . .*, CNN MONEY (Nov. 10, 2015, 6:14 AM), http://money.cnn.com/2015/11/10/real_estate/most-and-least-expensive-housing-markets/ [perma.cc/YH8Y-LWXV].

31. Wendell Cox, *Thomas Sowell Explains the Economics of Urban Containment (Smart Growth)*, NEW GEOGRAPHY (May 12, 2014), www.newgeography.com/content/004310-thomas-sowell-explains-economics-urban-containment-smart-growth [perma.cc/5UTA-F2DB].

32. Cox, *supra* note 26.

33. *See, e.g.*, Todd Litman, *Smart Growth Policies for Urban Affordability and Fertility*, SMART GROWTH ONLINE (Feb. 17, 2016), http://smartgrowth.org/smart-growth-policies-for-urban-affordability-and-fertility [perma.cc/49CZ-BP6H].

Nevertheless, as acclaimed economist Thomas Sowell explained, the drawback is clear—"[a]nyone who has taken Economics 1 knows that preventing the supply from rising to meet the demand means that prices are going to rise. Housing is no exception."[34] Smart-growth policies are a self-imposed restraint on the housing supply, and proponents have failed to address the subsequent rising costs.

Thus, general-purpose municipalities are often constrained from adequately responding to new housing demands. Constraints on these general-purpose governments include the problem of redistribution, strict limitations on debt and spending, and the increased use of smart-growth policies that purposefully restrict urban growth and new housing.

B. Private Constraints

There are also private constraints that inhibit quick, effective urban development. A developer willing to undertake the large capital investments associated with new urban development is limited by the ability to recover the investment and make a profit. There are a few options by which developers can supply the necessary utilities associated with urban growth, such as annexation through an existing government, use of developers' equity, formation of a private utility company, or formation of a special district.[35] Developers will evaluate the feasibility of these methods using criteria such as maintenance of adequate control and minimization of "front end" investment.[36]

In Texas, developers generally disfavor relying on a city to provide for infrastructure through annexation.[37] First, the existing government will likely deny an annexation application because it views the annexation as a liability without improvement to its tax base.[38] Second, annexation is a generally undesirable option for developers because it "fail[s] to assure that the developer[s] will maintain adequate control of the project."[39] Devel-

34. Thomas Sowell, *The High Cost of Liberalism*, TOWNHALL (Apr. 22, 2014, 12:01 AM), https://townhall.com/columnists/thomassowell/2014/04/22/the-high-cost-of-liberalism-n1827188 [perma.cc/8QDP-K9YR].

35. John T. Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 URB. LAW. 185, 187–88 (1973).

36. *Id.* at 188.

37. Interview with Trey Lary, Partner, Allan Boone Humphries Robinson LLP, in Austin, Tex. (Apr. 15, 2016).

38. *Id.*; Mitchell, *supra* note 35, at 188.

39. Mitchell, *supra* note 35, at 188.

opers often consider this factor to be the most important because, without control over the project, the uncertainty that the project can be carried out to its completion imposes extra costs, and consequently will prevent them from taking on otherwise feasible projects.[40]

Financing necessary utilities for urban growth through developer equity is undesirable for two reasons. First, developers must recover the costs "through the sale of land, resulting in higher lot prices and unaffordable housing."[41] Higher lot prices naturally limit the pool of potential buyers, making it more difficult to sell the lots. As a result, developers cannot engage in as much development. This further restricts the housing supply and leads to higher prices.

Second, using developer equity to finance utilities necessary for urban growth is detrimental because it leads to low-quality infrastructure. If developers are forced to use this method, they are likely limited to providing on-site utilities such as private wells and septic tanks.[42] While septic tanks are generally the most inexpensive sewage systems to install, they come with many disadvantages, the primary being that septic tanks "cannot be installed in clay soils, shallow soils, rock, soils that become saturated during wet periods of the year, or soils with a high water table."[43] Moreover, these restrictions can make septic tanks difficult to build in major metropolitan areas.[44] This further restricts the housing supply and causes home prices to rise.[45]

Formation of a private utility company ("PUC") or an investor-owned utility company ("IOU") might appear to be the most obvious option. Developer reliance on an IOU should remove the government from interfering with the project and enable market forces to provide for the necessary utilities. However, Texas's recent history with private utilities has shown that this is not always the case. Texas's experience with IOUs has been largely negative, and in the case of water, has often led to substandard systems.

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40. *Id.*

41. ALLEN & OLIVER, JR., *supra* note 6, at 1.

42. Mitchell, *supra* note 35, at 189.

43. Bruce Lesikar, *Conventional Septic Tank/Drain Field*, TEX. A&M AGRILIFE EXTENSION, baen.tamu.edu/wp-content/uploads/sites/24/2017/01/L-5234.-Conventional-septic-tank-drain-field.pdf [perma.cc/AC22-TB5R] (last visited Apr. 19, 2017).

44. Mitchell, *supra* note 35, at 187.

45. *Id.*

In 2002, Texas "deregulated" its energy market by eliminating old monopolies, an act that, in theory, would allow for competition in the energy market and lower prices.[46] Unfortunately, this did not occur. Although in 2015, Texans began to finally find "decent deals" in electricity rates, "the average customer . . . about 85 percent of the state" still pays more for electricity than citizens served by monopoly utilities.[47] The problem with Texas's "deregulation" is that deregulation did not really occur.[48] The Texas electricity market is still heavily regulated.[49] In fact, deregulation "created a far more complicated system for the state to oversee."[50] Texas now has "a hybrid of regulated and deregulated markets, a mishmash that requires more government involvement and bureaucracy than the old monopoly system."[51]

In the case of private providing of water, the experience has also been largely negative. IOU water providers have a history of "substandard" systems.[52] One example of a substandard private system comes from Aldine, Texas,[53] a small, unincorporated area of Harris County that is completely surrounded by Houston city limits. In Aldine, Texas, there is no governmental entity that provides water; rather, a private company provides it.[54] The private company, Suburban Utility, has been cited multiple times by regulators, and in 2014, water service was so poor that schools had to bring in water from other areas to simply "flush toilets."[55]

46. Jim Malewitz, *Deregulated Energy a Mixed Bag for Consumers*, THE TEX. TRIBUNE (Aug. 12, 2015, 7:00 AM), www.texastribune.org/2015/08/12/report-deregulated-electric-utilities-narrowing-pr/ [perma.cc/KKZ8-9GHV].

47. *Id.*

48. *See* Loren Steffy, *The Generation Gap*, TEX. MONTHLY (Mar. 2014), www.texasmonthly.com/articles/the-generation-gap/ [https://perma.cc/GF7B-HWLR] (detailing how the Texas Public Utility Commission directly regulates transmission companies and oversees retailers after deregulation).

49. *Id.*

50. *Id.*

51. *Id.* ("'When you rope a calf and you've got all four legs tied, that calf is well regulated,' said Ed Hirs, a professor of energy economics at the University of Houston. 'If one of those legs gets loose, the calf is still regulated, but it will kick the hell out of you. That's the Texas market.'").

52. Interview with Trey Lary, *supra* note 37 (Lary described IOUs as "substandard by anyone's definition" and contended that "the problem with private systems of water is lack of competition. Due to the nature of water distribution, natural monopolies result and consumers are left without options.").

53. Ericka Mellon, *Poor Water Service Forces Aldine Charter School to Flush Toilets with Buckets*, HOUS. CHRONICLE (Nov. 16, 2014), www.houstonchronicle.com/news/houston-texas/houston/article/Poor-water-service-forces-Aldine-charter-school-5897417.php [perma.cc/U55E-7J3G].

54. *Id.*

55. *Id.*

The private company claims that although its infrastructure is failing, it cannot improve its equipment without charging its customers more.[56] However, the Texas Commission on Environmental Quality ("TCEQ") denied Suburban Utility's petition to surcharge its customers because it believed it was an "unjust burden" on existing customers.[57] This conflict embodies the inherent difficulties that Texas faces with privatizing utilities.

Texas's history with private water has resulted in heavy regulation and often has led to substandard systems. In light of Texas's experience with electricity deregulation, Texans should be skeptical of a similar move with water. Note that this is not an argument against Texas making a true move toward the free market; rather, it is unlikely that Texas would truly transition to a free-market system. More likely, widespread water privatization would not move Texas from a public to a private and free-market system. Instead, it would likely move Texas from public water to highly regulated water, and Texas's experience has largely been that public utilities are better than highly regulated utilities.

Many states, including Texas, recognize the inherent restraints on urban growth and have developed some sort of vehicle to more efficiently develop unincorporated land and accommodate urban growth. In Texas, this vehicle is the Municipal Utility District ("MUD").

II. HISTORICAL BACKGROUND

Texas has long had legal restrictions on municipal debt and taxing authority. These restrictions historically hindered Texas cities' abilities to provide the basic utilities needed to grow and develop urban areas.[58] In 1904, the Texas Legislature recognized that "private capital for large scale investments was scarce," and that, "unless extensive water conservation measures were undertaken, the state could not grow."[59] At this point in its history, Texas had only three types of entities that could tax or spend public money—the state, the counties, and the cities.[60] However, these entities were "so severely limited" that "large scale [projects]" to improve water conservation or road construction "were

56. *Id.*
57. *Id.*
58. ALLEN & OLIVER, JR., *supra* note 6, at 1.
59. TEX. CONST. art. III, § 52 interp. commentary (West 2007).
60. *Id.*

out of the question."[61] These limitations led Texas to amend its constitution by adding an additional entity with taxing power that could finance "permanent improvements including conservation projects and road-building projects," thus permitting the creation of special districts.[62]

Initially, these new districts could not issue bonds in excess of 25% of the total assessed value of real property within the district.[63] Texas quickly realized that 25% was too restrictive to achieve the purpose of developing large-scale infrastructure. In 1917, Texas once again amended its constitution, adding Article 16, Section 59, allowing for unlimited bond indebtedness and tax authority.[64] It was here that special districts were truly made possible.

These special districts were initially used to develop agricultural lands and service small communities by developing the foundation for water supply.[65] In the 1950s, Texas experienced rapid population growth and local general governments struggled to meet the increasing demands of new housing.[66] In response to the increased housing demand, special districts were increasingly used to develop urban residential areas.[67] Moreover, the increased use of special districts prompted Texas to adopt Chapter 54 of the Texas Water Code in 1971 and streamline the special-district process through the creation of the MUD.[68] Today, MUDs have become the most numerous of all special districts and are the primary method of financing for developers in Texas.

A. MUD Creation

MUDs are political subdivisions of Texas. Generally, the goal of a MUD is to provide services such as water, sewer, and drain-

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61. *Id.*
62. *Id.*
63. *Id.*
64. TEX. CONST. art. III, § 59(a)–(b) interp. commentary (West 2007); *see also* ALLEN & OLIVER, JR., *supra* note 6, at 2 (discussing the Texas Legislature enacting this constitutional provision).
65. Sara C. Galvan, *Wresting with Muds to Pin down the Trust about Special Districts*, 75 FORDHAM L. REV. 3041, 3058 (2007) (stating that "[w]hen water districts were first authorized by the Texas constitution in 1917, legislation empowering such districts aimed to address a pressing need to supply water to outlying areas").
66. Lee Charles Schroer, Comment, *The Water Control and Improvement District: Concept, Creation, and Critique*, 8 HOUS. L. REV. 712, 717 (1971).
67. *Id.*
68. ALLEN & OLIVER, JR., *supra* note 6, at 2.

age to areas where those services do not exist. MUDs are authorized in Texas under two principle categories: special-law districts created by legislative acts[69] and general-law districts formed under Chapter 49 of the Texas Water Code.[70]

A standard example of a MUD creation is as follows: first, a developer recognizes demand for housing in an area that is currently undeveloped. To develop the land and build houses, the developer needs a way to finance the large capital expenditures related to utilities such as water, sewage, and drainage. Next, the developer petitions either the TCEQ or a state representative to begin the process of creating the district.[71]

Once a MUD is created, it is still not operational until there is a confirmation election.[72] This election is held in accordance with state and federal election laws. In the election, voters are asked to approve the creation of the MUD, to authorize the district to issue municipal bonds that are required to complete the anticipated development,[73] and to elect the initial board of di-

69. Special-law creation is often preferred because MUDs created legislatively do not require TCEQ approval. Additionally, MUDs created by special law only require the passage of one bill. However, because the Texas Legislature only meets once every two years, timing becomes an issue for these MUDs. Creation by special law can be difficult because of the politicized nature of passing the bill. A bill may fail to pass because of the political climate at the time, rather than because of the bill's merits. Interview with Trey Lary, *supra* note 37.

70. TEX. WATER CODE ANN. §§ 49.011, 49.101, 49.238, 65.021(a) (West 2015) (requiring four steps for general-law creation: (1) a landowner petition, (2) a review by the TCEQ, (3) a review by a city or county, and (4) an election. First, a landowner petitions the TCEQ to create the district. Here, the petition must be signed by a majority of landowners. Second, the TCEQ will review the petition. During this stage the TCEQ is presented with a market study that includes information such as the source of the water and sewage.).

71. *See e.g.*, SUMMARY OF PROPOSED CASCADES MUNICIPAL UTILITY DISTRICT (Apr. 3, 2013), www.austintexas.gov/edims/document.cfm?id=187114 [https://perma.cc/67EP-MZAB].

72. TEX. WATER CODE ANN. § 49.102(a) (West 2015) ("Before issuing any bonds or other obligations, an election shall be held within the boundaries of the proposed district . . . to determine if the proposed district shall be established and, if the directors of the district are required by law to be elected, to elect permanent directors."). In industry terms this is known as a Paper District or a district that has been created that is not in operation. Interview with Jody Richardson, Of Counsel, Allen Boone Humphries Robinson LLP, at Allen Boone Humphries Robinson, Austin, Tex. (Jan. 15, 2016).

73. TCEQ, TCEQ EXPEDITED REVIEW—DEVELOPER PROJECTS: "CERTIFICATE JUSTIFYING 60-DAY BOND APPLICATION REVIEW" 1–2 (2004), www.tceq.texas.gov/assets/public/permitting/forms/20166.pdf [perma.cc/QTH7-AYFE]. During the initial MUD election, or the confirmation election, voters approve the issuance of future bonds. This means that after the developer has paid for infrastructure (roads, water, sewage) to be built, the board representing the MUD can pay back the developer according to TCEQ rules. This process is misunderstood by many MUD critics. It is crucial to understand that no bonds are issued until strict TCEQ requirements are met and millions of dollars of value has been added to the land by the developer. *Id.*

rectors.[74]

B. Reimbursement Vehicles

A full grasp of the MUD process requires an understanding that MUDs are reimbursement vehicles. These financing vehicles allow developers to develop raw land into thriving communities. MUDs do not finance development with up-front capital, but instead reimburse developers through bond proceeds for certain expenses associated with developing the vacant land.[75] This allows for development projects to occur in areas that would otherwise be prohibitively expensive because MUD financing enables the developer to quickly recover infrastructure costs, subject to a certain schedule.[76] For example, "during the first phase of a typical 500-acre development using a MUD, the developer finances the build out of infrastructure for the first 100 acres."[77] After construction of the first 100-acre phase is complete and the required TCEQ standards are met, the MUD then issues bonds and the bond proceeds are used to reimburse the developer.[78] The developer then repeats this cycle for the leftover development, in 100-acre increments.[79] While the developers are being reimbursed for each phase via bond proceeds, the MUD is left to raise income via an ad valorem tax on all taxable land, houses, and other improvements to support the new bond issue.[80]

While the reimbursement process eliminates some developer risk, it is crucial to understand that a developer cannot be reimbursed unless the MUD satisfies the TCEQ's strict engineering and feasibility requirements. To meet these requirements, the MUD must show that its bonds would be economically feasible based on its tax rate and property values.[81] Here, the TCEQ de-

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74. TEX. WATER CODE ANN. § 49.102(a), (e) (West 2015).

75. ALLEN & OLIVER, JR., *supra* note 6, at 4.

76. Telephone Interview with Ed Horne, President and CEO of Capital Realty Advisors, Inc. (Mar. 23, 2016). Horne does not know of any major development projects in Texas (300–400 lots) that have been completed without some sort of secondary repayment. Even cities that do not use MUDs, such as San Antonio, use other repayment methods such as public improvement districts (PIDs). *Id.*

77. ALLEN & OLIVER, JR., *supra* note 6, at 4.

78. *Id.*

79. *Id.*

80. *Id.*

81. 30 TEX. ADMIN. CODE § 293.59(b) (West 2017) ("Economic feasibility is the determination of whether the land values, existing improvements, and projected improvements in the district will be sufficient to support a reasonable tax rate for debt service payments for existing and proposed bond indebtedness while maintaining competitive utility rates.").

termines whether the land is valuable enough to support a "reasonable tax rate" that would allow the district to service its bond payments.[82] These feasibility requirements incentivize developers to make smart investment decisions by only rewarding the developer if the land has become attractive to residents, therefore making it more valuable.

Moreover, TCEQ rules further incentivize smart investment in public utilities by allowing 100% reimbursement of developer contributions only in circumstances that indicate a high likelihood of bond repayment due to increased property value.[83] While "MUD items"[84] are reimbursed at 100%, "Developer Contribution items"[85] are only reimbursed at 70%, unless the 30% developer contribution is waived.[86] The 30% developer contribution may be waived only if the MUD meets one of the listed conditions, including that: (1) the MUD has a ratio of certified assessed taxable value to debt of 10 to 1; (2) the MUD has obtained an acceptable credit rating; or (3) the MUD has an agreement with a political subdivision under which it receives tax or other revenue for its development of MUD facilities.[87] In recent years, most MUDs have kept a ratio of assessed taxable value to debt of 10 to 1 and have been eligible for the maximum reimbursement, signaling great health in the MUD bond industry.[88]

III. ECONOMIC AND POLITICAL BENEFITS OF THE TEXAS MUD PROCESS

So far, this Article has addressed (1) the inherent problems with urban development that inhibit both the public sector and private sector from providing the financing for urban growth and (2) Texas's solution—the MUD—as a vehicle that allows developers to recuperate their investment in public utilities. This

82. *Id.*

83. *Id.* § 293.47(g).

84. *Id.* § 293.47(d) (stating that "MUD items" include, among other things, expenses such as construction costs, wastewater treatment plant facilities, and water supply, treatment and storage facilities, including site costs).

85. *Id.* (developer-contribution items are anything not exempted under this subsection).

86. *See id.* ("[T]he developer shall contribute to the district's construction program an amount not less than 30% of the construction costs for all water, wastewater, drainage, and recreational facilities, including attendant engineering fees and other related expenses," subject to the exceptions listed in this subsection.).

87. *Id.* § 293.47(a), (d).

88. ALLEN BOONE HUMPHRIES ROBINSON LLP, TEXAS MUNICIPAL UTILITY DISTRICTS: THE BOND ISSUANCE PROCESS 1 (2015) (on file with author).

section will highlight Texas's success in creating an affordable housing market even during times of great economic and population growth.

A. Texas's Economic Success

Texas's historic economic success has been well documented. In recent times, when much of the country was experiencing rising unemployment and shrinking wages, Texas remained economically strong, causing Americans to notice and look closer at the "Texas Miracle."[89] Texans experienced higher paying jobs than most Americans, even while the state underwent rapid population growth. Texas also kept homes affordable and did not suffer the same volatility that much of the country did during the real-estate bubble.[90]

1. Texas's Large Population Growth Indicates Good Housing Policies

Texas has for decades been a destination for individuals and families looking for economic opportunity and better quality of life. This trend intensified during the first part of the twenty-first century. Texas's population grew 7.2% from 2010 to 2014, compared to the national average of 3.3%.[91] While there are many factors that contribute to population growth, migrants from other states are a significant contributor to Texas's rapid growth.[92] In fact, in 2013, Texas added the most households from other states, outgrowing the second-fastest-growing state, Florida, by 15%.[93] While there are a number of reasons for the rapid growth, Texas's lower cost of living—particularly its affordable housing—has been listed as one of the most important reasons

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89. Max Ehrenfreund, *The Facts about Rick Perry and the 'Texas Miracle'*, WASH. POST (June 8, 2015), www.washingtonpost.com/news/wonk/wp/2015/06/08/the-facts-about-rick-perry-and-the-texas-miracle/ [perma.cc/5NLL-8AE8].

90. *Id.*; Bob McTeer, *Why Has the Texas Economy Outperformed? A Surprising Answer from Paul Krugman*, FORBES (Aug. 27, 2014, 3:38 PM), www.forbes.com/sites/bobmcteer/2014/08/27/why-has-the-texas-economy-outperformed-a-surprising-answer-from-paul-krugman/#467ea01e18dd [perma.cc/P3AF-YQ4K].

91. *U.S. Population Growth Rate (2010–2014) by State*, INDEX MUNDI, http://www.indexmundi.com/facts/united-states/quick-facts/all-states/population-growth#chart [perma.cc/8HTE-6KYJ] (last visited Feb. 24, 2017).

92. Baddour, *supra* note 10.

93. *See id.* (presenting Headlight Data statistics showing that Texas added 72,243 households from other states in 2013); *see also* TEX. DEMOGRAPHIC CTR., TEXAS MOBILITY 1 (Nov. 2016), http://demographics.texas.gov/Resources/publications/2016/2016_11_01_TexasMobility.pdf [perma.cc/5BYG-5X7N] (stating that Texas added 126,000 people per year on average from domestic migration between 2005 and 2013).

bringing people to Texas.[94] Furthermore, according to many analysts, Texas's affordable housing is the result of "cheap land around cities and easy regulations that enable developers to build quickly."[95] In summary, Texas's pro-growth housing policies have led to affordable housing, lower costs of living, and have helped Texas become the prime destination for domestic migrants.[96]

2. Texas's Housing Market Affordability

Texas is one of the most affordable places in the United States to live. Texas's most prominent cities, Houston and Dallas,[97] consistently are among the nation's most affordable and most stable housing markets for large cities.[98] Texas's major cities have much lower median home values than other similar large metropolitan markets. In February 2016, the median home prices for Houston and Dallas were $139,000 and $135,000, respectively,[99] much lower than other comparable metropolitan areas. Compare, for example, the cities of Los Angeles ($567,000), Denver ($340,000), and Miami ($289,000).[100] Texas's largest cities are among the most affordable places to live in the United States.

An even more insightful statistic is the price-to-income ratio.

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94. Les Christie, *Why Everybody Is Moving to Texas,* CNN MONEY (Sept. 29, 2014, 8:20 AM), http://money.cnn.com/2014/09/29/real_estate/affordable-housing-growth/ [perma.cc/37JK-SHSJ]; Max Borders, *Flooding Texas: 5 Reasons Californians Are Still Moving to Texas,* FOUND. ECON. EDUC. (May 29, 2015), http://fee.org/articles/flooding-texas/ [perma.cc/WAY6-H5XX].

95. Christie, *supra* note 94.

96. McTeer, *supra* note 90.

97. *U.S. and World Population Clock,* U.S. CENSUS BUREAU, www.census.gov/popclock/ [perma.cc/4M6F-Z5BQ] (last visited Apr. 20, 2017) (noting that Houston and Dallas were ranked the fourth and ninth largest cities by population in the U.S. in 2015).

98. Borders, *supra* note 94; *see also* Catey Hill, *10 Most Stable Housing Markets in America,* MARKET WATCH (June 28, 2016, 9:51 AM), www.marketwatch.com/story/10-most-stable-housing-markets-in-america-2016-06-28 [perma.cc/JB9L-PXBN].

99. *Houston Home Prices and Values,* ZILLOW, www.zillow.com/houston-tx/home-values/ [perma.cc/L6MB-5DJX] (last visited Apr. 20, 2017) (listing the median home value for Houston in February 2016 as $135,000); *Dallas Home Prices and Values,* ZILLOW, www.zillow.com/dallas-tx/home-values/ [perma.cc/ALE3-6SR8] (last visited Apr. 20, 2017) (listing the median home value for Dallas in February 2016 as $139,000).

100. *Los Angeles Home Prices and Values,* ZILLOW, www.zillow.com/los-angeles-ca/home-values/ [perma.cc/Y37C-ATWZ] (last visited Apr. 20, 2017) (listing the median home value in Los Angeles in February 2016 as $567,000); *Denver Home Prices and Values,* ZILLOW, www.zillow.com/denver-co/home-values/ [perma.cc/29SP-UTVU] (last visited Apr. 20, 2017) (listing the median home value in Denver in February 2016 as $340,000); *Miami Home Prices and Values,* ZILLOW, www.zillow.com/miami-fl/home-values/ [perma.cc/5XWG-KEWT] (last visited Apr. 20, 2017) (listing the median home value in Miami in February 2016 as $289,000).

This statistic takes earning capacity into account to get a more accurate picture of home affordability. For example, if the median income of a city is $100,000, and the median home price of that city is $500,000, the price-to-income ratio would be 500,000 over 100,000, or 5. An examination of the Texas market shows that it outshines other comparable markets in the price-to-income ratio. Houston and Dallas both have ratios of 2.7 compared to Los Angeles's 8.7, Denver's 4.6, and Miami's 4.5.[101] The price-to-income ratio highlights Texas's lower cost of living and shows that Texas's home prices are not merely the result of lower wages, but instead the result of housing policies that allow for necessary growth.[102]

3. Texas's Housing Market Stability

Perhaps even more impressive than its low prices is Texas's housing market stability. During the soaring home prices of the early-to-mid 2000s and the subsequent crash in 2008, Texas was remarkably stable. While most of the nation was reeling from shocking drops in home prices, Texas vastly avoided the housing bubble.[103] A study by the U.S. Census Bureau of the effects of the housing bubble showed that, where cities such as Miami and Los Angeles had drops of 16.9% and 15.7% in their median home values, respectively, Houston only had a drop of 1.3%, while Dallas' median home value rose by 1.1%.[104] Similarly, changes in the cities' price-to-income ratios, from the peak of the bubble to the trough, demonstrate Texas's great stability. Houston and Dallas only dropped 0.1% and 0.4%, respectively, compared to Los Angeles and Miami dropping 3.9% and 2.9%, respectively.[105]

Texas has historically had affordable and stable home prices

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101. *See American House Prices: Realty Check*, THE ECONOMIST (Aug. 24, 2016), www.economist.com/blogs/graphicdetail/2015/11/daily-chart-0 [perma.cc/844A-CALC] (showing price-to-income ratios for the largest U.S. cities).

102. There are many factors that contribute to the price of a home. *See* Barry Ritholtz, *Where Building Homes Is Hardest, and Priciest: Ritzholt Chart*, BLOOMBERG (Feb. 28, 2014, 1:40 PM), www.bloomberg.com/view/articles/2014-02-28/where-building-homes-is-hardest-and-priciest-ritholtz-chart [perma.cc/2P34-JMP3].

103. *See* Wendell Cox, *How Texas Avoided the Great Recession*, NEW GEOGRAPHY (July, 20, 2010), www.newgeography.com/content/001680-how-texas-avoided-great-recession [perma.cc/HAH5-3AN3] (explaining that Texas's superior economic performance during the Great Recession was due, in part, to fully escaping the "housing bubble").

104. CHRISTOPHER MAZUR, U.S. CENSUS BUREAU, PROPERTY VALUE: 2008 AND 2009 5 (2010), www.census.gov/prod/2010pubs/acsbr09-6.pdf [perma.cc/F56K-VJ8W].

105. *See* THE ECONOMIST, *supra* note 101 (referring to data for peak Q1 2006 and trough Q1 2009 shown in the interactive table).

even during times of rapid population growth. Large Texas cities consistently rank among the lowest home prices in the country. Furthermore, it is no mere coincidence that Texas has experienced such great success; the strong and prosperous Texas housing market is the direct result of policies that enable the market to quickly react to meet housing demands, with MUDs serving as catalysts.

B. MUDs' Contribution to Texas's Success

Texas experienced remarkable economic growth and stability throughout the twentieth century and the beginning of the twenty-first century. The state saw its population grow rapidly, saw real wages rise, and kept housing prices affordable and stable even during one of the greatest housing crashes in American history. While numerous factors contributed to this "Texas Miracle," an often overlooked yet crucial contributing factor has been Texas's ability to respond to market demand and create affordable, quality housing quickly. Furthermore, it is the MUD system of financing for urban development that has enabled Texas to respond so quickly to housing needs. MUDs contribute to the affordability and the stability of Texas's housing market since MUDs provide an alternative to central planning of new housing, and allow developers to spread the initial costs of infrastructure over many years, rather than up front through higher home prices.

1. MUDs Provide an Alternative to Central Planning

As discussed earlier, developers face enormous challenges when developing unincorporated land outside of a metropolitan area.[106] To make the land inhabitable, it needs to have utility services such as roads, water, and sewage. Without MUDs, financing for public utilities necessary for urban growth must come from a nearby government or solely from the developer's own equity. If developers rely on a city to annex the area and provide the utilities, they face uncertainties of whether the nearby government will eventually annex the land, and even if a larger municipality annexes the land, the developer still has to rely on the larger municipality to provide utility services. This option brings with it a number of inefficiencies related to government financing, such

106. *See generally* ALLEN & OLIVER, JR., *supra* note 6.

as debt, spending limitations, and redistribution issues.[107]

Alternatively, if the developer relies solely on his own equity to create the utilities needed for urban development, then the developer faces massive costs, which lead to higher lot prices and unaffordable housing.[108] As a result, without a method to incentivize the private sector to use its resources and efficiency to develop unincorporated land, planning for new growth and development is left to larger municipalities, typically cities.

For purposes of this Article, "central planning" refers to the type of planning that occurs in an economy "in which the state or government makes economic decisions rather than the interaction between consumers and businesses."[109] Although a full analysis of the inefficiencies of central planning is beyond the scope of this Article, it is important to understand the criticisms of such an economic system. Friedrich Hayek, Austrian Economist and Nobel Prize winner, provided one of the most famous criticisms of central planning. Hayek's argument has two main components:

> 1. There are many moving parts and information exists "solely as dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."[110] Accordingly, a single mind or person never possesses the economic data in its entirety for a whole society.
> 2. Therefore, when dealing with economic change, the people best suited to make choices are those who know their businesses, resources, and markets.[111]

Applying Hayek's criticisms to urban growth leads to a conclusion that necessitates the use of some other form of financing in order to avoid central planning. Without a method of incentivizing the private sector to provide for public goods such as roads, sewage, and water, general-government officials will have to plan

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107. Mitchell, *supra* note 35; Interview with Trey Lary, *supra* note 37.

108. Telephone Interview with Ed Horne, *supra* note 76.

109. *Centrally Planned Economy*, INVESTOPEDIA, www.investopedia.com/terms/c/ centrally-planned-economy.asp [perma.cc/L6BD-PMHX] (last visited Feb. 24, 2017).

110. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

111. *See id.* at 524 ("[T]he ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them.").

and pay for urban growth. However, as Hayek's first point recognizes, the government will never have all of the economic data for the whole society or community, and will never use resources in the most efficient manner.[112] In this case, a state or city official will not have all of the relevant information necessary to efficiently meet the market demands of urban growth because there are so many dispersed bits of incomplete information.

Furthermore, we can infer from Hayek's second contention that the people best suited to deal with economic change in urban growth are people immersed in the industry of urban development and home building. These are people who know real-estate markets and the demand for certain areas, people who stand to gain a profit from a previously unincorporated area being developed, and individuals who risk personal loss if the newly developed area fails to gain new residents. The MUD system that Texas uses for urban development utilizes the wisdom and efficiency of the market to avoid the inefficiencies of central planning. The MUD reimbursement process encourages developers to invest in projects that would otherwise be prohibitively expensive. Ultimately, there will be more homes built, raising the overall supply to meet demand, and keeping prices low.[113]

2. MUDs Pass Infrastructure Costs on to the Eventual Users of the Infrastructure, Allowing Growth to Pay for Itself

Following the great housing crisis of 2007, national media representatives began to ask "why Texas [had] fared better than most other states."[114] To describe Texas's stability during this time, University of Houston Professor of Economics Dr. Barton Smith, explained that "Texas did not get caught up in a speculative housing market bubble with home prices far exceeding the financial capabilities of families."[115] Dr. Smith attributes the sub-

112. *See id.* ("We cannot expect that this problem will be solved by first communicating all this knowledge to a central board which, after integrating all knowledge, issues its orders.").

113. *See id.* Critics of central planning do not contend that the free market is 100% efficient or that there will never be mistakes made. The central argument is that free-market planning is more efficient than governmental central planning, so while this may not be the perfect system, it may be the best suited to fill society's needs.

114. Letter from Dr. Barton Smith, Dir., Inst. for Reg'l Forecasting at Univ. of Hous., to Tex. Legislature (Aug. 23, 2010, www.msrb.org/~/media/Files/RFC/2010/2010-27/MunicipalInformationServices.ashx?la=en [perma.cc/LFW8-G6WL] (discussing the importance of MUDs to Texas).

115. *Id.*

dued prices of Texas homes primarily "to the low costs of developing residential subdivisions in Texas compared with most other locations in the country" resulting from Texas's use of MUDs.[116] MUDs not only eliminate many of the public constraints, such as administrative and fiscal concerns that new developments impose on local governments, but also eliminate private constraints by lowering developers' up-front costs.[117]

MUDs allow developers to be reimbursed for certain up-front costs relating to water, sewer, and drainage facilities associated with urban development.[118] These utilities are among the most costly expenses of urban growth and will be recovered in the price of the new home without another mechanism.[119] Dr. Smith describes MUDs as a "win-win" for all parties.[120] Developers can keep costs lower, home buyers can purchase homes at much lower prices, and the public sector can avoid paying for the massive up-front costs with debt.[121]

How much do MUDs affect the price of homes? One major developer's study showed that MUDs could lower home prices by 47%.[122] The study sampled a housing project in the extraterritorial jurisdiction of Houston and compared the resulting price of homes if the project was financed with a MUD or developer equity.[123] The study found that the average price for a home built in a MUD is $294,977, while the average price of a home not built in a MUD is $559,527, a $264,550 difference.[124] Furthermore, the annual income needed to qualify for the total monthly payment required is $98,650 for a home built in a MUD, compared to $165,882 for a home not built in a MUD, thereby allowing Texas to maintain "higher 'real incomes' without having higher wages and salaries" by keeping home prices down.[125] Thus, the MUD system of financing urban development allows

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116. *Id.*

117. *Id.* ("MUDs are a win-win solution for all parties involved: the developer's costs are lower . . . and the public sector is not laden with fiscal burdens that can stretch their budgets, entangle them in debt issuance issues, and risk shifting tax incidence on their existing constituencies.").

118. *But see* 30 TEX. ADMIN. CODE § 293.47(k) (West 2017) (describing an exception to this general rule).

119. ALLEN & OLIVER, JR., *supra* note 6, at 4.

120. Smith, *supra* note 114, at 2.

121. *Id.*

122. ALLEN BOONE HUMPHRIES ROBINSON LLP, AVERAGE HOME SALE AND RESULTING PAYMENT SAMPLE HOUSTON ETJ PROJECT (2015) (on file with author).

123. *Id.*

124. *Id.*

125. Smith, *supra* note 114, at 3.

the buyer's payments to be significantly lower than if the cost of improvements were included in the initial purchase price. The Texas MUD system of financing urban development allows Texas to avoid the inefficiencies of central planning and enables developers to recuperate initial infrastructure costs through tax-exempt bonds rather than in the initial purchase price.

C. Political Benefits of MUDs

So far, this Article has established that there are inherent public-sector and private-sector constraints that hinder urban growth, and that, as a response to these inherent problems, Texas developed the MUD as a tool to incentivize developers to use their own equity to finance urban growth. Furthermore, MUDs have contributed to Texas's outstanding economic success, particularly in the area of housing affordability and stability, because MUDs eliminate problems of central planning and allow for infrastructure costs to be repaid through user fees rather than embedded home prices. MUDs also offer political benefits to Texas: financing urban development through a MUD offers the fairest form of taxation and allows citizens to utilize the most local form of government.

1. Fairer Taxation: Growth Pays for Itself and Other Benefits of MUD Taxes

When MUDs are used to finance new utilities in unincorporated areas, the initial price of the home is lower because, among other reasons,[126] the costs of infrastructure are not included in the price of the home. Critics might point out that MUDs do not eliminate infrastructure costs, but simply pass those costs along to the homeowners. This is correct. The homeowner does ultimately pay for the benefits of infrastructure through taxes; however, this is a most desired result. First, it removes the problem of redistribution and places the burden of paying for utilities solely on their users. Thus, the only people paying for the new utilities

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126. Delayed pricing of infrastructure is not the only reason why MUDs lower home costs. MUDs also offer an alternative to central planning and remove public-sector constraints that delay development, thereby increasing the supply. This increased supply keeps prices suppressed. *See* Scott D. Levine, *Municipal Utility Districts: The Pros/Cons of a MUD As Your Neighbor* (June 12, 2008), https://texascityattorneys.org/2008speaker_papers/MunicipalUtilityDistricts.pdf [perma.cc/VVS2-ARM9] (noting that MUDs can permit faster access to infrastructure and prompt development in a city's extraterritorial jurisdiction).

are those who receive their benefit. By contrast, without the MUD system of financing for public utilities, one alternate method of providing for utilities is for a city to annex an area in its extraterritorial jurisdiction and use the tax base of the city, stemming from those citizens in the original jurisdiction, to pay for new utilities. This method undesirably burdens citizens who derive either no benefit or who only tangentially benefit from the new growth. Through the use of MUD financing, taxes are essentially turned into a form of user fees, a generally more acceptable form of taxation.

Second, MUD financing is desirable because homeowners pay for these costs monthly and annually, allowing the homeowner to "indirectly take advantage of the tax-free borrowing capabilities of the MUDs."[127] This feature is not available if developers recover the costs of infrastructure through the price of the home. This process lowers the amortization costs of the infrastructure improvements and allows for the benefits to be spread out over time.

Third, MUD taxes provide additional benefit to the homeowner because the tax-exempt rates on the MUD bonds are lower than mortgage rates, and payments of MUD taxes are generally deductible from the homeowner's federal income tax.[128] Thus, the MUD system of financing urban development allows the home buyer's payments to be significantly lower than if the cost of improvements were included in the initial purchase price.

Lastly, MUD financing of utilities is beneficial because it allows debt related to infrastructure costs to be limited to specific areas. Texas benefits because the debt does not burden an entire city, county, or the Texas general public.

2. The MUD Form of Government Is the Most Local, Democratic Form of Government

Strong local governments are highly regarded, since they facilitate democratic participation because constituents are closer to their leaders and, therefore, can more easily voice their opinion during the decision-making process.[129] Thomas Jefferson argued

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127. Smith, *supra* note 114, at 2.

128. Jon VanderWilt, *Municipal Utility Districts (MUD) 101*, COSTELLO BLOG (Sept. 2, 2015), www.costelloinc.com/blog/municipal-utility-districts-mud-101 [perma.cc/YMC9-2D4C].

129. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L.

that responsible government is not facilitated "by the consolidation, or concentration of powers, but by their distribution."[130] Jefferson believed in dividing and subdividing government to create narrow units of government that are best suited to manage its duties.[131] Similarly, Richard Thompson Ford, a Stanford Law professor, advocates for local governments over the "centralized control" of a state or city because local governments offer "responsive, democratic government," compared to larger units of government that are "more distant, more bureaucratic, and less responsive."[132] Put simply, local governments are desirable because they are more accountable to their constituents than distant governments. In Texas, MUDs offer the most local form of government.

A board consisting of five members governs each MUD.[133] At creation, the developer picks the board members and they serve as the governing body until they are either voted out of office or choose to give up their position.[134] Furthermore, the initial directors can only stay in office if they are not voted out. So, once the development is complete and people begin to reside on the land, the new residents can vote the former board members out of office and replace them with resident board members.

If a MUD district resident has an issue with his water rates, he is not forced to travel miles away or attempt to navigate a large bureaucracy. A dissatisfied resident can walk down the street to his neighbor's house and discuss his problem. Furthermore, if residents are dissatisfied with their service, they can fairly easily

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REV. 346, 396 (1990) ("[L]ocalities may have a greater sense of community, which, it is assumed, will facilitate participatory decision making.").

130. THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 66 (Thomas Jefferson Randolph ed., Cambridge, E.W. Metcalf & Co. 1829).

131. *Id.* (This "partition[ing] of cares," descending "from general to particular" allows "that the mass of human affairs may be best managed, for the good and prosperity of all." Ultimately, Jefferson advocated for division of government that enables each local municipality to do for itself what it can do "so much better than . . . a distant authority."); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* WORDS OF THE FOUNDING FATHERS 329 (Steve Coffman ed., 2012) ("These wards, called townships in New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government and for its preservation.").

132. Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1184 (1996); Briffault, *supra* note 129, at 396.

133. *See* TEX. SPEC. DISTS. CODE ANN. § 7903.003 (West 2015).

134. While some disapprove of the amount of control that developers have over the initial MUD board, it is unclear how else a board's members would be chosen. At this stage of the development, the land is raw and undeveloped, with few or no residents.

band together to vote new board members into office.[135] MUD residents, as board members, are highly accountable to their constituents, and a MUD, as a local unit of government, fulfills the Jeffersonian ideal of small local government.

IV. COMMON MUD CRITICISMS

A. Special-District Growth Is Out Of Control, and MUDs Burden Texas with Too Much Public Debt

Two common criticisms of special districts and MUDs are that they are rapidly growing in number and that, as a consequence of their growth, they are dangerously adding to Texas's debt.[136] It is undeniable that the number of special districts has grown rapidly in Texas. In 2012, the comptroller of Texas put out a special report detailing the growth of special districts.[137] According to the report, from 1992 to 2010, the number of special districts grew from 1,158 to 1,675, a roughly 45% increase.[138] However, simply looking at the rise in number of special districts does not paint an accurate picture of Texas's special districts. The state's population growth rate is quite relevant to the number of special districts that are emerging. Special districts, such as MUDs, are a response to population growth, and they accommodate the growing population by providing the necessary infrastructure for new communities when general governments cannot. Accordingly, it is unsurprising that from 1992 to 2010, where special districts grew by 45%, Texas's population grew by a corresponding 42%.[139]

Critics of MUDs also often point to the amount of debt that MUDs incur to imply that MUDs are out of control and have the

135. Interview with Trey Lary, *supra* note 37.

136. Deena Winter, *Special Districts—with Power to Tax—Grow Like Weeds in Texas*, WATCHDOG (Dec. 25, 2015), http://watchdog.org/252328/special-districts/ [perma.cc/Q6A4-8ATA]; SUSAN COMBS, YOUR MONEY AND THE TAXING FACTS 5 (2012), www.scribd.com/document/108721259/Your-Money-and-Local-Debt-A-Texas-It-s-Your-Money-Report# [perma.cc/Z234-BSTK].

137. COMBS, *supra* note 136, at 5.

138. *Id.* at 4.

139. *Id.* Similar to special districts as a whole, MUD growth has corresponded to population growth. For example, when examining the Houston—The Woodlands—Sugar Land MSA, from 1990–2014, population growth has actually outpaced MUD growth when taking into account growth of the MSA excluding the City of Houston. This shows that while the "City of Houston" is growing rapidly, the majority of growth is occurring in areas that are technically outside the city, normally in MUDs.

possibility of damaging Texas's financial health.[140] It is certainly true that MUDs take on large amounts of debt. For instance, estimations show that the 650 special districts in the Houston metropolitan area have over $6 billion in outstanding bonds.[141] What is not true, however, is that debt associated with MUDs is endangering Texans, or that MUD debt is out of control. Instead, MUD debt is growing in accordance with Texas's rapid population growth and corresponding need to provide infrastructure to undeveloped areas. This is evidenced by the MUD bonds' strong financial health. For example, in 2012, Standard & Poor's ("S&P") acknowledged that MUD bonds had "sustained remarkable rating stability."[142] The particularly "remarkable" aspect of this rating was that the MUD debt remained stable even during a time when "property tax revenues [had] generally taken a hit" due to "the prolonged downturn in U.S. housing."[143] In fact, in 2009, during the heat of the national housing crisis, S&P raised the ratings on 250 Texas MUDs.[144] S&P credited "generally high reserve levels and low tax delinquency rates," as well has home-price stability, as principal reasons for MUD bond strength.[145]

MUD bonds have not always been this stable. In the 1970s and 1980s, the amount of MUDs grew rapidly in Texas.[146] During this time period, MUDs were not strictly a reimbursement vehicle, and developer contributions to the projects were optional.[147] After the banking crash in the late 1980s, many MUDs had a difficult time servicing their debts and many MUDs even defaulted on their debt.[148] This led the Texas Legislature to reform the MUD bond process.[149] It was these reforms that shifted MUDs from an up-front method of financing to a reimbursement sys-

140. *Id.*

141. ALLEN & OLIVER, JR., *supra* note 6, at 2.

142. STANDARD & POOR'S, RATINGSDIRECT ON THE GLOBAL CREDIT PORTAL, LESSONS LEARNED FROM THE 1980S ALLOW TEXAS MUNICIPAL UTILITY DISTRICTS TO MAINTAIN STABLE CREDIT 2 (2012), www.legis.state.tx.us/tlodocs/83R/handouts/C2102013022110301/b00b10c0-0a01-446f-ac1a-efd0d5cc3378.PDF [perma.cc/E44E-G4PC].

143. *Id.*

144. Richard Williamson, *Texas MUD Sinks Toward Chap. 9; Others on Solid Ground*, THE BOND BUYER (May 18, 2009, 1:00 AM), www.bondbuyer.com/issues/118_94/-303505-1.html [perma.cc/9Q2Q-GMQT].

145. *Id.*

146. STANDARD & POOR'S, *supra* note 142, at 2.

147. *Id.*

148. *Id.*

149. *Id.*

tem.[150] This major change is credited for the stability of MUD bonds. In fact, since the new MUD bond regulations, MUD default is rare.[151]

Texas has experienced large population growth in the early part of the twenty-first century.[152] Accordingly, the number of MUDs and the amount of MUD debt have grown substantially in order to accommodate the millions of new Texas residents. While debt attributable to MUDs has grown substantially during this time, this debt is growing in correspondence to the growing population. Furthermore, financing new growth through MUDs allows Texas to keep debt localized and to meet the demands for new housing, without placing the burden on the public at large.

B. Initial MUD Elections Appear Contrived

One of the sharpest criticisms of MUDs is that initial MUD elections appear contrived.[153] In the initial election, voters are asked to approve the creation of the MUD, authorize the issuance of municipal bonds required to complete the anticipated development,[154] and elect the initial board of directors.[155] A casual online search of "Municipal Utility District bond elections" will result in multiple articles written by various media outlets lamenting the MUD election process. For example, the Houston Press published an article in late 2016 titled, "How a Few Rent-A-Voters in a Vacant Lot Lead to Millions in Bonds for Taxpayers."[156] The article, not atypical of the Texas media, criticizes initial MUD elections as artificial, while implying there is some nefarious relationship between lawmakers, developers, and the

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150. *Id.*

151. *But cf.* Williamson, *supra* note 144 (noting that a central Texas MUD, which for years had been in default, was seeking to file for Chapter 9 bankruptcy); Elizabeth Albanese, *FDIC Sues Texas MUD for Loan Default*, THE BOND BUYER (May 1, 2001, 2:00 AM), www.bondbuyer.com/news/-138012-1.html [perma.cc/ME27-F32A] (discussing an FDIC suit against a Texas MUD that allegedly owed over $4 million to a failed savings and loan because of its failure to pay a loan for water, sewer, and drainage renovations).

152. *See* Ehrenfreund, *supra* note 89.

153. Sara C. Galvan, *Wrestling with MUDs to Pin down the Truth about Special Districts*, 75 FORDHAM L. REV. 3041, 3053–55 (2007).

154. It is important to understand what this means. During the initial MUD election, or the confirmation election, voters approve the issuance of future bonds. This means that after the developer has paid for infrastructure (roads, water, and sewage) to be built, the board representing the MUD can pay back the developer according to TCEQ rules. Many MUD critics misunderstand this process. It is crucial to understand that no bonds are issued until strict TCEQ requirements are met and millions of dollars of value has been added to the land by the developer. *Id.*

155. *See* TEX. WATER CODE ANN. § 49.102(h) (West 2015).

156. Miller, *supra* note 5.

professions that connect the two. While there is some validity to the claim that initial MUD elections are somewhat contrived, a deeper look into the MUD process reveals purer motives than those often portrayed by the media.

The Texas Election Code requires that voters reside in "the territory covered by the election for the office or measure on which the person desires to vote."[157] While requiring resident voters may be sensible in a general manner, it causes significant practical issues for development districts such as MUDs. Most troublesome is that, generally, no one resides on the land. During the early stage of a MUD, the land being voted on is raw and uninhabited. Typically, a single individual or a group of investors that has an eye towards development will own the land. Due to this restriction, early stage MUDs cannot function in typical democratic manner using resident voters. There is simply no one living in the area that could vote even if he or she wanted to do so. To overcome this legislatively created hurdle, developers are forced to engage in suspicious acts such as asking a friend or family member to temporarily reside on the property to qualify them to vote in the election. Here, to avoid media scrutiny and public dissatisfaction over a misunderstood process, Texas legislators might consider revising the election code to allow for jurisdictions with no resident voters to hold elections with nonresident landowners as voters.

Furthermore, home buyers are protected by Texas's notice-to-purchaser requirement. The Texas Water Code requires the seller of a property located within a MUD to provide the buyer with notice regarding the MUD in which the property is located.[158] Prior to entering into a sales contract, the seller must disclose information such as the tax rate, bonded indebtedness, and standby fees. This process ensures that buyers are aware of the extra financial liabilities associated with MUDs before completing the sale. Moreover, this allows buyers to vote with their feet by guaranteeing only those willing to take on the extra MUD taxes to do so, which they often do for the significant reduction in home costs.

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157. TEX. ELEC. CODE ANN. § 11.001(a)(2) (West 2005).

158. TEX. WATER CODE ANN. § 49.452(a)(1) (West 2013). ("Any person who proposes to sell or convey real property located in a district created under this title or by a special Act of the legislature . . . must first give to the purchaser the written notice provided in this section.").

In summary, while there is some truth to the accusation that initial board elections are contrived, these manufactured elections are legislatively created. Elections made of so-called "rent-a-voter" constituents are done out of necessity, not out of a desire to deceive the public. Moreover, home buyers, through Texas's required notice to purchaser, are allowed to vote with their feet and ensure that MUDs only burden those who consent to the extra burden.

C. MUDs Create Fragmentation and Inefficient Use of Resources

MUD critics often claim that special districts lead to the inefficient use of natural resources. Sara Bronin (formerly Sara Galvan), a law professor at the University of Connecticut, argues that MUDs aggravate water-supply issues.[159] Bronin summarizes her argument like this: the MUD process causes increased governmental fragmentation, and this fragmentation "prevents governments from operating at the same scale as the problems they need to address."[160] Ironically, Bronin alleges that the MUD process—initially created to eliminate water issues—is causing water-supply issues. She argues that, after the MUD is formed, "it is not required to consider any of the water planning issues" that could be critical for its success.[161] Moreover, MUDs are not required to coordinate efforts with other MUDs or local governments in addressing water-supply issues.[162]

On this issue, Trey Lary, partner at a prominent MUD law firm, says, "If every MUD had its own wastewater treatment plant and its own water plant, that would be inefficient. But that's not the way it is."[163] Groups of MUDs get together and jointly own and operate plants to serve their areas through intergovernmental cooperation.[164] Where there are many MUDs located near each other, as there is in Houston, regionalization occurs.[165] For

159. Galvan, *supra* note 153, at 3072.
160. *Id.*
161. *Id.* at 3070.
162. *Id.*
163. Interview with Trey Lary, *supra* note 37.
164. *Id.*
165. Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, J.L. & POL. 365, 365 (2005) ("Regionalization promises to reduce the inefficiencies related to fragmented government, reduce distributional inequality between Cities and their suburbs, allow local public goods to be provided in a comprehensive manner consistent with scale economies rather than on the basis of fortuitous boundaries that bear only coincidental relationship to ideal service areas, and limit ethnic segregation."); *see, e.g.*, *Cities and Districts in the NHCRWA*, NORTH HARRIS CTY. REG'L WATER AUTH. (Oct. 29, 2014),

example, four major regional water authorities combine to serve hundreds of governmental entities, the majority of which are MUDs.[166] The largest regional authority, North Harris County Regional Water Authority ("NHCRWA") was originally created to reduce dependence on groundwater. NHCRWA serves over 140 government entities, the majority of which are MUDs.[167] These authorities act as a collective-bargaining tool for the MUDs and work to plan water use efficiently.[168] In sum, there are fragmentation concerns that arise when governments are broken down into small units such as MUDs, but MUDs often work together through intergovernmental agreements or work with regional water authorities to create efficient economies of scale.

V. Conclusion

MUDs in Texas are an essential part of the growing Texas economy. However, MUDs are often criticized by those who misunderstand this complex system and point to arguments that are misstated, without addressing or acknowledging the benefits Texans enjoy from this system. These arguments—that MUDs burden Texas with too much public debt, that MUD elections appear contrived, and that MUDs create fragmentation that result in an inefficient use of resources—are all based on select, non-representative examples or fundamental misunderstandings, and fail to address the stability, affordability, and growth that MUDs have brought to the Texas housing market.

Moreover, MUDs tackle both the private and public sector constraints to new housing development, driving growth and affordable housing in Texas. MUDs allow for the housing supply to expand in accordance with the population by passing the major infrastructure costs to new inhabitants through the MUD reimbursement structure. MUD constituents purchase these homes at

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www.nhcrwa.org/about/districts-in-nhcrwa/ [perma.cc/GFK9-XESE] (listing the numerous regional Houston MUDs).

166. *See* Karen E. Menard, *Houston, Texas: A Big City with a Growing Thirst for Drinking Water*, Tex. Am. Water Works Ass'n (Oct. 5, 2016), www.tawwa.org/blogpost/1203603/258815/Houston-Texas-A-Big-City-with-a-Growing-Thirst-for-Drinking-Water [https://perma.cc/MH5K-85DY] (discussing the four regional water authorities that serve Houston).

167. *See* North Harris Cty. Reg'l Water Auth., *supra* note 165.

168. Interview with Trey Lary, *supra* note 37 (observing that the Houston regional water authorities work as collective-bargaining tools for the smaller governments, and that "for all intents and purposes, all of the water for all of the MUDs in Harris County is now or will be City of Houston-owned surface water that they are buying. It is all connected.").

a significantly subsidized rate, with the promise to pay minimal taxes on their land. Lastly, MUDs provide a strong local government system that encourages participation and allows for swift change when necessary.

In conclusion, the Texas MUD process involves a complicated system; however, the complexity is often unfairly used to criticize one of Texas's great ingenuities—a system that encourages economic growth and prosperity through affordable taxes and efficient local governments.

THE JURISPRUDENCE OF THE BODY: CONSCIENCE RIGHTS IN THE USE OF THE SWORD, SCALPEL, AND SYRINGE

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INTRODUCTION

Because humans are embodied beings, all religions feature teachings, doctrines, or dogmas relevant to the human body and its manifestation in the male or female form.[1] For example, John Paul II's *Theology of the Body* lectures explain in exhaustive detail the Catholic view that humans are created male or female and are therefore ordered to the "one flesh" conjugal union signified in the sacrament of marriage.[2] In a similar vein, Orthodox Jewish scholars read Levitical and Talmudic texts to proscribe non-marital male–female touching (*negiah*), prescribe separate male and female seating sections in the synagogue (*mechitza*), or prohibit male–female seclusion prior to marriage (*yichud*).[3] Sunni and Shia Muslims famously disagree on eschatology but basically agree on the sex-specific, full-body washing rituals for the living (*ghusl*), the dead (*ghusl mayyit*), and those who touch the dead (*ghusl mase mayyit*).[4] Because these beliefs are integral to millennia-old religions and closely correlate to First Amendment rights enshrined in the Constitution, American policy makers have a long track record of accommodating idiosyncratic "theologies of the body"—especially in military and medical cases where religious persons sincerely disagree about what may be done with or to the human body.[5]

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1. *See generally* RELIGION AND THE BODY (Sarah Coakley ed., 1997) (a collection of essays comparing various religious traditions' understanding of the body).

2. Pope John Paul II, *General Audiences: John Paul II's Theology of the Body*, ETERNAL WORD TELEVISION NETWORK, https://www.ewtn.com/library/PAPALDOC/JP2TBIND.HTM [https://perma.cc/P837-92PH] (last visited May 18, 2017).

3. *See, e.g.*, Shain v. Ctr. for Jewish History, Inc., 418 F. Supp. 2d 360, 364 (S.D.N.Y. 2005) ("[Shomer Negiah is] a person who observes the Orthodox rule that men and women may not touch members of the opposite sex except for their spouses"); Katz v. Singerman, 120 So. 2d 670, 678 (La. Ct. App. 1960), *rev'd*, 127 So. 2d 515 (La. 1961) ("There are differences of opinion as to what is the proper type or kind of separation, or 'mechitzah,' and, therefore, Orthodox Jewish Rabbis are not in complete agreement as to what is a proper separation or 'mechitzah.'").

4. *See, e.g.*, *After Death Rituals*, AL-ISLAM, https://www.al-islam.org/burial-rituals-muhammadhusein-kermali/after-death-rituals [https://perma.cc/NH8J-UUQ2] (last visited May 18, 2017) (explaining after-death washing rituals within Shia Islamic tradition); *Ghusl for Sunni Muslims*, FEMETTE, www.femette.com/how-to-do-ghusl-sunni/ [https://perma.cc/BPS2-M3EW] (last visited May 18, 2017) (explaining full-body washing rituals for the living within Suni Islamic tradition).

5. *See* CONSCIENCE IN AMERICA, A DOCUMENTARY OF CONSCIENTIOUS OBJECTION IN AMERICA 1757–1967, 17–22 (Lillian Schlissel ed., 1963) (tracing the American history of conscientious objection from the French and Indian War, the American Revolution, the Civil War, World Wars I and II, the Korean War, and the Vietnam War). For modern exceptions, see, for example, 42 U.S.C. § 1996(a) (2012) (providing an exemption for Native Americans who choose to use peyote in their religious ceremonies); Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (holding that Hobby Lobby could not legally be required to provide certain types of birth control to its employees); *Accommodation of Religious Prac-*

By expressly denying any religious exemption, the Department of Health and Human Services (HHS) Transgender Mandate[6] represents an unprincipled and unnecessary departure from the venerable American tradition of accommodating religious adherents. The HHS Transgender Mandate was promulgated pursuant to Section 1557 of the Affordable Care Act (ACA) and administratively redefines the longstanding protected class "sex" to include three new categories not listed in the original federal nondiscrimination statutes: (1) "gender identity," (2) "sex stereotyping," and (3) "termination of pregnancy."[7] These three categories are broadly defined, thereby maximizing the potential for liability or litigation:

- "Gender identity" includes "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female."[8]
- "Sex stereotyping" includes the "belief that gender can only be binary" or "the expectation that individuals will consistently identify with only one gender."[9]
- "Termination of pregnancy" is not defined, and the relevant clause omits the abortion exception appearing in the Pregnancy Discrimination Act.[10]

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tices Within the U.S. Military, RELIGIOUS TOLERANCE, www.religioustolerance.org/mili_rel.htm [https://perma.cc/44JQ-TG5P] (last visited Mar. 24, 2017) (citing excerpts from the Feb. 3, 1988 version of Department of Defense Directive DODD-1300.17 that exhibit an accommodative stance toward religious practices among military members). This courtesy is extended to even our worst enemies: Osama Bin Laden was buried at sea in accordance with traditional Islamic procedures. *Secret Details of Bin Laden Burial Revealed*, AL JAZEERA (Nov. 22, 2012), http://www.aljazeera.com/news/americas/2012/11/2012112243823204328.html [https://perma.cc/TH8P-JULC].

6. 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

7. *See* Quality Affordable Health Care for All Americans, 42 U.S.C.A. § 18116 (2010) ("Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) [(race, color, national origin)], title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) [(sex)], the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.) [(age)], or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) [(disability)], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).").

8. Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4 (2016) (emphasis added).

9. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376-01, 31,392 (May 18, 2016) (codified at 45 C.F.R. pt. 92); Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4 (2016).

10. *Compare* Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4

Consequently, medical providers and practitioners may be required to cover, perform, or facilitate sex-reassignment procedures[11] and whatever abortion services may fall within the HHS's administrative reading of the words "termination of pregnancy" in direct contravention of their longstanding religious beliefs.[12] These requirements are on a collision course with millennia-old theologies of the body—for example, the Abrahamic religions that share the Book of Genesis and adhere to the *imago dei* view of the human body: "So God created mankind in his own image, in the image of God he created them; male and female he created them."[13]

Despite numerous public comments seeking an exemption for religious providers and religious practitioners,[14] HHS did not provide a safe harbor for Roman Catholic, Southern Baptist, Orthodox Jewish, Sunni Muslim, or other religious physicians who cannot use their scalpels to make female what God created male, cannot use their syringes to feminize biological males or masculinize biological females,[15] and cannot use their pens to prescribe

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(2016) (including "termination of pregnancy" in the category for "[o]n the basis of sex" without further definition or including any exceptions), *with* Pregnancy Discrimination Act of 1978, 42 U.S.C.A. § 2000e(k) (1991) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.").

11. *See, e.g.*, 45 C.F.R. § 92.4 (2016) (stating that a covered entity includes health programs receiving federal assistance); *id.* at § 92.207(b) (2016) (stating that covered entities offering services relating to gender transition may not deny, limit, or subject additional costs on the basis of a protected class); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376-01, 31,434–35 (May 18, 2016) (codified at 45 C.F.R. pt. 92) ("[T]he rule does require that a covered entity apply the same neutral, nondiscriminatory criteria that it uses for other conditions when the coverage determination is related to gender transition.").

12. *See* 45 C.F.R. § 92.4 (2016) ("On the basis of sex includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity."); *but see* Affordable Care Act, 42 U.S.C.A. § 18023(b)(4), (c)(2)(A) (2010) (stating that providers and facilities may not be discriminated against because of their unwillingness to "provide, pay for, provide coverage of, or refer for abortions").

13. *Genesis* 1:27 (New International Version).

14. *See* United States Conference of Catholic Bishops et al., Comment Letter on Proposed Rule Regarding Nondiscrimination in Health Programs and Activities (Nov. 6, 2015), http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf [https://perma.cc/RL8H-YYAL] (including signatories such as United States Conference of Catholic Bishops, National Association of Evangelicals, Christian Medical Association, Institutional Religious Freedom Alliance, Christian Legal Society, World Vision, Ethics & Religious Liberty Commission of the Southern Baptist Convention, and The National Catholic Bioethics Center).

15. *See, e.g.*, Aetna Policy Procedure Number 0615: Gender Reassignment Surgery (May 14, 2002), http://www.aetna.com/cpb/medical/data/600_699/0615.html

or dispense abortifacient drugs designed to kill unborn children. Instead, the HHS Transgender Mandate advises religious dissenters that they can always sue the federal government under the Religious Freedom Restoration Act (RFRA).[16] Having spent millions of dollars and countless attorney hours litigating the *Hobby Lobby*[17] and *Zubik*[18] cases to the Supreme Court, the HHS responded to the newest religious conscientious objector with a virtual "So sue me."

On August 23, 2016, the Christian Medical & Dental Associations (CMDA), Franciscan Alliance, and five states sued HHS in federal court.[19] Four months later, the United States District Court for the Northern District of Texas preliminarily enjoined the HHS Transgender Mandate as likely violative of RFRA: "The Rule therefore places substantial pressure on Plaintiffs to perform and cover transition and abortion procedures. . . . Accordingly, the Rule imposes a substantial burden on Private Plaintiffs' religious exercise."[20] The injunction was as broad as the regulation's reach: nationwide.[21]

It did not have to be this way.

This Article cites American history and American policy to explain a longstanding American principle that once united left and right, Democrats and Republicans, progressives and conservatives: absent a compelling interest that cannot be fulfilled using lesser means, the government should provide particularized conscience protections for religious dissenters who are willing to serve their country and countrymen but are unwilling to violate their faith while doing so. In short, in a nation founded by religious dissenters, exceptions for conscientious objectors are unexceptional. This is particularly true in military and medical cases where the human body may be drugged, cut, or killed.[22] In

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[https://perma.cc/828K-U4RM] (describing male-to-female feminization procedures and female-to-male masculinization procedures).

16. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,428, 31,435 (May 18, 2016) (codified at 45 C.F.R. pt. 92) (declining to provide a conscience exemption).

17. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

18. Zubik v. Burwell, 136 S. Ct. 1557 (2016).

19. Complaint at *1, Franciscan All. v. Burwell, 2016 U.S. Dist. LEXIS 183116 (N.D. Tex. Dec. 31, 2016) (No. 7:16-cv-00108-O).

20. Franciscan All. v. Burwell, No. 7:16-cv-00108-O, 2016 U.S. Dist. LEXIS 183116, at *53–55 (N.D. Tex. Dec. 31, 2016).

21. *Id.* at *61.

22. *See, e.g.*, Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 128 (2012) (describing the history of the recognition of the right not to kill across various

general, American governments—federal, state, and territorial—have not forced religious soldiers, doctors, nurses, or pharmacists to use the sword, the scalpel, or the syringe in a manner that would violate their faith.

I. CONSCIENCE PROTECTIONS ARE STANDARD IN AMERICAN LAW

The American tradition of protecting conscience rights originated with Peace Church immigrants who refused to "bear arms" in the colonial militias—Quakers, Mennonites, Brethren—and continued to develop imperfectly and intermittently through successive waves of immigrants, wars, and controversies that pitted the conscientious objector against the government.[23] For example, shortly after the Revolutionary War, George Washington wrote to a Quaker leader expressing the importance of respecting conscience rights:

> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[24]

This uniquely American practice of protecting conscientious objectors started in the Revolutionary War and continued through successive American wars. For example, scholars estimate that over 25,000 conscientious objectors were allowed to serve in noncombat assignments during World War II.[25] Nearly 12,000 conscientious objectors adhered to pacifist religious traditions that precluded any form of military service but were nonetheless allowed to serve in the Civil Public Service.[26] By tailoring the conscience exemptions to particular religious beliefs, the United States maximized the number of able-bodied men and

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contexts in American jurisprudence).

23. Schlissel, *supra* note 5, at 17–23; PETER BROCK, PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR 160–82 (1968).

24. Letter from George Washington to the Religious Society called Quakers (Oct. 1789), *in* 12 THE WRITINGS OF GEORGE WASHINGTON 168–69 (Jared Sparks ed., Boston, F. Andrews 1838).

25. CYNTHIA ELLER, CONSCIENTIOUS OBJECTORS AND THE SECOND WORLD WAR: MORAL AND RELIGIOUS ARGUMENTS IN SUPPORT OF PACIFISM 28 (1991).

26. *Id.* at 28–29.

women available to fight in a global war that was fought on two fronts and four continents.

Today, the federal government continues to recognize and respect conscientious objectors in the United States Army,[27] Navy,[28] Marine Corps,[29] Air Force,[30] and Coast Guard[31]—notwithstanding the compelling governmental interest in national defense. The Department of Defense defines "conscientious objection" as a "firm, fixed, and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief."[32] This definition is subdivided into two classes to better accommodate the particular beliefs of the conscientious objector: (1) Class 1-O "objects to participation in military service of any kind in war in any form," while (2) Class 1-A-O "objects to participation as a *combatant* in war in any form."[33] The former must be discharged from the Armed Forces, while the latter may serve in a noncombat role—especially in the Army, where written policy assigns Class 1-A-O Conscientious Objectors to noncombat duties.[34]

The film *Hacksaw Ridge* recently celebrated and popularized a conscientious objector in this latter category: Seventh-day Adventist Desmond Doss refused to carry a weapon while serving in the United States Army but dodged bullets and grenades to rescue seventy-five American soldiers during the Battle of Okinawa.[35] Doss was awarded the Medal of Honor for his heroism, becoming the first conscientious objector to receive our nation's

27. U.S. DEP'T OF THE ARMY, CONSCIENTIOUS OBJECTION, ARMY REGULATION 600-43 (Aug. 21, 2006).

28. *See generally* SEC'Y OF THE U.S. NAVY, MILPERSMAN 1900-020, http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Documents/1900-020.pdf [https://perma.cc/8D2S-8T8S].

29. U.S. DEP'T OF THE NAVY, CONSCIENTIOUS OBJECTORS, MARINE CORPS ORDER 1306.16E (Nov. 21, 1986).

30. U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3204 (July 15, 1994).

31. U.S. DEP'T OF TRANSP., U.S. COAST GUARD, CONSCIENTIOUS OBJECTORS AND THE REQUIREMENT TO BEAR ARMS, COMDTINST 1900.8 (Nov. 30, 1990).

32. U.S. DEP'T OF DEF., DEP'T OF DEFENSE INSTRUCTION 1300.06, ¶¶ 3.1, 5.1 (May 31, 2007).

33. *Id.* ¶¶ 3.1.1–3.1.2 (emphasis added).

34. U.S. DEP'T OF THE ARMY, CONSCIENTIOUS OBJECTION, ARMY REGULATION 600-43, ¶ 3-1b (Aug. 21, 2006).

35. Matthew Kacsmaryk, *Defending Conscience Rights at Hacksaw Ridge and in the HHS Cases,* FIRST THINGS (Nov. 4, 2016), https://www.firstthings.com/blogs/firstthoughts/2016/11/defending-conscience-rights-at-hacksaw-ridge-and-in-the-hhs-cases [https://perma.cc/MJ5W-55JG].

highest award.[36] But he would not be the last. Army medics Thomas Bennett and Joseph LaPointe served during the Vietnam War and were awarded Medals of Honor posthumously for "conspicuous gallantry and intrepidity in action at the risk of [their lives] above and beyond the call of duty."[37] The Army and the nation were well served by allowing all three men to serve in manners consistent with their particular religious convictions—Seventh-day Adventist, ecumenical Protestant, and Baptist, respectively.

II. CONSCIENCE RIGHTS IN MEDICAL CASES: FEDERAL, STATE, AND TERRITORIAL

If the Armed Forces can protect both conscience rights and national security during times of war, civilian authorities can protect conscience rights in peacetime when a religious medical practitioner cannot in good conscience use a syringe, scalpel, or prescription to alter the human body. Thus far, federal, state, and territorial governments have been remarkably consistent in protecting conscience rights in the most contentious medical cases: abortion, assisted suicide, capital punishment, contraception, fertility treatments, and sterilization.[38] To date, the federal government[39] and nearly every state[40] have enacted over 160 par-

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36. Richard Goldstein, *Desmond T. Doss, 87, Heroic War Objector, Dies*, N.Y. TIMES (Mar. 25, 2006), http://www.nytimes.com/2006/03/25/us/desmond-t-doss-87-heroic-war-objector-dies.html [https://perma.cc/W5U8-S3U9].

37. Danae Tuley, *The Courage of Their Convictions: Three Conscientious Objectors and the Heroism That Earned Them the Medal of Honor*, SELECTIVE SERV. SYS., https://www.sss.gov/Alternative-Service/CO-Story-1 [https://perma.cc/36PN-FLVW] (last visited May 18, 2017).

38. *See* Brief for 43 Members of Congress as Amici Curiae Supporting Petitioners at 7a, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862), http://scotusblog.com/wp-content/uploads/2016/03/Stormans-Brief-of-43-Members-of-Congress.pdf [https://perma.cc/KW62-VCNR] (explaining that it has served the United States well to allow conscientious objectors to serve their nation in accordance with their beliefs).

39. For federal conscience-protection laws see, for example, Public Health Service Act, Church Amendment, 42 U.S.C. § 300a-7 (2012); Legal Services Corporation Act, 42 U.S.C. § 2996f(b)(8) (2012); Consolidated and Further Continuing Appropriations Act 2015, H.R. 83, 113th Cong. 128 § 2130 (2nd Sess. 2014); Civil Rights Restoration Act, Danforth Amendment, 20 U.S.C. § 1688 (2012); Public Health Service Act, Coats-Snowe Amendment, 42 U.S.C. § 238n (2012); Federal Death Penalty Act of 1994, 18 U.S.C. § 3597(b) (2012); Medicare+Choice Program, 42 U.S.C. § 1395w-22(j)(3)(B) (2012); Medical Assistance Programs, 42 U.S.C. § 1396u-2(b)(3)(B) (2012); Medical Assistance Programs, 42 C.F.R. § 438.102(a)(iv)(2) (2007); United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7631(d) (2012); Federal Employees Health Benefits Acquisition Regulation, 48 C.F.R. § 1609.7001(c)(7) (1999). For military conscience-protection laws see, for example, National Defense Authorization Act for Fiscal Year 2013 § 533, Pub. L. No. 112-239, 126 Stat. 1727 (2013) (as amended by

National Defense Authorization Act for Fiscal Year 2014 § 532, Pub. L. No. 113-66, 127 Stat. 672 (2014)); Dept. of Defense Directive 6000.14 (2011); Military Selective Service Act, 50 U.S.C. § 3806(j) (2006); Dept. of Defense Instruction No. 1300.06 (2007); Air Force Instruction 36-3204, Procedures for Applying as a Conscientious Objector (1994); U.S. Dep't of Army, Regulation 600-43, Conscientious Objection (Aug. 21, 2006); U.S. Coast Guard, Commandant Instruction 1900.8, Conscientious Objectors and the Requirement to Bear Arms (1990); U.S. Marine Corps, Order 1306.16F, Conscientious Objectors (June 11, 2013);
Convenience of the Government Separation Based on Conscientious Objection (Enlisted and Officers), Naval Military Personnel Manual 1900-020 (2002). (Research initially compiled for 43 Members of Congress as Amici Curiae Supporting Petitioners, *supra* note 38.)

40. For state conscience protection laws see, for example, ALA. CODE § 15-18-82.1(i) (2016); ALASKA STAT. ANN. § 13.52.060(e) (West 2016); ALASKA STAT. ANN. § 18.16.010(b) (West 2016), *invalidated by* Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122 (Alaska 2016); ARIZ. REV. STAT. ANN. §§ 36-3205(C)(1), -2154 (2016); ARIZ. REV. STAT. ANN. §§ 20-826(Z), -1057.08(B), -1402(M), -1404(V), -2329(B), (C) (2016); ARK. CODE ANN. §§ 20-13-1403(b)(1), -16-304(4)-(5), -601 (West 2016); ARK. CODE ANN. §§ 23-79-1102(3), -1103(b), -1104(b)(3) (West 2016); CAL. BUS. & PROF. CODE § 733(b)(3) (West 2016); CAL. HEALTH & SAFETY CODE §§ 443.14(b)–(e), 443.15, 1367.25(c), 1374.55(e)–(f), 123420(a)–(c) (West 2016); CAL. INS. CODE §§ 10119.6(d)–(e), 10123.196(e) (West 2016); CAL. PENAL CODE § 3605(c) (West 2016); CAL. PROB. CODE § 4734 (West 2016); COLO. REV. STAT. ANN. §§ 25-3-110(3), -6-102(9), -6-207 (West 2016); CONN. GEN. STAT. ANN. §§ 38a-509(c), -536(c) (West 2016); CONN. AGENCIES REGS. § 19-13-D54(f) (2016); DEL. CODE ANN. tit. 18, § 3559(d), tit. 24, § 1791 (West 2016); FLA. STAT. ANN. §§ 381.0051(5), 409.973(1)(h), 765.1105, 922.105(9) (West 2016); FLA. STAT. ANN. § 390.0111(8) (West 2016), *invalidated by* Planned Parenthood of Sw. & Cent. Fla. v. Philip, 194 F. Supp. 3d 1213 (N.D. Fla. 2016); GA. CODE ANN. §§ 16-12-142, 17-10-38(d), 31-20-6, 49-7-6 (West 2016); GA. COMP. R. & REGS. 290-5-32-.02(3) (2016); HAW. REV. STAT. ANN. §§ 327E-7(e), 431:10A-116.7(a)–(c), 453-16(e) (West 2016); IDAHO CODE ANN. §§ 18-611, -612, 39-3915 (West 2016); 215 ILL. COMP. STAT. ANN. § 5 / 356m(b)(2) (West 2016); 720 ILL. COMP. STAT. ANN. § 510 / 13 (West 2016); 745 ILL. COMP. STAT. ANN. §§ 30 / 1, 70 / 1–14 (West 2016); IND. CODE ANN. §§ 16-34-1-3 to -7 (West 2016); IOWA CODE ANN. §§ 146.1–.2 (West 2016); KAN. STAT. ANN. §§ 65-443, -444, -446, -447, -6737 (West 2016); KY. REV. STAT. ANN. § 311.800(3)–(5) (West 2016); LA. STAT. ANN. §§ 15:569(c), :570(c) (2016); LA. STAT. ANN. §§ 40:1061.2–.4, .20 (2016); ME. REV. STAT. tit. 18-A, § 5-807(E) (2017); ME. REV. STAT. tit. 32, § 13795(2) (2017); ME. REV. STAT. tit. 22, § 1591, 1592 (2017); ME. REV. STAT. tit. 22, § 1903(4) (2017); ME. REV. STAT. tit. 24, § 2332-J(2) (2017); ME. REV. STAT. tit. 24-A, § 2756(2) (2017); ME. REV. STAT. tit. 24-A, § 2847-G(2); ME. REV. STAT. tit. 24-A, § 4247(2) (2017); ME. REV. STAT. tit. 34-B, § 7016(1) (2017); MD. CODE ANN., HEALTH–GEN. § 20-214 (2016); MD. CODE ANN., INS. § 15-810 (I) (2016); MD. CODE ANN., INS. § 15-826 (West 2016); MASS. GEN. LAWS ANN. CH. 112, § 121 (West 2017); MASS. GEN. LAWS ANN. CH. 272, § 21B (West 2017); MASS. GEN. LAWS ANN. CH. 175, § 47W (West 2017); MASS. GEN. LAWS ANN. CH. 176A, § 8W(C) (West 2017); MASS. GEN. LAWS ANN. CH. 176B, § 4W(C) (West 2017); MASS. GEN. LAWS ANN. CH. 176G, § 4O(C) (West 2017); MINN. STAT. ANN. § 145.414 (West 2017); MINN. STAT. ANN. § 145.925 (6) (West 2017); MISS. CODE. ANN. § 41-41-215(5) (West 2017); MISS. CODE. ANN. § 41-107-3(H) (West 2017); MO. ANN. STAT. §§ 188.105, 188.110, 188.120 (West 2016); MO. ANN. STAT. § 197.032 (West 2016); MO. ANN. STAT. § 191.724; MO. ANN. STAT. § 191.724 (West 2016); MO. ANN. STAT. § 376.805(1) (West 2017); MONT. CODE ANN. § 50-20-111(2) (West 2017); MONT. CODE ANN. § 50-5-502 (1) (2016); MONT. CODE ANN. § 50-5-503 (1) (West 2016); MONT. CODE ANN. § 50-5-504(1) (2016); MONT. CODE ANN. § 50-5-505 (West 2016); NEB. REV. STAT. ANN. §§ 28-337 to -341 (West 2016); NEV. REV. STAT. ANN. §§ 449.191, 632.475, 689A.0415(5), .0417(5), 689B.0376(5), .0377(5), 695B.1916(5), .1918(5), 695C.1694(5), .1695(5) (West 2016); N.J. STAT. ANN. §§ 2a:65A-1 to -4, 17:48-6ee, -6x(b), -7bb, :48A-7w(b), :48E-35.22(b), .29, :48F-13.2, 17b:26-2.1y, :27-46.1ee, -46.1x(b), :27A-7.12, -19.15, 26:2J-4.23(b), .30 (West 2016); N.M. STAT. ANN. §§ 24-7A-7(E)–(F), 24-8-6, 30-5-2, 59A-22-42(D), -46-44(C) (West 2016); N.Y. INS. LAW §§

ticularized conscience statutes, rules, or policies.

Because medical practitioners have a unique responsibility for the well-being of their patients, conscience protections are especially appropriate in health care law. This responsibility has led to various oaths and codes of conduct dating as far back as ancient Greece's Hippocratic Oath.[41] Modern oaths emphasizing the responsibility to "do no harm" became standard after the atrocities committed in the name of medical research in Nazi Germany.[42] Additionally, emerging fields of medicine entail

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3221(l)(16)(A), 4303(cc)(1); N.Y. COMP. CODES R. & REGS. tit. 10, § 405.9(10); N.Y. COMP. CODES R. & REGS. tit. 18 § 463.6(d); N.C. GEN. STAT. ANN. §§ 14-45.1(e)–(f), 58-3-178(e) (West 2016); 21 N.C. ADMIN. CODE 46.1801(a) (2016); N.D. CENT. CODE ANN. § 23-16-14 (West 2016); OHIO REV. CODE. ANN. § 4731.91 (West 2016); OKLA. STAT. ANN. tit. 63, §§ 1-568, 1-728a to -728f, 1-741 (West 2016); OR. REV. STAT. ANN. §§ 127.625, 127.885, 435.225, 435.475, 435.485 (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 3213(d), (f)(1) (West 2016); 43 PA. STAT. AND CONS. STAT. ANN. § 955.2 (West 2016); 16 PA. CODE §§ 51.31–.44 (2016); 23 R.I. GEN. LAWS § 23-17-11 (2016); 27 R.I. GEN. LAWS §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2016); S.C. CODE ANN. §§ 44-41-40, 44-41-50 (2016); S.D. CODIFIED LAWS §§ 34-23A-11 to -14, 36-11-70 (2016); TENN. CODE ANN. §§ 39-15-204 to -205, § 68-34-104(5) (West 2016); TEX. INS. CODE ANN. §§ 1271.007, 1366.006, 1369.108 (West 2015); TEX. OCC. CODE ANN. §§ 103.001–.004 (West 2015); UTAH CODE ANN. § 76-7-306 (West 2016); VT. STAT. ANN. tit. 18, §§ 5285-5286 (West 2016); VA. CODE ANN. §§ 18.2-75, 32.1-134, 54.1-2957.21 (West 2016); WASH. REV. CODE ANN. §§ 9.02.150, 48.43.065(2), 70.47.160(2), 70.245.190(1)(b)–(2) (West 2016); WASH. ADMIN. CODE § 284-43-5020(2) (2017); W. VA. CODE ANN. §§ 16-2B-4, 16-11-1, 16-30-12, 33-16E-2 to -7 (West 2016); WIS. STAT. ANN. §§ 253.07(3)(b), 253.09, 441.06(6), 448.03(5)(a)(West 2017); WYO. STAT. ANN. §§ 35-6-105 to -106, 35-6-114, 42-5-101(d), 42-5-102(a)(ii) (West 2016). (Research initially compiled for Brief of Amici Curiae 43 Members of Congress in Support of Petitioners, *supra* note 38.)

41. *Hippocratic Oath,* JOHNS HOPKINS SHERIDAN LIBRARY (Dec. 14, 2016, 11:20 AM), http://guides.library.jhu.edu/c.php?g=202502&p=1335752 [https://perma.cc/QJH9-VB8K] (last updated Apr. 14, 2017, 7:27 PM) ("Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice. . . ."); *see also Oath and Prayer of Maimonides,* JOHNS HOPKINS SHERIDAN LIBRARY (Dec. 14, 2016, 11:20 AM), http://guides.library.jhu.edu/c.php?g=202502&p=1335755 [https://perma.cc/7EFU-EJ2G] (last updated Apr. 14, 2017, 7:27 PM) ("Almighty God, Thou has created the human body with infinite wisdom. Ten thousand times ten thousand organs hast Thou combined in it that act unceasingly and harmoniously to preserve the whole in all its beauty the body which is the envelope of the immortal soul. They are ever acting in perfect order, agreement and accord. Yet, when the frailty of matter or the unbridling of passions deranges this order or interrupts this accord, then forces clash and the body crumbles into the primal dust from which it came. . . . Thou hast endowed man with the wisdom to relieve the suffering of his brother, to recognize his disorders, to extract the healing substances, to discover their powers and to prepare and to apply them to suit every ill. In Thine Eternal Providence Thou hast chosen me to watch over the life and health of Thy creatures. I am now about to apply myself to the duties of my profession. Support me, Almighty God, in these great labors that they may benefit mankind, for without Thy help not even the least thing will succeed.").

42. *Hippocratic Oath, supra* note 41; *Major Codes from Then and Now,* JOHNS HOPKINS SHERIDAN LIBRARY, http://guides.library.jhu.edu/c.php?g=202502&p=1335753 [https://perma.cc/DN2D-S3JW] (last updated Apr. 14, 2017, 7:27 PM) (noting that the 1948 Declaration of Geneva oath for physicians was "largely in response [to] the atrocities committed in the name of research in WWII Nazi concentration camps. It was also meant to update the Hippocratic Oath to make it more applicable to the modern era.").

complicated moral judgments about bioethics, for which reasonable people of goodwill can hold differing opinions.[43]

Because the stakes are high—involving people's lives and well-being—American laws generally respect the ethical judgments of medical practitioners. As a society, we want those who enter and practice medicine to do so in accordance with their own moral, professional, and religious beliefs. For these reasons, it is standard to permit health care providers to opt out of personally performing or facilitating procedures that violate their religious beliefs or ethical judgments.

III. INCOMING HHS SECRETARY TOM PRICE SHOULD REINSTATE CONSCIENCE RIGHTS

Against the grain of American history and American health care policy, the decision makers who promulgated the HHS Transgender Mandate refused to include particular conscience protections for religious practitioners whose view of the human body is different from the definition codified in the Section 1557 regulation.[44]

The consequent collision of worldviews is well illustrated in three hypotheticals presented in Congressman Joe Pitts's October 6, 2016, letter to HHS Secretary Sylvia Burwell objecting to the new rule:

> [If a covered] doctor prescribes puberty blocking medication to children with a medical condition known as precocious puberty[,] . . . [w]ould that doctor be required under the rule to prescribe puberty blocking medication to children who have been diagnosed by a mental health professional as requiring puberty blocking medication to treat gender dysphoria, even if the doctor's best medical judgment was that such treatments are always experimental and inappropriate to

43. BERNARD GERT, CHARLES M. CULVER & K. DANNER CLOUSE, BIOETHICS: A SYSTEMATIC APPROACH 3 (2d ed. 2006).

44. *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 1, 9 (5th ed. 2009), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf [https://perma.cc/VF5S-L32C]; *see also* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376-01, 31,435 (May 18, 2016) (codified at 45 C.F.R. pt. 92) (declining to adopt any religious exemption).

> provide to children to facilitate a gender transition?
>
> . . . [If a covered] doctor regularly provides hysterectomies to women to treat uterine cancer[,] . . . [w]ould the doctor be required under the rule to provide a hysterectomy to treat gender dysphoria if the patient's mental health physician determined that a hysterectomy was medically necessary to treat gender dysphoria? Would the doctor be required to perform these procedures even if the doctor had ethical and religious objections to performing a hysterectomy to facilitate a gender transition?
>
> . . . If a [covered] physician or hospital . . . performs [dilation and evacuation] after a miscarriage to prevent infection, must the physician or hospital also perform [dilation and evacuation] for an abortion?[45]

In the months between the HHS Transgender Mandate's effective date and the preliminary injunction issued by the United States District Court, the American Civil Liberties Union (ACLU) took legal action against Catholic health care providers Dignity Health in California and Ascension Health in Michigan.[46] In both cases, plaintiffs cite the HHS Transgender Mandate as the basis for forcing Catholic providers to cover sex reassignment and sterilization surgeries that violate the Ethical and Religious Directives for Catholic Health Care Services (ERD) promulgated by the United States Conference of Catholic Bishops (USCCB).[47] The ACLU is actively recruiting new plaintiffs through an interactive webpage: Health Care Denied.[48]

45. Letter from Joseph Pitts et al. to Sylvia Burwell, Health and Human Serv. Sec'y (Oct. 6, 2016); *see also* Lauretta Brown, *47 Lawmakers Demand Answers to HHS Rule Requiring Doctors to Perform 'Gender Transition' Procedures*, CNS NEWS (Oct. 14, 2016, 4:10 PM), http://www.cnsnews.com/news/article/lauretta-brown/47-lawmakers-demand-answers-hhs-rule-requiring-doctors-perform-gender [https://perma.cc/9TBP-8NFZ].

46. Robinson v. Dignity Health, No. 16-CV-3035 YGR, 2016 WL 7102832 (N.D. Cal. Dec. 6, 2016); Julia Kaye, Administrative Complaint Filed with the U.S. Department of Health and Human Services, Office of Civil Rights, AMERICAN CIVIL LIBERTIES UNION (Oct. 25, 2016), https://www.aclu.org/sites/default/files/field_document/section_1557_complaint_on_behalf_of_jessica_mann_and_the_aclu_oct._25_2015.pdf [https://perma.cc/WN3B-SS5P].

47. *See Robinson*, 2016 WL 7102832, at *1 (arguing that the exclusion of "sex transformation" surgery is sex discrimination); Kaye, *supra* note 46, at 3 (arguing that ban on tubal ligations is sex discrimination).

48. *Catholic Hospitals Deny Women Critical Care*, ACLU ACTION, https://action.aclu.org/secure/care-denied?ms=web_160503_religiousrefusals_catholichospitals_featurepage [https://perma.cc/SY5E-VTCG] (last visited May 18,

Threats of litigation against medical professionals who seek to abide by their consciences could continue unless incoming HHS Secretary Tom Price repudiates the false premise that faith-based providers, physicians, and practitioners must forfeit their deepest religious convictions to participate in federally funded programs. Similarly, if Congress chooses to retain or revise the ACA, it should add to the Transgender Mandate what HHS conspicuously omitted: particularized conscience protections for medical professionals who cannot use a scalpel or syringe in a manner that violates their faith.

CONCLUSION

The principle of conscientious objection applies with equal force to individuals of various political, ethical, or religious beliefs. It applies to the pacifist conscientious objector in the same way as to the Catholic health care provider. It is imperative that American health care laws provide robust conscience protections so that our medical providers may freely serve the sick, the dying, and the poor.

2017).

RELIGIOUS COLLEGES' EMPLOYMENT RIGHTS UNDER THE "MINISTERIAL EXCEPTION" AND WHEN DISCIPLINING AN EMPLOYEE FOR SEXUALLY RELATED CONDUCT

JAMES A. DAVIDS*

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INTRODUCTION

Edward Nagy stretched his lower back after slowly lifting himself from his office chair. "What's next?" thought the president of John Hus College, as he ambled to the window to see the rolling hills of central Iowa as the Indian summer sun of early November lit the quad in front of Old Main.

The current stressor in President Nagy's life was Jeff Varga. Jeff was as close to Hus College "royalty" as one could get. Jeff's great-great-grandfather was one of Hus's early presidents, and his maternal great-aunt is married to the recently retired Hus Vice President of Finances. Jeff's parents are both graduates of Hus, as are all three of their children. After Jeff graduated, he returned home to Chicago for his master's degree in Student Services, and when a position opened as a Resident Director in "Old Laddie," Hus's all-male dorm named after St. Ladislaus, Jeff applied and Hus hired him for this full-time position. Jeff's charges in the dorm continually give him good evaluations, as does the Director of Student Affairs to whom Jeff reports. Jeff, who graduated from Hus with a degree in divinity, completed an online Master of Divinity degree from Chicago Theological School. He faithfully attends the Metropolitan Community Church in Des Moines, which ordained him and then hired him as its part-time Assistant Pastor for Youth Ministries in February 2015.

As occurs probably on every college campus in our nation, Hus students meet informally to discuss current events, and over the past several years these discussions have included LGBT rights and privileges. As a student, Jeff was a vocal proponent of increasing societal benefits to the LGBT community, one time writing a letter to the student newspaper editor applauding the Iowa Supreme Court for its courage in ruling that LGBTs have the right to obtain a state marriage license.[1] Jeff's gay advocacy did not dissipate after graduating from Hus; in fact, Jeff's master's thesis in divinity school focused on how the Christian church had historically misinterpreted the "sin of Sodom." Jeff's thesis concluded that this Old Testament story did not prohibit consensual gay sexual relations, just nonconsensual relations. Moreover, as Jeff argued in his thesis, Jesus as the epitome of love never condemned homosexuality in his public ministry as recorded in the Gospels.

1. *See generally* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

Jeff's Resident Director apartment in Old Laddie has become quite renowned on campus for its "bull sessions" that often cover contemporary issues like gay marriage. Jeff often expresses his opinion on the subjects discussed. Rumors have circulated on campus of occasional consensual sex in Old Laddie. Once each in the last two years a male resident of Old Laddie has walked into his room and discovered his roommate sleeping with another male in a bunk bed. These incidents were reported to Jeff, who took no further action to investigate or otherwise pursue these infractions of Hus College rules.

The event that precipitated Hus's firing of Jeff was quite innocent. In October 2015, the Knoxville *Weekly* ran a story on page six about the first gay couple in Marion County getting married. The story included a photo of the couple saying their vows, and included in the picture the pastor officiating at this wedding, none other than Jeff Varga. Someone in the Hus Democrat Club, seeking to promote its social agenda, posted copies of the article and picture on the main doors of St. Laddie and each of the academic and administrative buildings on campus, which of course brought this matter to the attention of the Director of Student Affairs.

In the conversation between Jeff and the director that ensued the morning after the picture appeared, Jeff of course admitted that he did, in fact, officiate at the wedding, and that this was not the first gay wedding he had performed. The director reminded Jeff that he had signed the Hus College Statement of Faith upon becoming a Hus employee (and had affirmed this statement in each subsequent annual employment contract), and that this statement, consistent with the official position of the Hungarian Reformed Church, had limited marriage to one man and one woman. Jeff argued that the Church appeared to be softening on this issue, that the couple had a fundamental right to marry,[2] that he was an ordained minister in the Metropolitan Community Church and was licensed to perform this ceremony, and that he would continue performing these ceremonies. The director gave Jeff a copy of the official Position of the Hungarian Reformed Church on Same Sex Marriage dated 2007, asked Jeff to read it, and they agreed to meet the following morning.

Jeff and the director met the next day, and Jeff said that he

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

had read the position statement, and that the statement misinterpreted Scripture. Hus's chaplain, who had joined the conversation at the request of the director, disputed Jeff's interpretation of the relevant scriptural passages. Jeff was unmoved, and when the director asked that Jeff repent and no longer officiate at gay wedding ceremonies, Jeff refused. The director said that he had no choice but to recommend to President Nagy that Jeff be fired.

Subsequent meetings between Jeff, the chaplain, and President Nagy followed a similar course and, after Edward Nagy had spoken with the Executive Committee of Hus's Board of Trustees, President Nagy fired Jeff when Jeff refused to repent and promise to no longer officiate at gay weddings. Jeff promptly filed a charge with the Equal Employment Opportunity Commission (EEOC), which after an investigation filed a complaint in federal district court against Hus College, claiming that Hus engaged in religious and sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Hus's attorneys have explained some of the defenses Hus can assert in this case.[3] One such defense is the "ministerial exception," which the U.S. Supreme Court in 2012 recognized in the case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC.*[4] Nagy has some doubts as to the applicability of this defense here, since Hus College is not a church and Jeff Varga is not a minister for the college. How elastic is this "ministerial-exception" defense?

Defense counsel has also told President Nagy of statutory defenses available to Hus in Title VII.[5] One such statutory defense is section 702(a) of the Civil Rights Act, which exempts from re-

3. There are some defenses to this civil-rights claim that are beyond the scope of this Article. One such defense is the Religious Freedom Restoration Act (RFRA), which generally protects a person's/organization's exercise of religion, unless the federal government demonstrates that the burden on the religious exercise is in furtherance of a compelling state interest, and the burden is the least restrictive means of furthering the compelling state interest. 42 U.S.C. §§ 2000bb-1–2000bb-4 (2012). For a recent application of RFRA, see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Another defense is the First Amendment's Establishment Clause, which prohibits the government from excessively entangling itself in doctrinal issues. *See* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1250, 1261–69 (10th Cir. 2008) (holding that Colorado was not permitted to exclude "pervasively sectarian" institutions from state scholarship programs when all other public and private accredited colleges in the state were included).

4. 132 S. Ct. 694, 710 (2012).

5. These Title VII statutory exemptions apply only to *religious* discrimination, and not to the other forms of discrimination covered by Title VII. Michael S. Truesdale & G. James Landon, *Labor and Employment Law*, 31 TEX. TECH L. REV. 711, 733 (2000).

ligious discrimination "a religious educational institution" that employs "individuals of a particular religion to perform work . . . with the . . . carrying on by such . . . educational institution . . . of its activities."[6] "What a poorly worded sentence!" Edward thought. Hus College has a Religion Department and an affiliated (but separate) seminary, but generally Hus provides a liberal-arts education to its students. Is Hus a "religious educational institution" within the meaning of section 702(a)? Perhaps more critically, can Hus terminate an employee who claims to be a Christian but who disagrees forcefully with historic Christian orthodoxy on the issue of homosexuality?

Hus's attorneys claim that Hus also has a defense under section 703(e)(1) of the Civil Rights Act that allows an employer to take into account for employment decisions an individual's religion if it is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise."[7] "Does this apply to Jeff Varga?" Nagy wondered. The requirement makes much more sense for a person in the Religion Department than it does for a Resident Director.

A final statutory defense is section 703(e)(2), which is explicit regarding religious schools:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such, school, college, university, or other educational institution . . . is, in whole or in . . . part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[8]

"This law obviously applies to hiring and employment, but

6. 42 U.S.C.A. § 2000e-1(a) (West 1991) (codifying Title VII of the amended Civil Rights Act of 1964); Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 8 (2004).

7. 42 U.S.C. § 2000e-2(e)(1) (2012).

8. 42 U.S.C. § 2000e-2(e)(2) (2012).

does it also apply to termination?" asked Nagy. The Hungarian Reformed Church does not *manage* Hus College, nor does it *control* Hus, even though the college bylaws require that one-quarter of the Board of Trustees consist of clerics from the Church, and the Church must approve Hus bylaw and Articles of Incorporation changes. The Church contributes between two and three percent of Hus's annual budget. Is this sufficient support for section 703(e)(2) to apply? Finally, Hus like other Christian colleges that are members of the Coalition of Christian Colleges and Universities integrates faith and learning. That is, Hus teaches fundamental Christian doctrine and applies it throughout the courses taught. Is this enough to satisfy the "propagation of a particular religion" requirement?

This Article explores the ruminations of our fictitious Hus College President Nagy. What is the "ministerial exception" and does it apply to a non-managerial employee in a religious college? What are the parameters afforded by sections 702 and 703 of the Civil Rights Act? Section I addresses the first issue, and section II looks at the religious exemptions found in sections 702 and 703, focusing specifically on the following questions: (1) How "religious" must an educational institution be to qualify for the religious-hiring exemption? (2) Does the religious exemption protect religious higher educational institutions (HEIs) from discriminatory conduct other than that based on religion? (3) Does the religious exemption cover standards regarding out-of-wedlock heterosexual conduct? and (4) Do the religious exemptions cover standards regarding gay sex and gender identity? Section III compiles the various religious-hiring rights principles derived from this study. Finally, section IV returns us to the fictional Hus President Nagy for some practical applications.

I. THE MINISTERIAL EXCEPTION

Hosanna-Tabor Evangelical Lutheran Church and School (Hosanna-Tabor) was a private K–8 school that offered a "Christ-centered" education in Redford, Michigan, and employed two types of teachers: "lay" and "called."[9] The lay teachers served under one-year renewable contracts, and generally taught the same subjects as called teachers, but lay teachers were only hired

9. *Hosanna-Tabor*, 132 S. Ct. at 699–700 (quoting EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008)).

when called teachers were unavailable.[10]

To become a called teacher, a lay instructor must complete a three-step process: (1) obtain additional academic training (eight theology courses) at a Lutheran college or university; (2) pass an oral exam by members of the college faculty; and (3) receive the endorsement of the local Lutheran synod.[11] Once this process was complete, the Lutheran congregation could "call" the teacher to ministry at the school. When called, the teacher received the title of "Minister of Religion, Commissioned," and the teacher served an open-ended term.[12] The congregation could rescind the call, but only by a supermajority vote and only for "cause."[13]

Cheryl Perich, at first a lay teacher at Hosanna-Tabor, completed her training and thereafter was called by the congregation.[14] She taught kindergarten for four years and then in her final year, she taught math, language arts, social studies, science, gym, art, and music to fourth-graders.[15] During that final year, she also taught a religion class four days a week, led the students in daily devotions and prayer, attended weekly chapel with her students, and led chapel herself about twice a year.[16]

Perich became ill with narcolepsy in June 2004, so the school granted her disability leave for the next academic year. Six months later in January 2005, however, she notified the school that she was ready to return to work.[17] The school discouraged her from doing so, since it had contracted already with a substitute lay teacher for the academic year.[18] Thereafter, the congregation offered Ms. Perich a "peaceful release" from her call, offering to pay a portion of her health-insurance premiums in exchange for her resignation as a called teacher.[19] Ms. Perich refused, showed up for work when released by her doctor, and the principal told her to go home.[20] During a subsequent phone call, Ms. Perich told the principal that Ms. Perich had spoken with a

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10. *Id.*
11. *Id.* at 707.
12. *Id.* at 699.
13. *Id.*
14. *Id.* at 700.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

lawyer and intended to pursue her legal rights.[21] The congregation then met, revoked her call, and discharged Perich.[22] In the letter informing her of this action, the board chair cited Perich's "insubordination and disruptive behavior" as well as the damage she had done to her "working relationship" with the school by "threatening to take legal action."[23]

Perich filed a charge with the EEOC, alleging a violation of the Americans with Disabilities Act.[24] The EEOC, after conducting its investigation, brought suit against the church claiming that it fired Ms. Perich in retaliation for threatening to file a charge with the EEOC.[25] The lawsuit sought reinstatement of Perich to her position, an award of back pay (front pay if no reinstatement), punitive damages, and attorneys' fees in the litigation.[26]

During the course of the case, Hosanna-Tabor asked the district court to dismiss the complaint on the grounds that the First Amendment protected the church's decision to discharge one of its ministers.[27] That is, the church argued that the First Amendment deprives the court of subject-matter jurisdiction to hear a dispute between a minister and a church that fired the minister for a religious reason (threatening litigation that violated the church's belief that Christians should resolve their disputes without going to court).[28] The district court agreed, finding that the church treated Ms. Perich as a minister, and that she worked in a religious school.[29] The Sixth Circuit Court of Appeals disagreed, finding that Perich was not a minister since, in the court's view, her duties at the school were little different than those of a lay teacher.[30] That is, her forty-five minute daily religion class and daily devotions were not sufficiently distinct duties from the lay teachers who were not ministers. The school appealed to the Supreme Court.[31]

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 701.
25. *Id.*
26. *Id.*
27. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 886–87 (E.D. Mich. 2008).
28. *Id.* at 887, 890–91.
29. *Id.* at 892.
30. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780–81 (6th Cir. 2010).
31. Petition for Writ of Certiorari, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

Hosanna-Tabor was the first case in which the Supreme Court considered the "ministerial exception."[32] Many courts of appeals had decided previously that the First Amendment protects the employment decisions of churches with respect to their leaders, but they differed on the breadth of the exception.[33] All courts considering this issue held that the exception covered senior ministers, but they differed on protection for other church per-

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32. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705 (2012); *see also* Carl H. Esbeck, *Defining Religion Down: Hosanna-Tabor, Martinez, and the U.S. Supreme Court*, 11 FIRST AMEND. L. REV. 1, 8 (2012) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its belief."); Lauren N. Woleslagle, *The United States Supreme Court Sanctifies the Ministerial Exception in* Hosanna-Tabor v. EEOC *Without Addressing Who Is a Minister: A Blessing for Religious Freedom or Is the Line Between Church and State Still Blurred?*, 50 DUQ. L. REV. 895, 896 (2012) ("In [*Hosanna-Tabor v. EEOC*], the unanimous Court, for the first time, recognized the 'ministerial exception' to employment discrimination laws by holding that churches and other religious organizations are free to hire and fire their ministerial leaders without government interference.").

33. *Hosanna-Tabor*, 132 S. Ct. at 705 n.2; *see, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 207, 209 (2d Cir. 2008) (explaining that a priest's Title VII claim was barred by the ministerial exception, even though the church defendant waived the Religious Freedom Restoration Act of 1993 as a defense); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007) (affirming extension of the ministerial exception to the hospital's decision to dismiss Hollins from its clinical pastoral program and from employment as resident chaplain following a psychological evaluation); Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006) (barring former chaplain's Title VII claims under the ministerial exception, which protects the university's right to choose which individuals perform its spiritual functions); Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1101–02 (9th Cir. 2004) (holding that under the ministerial exception a former pastor could not bring a Title VII claim against the church for failure to accommodate his disability); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 702–04 (7th Cir. 2003) (holding that the Hispanic Communications Manager of a church was barred by the ministerial exception from bringing otherwise actionable Title VII claims of gender and national-origin discrimination); Bryce v. Episcopal Church, 289 F.3d 648, 655–59 (10th Cir. 2002) (barring, under the church-autonomy doctrine, a youth minister's sexual-harassment claims following her civil-commitment ceremony with her same-sex partner); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 802, 805 (4th Cir. 2000) (affirming dismissal of gender discrimination and retaliation claims for lack of subject-matter jurisdiction under the ministerial exception because employee was cathedral's director of music ministry and part-time music teacher at the cathedral's elementary school); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301, 1304 (11th Cir. 2000) (upholding decision that the minister's Title VII claims of retaliation and constructive discharge were beyond judicial scrutiny under the ministerial exception); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (affirming dismissal under the ministerial exception of a female minister's Title VII pregnancy-discrimination complaint); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463–64 (D.C. Cir. 1996) (affirming under the ministerial exception the dismissal of Catholic nun's sex-discrimination claim regarding the university's refusal to grant her tenure); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362–63 (8th Cir. 1991) (affirming dismissal of ADEA and Title VII actions against a church-affiliated hospital on the basis that enforcing would constitute "excessive entanglement in religious affairs," and is therefore barred by the First Amendment); Woleslagle, *supra* note 32, 896.

sonnel and employees of non-church religious organizations (for example, relief organizations and publishers of religious materials).[34]

In confirming the existence of the ministerial exception, Chief Justice Roberts reviewed the history of the church–state relationship in England and then in the colonies.[35] From this study, the Chief Justice concluded that in reaction to the intertwined church–state relationship in England, the new United States specifically rejected a national church.[36] According to the Chief Justice, the founders intentionally created two clauses in the First Amendment so that the "Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[37]

With this foundation, the Chief Justice reviewed both the Supreme Court's jurisprudence on church issues, and then the courts of appeals' "extensive experience" with the ministerial exception.[38] After this review, the Court concluded:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister,

34. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) (holding that an employee's secular, administrative duties did not preclude application of the ministerial exception when her other responsibilities furthered the church's pastoral mission); Elliott Williams, *Resurrecting Free Exercise in* Hosanna-Tabor Lutheran Church & School v. EEOC, *132 S. Ct. 694 (2012)*, 36 HARV. J.L. & PUB. POL'Y 391, 391 (2013) ("Beyond that baseline, appellate opinions have diverged as to whether the exception protects only churches or whether it extends to other kinds of religious organizations, whether it applies to most employees of religious organizations or only a few, and whether the exception bars all employment-related suits or only discrimination suits."); *cf.* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985) (holding that an "associate in pastoral care" was covered by the ministerial exception). *Contra* EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982) (holding that a church secretary did not fall under the exception).

35. *Hosanna-Tabor*, 132 S. Ct. at 702–04.

36. *Id.* at 703.

37. *Id.*

38. *Id.* at 705 n.2.

> the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[39]

The next issue addressed by the Court was whether Ms. Perich was a minister within the exception.[40] The Court declined to adopt a test for who qualifies as a "minister," but agreed that Ms. Perich qualified, and that the exception "is not limited to the head of a religious congregation."[41]

The particular facts the Court found important to Ms. Perich's status as a "minister" included: (1) Hosanna-Tabor held Perich out as a minister by extending a call to her for religious service and commissioning her; (2) Perich received a significant degree of religious training, had passed an oral exam by the Lutheran college faculty, and had received the endorsement from the local religious body (the Lutheran Synod); (3) Perich held herself out as a minister by accepting a formal call to religious service, claiming a special-housing allowance on her taxes, and referring to herself as having served in a "teaching ministry"; and (4) "Perich's job duties teaching a religion class four days a week, leading daily devotions, and conducting chapel services twice a year reflected a role in conveying the Church's message and carrying out its mission," including "transmitting the Lutheran faith to the next generation."[42]

The Court found that the appellate court erred by putting too much weight on the fact that lay teachers also performed the same religious duties as called teachers, and that called teachers also performed secular duties.[43] The Court determined that the EEOC incorrectly concluded that only forty-five minutes of the teacher's day concerned exclusively religious functions.[44] The Chief Justice noted that ministers, despite their religious functions, also have secular duties including managing finances, su-

39. *Id.* at 706.
40. *Id.* at 697–98.
41. *Id.* at 707.
42. *Id.* at 708.
43. *Id.*
44. *Id.*

pervising employees performing non-religious functions, and monitoring facility upkeep.[45] The Chief Justice concluded that the "amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed . . . ."[46]

Justice Thomas concurred in the Chief Justice's opinion, stating that "the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith."[47] He considered the religious institution's sincere view of who is a minister as enough to trigger the ministerial exception.[48] That is, secular courts should not be permitted to "second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."[49]

In a separate concurrence, Justices Alito and Kagan emphasized that ordination and the title "minister" are not essential to trigger the ministerial exception.[50] They said the ministerial exception "include[s] those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation."[51] Justice Alito emphasized the importance of teaching when he stated:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right

45. *Id.* at 709.
46. *Id.*
47. *Id.* at 710 (Thomas, J., concurring).
48. *Id.* at 711.
49. *Id.* at 710.
50. *Id.* at 711 (Alito, J., joined by Kagan, J., concurring).
51. *Id.* at 712.

> to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.[52]

Note here that Justices Alito and Kagan not only stress the importance of the teachers and the content of their teaching, but also the *example* the teachers present in their lives. Implicit in this statement is the idea that religious organizations have the *right* to adopt moral codes for teachers consistent with religious doctrine, and the *power to punish* deviations from this code.

The Chief Justice in *Hosanna-Tabor* noted that every federal appellate court that had considered the applicability of the ministerial exception had ruled that it is not limited to the leader of a religious congregation.[53] Unlike Justice Alito who provided some broad parameters for who is a minister,[54] the Chief Justice was reluctant "to adopt a rigid formula for deciding when an employee qualifies as a minister."[55] Although not a "rigid formula," the "religious-hiring principles" found in the conclusion below show lower-court decisions on which religious-organization employees were, and which were not, ministers for purposes of the ministerial exception.[56]

II. TITLE VII RELIGIOUS EXEMPTIONS

As shown above, the ministerial exception fully protects religious institutions from employment-discrimination claims made by: (1) the institution's leadership; (2) those who perform important functions in the institution's religious services; and (3) teachers who disseminate the faith to the next generation. Most employees of large religious organizations, of course, do not fall within these limited categories.[57] Even these non-ministerial em-

52. *Id.* at 713 (quoting Petruska v. Gannon Univ., 462 F. 3d 294, 306 (3d Cir. 2006)).
53. *Id.* at 707 (majority opinion).
54. *Id.* at 712 (Alito, J., concurring).
55. *Id.* at 707 (majority opinion).
56. *See infra* notes 280–318 and accompanying text. Note that most of the cases cited in these notes are pre-*Hosanna Tabor*, but nevertheless comply with the Supreme Court's holding in that case.
57. Commentators on the *Hosanna-Tabor* case have been quick to criticize the Court

ployees, however, are subject to the Title VII religious exemptions, which provide a level of protection for religious colleges.[58]

Federal courts have issued dozens of opinions on the section 702[59] religious-employment exemption and Title VII's specific protection for religious schools found in section 703(e)(2).[60] Given the focus of this Article, however, it is prudent to cull from this list the most important cases for these exemptions generally, and also to cover all the religious-school cases. This reduces the list of cases requiring examination to about two dozen that should be studied in order to address the following questions: How "religious" must an educational institution be to qualify for the religious-hiring exemption? Do the religious exemptions protect educational institutions from discriminatory conduct other than that based on religion? Do the religious exemptions cover out-of-wedlock heterosexual standards of conduct? Do the religious exemptions cover standards regarding gay sexual conduct and gender identity?

A. *How "Religious" Must an Educational Institution Be to Qualify for the Religious-Hiring Exemption?*

Killinger v. Samford University[61] involved a distinguished professor of theology who disagreed theologically with the dean of the divinity school.[62] When the dean removed the plaintiff from the divinity-school faculty, the plaintiff sued alleging religious discrimination.[63] When Samford asserted its section-702 exemption,

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for its failure to provide a bright-line rule for both lower courts and religious institutions seeking to avoid future litigation. *See, e.g.*, Woleslagle, *supra* note 32, at 913.

58. 42 U.S.C. §§ 2000e-1(a), 2000e-2(e) (2012); *see* Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J.C.R. & SOC. JUST. 529, 543 (2010) ("These exemptions excuse religious employers from Title VII by permitting them to employ only members of their own faith in their non-profit activities.").

59. § 2000e-1(a) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

60. § 2000e-2(e)(2) ("[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."); *see also* 2 W. COLE DURHAM & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 9:12 (2013).

61. 113 F.3d 196 (11th Cir. 1997).

62. *Id.* at 198.

63. *Id.* at 197–98.

the plaintiff responded that Samford was not sufficiently religious to assert this exemption.[64]

In ruling that Samford was indeed a "religious educational institution" for purposes of section 702, the court cited the following factors: (1) The Alabama Baptist Convention supplies roughly 7% of Samford's annual budget (over $4 million), and is the largest single source of Samford's funding;[65] (2) Samford submits annual budgets and financial reports to the convention;[66] (3) the university requires all faculty teaching religion courses to sign the Baptist Statement of Faith, and failure to do so could result in termination;[67] (4) Samford mandates student chapel attendance;[68] (5) Samford's charter states that the university's chief purpose is "the promotion of the Christian Religion throughout the world by maintaining and operating . . . institutions dedicated to the development of Christian character in high scholastic standing";[69] (6) the IRS and Department of Education recognize Samford as a religious educational institution, and Killinger requested and received a ministerial-housing allowance based on Samford's exemption. On these facts, the court stated that "Samford is doubtlessly a 'religious educational institution.'"[70]

A case that nearly concluded the opposite was *Pime v. Loyola University of Chicago.*[71] Plaintiff Dr. Pime was a Jewish professor who sought a tenure-track position in Roman Catholic Loyola University's Department of Philosophy.[72] Unfortunately for Dr. Pime, the department had passed a resolution reserving the next three tenure-track teaching slots for Jesuits, since Jesuits had previously filled these three positions.[73] When Loyola denied a tenure-track position to Dr. Pime, he filed a charge of religious discrimination.[74]

Undoubtedly as the result of good lawyering, Loyola chose not to claim it was a "religious educational institution" under section

64. *Id.* at 198.
65. *Id.* at 199.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. 803 F.2d 351 (7th Cir. 1986).
72. *Id.* at 353.
73. *Id.*
74. *Id.*

702.[75] Loyola's choice of defense was dictated by the fact that after 1970, the Jesuits no longer constituted a majority of Loyola's board of trustees (just 33% plus one).[76] Moreover, 93% of Loyola's administrators, and 94% of its teaching faculty, were non-Jesuits.[77]

The court, nevertheless, rejected Pime's claim for religious discrimination, the court noting that Loyola did not reject Pime because he was Jewish, but because he was not a Jesuit.[78] The court stated that even if Pime was a Catholic he still would not be eligible for the tenure-track position, which required a particular order of Catholic, the founding order of Jesuits.[79] The court therefore held that being a Jesuit was a bona fide occupational qualification (BFOQ) for Loyola's philosophy department.[80]

Judge Posner of the Seventh Circuit concurred in the judgment, but noted that if Loyola had defended on the grounds of the section 702 "religious educational institution" exemption, it would have lost.[81] Judge Posner based this opinion on the fact that Loyola received only one-third of 1% of its income from Jesuits, did not require its students to take courses in Catholic theology, did not have a seminary (although it did have a theology department), and offered a full range of secular courses.[82]

A case in which a court concluded that the school was too secular to use the section 702 religious-employment exemption was *EEOC v. Kamehameha Schools/Bishop Estate*.[83] This case had its genesis in 1884, when Bernice Pauahi Bishop, a member of the Hawaiian royal family, provided by will that the bulk of her estate be placed in a trust that would build and maintain in Hawaii a school for boys and a second school for girls, the teachers for

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75. Rather, Loyola claimed that being a Jesuit philosopher was a bona fide occupational qualification (BFOQ) for the position under section 703(e). *Id.* at 351–52.

76. *See* Prenkert, *supra* note 6, at 33, 50, 58 (discussing how Loyola University Chicago utilized the BFOQ defense to maintain a Jesuit presence in its philosophy department, which in turn allowed Loyola to protect its unique character as a Jesuit university, as well as preserve a small part of intellectual diversity for higher education as a whole).

77. *Pime*, 803 F.2d at 352.

78. *Id.* at 354 (Posner, J., concurring).

79. *Id.*

80. *Id.* (majority opinion).

81. *Id.* at 355; *see also* Robert John Araujo, *The Harvest Is Plentiful, but the Laborers Are Few: Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713, 780 n.75 (1996) (summarizing Judge Posner's concurrence in *Pime*).

82. *Pime*, 803 F.2d at 354–55 (Posner, J., concurring); *see also* Araujo, *supra* note 81, at 780 n.75 (summarizing Judge Posner's concurrence in *Pime*).

83. 990 F.2d 458, 460 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993).

which "shall forever be persons of the Protestant religion."[84] When the school denied a teaching position to a non-Protestant, the EEOC brought an action seeking an injunction and damages on the basis of religious discrimination.[85] The school defended on sections 702 and 703.[86]

The Ninth Circuit Court of Appeals began its discussion by noting that it construes statutory exemptions narrowly, and that the schools bear the burden of proof regarding exemption.[87] The court then stated that the proper test to apply was to weigh "all significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious."[88] The court's inquiry was to gain a "general picture" as to whether the institution was primarily secular or religious, recognizing that only churches and "institutions with extremely close ties to organized religion would be covered."[89] Both the narrow construction of these exemptions, and the test applied, are now much in doubt after the *Hosanna-Tabor* case.[90]

Although the district court determined the Kamehameha schools to be religious, the Ninth Circuit disagreed,[91] the Ninth Circuit basing its decision on the fact that no religious organization owned or supported the schools, and there was no affiliation between the schools and a church.[92] The Bishop Trust owned the schools, and the trust was overwhelmingly secular (the trust's annual reports made no mention of religion).[93] Secondly, the schools' purpose had changed over the decades from "providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments."[94] Thirdly, although the schools require faculty to prove

84. *Id.* at 459.
85. *Id.*
86. *Id.*
87. *Id.* at 460.
88. *Id.* (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).
89. *Id.*
90. *See* Matthew K. Richards, Scott E. Isaacson, David A. Peterson & Victor van Vuuren, *Religious-Based Employment Practices of Churches: An International Comparison in the Wake of* Hosanna-Tabor, 26 TEMP. INT'L & COMP. L.J. 263, 268 (2012). *See generally* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704–05 (2012) (noting that government interference generally will not prohibit religious organizations from making internal governing decisions).
91. *Kamehameha Schools/Bishop Estate*, 990 F.2d at 463–64.
92. *Id.* at 461.
93. *Id.*
94. *Id.* at 462.

an affiliation with a Protestant church upon hiring, there is no requirement that teachers maintain active membership in a Protestant church, and there is no inquiry into the beliefs of the teachers or how they integrate faith into their instruction.[95] Moreover, only three of the 250 full-time faculty members teach religion classes.[96] Fourthly, the student body consists of 3,000 boarding and day students, 16,000 off-campus students, and another 20,000 Hawaiians in community-outreach programs, all of whom are admitted without inquiring into religious affiliation.[97] In fact, less than a third of the on-campus boarding students are Protestants.[98] Fifthly, the curriculum consists of subjects like "math, science, English, languages, and social studies, all of which are taught from a secular perspective."[99] No effort is made to instruct students in Protestant doctrine or to convert non-Protestant students.[100] Bible stories, religious songs and prayer constitute fifteen to thirty minutes once a week for one semester in elementary school, but thereafter all religious studies are comparative with an emphasis on how religion has influenced Hawaiian culture and history.[101] The court did note that prayer and worship are common (teachers lead their classes in prayers daily in the elementary school and middle school, grace is said before meals, the athletic teams pray before games, and prayer and hymn singing is included in mandatory school functions like graduation), and students must attend worship services at the on-campus Bishop Memorial Church every Sunday during the school year.[102]

After presenting these facts, the court concluded:

> In sum, the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects. References to Bible verses, comparative religious education,

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 463.
100. *Id.*
101. *Id.*
102. *Id.* at 462–63.

> and even prayers and services are common at private schools and cannot suffice to exempt such schools from § 2000e-1; the addition of nominally Protestant teachers does not alter this conclusion. We conclude the Schools are an essentially secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not primarily religious.[103]

The district court also had ruled in favor of the schools with respect to the BFOQ defense, relying on *Pime v. Loyola University of Chicago*.[104] The Ninth Circuit also disagreed with this ruling.[105] The Ninth Circuit noted that in *Pime* the number of Jesuits on the board of trustees and in the philosophy department was much less than 50%, and therefore there was no BFOQ requirement here that all teachers be Protestant.[106]

Yet another case that considered whether a school was too secular for the religious-hiring exemptions was *Hall v. Baptist Memorial Health Care Corp.*[107] In *Hall*, a Baptist-related nursing school owned by a hospital hired plaintiff as a student-services specialist.[108] Thereafter, a church known in the Memphis area as supporting gays and lesbians ordained plaintiff as a lay minister.[109] Shortly after her ordination, plaintiff told her superior that she was a lesbian, which in turn led to discussions of the sensitivity of plaintiff's position with students, the conflict between plaintiff's church's position on homosexuality in contrast to the

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103. *Id.* at 463–64.
104. *Id.* at 466.
105. *Id.* at 466–67.
106. *Id.* at 466.
107. 215 F.3d 618 (6th Cir. 2000).
108. *Id.* at 622.
109. *Id.* at 622–23. Note that "supporting gays and lesbians" goes much beyond supporting emotionally those who are attracted to the same sex. Christian churches certainly do not condemn in any way those who are attracted to the same sex, and should provide them with the emotional support needed to resist the temptation to act upon their attraction. The Christian church has a similar response to those attracted to the opposite sex. The church similarly requires that they also do not act upon their sexual urges until they are married. *See, e.g.*, Michelle Boorstein, *Gay Christians Choosing Celibacy Emerge from the Shadows*, WASH. POST (Dec. 13, 2014), https://www.washingtonpost.com/local/gay-christians-choosing-celibacy-emerge-from-the-shadows/2014/12/13/51c73aea-6ab2-11e4-9fb4-a622dae742a2_story.html?utm_term=.6a34824d47be [https://perma.cc/5BR3-F76H]; *see also* Jonathan Merritt, *Celibate Gay Christian Leader Urges Faithful to "Normalize" Committed Friendships*, RELIGIOUS NEWS SERVICE (Apr. 7, 2015), http://religionnews.com/2015/04/07/celibate-gay-christian-leader-urges-faithful-reimagine-friendship/ [https://perma.cc/FF7T-6CWG].

Southern Baptist position, and an offer by the employer to reassign plaintiff to another position if she resigned.[110] Plaintiff refused and the nursing school fired her.[111] She then brought suit claiming religious discrimination.[112] The nursing school defended, among other things, on the grounds of the religious-employment exemption.[113]

One of the issues in the case was whether the nursing school, which provided no theological training, was a "religious educational institution" within the meaning of section 702.[114] Agreeing with the Ninth Circuit that the proper test to apply is weighing the secular components of the education offered against its religious components,[115] the Sixth Circuit (in sharp contrast to the Ninth Circuit in *Bishop Estate*) concluded that the following facts evidenced that the nursing school was a religious educational institution:

> [T]he Mississippi, Arkansas and Tennessee Baptist State Conventions [founded Defendant's college, which has a] "preaching, teaching, and healing" mission. . . .
>
> The College atmosphere is permeated with religious overtones. It recruits students in Baptist publications and at Baptist Conventions. Prospective students are informed of the religious mission of the College at open houses. Incoming students are informed of this mission at orientation. The College seal includes a picture of the Bible and the words "higher education with a higher purpose." All students are required to take three hours of religious studies and must comply with a dress code that reflects "Christian principles of appropriateness." The College holds numerous prayer breakfasts and chapel programs. It has held several commencements at Baptist churches and hosted Baptist-sponsored programs. The fact that the College trains its students to be nurses and other health care professionals does not transform the institution into one that is

110. *Hall*, 215 F.3d at 623.
111. *Id.*
112. *Id.*
113. *Id.* at 624.
114. *Id.*
115. *Id.*

secular.[116]

The Sixth Circuit's standard in *Hall* for finding a school to be a "religious education institution" for purposes of the civil rights religious exemptions was obviously less exacting than the Ninth Circuit's standard in *Kamehameha Schools/Bishop Estate.* The Eighth Circuit approved of an even less exacting standard in *Wirth v. College of the Ozarks.*[117]

Professor Wirth, a Catholic, sued his former employer, a nondenominational Christian college, for religious discrimination when the college terminated his employment.[118] The college asserted sections 702 and 703(e) as defenses.[119] Wirth claimed that these defenses were not available to the college, since it was nondenominational.[120] In ruling that the college was, in fact, a "religious educational institution" and therefore protected by sections 702 and 703, the court cited the following facts: the Presbyterian Church founded the college in 1906, the college was incorporated as a Missouri nonprofit corporation in 1986, and that the mission of the college, according to its corporate charter, was to provide "Christian education for youth of both sexes, especially those found worthy but who are without suffi-

116. *Id.* at 625 (citing EEOC v. *Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980) (holding that a four-year coeducational liberal-arts college owned and operated by the Mississippi Baptist Convention is a "religious educational institution"); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335 (N.D. Ga. 1994) (holding that a private coeducational college of liberal arts and sciences founded by the Georgia Baptist Convention is a "religious educational institution" under Title VII), *aff'd*, 73 F.3d 1108 (11th Cir. 1995)). Note that the district court made the following findings that were ignored by the Sixth Circuit:

> The College does not offer any degrees in religion or theology. The College only requires one three-hour course in religion for degree programs and offers only three religious courses to satisfy that requirement. Moreover, these courses do not teach Baptist doctrine or the tenets of faith held by the Southern Baptist Convention. Rather, the course descriptions indicate that the classes are not taught with any strong denominational bent. Although some of the faculty are ordained Baptist ministers, the College does not require its faculty, staff or students to be members of Baptist churches. Moreover, Temple [plaintiff's supervisor at the College] testified in her deposition that the College is not owned by any religious institution.

Hall v. Baptist Mem'l Health Care Corp., 27 F. Supp. 2d 1029, 1036 (W.D. Tenn. 1998), *aff'd*, 215 F.3d 618 (6th Cir. 2000).

117. 26 F. Supp. 2d 1185 (W.D. Mo. 1998), *aff'd.*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001).

118. *Id.* at 1186–87.

119. *Id.*

120. *Id.* at 1188.

cient means to procure such training."[121] The court also cited the college's membership in two Christian college associations, and Wirth's admission that the college was "Christian-based."[122]

With respect to Wirth's claim that the school fired him because he was Catholic, the court reasoned as follows:

> Even though a Christian corporation or organization is non-denominational, it nevertheless may subscribe to particular religious views with which other Christians do not agree, and conversely, it may disagree with the religious views of other Christians. Indeed, if the Court accepts Plaintiff's allegations as true, which it must on a motion to dismiss, the College of the Ozarks terminated Plaintiff's employment and otherwise discriminated against him because he is a member of, and subscribes to the views of the Catholic Church. If true, it necessarily follows that the college took such action because it did not subscribe to the religious views, which Plaintiff espoused. This is precisely the situation for which the exemptions were enacted; the exemptions allow religious institutions to employ only persons whose beliefs are consistent with the views of the religious organization.[123]

Another case that considered the eligibility of a college for the religious-employment exemption is *Siegel v. Truett-McConnell College, Inc.*[124] In this case, the college hired Siegel to teach a summer course in sociology but before the summer term began, the college terminated the contract because Siegel was not a Christian.[125] Siegel sued charging, among other things, that Truett-McConnell was not eligible to use the religious exemption because the college received a substantial amount of government funds.[126]

The college defended on the grounds of the section 703(e)(2) exemption, claiming that its charter and bylaws gave substantial

121. *Id.* at 1187.
122. *Id.* at 1187–88.
123. *Id.* at 1188.
124. 13 F. Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).
125. *Id.* at 1337.
126. *Id.* at 1343.

control and management of the college to the Georgia Baptist Convention (GBC).[127] The court in considering this defense stated that the facts in these cases must be reviewed closely on a case-by-case basis, and that mere affiliation with a religious organization was insufficient for the exemption.[128] "Only those institutions with extremely close ties to organized religion will be covered."[129]

In determining control and management, the court looked to the following factors: (1) the corporate charter (GBC elects the college trustees who have control over the college, and amendment of the charter requires approval by the GBC); (2) financial support (GBC donates enough money to pay the salaries and benefits of 19 of the 25 full-time faculty members on the main campus);[130] (3) composition of the college board (at least 25% must be Baptist ministers); (4) composition of the faculty (the faculty handbook requires a faculty member to be a professing Christian and active church member, and 66% of the full-time faculty and 52% of the part-time faculty on campus were Baptists); (5) property ownership (the campus's real estate is owned by the GBC's Executive Committee); (6) student body (41% Baptist, followed next by Methodists at 9%); and (7) curriculum (at least one religion class is required for students).[131] Regarding control, the court conceded that the GBC did not have operational control of the college, yet such control was not necessary to meet the section 703(e)(2) exception.[132] The court noted:

> The Georgia Baptist Convention controls the College through a line of accountability running from the administration to the trustees to the Georgia Baptist Convention. The College's administration must answer to the board of trustees, who have the power to hire and fire the administration. The board of trustees is accountable to the Georgia Baptist Convention, who elected and can replace them as trustees of the College.

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127. *Id.* at 1339.
128. *Id.* at 1340–41.
129. *Id.* at 1340.
130. The court noted that even though the college may have received more funds from government by means of student grants and loans, the college nevertheless received significant financial support from Baptists, and therefore was "substantially supported" by the church for the purposes of section 703(e)(2). *Id.* at 1345–47.
131. *Id.* at 1340–44.
132. *Id.* at 1343.

> This accountability is secured within the corporate charters and bylaws discussed above. The court finds that, as a matter of law, this accountability constitutes control.[133]

Finally, Siegel claimed that even if Truett-McConnell was substantially owned, supported, controlled, or managed by the GBC, it was not eligible for the exemption because the college received substantial government funding.[134] The court assumed here that plaintiff was referring to grant and loan programs to students that allowed them to attend the colleges of their choice.[135] The court found no constitutional infirmity in the government providing students with money to attend the schools of their choice.[136] The court concluded that because the GBC substantially controls, owns, supports, and manages Truett-McConnell, the college may use the exemption from the religious-discrimination provisions in Title VII of the Civil Rights Act.[137]

B. How Broad Are the Religious Exemptions? Do They Protect Religious HEIs from Discriminatory Conduct Other than That Based on Religion?

To briefly recap, the ministerial exception under the First Amendment allows religious organizations discretion to make employment decisions unimpeded by civil-rights laws regarding

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133. *Id. But see* Winberry v. La. Coll., 124 So. 3d 1212 (La. Ct. App. 2013) (holding that religion professors at a college whose board was elected by the Louisiana Baptist Convention were not ministers, and the college was not a church). In its decision, the court relied upon EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981), which has questionable validity after *Hosanna-Tabor.*

134. *Siegel*, 13 F. Supp. 2d at 1343–44.

135. *Id.* at 1344.

136. *Id.* (recognizing that "[t]he government has not abandoned its neutrality in deciding to provide funds for students to attend schools. The government is not promoting a particular point of view in religious matters. Students could take Pell grants, for example, and attend Truett-McConnell, the University of Georgia or Notre Dame. The use of government funds to attend Truett-McConnell College does not violate the Establishment Clause . . . . The monies plaintiff refers to are, in all likelihood, available to all institutions of higher learning, whether or not they have a religious affiliation."). That is, the *government* itself is not advancing religion through *its* own activities and influences. Rather, any advancement of the religious mission of the college is the result of the private, independent action of the student. Public aid to higher education is unconstitutional only if the government has singled out religious entities for a benefit, or is directly funding explicit religious activities. *Id.* (citing Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971)).

137. *Id.* at 1347.

its employees covered by the exception. For those employees of religious organizations (including religious schools) who are not classified as ministers, the organization can make employment decisions based on religious factors. For the non-ministers, the question arises as to whether they, like ministers, are unprotected by the civil-rights laws prohibiting discrimination based on race, color, sex, national origin, age or disability.

The answer to this question is no, as demonstrated by the plain text of section 702(a): "This subchapter [Title VII] shall not apply to . . . a religious corporation, association, educational institution, or society *with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by [the religious employer] of its activities.*" 138 If Congress had intended to exempt religious organizations from *all* civil-rights laws, it would have ended this sentence where the italicized phrase begins (right after the word "society").[138] It obviously did not, and Congress, by adding the phrase "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by [the religious employer] of its activities," signaled its intent to limit the exemption to religious discrimination.[139]

There are times when biblically based employment policies of religious organizations violate Title VII's gender-discrimination laws. An example is *EEOC v. Fremont Christian School*,[140] which involved an employment policy based on the Christian view of marriage, in which the husband is the head of the household.[141] Consistent with this teaching, the Fremont Christian School offered health insurance to husbands, and to single male and female employees, but not to married female employees.[142] The court determined that providing insurance to male household heads, without providing the same benefit to female household

138 42 U.S.C.A. § 2000e-1(a) (West 1991) (emphasis added).

138. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination; Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 375 (2015) (noting that the religious-employer exemption begins with a "sweeping override of everything else in all of Title VII").

139. *See* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (stating that, based on the language and statutory history of section 702, Congress exempted religious organizations only from liability for religious discrimination, and not for discrimination based on "race, color, sex, or national origin").

140. 781 F.2d 1362 (9th Cir. 1986).

141. *Id.* at 1364.

142. *Id.* at 1368.

heads, violated the sex-discrimination prohibition in Title VII.[143]

C. Do the Religious Exemptions Protect Religious Schools' Codes of Conduct That Require Adherence to Church Doctrine or Biblical Standards?

The purpose of every organization is, of course, to advance its mission. The mission of religious schools is to create an educational community based on a faith shared by parents, students, teachers, staff, and administrators, and each member of the school community impacts the health of the community. Because those leading the educational community are administrators and teachers, they at a minimum should exemplify their faith through their lifestyle, and should know and respect the tenets of the shared religion.[144]

To promote the welfare of the educational community, its leaders establish codes of conduct that provide a floor of behavior for members of the community. All schools, whether secular or religious, have these codes of conduct.[145] This section explores whether the Title VII religious exemptions protect religious schools that enforce prescribed standards of conduct, of-

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143. *Id.* at 1364.

144. The educational policy at issue in *Herx v. Diocese of Ft. Wayne-South Bend, Inc.* is a good example of a mission statement for a Catholic school:

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

48 F. Supp. 3d 1168, 1172 (N.D. Ind. 2014).

145. Although secular and religious schools have codes of conduct, there can be differences between the two, often in the area of sexual behavior. *Compare* REGENT UNIVERSITY STUDENT HANDBOOK sec. 5.2.12 (Nov. 10, 2016), http://www.regent.edu/admin/stusrv/docs/StudentHandbook.pdf [https://perma.cc/747R-KYQL] (stating that "[s]exual misconduct that is prohibited includes disorderly conduct or lewd, indecent, or obscene conduct or expression, involvement with pornography, premarital sex, adultery, homosexual conduct or any other conduct that violates Biblical standards"), *with* OLD DOMINION UNIVERSITY CODE OF STUDENT CONDUCT sec. IX.Z. (Dec. 3, 2015), http://www.odu.edu/about/policiesandprocedures/bov/bov1500/1530 [https://perma.cc/4U6Y-ATTE] (prohibiting non-consensual sexual activity and "sexual exploitation").

ten resulting in employee termination. The areas considered are pregnancy out of wedlock, divorce, abortion advocacy, and in vitro fertilization.

1. Pregnancy out of Wedlock

In *Vigars v. Valley Christian Center of Dublin,*[146] the defendant church and its school employed the plaintiff as a librarian.[147] Before employment, plaintiff signed a statement of faith that committed her "to the mission of the church (to instill fundamentalist [C]hristian values)" and to a "fundamentalist [C]hristian lifestyle that emulates the life of Christ."[148] In short, the school and church required its employees to be "born-again believers living a consistent and practical Christian life."[149] Since plaintiff enrolled her children in the school, each year upon re-enrollment she signed an "agreement in which she agreed that she and her children would be bound by the moral values, codes, doctrines and beliefs of the church."[150]

The defendant fired plaintiff when she informed the administration that she was pregnant. At that time, she was in the process of having her then-current marriage annulled and planned to marry another man who was the father of the child.[151]

The defendant originally asserted that it fired plaintiff "for the sin of being pregnant out of wedlock."[152] The school's termination letter made clear that plaintiff was fired for being "pregnant without benefit of marriage," which was "inconsistent with the religious values of the church and school."[153] Subsequently, the defendant *changed* the reason for termination, the *new* reason being that plaintiff committed adultery with the pregnancy being evidence of the adultery.[154] The pregnancy now "had nothing to do with the *religious* reason for her termination."[155]

The changed reason for termination was, in the opinion of the court, grounds for denying summary judgment to the de-

146. 805 F. Supp. 802 (N.D. Cal. 1992).
147. *Id.* at 804.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 805.
155. *Id.* at 804–05.

fendants.[156] The court noted that under the old reason (pregnant out of wedlock), plaintiff had a viable claim for sex discrimination under Title VII.[157] Under the new reason, the claim would be covered by the religious exemption since the new reason was *religious* in the opinion of the court.[158]

A trial court reached a similar result in *Ganzy v. Allen Christian School*,[159] in which the court framed the issue as follows:

> Women can become pregnant. Men cannot. It is therefore sometimes easier to enforce restrictions on sexual activity against a woman employee. Nevertheless, if a woman is dismissed from a teaching position in a religious school because she is pregnant, rather than because she had sexual relations, state and federal prohibitions on gender discrimination are violated.[160]

The defendant in this case, Allen Christian School (Allen), provides students with a "Christ-centered education" where there is a "pursuit of spiritual values";[161] Allen presents its curriculum "in light of the Word of God," and Allen's "teachers provide Bible instruction in varied forms on a daily basis, seeking to establish the Word of God as the foundation of the student's way of life."[162]

When Allen hired Ganzy as an elementary-school math teacher, Ganzy signed a statement of belief affirming her commitment to the following: "We firmly believe that the Holy Scripture contains all things necessary for salvation, and is the supreme authority by which our lives are governed."[163] Ganzy also agreed that her "temperament and lifestyle are in accordance with the will of God and The Holy Scripture," and that "daily I grow more gracefully and spiritually mature."[164] Allen expected its teachers to be role models for Allen students.

During Ganzy's second year of employment, Allen learned

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156. *Id.* at 805–06.
157. *Id.* at 805.
158. *Id.* at 805–07.
159. 995 F. Supp. 340 (E.D.N.Y. 1998).
160. *Id.* at 344.
161. *Id.*
162. *Id.* at 344–45.
163. *Id.* at 344.
164. *Id.*

that Ganzy was pregnant, and because Ganzy was unmarried, her pregnancy was clear evidence that she had sex outside of marriage.[165] Ganzy contended that Allen never informed her before her pregnancy of any policy prohibiting her from having sex outside of marriage.[166] Allen admitted that at the time of hiring it did not specify that chastity before marriage was required, but Allen claimed that the statement of belief and other documents implied this.[167]

Allen's educational director discharged Ganzy, who contended that her termination was the result of her being unmarried and pregnant, "and therefore a bad role model."[168] The school claimed that non-marital sexual activity, and not pregnancy, was the reason for dismissal.[169] Allen contended that it would apply this non-marital sex policy evenhandedly to males and females, although the court noted that Ganzy was the first person to whom this rule was applied.[170] Because of these differing testimonies, the court denied both parties' motions for summary judgment, concluding that a jury should decide the credibility of the parties.[171]

In *Redhead v. Conference of Seventh-Day Adventists*[172] and *Dolter v. Wahlert High School*,[173] the courts similarly denied summary judgment and ordered the cases to go to trial.[174] As in *Ganzy*, both *Redhead* and *Dolter* involved religious schools that discharged pregnant teachers, and the issue in both cases was whether the school's motive for discharge was the teacher's pregnancy (a violation of the Pregnancy Discrimination Act) or the teacher's non-marital sex that led to the pregnancy.[175] Noteworthy is the *Dolter* court's statement on the issue of a moral code versus sex/pregnancy discrimination:

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165. *Id.*
166. *Id.* at 345.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 360–61; *see also* Redhead v. Conference of Seventh-Day Adventists, 566 F. Supp. 2d 125, 139 (E.D.N.Y. 2008) (denying summary judgment and allowing jury to decide reason for discharge—pregnancy or non-marital sex); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 271–72 (N.D. Iowa 1980) (same).
172. 566 F. Supp. 2d 125 (E.D.N.Y. 2008).
173. 483 F. Supp. 266 (N.D. Iowa 1980).
174. *Redhead*, 566 F. Supp. 2d at 139; *Dolter*, 483 F. Supp. at 271–72.
175. *Redhead*, 566 F. Supp. 2d at 127; *Dolter*, 483 F. Supp. at 267–68.

> The court has no quarrel . . . with defendant's contention that it can define moral precepts and prescribe a code of moral conduct that its teachers, including [plaintiff], must follow. In deciding plaintiff's claim, the court need not even concern itself in any way with the content of that code nor with the substance of Catholic teaching generally. Certainly the court need not pass judgment on the substance of the Catholic Church's moral or doctrinal precepts. The only issues the court need decide are whether those moral precepts, to the extent they constitute essential conditions for the continued employment, are applied equally to defendant's male and female teachers; and whether [plaintiff] was in fact discharged only because she was pregnant rather than because she obviously had pre-marital sexual intercourse in violation of defendant's moral code.[176]

A final pregnancy case worthy of review and discussion is *Boyd v. Harding Academy of Memphis, Inc.*[177] Boyd was an unmarried preschool teacher at a church-related school in Memphis.[178] When she joined the school, the faculty handbook stated: "Christian character, as well as professional ability, is the basis for hiring teachers at Harding Academy. Each teacher at Harding is expected in all actions to be a Christian example for the students . . . ."[179] In her first year of teaching, Boyd had a miscarriage with some minor complications.[180] She told her supervisor and asked for a few days off, which the supervisor granted without telling her superior about it.[181]

The following year Boyd's supervisor suspected that Boyd was again pregnant, and this time Boyd's supervisor told her superior, who instructed her to confront Boyd about the pregnancy and fire her if she confirmed "because it would establish that she had engaged in extramarital sexual intercourse."[182] Boyd met with her supervisor, confirmed the pregnancy, and the supervisor then said that she must fire Boyd because she was "pregnant

176. *Dolter*, 483 F. Supp. at 270.
177. 88 F.3d 410 (6th Cir. 1996).
178. *Id.* at 411.
179. *Id.*
180. *Id.* at 412.
181. *Id.*
182. *Id.*

and unwed," which "set a bad example for the students and parents."[183] The supervisor further said, however, that if Boyd married the child's father, Boyd could reapply for the job, and identified a previous mother who had regained employment.[184]

Before trial, the school moved to dismiss the action on the basis of the religious exemption, which the trial court denied.[185] The trial court ruled that although the exemption pertained to the school and that the school had articulated a religious reason to terminate Boyd (engaging in premarital sex), the religious exemption did not cover sex discrimination and the court needed evidence to determine whether the school fired Boyd for being pregnant or for engaging in sex out of wedlock.[186]

The case proceeded to trial. The school's superintendent testified that during his tenure, he had dismissed several employees for violating the school's prohibition against sex outside of marriage.[187] In addition to Boyd, he fired one male teacher who was living with a woman not his wife, a second male who was a twenty-year employee and principal for sexual immorality, and two women who were not pregnant but were sexually involved with men to whom they were not married.[188] The superintendent further testified that he was unaware of any times he knew of an employee's sexual activity outside of marriage and failed to take action.[189] The school also "presented evidence at trial to show that at least six married women who became pregnant while working at Harding remained employed there during and after their pregnancies."[190] Finally, Boyd's supervisor at trial testified that although she told Boyd during their termination conversation that Boyd was fired for being "pregnant and unwed," she meant that the reason for firing was for having sex outside of marriage.[191] On the strength of this testimony the trial court entered judgment for the school, which the Sixth Circuit affirmed on appeal.[192]

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 413–15.
187. *Id.* at 412.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 414.
192. *Id.* at 414–15.

2. Divorce

In *Little v. Wuerl*,[193] a Catholic school hired a Protestant who taught in the school for ten years.[194] During her last year, she divorced her husband and took a leave of absence, during which she married a man who was baptized in the Catholic Church, but was not a practicing member of any religion.[195] When plaintiff attempted to renew her contract after the leave of absence expired, the school refused to rehire her.[196] The stated reason was because she had remarried without obtaining a validation of her second marriage through the Church.[197]

The Third Circuit in *Little* considered, among other things, whether the religious exemptions in Title VII included *conduct* considered by the employer to have religious significance.[198] After examining the legislative history and the statutory definition of religion found in Title VII,[199] the Third Circuit concluded that:

> Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's "religious activities." . . . We conclude that the permission [found in section 702] to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.[200]

Another experienced Catholic schoolteacher who ran afoul of

193. 929 F.2d 944 (3d Cir. 1991).
194. *Id.* at 945.
195. *Id.* at 946.
196. *Id.*
197. *Id.*
198. *Id.* at 950.
199. 42 U.S.C. § 2000e(j) (2006). ("The term 'religion' includes all aspects of religious observance and practice, as well as belief.").
200. *Little*, 929 F.2d at 951.

Catholic Church doctrine was Connie Gosche, a music teacher in several Catholic schools around Toledo, Ohio.[201] Gosche in 1994 signed an annual contract in which she promised, among other things, that she would by "word and example . . . reflect the values of the Catholic church."[202] Gosche in that school year divorced her husband, began an affair three months later with a married man who had three children enrolled in the local Catholic schools, and this affair caused the married man to leave his wife of fifteen years.[203] Later that school year, Gosche took a medical leave of absence for depression.[204] While Gosche was on leave, the parents and grandparents of children in the Catholic schools complained to the Catholic school principal about Gosche's affair, the principal confronted Gosche with this information, and she denied a sexual relationship with the married man.[205] Based on numerous additional reports, the principal decided that Gosche had violated her contract regarding reflecting the values of the Catholic Church, and he chose not to renew her contract for the following year.[206]

Gosche brought suit for, among other things, sex discrimination.[207] The district court granted summary judgment to the Catholic school on this claim, the court determining that one of the school's expectations was that Gosche "by word and example . . . [would] reflect the values of the Catholic Church," which Gosche had failed to do.[208]

3. Abortion Advocacy Contrary to Church Doctrine

In *Maguire v. Marquette University*,[209] a female teacher sued Marquette because the university denied her a position in the Theology Department.[210] The plaintiff, a Catholic who held a Ph.D. in Religious Studies from the Catholic University of America in Washington, D.C., alleged that the university engaged in sex and religious discrimination by preferring Jesuit teachers

201. Gosche v. Calvert High Sch., 997 F. Supp. 867, 869 (N.D. Ohio 1998).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. 814 F.2d 1213 (7th Cir. 1987).
210. *Id.* at 1214.

(particularly in the Theology Department).[211] After reviewing the pertinent facts, the Seventh Circuit held that Marquette did not discriminate in refusing to hire Dr. Maguire, because the reason for the employment decision was Dr. Maguire's advocacy of abortion.[212] This advocacy, in direct contravention of the Roman Catholic Church's stance on this subject, allowed a Catholic university on religious grounds to refuse to hire a Catholic teacher.[213]

Another case involving a Catholic schoolteacher advocating abortion rights was *Curay-Cramer v. Ursuline Academy of Wilmington, Inc.*[214] Plaintiff Curay-Cramer was an English and religion teacher in Catholic Ursuline Academy when, on the thirtieth anniversary of *Roe v. Wade*, she and about 600 others lent their names to the following advertisement that appeared in a newspaper of general circulation in Wilmington:

> Thirty years ago today, the U.S. Supreme Court in *Roe v. Wade* guaranteed a woman's right to make her own reproductive choices. That right is under attack. We, the undersigned individuals and organizations, reaffirm our commitment to protecting that right. We believe that each woman should be able to continue to make her own reproductive choices, guided by her conscience, ethical beliefs, medical advice and personal circumstances. We urge all Delawareans and elected officials at every level to be vigilant in the fight to ensure that women now and in the future have the right to choose.[215]

On the day the advertisement appeared, Ursuline's president told plaintiff that the school was "deeply troubled by her public support of a position inimical to accepted Catholic doctrine," and that the president was considering firing plaintiff.[216] Curay-Cramer responded that she was asserting her "right to protest without retribution the school's stance on abortion."[217] "She also

211. *Id.* at 1214–15.
212. *Id.* at 1217–18.
213. *Id.* at 1218.
214. 450 F.3d 130 (3d Cir. 2006).
215. *Id.* at 132.
216. *Id.*
217. *Id.*

informed [Ursuline's president] that she had volunteered for Planned Parenthood and distributed pamphlets that she believed contained important information related to reproductive options."[218]

After Ursuline's president conferred with the local Catholic bishop, the president gave Curay-Cramer a chance to resign rather than be fired, which she refused.[219] At yet another meeting, the president told Curay-Cramer that she could keep her job if she "publicly recanted her support of the advertisement and stated unequivocally that she was pro-life."[220] When she refused, the school fired her and she sued.[221]

In her complaint, Curay-Cramer alleged that Ursuline violated Title VII and the Pregnancy Discrimination Act (PDA) by firing someone in retaliation for advocating for, and associating with, persons protected by Title VII and the PDA.[222] Plaintiff also alleged that Ursuline fired her because she was a woman, and that Ursuline treated her more harshly than male employees with similar behavior.[223] The trial court dismissed the complaint, and plaintiff appealed.[224]

In affirming the dismissal of the complaint, the Third Circuit acknowledged that Title VII permits a claim for retaliation, but that persons seeking a recovery for retaliation must allege and prove that the employer retaliated for the employee's pursuit of employment rights under the law.[225] Here, the plaintiff did not complain at all about Ursuline's employment practices in the advertisement that sparked the dismissal. In fact, the ad did not mention sex discrimination, pregnancy discrimination, employment practices, Ursuline, or any other employer. Rather, the ad simply sought to preserve reproductive rights under *Roe v. Wade*.[226] The court stated that it was "not aware of any court that has found public protests or expressions of belief to be protected conduct absent some perceptible connection to the employer's alleged illegal employment practice."[227] The court went on to say

218. *Id.*
219. *Id.*
220. *Id.* at 133.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. 42 U.S.C. § 2000e-3(a) (2012); *Curay-Cramer*, 450 F.3d at 134.
226. *Curay-Cramer*, 450 F.3d at 132.
227. *Id.* at 135.

that "[t]o turn pro-choice advocacy, unconnected to employment practices, into conduct protected by Title VII would inappropriately stretch the concept of protected activity."[228]

With respect to Curay-Cramer's claim that Ursuline punished her more harshly than males with similar conduct, the appellate court agreed with the trial court that addressing this claim would violate the First Amendment's Religion Clauses.[229] That is, "to assess this claim of the relative harshness of penalties for 'similar conduct,' [the court] would have to measure the degree of severity of various violations of Church doctrine."[230] Such an inquiry would violate the Establishment Clause's prohibition of the state's excessive entanglement in church affairs, as well as the church's Free Exercise rights.[231] Plaintiff's failure to identify any male who advocated for reproductive rights and yet kept his job at Ursuline undoubtedly influenced the court's opinion in this regard.[232]

4. In Vitro Fertilization

Another case dealing with a violation of church doctrine is *Herx v. Diocese of Fort Wayne-South Bend, Inc.*[233] Herx was a junior-high language-arts teacher at a Catholic school who signed an annual contract that provided, in part:

> Acknowledging and accepting the religious and moral nature of the Church's teaching mission, the undersigned agrees to conduct herself or himself at all times, professionally and personally, in accordance with the episcopal teaching authority, law and governance of the Church in this Diocese. Charges of immoral behavior, or of conduct violative of the Teachings of the Church shall ultimately be resolved exclusively by the Bishop, or his designee, as provided in the Diocesan Educational Policies.[234]

After teaching in the school for a number of years, Herx

228. *Id.* at 136.
229. *Id.* at 137–40.
230. *Id.* at 137.
231. *Id.* at 139.
232. *See id.*
233. 48 F. Supp. 3d 1168 (N.D. Ind. 2014).
234. *Id.* at 1171–72.

learned that she suffered from a medical condition that caused infertility, so she and her husband began a course of fertility treatments.[235] Herx notified her principal about these treatments, and Herx's contract was renewed for the following year, and she took sick days for this treatment.[236]

Because the first round of treatments was ineffective, Herx began a second round of treatment, but this time her actions attracted the attention of the local priest, who told Herx that her fertility treatments violated church teachings, of which Herx was unaware.[237] Herx, nevertheless, continued the fertility treatments, and when the school refused to renew her contract because of this failure to abide by Church doctrine, Herx filed a complaint alleging sex, pregnancy, and disability discrimination.[238]

The school defended on several grounds, one of which was the religious exemptions, claiming that these exemptions provided a broad protection for a religious organization's employment action against the religious and secular activities of its employees.[239] The school further argued that through the exemptions, Congress enabled "religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[240] The school finally argued that it operated according to the Catholic Church's principles, "with teachers who reflect correct doctrine and integrity of life [thereby setting good moral examples], so that schools providing a Catholic education with the Christian spirit are available to members of the Diocese."[241]

The district court, however, disagreed with these arguments, citing and quoting several cases for the proposition that the exemptions only protect against claims of religious discrimination, and not claims based on race, color, sex, and national-origin discrimination.[242] The court relied on these previous cases for its

235. *Id.* at 1172.
236. *Id.*
237. *Id.*
238. *Id.* at 1173.
239. *Id.* at 1174 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327 (1987) and NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979)).
240. *Id.* at 1174–75 (quoting Little v. Wuerl, 929 F.2d 994, 951 (3rd Cir. 1991)).
241. *Id.* at 1175.
242. *See id.* at 1175–76 (discussing Little v. Wuerl and noting that "[t]he [*Little*]

determination that the religious exemptions in Title VII were limited to religious organizations' choice "to employ members of their own religion without fear of being charged with religious discrimination."[243] The court, therefore, ruled that the case did not involve religious discrimination, but rather sex and disability discrimination (only women can suffer infertility).[244]

Herx is contrary to the other cases cited above and below in which the courts ruled that the religious exemptions protected schools enforcing their codes of conduct. The reason for this difference is *Herx*'s incorrectly narrow interpretation of a religious organization's exemption to employ members of its own religion.[245] There is, of course, a big difference between a nominal believer (say a person who was raised as an evangelical Christian but has fallen away from the faith, as evidenced by a lack of Bible reading and prayer in his life, and visiting church only on Christmas and Easter when with family), and a person who is steeped in the evangelical tradition (prays and reads the Bible daily, faithfully attends church on Sunday and Wednesday-night Bible studies, and is trained in Christian worldview). The first person may claim to be an evangelical to get a job teaching in an evangelical school, but that person will in teaching and life demonstrate his secular worldview. Yet, if this person was disciplined by his religious employer for violating a code of conduct or lack of religious-faith integration in teaching his/her subject,

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court interpreted the phrase 'of a particular religion' in Title VII's exemption provisions as including 'permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts,' and concluded that Title VII's prohibition against religious discrimination is not violated when a parochial school discharges a teacher who publicly engaged in what the school regarded as inconsistent with its religious principles.").

243. *Id.* (citing EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982)).

244. *Id.* at 1175, 1178, 1180. The school also defended on the ministerial exception, relying upon *Hosanna-Tabor*, claiming that although Herx did not teach religion in the school, she functioned as a minister every day by demonstrating her faith in word and deed. *Id.* at 1176. The district court disagreed, distinguishing *Hosanna-Tabor* on the theological education Perich received; her call from the congregation; her "diploma of vocation"; her holding herself out as a minister; and, most importantly, her role in conveying the church's message and mission through her teaching students religion four times a week, leading prayer three times a week, leading chapel twice a year, and leading brief devotional exercises every morning, none of which Herx did. *Id.* at 1176–77. Incidentally, the court denied the diocese's motion for summary judgment as to Herx's Title VII claim, and the case proceeded to trial. At the trial's conclusion, the jury awarded Herx $1.75 million for emotional and physical damages, $125,000 for medical expenses, $75,000 for lost wages, and $1 in punitive damages. Jury Verdict, *Herx*, 48 F. Supp. 3d 1168 (No. 1:12-cv-00122-RLM-RBC), 2014 Jury Verdicts LEXIS 13204.

245. *See Herx*, 48 F. Supp 3d at 1087.

the *Herx* court would provide no protection because the teacher was nominally an evangelical when hired.

The *Herx* court's narrow interpretation of the religious exemption misses the robust exemption intended by Congress when it broadly defined "religion."[246] Congress in Title VII did not define "religion" as simply "belief," however strong or weak that belief may be. Rather, Congress defined "religion" as including "all aspects of religious observance and practice, as well as belief."246 "Religious observance and practice" goes beyond mere belief—focusing on conduct that flows from a sincere, active belief.[247] This conduct in teaching and lifestyle is precisely what the diocese's educational policy sought to achieve.[248]

In summary on this issue, *Herx*'s narrow interpretation of the religious exemptions in Title VII misconstrues the purpose of the exemptions, which is to allow religious organizations to employ and discipline fellow believers who demonstrate their active faith in word and deed. As reflected by Chief Judge McManus in *Dolter*, religious organizations can adopt codes of conduct that help shape the religious community and empower them to remove those detrimental to the community.[249] These codes of conduct can be based on religious principles, and these principles are entitled to First Amendment protection. Yet, these codes of conduct once established cannot be applied discriminatorily. A religious organization that discharges a female for undergoing in vitro fertilization must discipline a man whose spouse is undergoing the same treatment. As demonstrated in *Boyd*, a religious employer who discharges a female for extramarital sex resulting in a pregnancy must similarly discipline men who engage in extramarital sex.[250] Codes of conduct based on religious principles are legally permissible; enforcement that violates Title VII is not.[251]

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246. In fairness to the court in *Herx*, it does not appear as if the definition of "religion" as found in Title VII was raised before the court. *See* 42 U.S.C. § 2000e(j) (2006).
246 *Id.*

247. Winfried Fritz, *Religion or Way of Life?*, VISION (Fall 2010), http://www.vision.org/visionmedia/religion-and-bible/way-of-life/37421.aspx [https://perma.cc/4X47-FKTZ].

248. *See* Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335, 1337 (N.D. Ga. 1994) ("The College contends that its right to discriminate on the basis of religion in the hiring of its faculty members is critical to its ability to carry out its purpose of maintaining a spiritual and intellectual community of faculty and staff dedicated to the pursuit of faith, scholarship and free inquiry."), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

249. Dolter v. Wahlert High Sch., 483 F. Supp. 266, 270–71 (N.D. Iowa 1980).

250. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996).

251. *Id.* at 412–13.

5. Homosexuality

A final area to consider is whether a religious institution can terminate an employee for violating the orthodox Christian moral code prohibiting homosexual behavior.[252] A leading case in this area is *Pedreira v. Kentucky Baptist Homes for Children, Inc.*[253]

The Kentucky Baptist Homes for Children (KBHC) provided food, shelter, care, and placement for children at risk for abuse and neglect, for which a Kentucky state agency paid KBHC over $1 million a month.[254] KBHC was unashamedly Christian.[255] KBHC's president in the annual report stated: "We know that no child's treatment plan is complete without opportunities for spiritual growth. The angels rejoiced last year as 244 of our children made decisions about their relationships with Jesus Christ."[256] The KBHC president in a news release stated that KBHC's "mission is to provide care and hope for hurting families through Christ-centered ministries. I want this mission to permeate our agency like the very blood throughout our bodies. I want to provide Christian support to every child, staff member, and foster parent."[257] KBHC has religious symbols throughout its facilities, the staff leads group prayers both before staff meetings and meals, and KBHC "requires its employees to incorporate its religious tenets in their behavior."[258]

In the spring of 1998, KBHC hired Alicia Pedreira as a Family Specialist for one of KBHC's children's homes.[259] Apparently

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252. Whether a religious institution can fire a homosexual for violation of ethical conduct was one of the issues in *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), which is discussed above. In *Hall*, the plaintiff claimed that the Baptist nursing school fired her because of her religious views. *Id.* at 623. The school countered that it did not fire Hall because of her attendance or membership at a gay-affirming church, of which it had known previously and had taken no action. *Id.* at 622. Rather, the school dismissed her when she became a leader of the church, ordained to teach its precepts that countered the Baptist teaching on homosexuality. *Id.* The district court determined that this justification was not pretextual, and the appellate court agreed. *Id.* at 627.

253. 553 F. Supp. 2d 853 (W.D. Ky. 2008), *aff'd in part, rev'd in part*, 579 F.3d 722 (6th Cir. 2009), *cert. denied*, 563 U.S. 935 (2011); Pedreira v. Ky. Baptist Homes for Children, 186 F. Supp. 2d 757 (W.D. Ky. 2001).

254. *See Pedreira*, 579 F.3d at 725 (noting that KBHC received over $12.5 million on average per year).

255. *Id.* ("After [Pedreira's] termination, KBHC announced as official policy that '[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment.'").

256. *Id.*

257. *Id.* at 726.

258. *Id.*

259. Complaint at ¶ 12, Pedreira v. Ky. Baptist Homes for Children, Inc., 186 F. Supp. 2d 757 (W.D. Ky. 2001) (No. 3:00-CV-210-S), https://www.au.org/files/legal_docs/Pedreira%20Second%20Amended%20Complaint.pdf

during the interview process, KBHC did not ask about, nor did Ms. Pedreira volunteer, information concerning her sexual orientation. Later that year, members of KBHC's management saw a photograph of Pedreira and her female partner at an AIDS fundraiser at the Kentucky State Fair, and learned of Pedreira's lesbian lifestyle.[260] KBHC decided to discharge Pedreira and sent her a statement that read: "Alicia Pedreira is being terminated on October 23, 1998, from Kentucky Baptist Homes for Children because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values."[261] KBHC then issued a public statement with respect to the termination to the effect that "[i]t is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment."[262]

KBHC has required that all its employees "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."[263] KBHC also adopted an employment policy that stated:

> Homosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternative lifestyle[;] we will however, act according to Board policy if a situation is brought to our attention.[264]

Ms. Pedreira sued, challenging her termination and KBHC's policies on the grounds that KBHC's enforcement of its historic, orthodox Christian moral values constituted religious discrimination against her lifestyle.[265] That is, Ms. Pedreira argued that KBHC's religious beliefs and employee behavioral requirements, which required conduct "consistent with the Christian mission and purpose of the institution," constituted impermissible religious discrimination against those whose lifestyles differed from

[https://perma.cc/AML7-VZPD].

260. *Pedreira,* 579 F.3d at 725.

261. *Pedreira,* 186 F. Supp. 2d at 759.

262. *Pedreira,* 579 F.3d at 725.

263. *Pedreira,* 186 F. Supp. 2d at 759.

264. Complaint at ¶ 34, *Pedreira,* 186 F. Supp. 2d 757 (No. 3:00-CV-210-S).

265. *Pedreira,* 186 F. Supp. 2d at 759.

those religious values.[266]

KBHC admitted that its policy openly discriminated against homosexual conduct in general, and Ms. Pedreira in particular.[267] KBHC maintained, however, that Title VII and Kentucky law did not prohibit discrimination against persons engaged in homosexual conduct, and did not constitute religious discrimination.[268]

The court began its analysis by noting Ms. Pedreira's concession that Title VII does not prohibit employment discrimination on the basis of sexual orientation.[269] Although many cities, counties, and states prohibit employment discrimination based on sexual orientation,[270] Congress to date has not declared that sexual orientation is a protected class under Title VII.[271] Without protection under Title VII, an aggrieved LGBT employee has no claim against his or her employer for discrimination based on sexual orientation.[272] Having disposed of Ms. Pedreira's sexual-

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266. Complaint at ¶ 46, *Pedreira*, 186 F. Supp. 2d 757 (No. 3:00-CV-210-S).

267. *Pedreira*, 186 F. Supp. 2d at 760.

268. *Id.*

269. *Id.*

270. *See, e.g.*, D.C. CODE ANN. § 2-1402.41 (West 2015) (making it unlawful to discriminate against protected classes, including sexual orientation); OR. REV. STAT. ANN. § 339.351 (West 2009) ("'Protected class' means a group of persons distinguished, or perceived to be distinguished, by race, color, religion, sex, sexual orientation . . . .").

271. *See* 42 U.S.C. § 2000e-2(a) (2012) (limiting protections to those discriminated against on the basis of "race, color, religion, sex, or national origin").

272. *See* Vickers v. Fairfield Medical Ctr., 453 F.3d 757, 762 (6th Cir. 2006) (stating that a plaintiff must show membership in a protected class to prevail in a Title VII sex-discrimination suit); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (stating that a plaintiff may not disguise a sexual-orientation claim as gender discrimination to trigger Title VII protection); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002) (declining to judicially amend Title VII to cover sexual-orientation discrimination in the context of an Equal Protection claim); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (noting that sexual orientation of an employee is "irrelevant" to a Title VII sex-discrimination suit); Simonton v. Runyon, 232 F.3d 33, 37–38 (2d Cir. 2000) (reasoning that there may be grounds for relief in cases of sex-stereotyping discrimination but not sexual-orientation discrimination); Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (stating that congressional intent was to cover discrimination against sex, not sexual orientation, in Title VII); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (acknowledging that Title VII did not prohibit sexual-orientation discrimination); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (stating that neither Title VII nor section 1981 prohibit sexual-orientation discrimination); Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (noting a non-cognizable, homosexual-discrimination claim may not be labeled as a cognizable Title VII claim to avoid dismissal); Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 622 (E.D.N.Y 2011) (stating that harassment due to sexual orientation is not actionable under Title IX); Ceslik v. Miller Ford, Inc., 584 F. Supp. 2d 433, 444 (D. Conn. 2008) (stating that a sexual-harassment claim based on sexual-orientation discrimination is not viable under Title VII); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 225 (D. Conn. 2006) (noting that Title VII does not include sexual orientation as a protected class); Schroer v. Billington, 424 F. Supp. 2d 203, 208

orientation claim, the court then addressed whether a private organization's enforcement of a moral code constitutes religious discrimination within the meaning of Title VII.[273] In this regard, the court noted that KBHC did not require its employees to practice any religion or belong to any particular religious group.[274] Perhaps more importantly, Ms. Pedreira did not allege that she premised her lifestyle on her religious beliefs or that she practiced any religion at all.[275]

The court recognized Pedreira's focus on KBHC's alleged "impermissible religious motivation" for what it was—"an attempt to turn this claim involving non-religious lifestyle choices into one based upon religious discrimination."[276] After recognizing that "Title VII does not prohibit an employer from having a religious motivation,"[277] the court stated that a private employer certainly could impose a code of conduct on its employees consistent with religious beliefs, as long as the employer did not require the employee's acceptance of those beliefs.[278] That is, the employer could create and enforce a code of behavior that required employees to refrain from non-marital sex, lying, stealing, and saying blasphemous things, without also requiring employees to believe that this code was the Word of God spoken through Moses. A private employer like KBHC can, in other words:

> impose[] upon its employees a code of conduct that requires consistency with [its] religious beliefs, but not the beliefs themselves. . . . The code of conduct, although requiring behavior consistent with [the private employer's] values, leaves the religious freedoms of

(D.D.C. 2006) (stating that discrimination based on sexual orientation is gender neutral and does not fall into the protected class of sex under Title VII); Rhea v. Dollar Tree Stores, Inc., 395 F. Supp. 2d 696, 701–02 (W.D. Tenn. 2005) (granting defendant's motion to dismiss plaintiff's claim of sexual-orientation discrimination which lacked protection under Title VII); Ianetta v. Putnam Invs., Inc., 183 F. Supp. 2d 415, 420 (D. Mass. 2002) (stating that "animosity toward homosexuals that amounted to discrimination" did not trigger Title VII protection); Fitzpatrick v. Winn-Dixie Montgomery, Inc., 153 F. Supp. 2d 1303, 1306 (M.D. Ala. 2001) (noting that Title VII does not protect against harassment based on sexual orientation rather than gender).

273. *Pedreira*, 186 F. Supp. 2d at 760.

274. *Id.*

275. *Id.* at 761.

276. *Id.* at 762.

277. *Id.* at 761.

278. *Id.*

employees and potential employees unfettered. The civil rights statutes protect religious freedom, not personal lifestyle choices.[279]

III. RELIGIOUS-HIRING-RIGHTS PRINCIPLES DERIVED FROM THIS STUDY

This Article's review of religious hiring rights leads to the following principles:

1. The First Amendment's Religion Clauses require that the government not interfere with a religious organization's choice of leadership for worship or teaching the tenets of faith.[280] This "ministerial exception" exempts religious organizations from all civil-rights laws with respect to the employees covered by the exception.[281]

2. A teacher qualifies as a "minister" for purposes of the "ministerial exception," even if he or she teaches "secular" subjects, if the teacher's job duties includes at least leading some students in religious devotions and/or teaching religion.[282] Although ordination is not required for the ministerial exception, the general rule is that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy."[283]

3. Courts have found the ministerial exception to cover the following positions applicable to religious schools: leadership;[284] chaplain;[285] director of music ministry and part-time music

279. *Id.*

280. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 703 (2012).

281. *Id.* at 710.

282. *Id.* at 712–13 (Alito, J. concurring). *But see* Winberry v. La. Coll., 124 So. 3d 1212, 1219 (La. Ct. App. 2013) (affirming the trial court's ruling that religion professors at a college whose board was elected by the Louisiana Baptist Convention were not ministers, and the college was not a church). In *Winberry*, the court relied upon EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981), which has questionable validity after *Hosanna-Tabor*. *Winberry*, 124 So. 3d at 1215.

283. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

284. *Hosanna-Tabor*, 132 S. Ct. at 703.

285. Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006); Scharon v. St.

teacher at a religious school;[286] resident in a clinical pastoral program;[287] an administrator who also preaches and leads worship singing, oversees daily devotions and teaches Bible studies;[288] teacher of canon law in college;[289] faculty member in religious seminary;[290] communications manager/press secretary who helps shape messages to constituencies;[291] Bible teacher at high school;[292] and teacher who integrates spiritual and cultural principles into classes.[293]

4. The religious exemptions found in sections 702 and 703 of Title VII of the Civil Rights Act of 1964, as amended, do not violate the Establishment Clause or the Equal Protection Clause,[294] and therefore are constitutional even if the government pays the religious organization substantial sums for services provided.[295]

5. Public funding of religious schools does not negate their status as exempt from religious-discrimination law under sections 702 and 703.[296]

6. The religious exemptions in sections 702 and 703 apply to nondenominational colleges.[297]

7. Although the ministerial exception provides blanket protection to the employee categories it covers, the section-702 exemption covers all employees of religious organizations, but is more

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Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (applying ministerial exception to a college or hospital chaplain).

286. EEOC v. Roman Catholic Diocese, 213 F.3d 795, 805 (4th Cir. 2000).

287. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 224, 227 (6th Cir. 2007).

288. Schleicher v. Salvation Army, 518 F.3d 472, 477 (7th Cir. 2008).

289. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463–64 (D.C. Cir. 1996).

290. Klouda v. Sw. Baptist Theological Seminary, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008).

291. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 702–04 (7th Cir. 2003).

292. Powell v. Stafford, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

293. Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858, 869 (E.D. Wis. 2004).

294. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 327–28 (1987) (discussing the constitutionality of section 702 of Title VII of the Civil Rights Act of 1964 in defense to a suit alleging a violation of section 703 of the same Act).

295. Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 228, 244 (S.D.N.Y. 2005).

296. Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

297. Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1188 (W.D. Mo. 1998), *aff'd*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001).

limited in scope. Section 702 permits hiring of coreligionists, but is not limited to this only.

8. Schools may require employees to sign statements of faith/beliefs and follow standards of conduct pursuant to a moral code.[298] The standards of conduct should be specific so that the employees know, for instance, that engaging in prohibited conduct (like sex outside of marriage) will result in termination.[299] Schools must enforce these standards in a nondiscriminatory manner, and failure to do so can lead to a violation of Title VII (enforcing a ban on extramarital sex against a pregnant woman violates Title VII unless similar treatment is given to men who engage in the same conduct). Codes of conduct based on religious principles are permissible, but discriminatory enforcement is not.[300]

9. Schools may also enforce, without violating the civil-rights laws, church policies and may prohibit employees from "publicly engaging in conduct regarded by the school as inconsistent with its religious principles."[301]

10. Religious institutions do not waive their section-702 exemptions by hiring individuals who are not coreligionists.[302] This protects religious institutions during the hiring process, and allows them to make employment decisions based on religious issues later. A person considered a good hire may, in fact, become a "bad hire" on the basis of religion, and thereafter can be discharged.

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298. *See generally* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000); Pedreira v. Ky. Baptist Homes for Children, Inc., 553 F. Supp. 2d 853 (W.D. Ky. 2008), *aff'd in part, rev'd in part*, 579 F.3d 722 (6th Cir. 2009), *cert. denied*, 563 U.S. 935 (2011); Pedreira v. Ky. Baptist Homes for Children, Inc., 185 F. Supp. 2d 757 (W.D. Ky. 2001); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998); Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802 (N.D. Cal. 1992); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980).

299. *See generally* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); *Ganzy*, 995 F. Supp. 340; Gosche v. Calvert High Sch., 997 F. Supp. 867 (N.D. Ohio 1998).

300. *See supra* note 145 and accompanying text (comparing student codes of conduct of two universities).

301. *See generally* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130 (3d Cir. 2006); Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991); Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987).

302. *Little*, 929 F.2d at 951.

11. Courts will consider many factors in deciding whether a college is a religious educational institution or is owned/supported by a religious body and therefore eligible for an exemption under sections 702 or 703 of Title VII. Not surprisingly, the more factors the court finds, the more likely it will determine the college to be "religious." Factors that courts have considered are: (A) whether a religious body founded the school;[303] (B) whether the school's charter or mission statement specifies that the purpose of the school is in part religious;[304] (C) whether the school is affiliated or interactive with a religious body;[305] (D) whether a religious body selects members of the board of trustees;[306] (E) the number of clergy on the board of trustees;[307] (F) whether the religious body owns the school's real estate;[308] (G) whether the school receives substantial financial support from a religious body;[309] (H) whether the school submits an annual budget and financial reports to a religious body;[310] (I) whether the school requires at least some faculty to sign a statement of faith/beliefs;[311] (J) whether faculty are members of the religious body;[312] (K) whether the school requires one or more courses in religion;[313] (L) whether the school has a seminary;[314] (M) whether the school is a member of a Christian college association;[315] (N) whether the school mandates student chapel or

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303. Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), *aff'd*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001); *see generally Hall*, 215 F.3d 618.

304. *See generally Hall*, 215 F.3d 618; Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1996); EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993); *Wirth*, 26 F. Supp. 2d 1185.

305. *Hall*, 215 F.3d at 624; *Kamehameha Schs./Bishop Estate*, 990 F.2d at 461.

306. Siegel v. Truett-McConnell Coll., 13 F. Supp. 2d 1335, 1343 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

307. Pime v. Loyola Univ. of Chi., 803 F.2d 351, 357 (7th Cir. 1986); *Siegel*, 13 F. Supp. 2d at 1341.

308. *Kamehameha Schs./Bishop Estate*, 990 F.2d at 461; *Siegel*, 13 F. Supp. 2d at 1341–42.

309. *Kamehameha Schs./Bishop Estate*, 990 F.2d at 461. *Compare Killinger*, 113 F.3d at 199, 201 (holding 7% is substantial), *with Pime*, 803 F.2d at 357 (holding .33% is too little).

310. *Killinger*, 113 F.3d at 200.

311. *Id.* at 199.

312. *Kamehameha Schs./Bishop Estate*, 990 F.2d at 466; *Pime*, 803 F.2d at 354; *Siegel*, 13 F. Supp. 2d at 1341.

313. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000); *Pime*, 803 F.2d at 352; *Siegel*, 13 F. Supp. 2d at 1343.

314. *Pime*, 803 F.2d at 357.

315. Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1188 (W.D. Mo. 1998), *aff'd*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001).

church-service attendance;[316] (O) whether the school has periodic prayer and worship services;[317] (P) whether the student body contains a large percentage of coreligionists.[318]

IV. FICTIONAL HUS COLLEGE PRESIDENT EDWARD NAGY'S PRACTICAL APPLICATIONS

Edward Nagy smiled as he read the *Hosanna-Tabor* case. He nodded his head as he read the Chief Justice's interlude into English and American history, muttering, "That's right, that's right," when the Chief Justice noted that the founders intended the First Amendment's Religion Clauses to separate church and state for the protection of the *church*.[319] In a unanimous decision, the Court had underscored the importance of personnel in the mission and vision of religious institutions by recognizing that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments."[320] Edward pumped his fist in the air when he read Justice Alito's concurrence regarding the importance of teachers' instruction and conduct in imparting religious values to students.

Edward Nagy had devoted his life to Christian higher education. Edward knew that the distinctiveness of Christian higher education, what sets it apart from public or secular private higher education, is the integration of faith and learning. Edward knew foundationally that education is not merely cognitive or affective; it has a distinct spiritual component. This spiritual component underlies all relationships—the individual's relationship with God; the relationships between faculty, staff, administration, and students; and the relationships among members of the student body. This spiritual component is the cornerstone or bedrock of Christian higher education. The goal or outcome for Christian higher education is not only to impart cognitive information to students so that they can become productive members of American society, but also to create an environment where the Holy Spirit can work on the hearts and souls of Christian higher-education students, thereby creating greater Christ-likeness.

316. *Killinger*, 113 F.3d at 198–99; *Kamehameha Schs./Bishop Estate*, 990 F.2d at 462.

317. *Hall*, 215 F.3d at 622; *Kamehameha Schs./Bishop Estate*, 990 F.2d at 462.

318. *Pime*, 803 F.2d at 352; *Siegel*, 13 F. Supp. 2d at 1342; *Kamehameha Schs./Bishop Estate*, 990 F.2d at 462.

319. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132. S. Ct. 694, 703–04 (2012).

320. *Id.* at 706.

Evangelical Christian colleges and universities like John Hus College seek to develop students holistically: spiritually, emotionally, relationally, intellectually, vocationally, physically, and even financially with respect to proper stewardship.

To achieve this distinctiveness, Christian institutions of higher education need people "sold out" to their respective missions and purposes. These institutions need individuals who are so enthusiastic for the institution's purposes that they are willing to sacrifice their time and money (generally by accepting below-market salaries) to advance their missions. This means finding, hiring, and retaining people willing to place a high priority on the mission and purpose of the institution.

An evangelical Christian college or university does not advance its holistic model of development through well-manicured lawns, nicely kept buildings, or modern residence-hall rooms. This holistic model of development is advanced only through personnel: teachers who integrate faith in their classroom (live or virtual) and make informed decisions on the proper textbooks to use, administrators who work on everything from recruiting to placement, cafeteria workers who may ask a blessing on the food they prepare for the nourishment of the students, grounds keepers who mow the lawn and wave to students they casually know, and all of the above and more who serve as living examples of their common faith to the students. If the mission of evangelical Christian higher education is to impart cognitively a Christian worldview, teach emotionally the principle of loving one's neighbors as oneself, and teach spiritually the importance of loving God with all one's mind, soul, and being, people who fully embrace and embody this mission are absolutely critical for success. Edward knew that this was the reason why Congress exempted religious employers and religiously affiliated educators from the religious-discrimination provisions in Title VII, and why the Court further protected this right for religious institutions in *Hosanna-Tabor.*

Edward recognized that *Hosanna-Tabor* may tempt some lawyers and religious-institution leaders to strip away civil-rights protection for whole categories of employees. Edward shook his head in amazement as he recalled conversations with one or two other Christian college presidents who viewed their greatest resource—faculty and staff "sold out" to Christian higher education—as an impediment. Edward like many other administrative

leaders sometimes had a less-than-pleasant encounter with one of the college employees, yet Edward recognized that a person gifted by God for Christian education and passionate about such ministry is frankly called by God for the position, and must be nurtured to fulfill the role intended by God.

Edward saw in *Hosanna-Tabor* the opportunity to grow spiritually the Hus faculty and staff and provide many of them with greater job protection than they currently enjoyed. Edward found intriguing the Lutheran Church–Missouri Synod's criteria for called ministers. After a designated period of time (say six years) during which the Hus administration would assess the Christian character, teaching, scholarship, and service of a faculty member or staff person, the administration would then decide whether or not to issue a call to the faculty or staff person. If an offer of a call is made, the faculty member or staff person could accept the offer and proceed to additional training, or decline and continue in the same role as before. The additional training could consist of advanced instruction in Christian worldview and theology, focusing even more heavily upon the integration of faith and learning in the professor's field of instruction. Following a successful examination, the faculty or staff member would then meet with representatives of the church denomination that controls or supports the college, or members of the college's board of trustees if the college is nondenominational. Upon successful completion of the examination, the church or board would then issue a call to the faculty or staff member followed by an ordination service. Once ordained, the called faculty or staff person would be eligible to lead chapel services and would enjoy a form of tenure. That is, the called faculty or staff member would continue in his/her position unless a supermajority of the board of trustees concluded upon investigation that the member must be dismissed for cause. If the college suffered exigent financial problems, the called member would continue to fill a position for which s/he was qualified while non-called faculty and staff would suffer dismissal. Advanced training—special recognition—elegant and meaningful ordination services—employee protection—further integration of faith and learning for even greater holistic student education—Edward liked the idea.

A colleague had sent Edward a copy of a recently published law-review article that considered the application of *Hosanna-*

Tabor to religious colleges. Edward's first take away from the article was simple—the greater the importance of religion in the life and essence of the college, the greater the law protects the college in making employment decisions that advance the college's true mission of teaching and applying the tenets of the faith to the next generation. Edward pondered ways to increase spirituality on campus. Although the college chapel services have been voluntary for the past thirty years, perhaps the college could mandate student and faculty attendance at special chapels twice a semester. Each year faculty members either sign or affirm their commitment to the college's statement of faith, but perhaps once a semester the chaplain could provide a chapel homily on what one or more of the tenets mean. Other ideas include creating and promoting a student-led chapel and student-led Bible studies in the residence halls, and even increasing the length of classes by five to ten minutes so the professor could give a devotion in addition to the current practice of praying before class. Edward thought adequate Hus's current six-hour core requirement in religion.

This article also showed that a college could gain further legal protection by strengthening its ties to the founding church. Edward remembered during his days as a Hus undergrad the ubiquity of Hungarian Reformed clergy as faculty members in the religion and philosophy departments, and on campus generally as chapel speakers and college advisors. The presence of Hungarian Reformed clergy sharply dropped over the past four decades as the church's financial support diminished, the college hired professors from the broader evangelical Christian community, and the college changed its bylaws to make the board of trustees self-perpetuating (within a decade wealthy college benefactors and alumni had replaced all Hungarian Reformed clergy-board members). Edward jotted a note to ask the college's Vice President of Finances, Albert Kovacs, whether the drop in the church's financial support or the college's move to independence occurred first.

It seemed clear to Edward that closer ties would benefit both the church and college. There was certainly no harm in sharing the college's financial information and budget with the church's executive body. Moreover, since the bylaws permit the alumni association to select two members of the board of trustees, why not similarly permit the church to select at least two pastors for

membership on the board? (Edward jotted another note, this time to college counsel Peter Horvath). Why not also expand the President's Council to include one prominent Hungarian Reformed clergyman? Since Horvath would review the bylaws anyway, perhaps he could consider how to strengthen the bylaws' and charter's commitment to a biblically solid education that focuses on transforming students into greater Christ-likeness.

Edward's second takeaway from this article was the need for constant vigilance in political and legal matters. Edward realized that Hus must give greater priority to governmental affairs. With the ever-growing involvement of government in financing and governing higher education, Edward and other evangelical Christian college presidents and board members must develop and strengthen relations with local representatives and their key staff personnel, including (but certainly not limited to) the staffer responsible for higher-education issues. Edward and other college presidents and board members must view the elected representatives and key staff personnel as key stakeholders in the college and must nurture those relationships accordingly. Developing relationships of course takes time and personal attention.

Although Edward and a few of Hus's board members could juggle their schedules to ensure time to develop and strengthen ties with state and federal officeholders and key staff, there was no assurance that the officeholders or staff could reciprocate. Hus College and its staff of two hundred employees was, after all, only a small-to-medium-sized employer in its Iowa congressional district.

Edward realized, however, that elected representatives are at times electoral candidates. Electoral candidates need money and manpower. Christian college faculty, staff, and students do not, as a general rule, have the capacity to give large monetary donations (they can give small donations, of course), but students do have the energy and time to make significant contributions as volunteers and interns. Colleges like Hus can be a very good source for votes and can even determine local elections. Edward remembered the effort conducted by Liberty University in the 2008 election and thought of it as a possible model. Liberty not only had a spirited voter-registration campaign and a widely distributed voter's guide, but Liberty canceled classes on election day and bussed students to the local precinct poll. One blogger

credited Liberty's effort in electing a state representative.[321]

Edward recognized that the Hus College effort to promote good citizenship in this way must not focus on one political party. Rather, Hus must promote and conduct bipartisan voting-registration drives, actively promote campaign involvement on behalf of both parties, provide internships for those working on political campaigns, and reward both professors and students who champion involvement in either party.

Edward knew of two fellow political-science professors who could motivate students and supervise their involvement. Stephanie Monsma was growing in popularity with the local Democrats, and would likely be a candidate for office herself in four to eight years. She could lead the Hus Democratic Club, and actively recruit students to support Democratic candidates. Her counterpart was Jim Henry, a recent Duke University grad who was very charismatic and had joined the local Republicans. He could take charge of the Hus Republicans and fill the Republicans' needs for interns and political volunteers. Hus would provide Professors Monsma and Henry with service credit for these assignments, relieving them of other college committee work. Since providing this service also would enhance their respective political careers, Edward thought this a rather easy sell. Perhaps someday the voters might even elect Professors Monsma or Henry to office.

Peter Horvath has warned that Hus as a nonprofit entity has specific limits on its political involvement. These rules, however, are rather straightforward: The college cannot make a political donation, endorse a candidate, or spend more than a small percentage of its budget on political matters, but faculty, staff, and students in their individual capacity certainly can.[322]

Edward got up from his desk to stretch and peer out his office window at the Hus students sitting in the grass by the new sci-

321. Bill Berkowitz, *Strange Times at Jerry Falwell's Liberty U*, BUZZFLASH (June 8, 2010), http://www.truth-out.org/buzzflash/commentary/item/9551-strange-times-at-jerry-falwell's-liberty-u [https://perma.cc/U4JH-3FQF].

322. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERVICE (last updated Sept. 13, 2016), http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organizations [https://perma.cc/W6MS-BC5K]; MATHEW D. STAVER, PASTORS, CHURCHES AND POLITICS: WHAT MAY PASTORS AND CHURCHES DO? 2 (2008), https://www.lc.org/Uploads/files/pdf/pastors_churches_politics_trifold_2008.pdf [https://perma.cc/6J48-6RP5].

ence building and enjoying the abnormally warm April day. Edward realized that the ground he was tilling regarding political and legal affairs would bear little immediate fruit. On balance, however, the younger brothers and sisters of these students (as well as their children!) would greatly benefit from his decision to engage Hus faculty, students, and staff in greater citizen involvement.

THE PATRIOT CONSTITUTION AND INTERNATIONAL CONSTITUTION-MAKING

M.C. MIROW*

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INTRODUCTION

Constitutions have been essential documents in the structure and function of the United States since independence. Throughout the country's history, groups have successfully and unsuccessfully turned to constitutions to define their political vision and community.[1] While structuring government and establishing rights were and are central constitutional functions, scholars have increasingly noted the international dimension of constitutions and related documents.[2] Constitutions speak internationally. This function is the central aspect of a newly found constitutional text in the history of American constitutionalism, the Patriot Constitution.

In 1812, the "Patriots," military adventurers from Georgia, with a few residents of East Florida, then part of Spain, invaded East Florida with the hope of annexing it to the United States.[3] Because the province was part of the Spanish empire and because Spain and the United States were at peace, direct occupation by a military force or by populating the area with settlers from the United States could not accomplish the annexation.[4] A pretextual revolution of the Spanish population, subsequently

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1. ROBERT L. TSAI, AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY 6–7 (2014) (observing that while "[s]ome [constitutions] . . . were embraced by the people[,] . . . [m]ore numerous were constitutions rejected by officials or put into practice incompletely by followers").

2. *See* GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989 xi (2009) (arguing that American constitutionalism, expressed in the Constitution, early state constitutions, the Declaration of Independence, the Articles of Confederation, *The Federalist*, and the Bill of Rights, had (and has) a "substantial and stable" international influence); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934 (2010) (arguing that "the United States' founding instrument is best understood, in historical perspective, as a fundamentally international document"); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 760–61 (2014) (observing that "Americans and their historians have long viewed constitution-making in the Founding Era as a local event with global repercussions[,]" when in fact "American constitution-making began as an international process"). *See generally* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY (2007) (discussing global influence on the creation of the Declaration of Independence and the Declaration's influence on the world).

3. *See* Robin F.A. Fabel & David L. Schafer, *British Rule in the Floridas*, *in* THE HISTORY OF FLORIDA 144–46 (Michael Gannon ed., 2013) (explaining that East Florida was then the region roughly corresponding to Florida's peninsula and that the division between East and West Florida was created during Florida's British period, from 1763 to 1783).

4. *See* JAMES G. CUSICK, THE OTHER WAR OF 1812: THE PATRIOT WAR AND THE AMERICAN INVASION OF SPANISH EAST FLORIDA 3–4 (2003) (remarking on President Madison's efforts to acquire East Florida while avoiding open hostilities with Spain).

recognized by the United States, would be necessary.[5] General George Mathews and John Houston McIntosh led the Patriots in the revolutionary process, which included the promulgation of a Patriot Constitution on July 17, 1812, to advance their aim of annexing East Florida to the United States.[6] The Patriot Constitution of 1812 was a product of this desire to shift territory from Spain to the United States during a complex period of imperial interaction along the southern border of the United States.

This Article explores three aspects of the Patriot Constitution through the concepts of pretext, text, and context. Part I of this Article discusses the pretext and actions needed for the United States to obtain East Florida and sets the background for drafting and promulgating the constitution. Part II analyzes the text of the Patriot Constitution. Part III contextualizes the Patriot Constitution in light of its intended transitional nature and the underlying international forces behind early nineteenth-century constitutions. The texts of the Patriot Constitution and the related Patriot Articles of Cession are transcribed in the Appendices.

I. PRETEXT

Between 1810 and 1814, under President James Madison, the United States asserted claims for the annexation of the Spanish province of East Florida.[7] In the United States, this project was supported by popular sentiment and by several intertwined economic, political, and military considerations.[8] One claim the United States asserted against Spain stemmed from its assistance to French privateers as they brought U.S. ships into neutral Spanish ports during the 1790s.[9] With a peace concluded with France, the United States maintained this spoliation claim, valued between five and fifteen million dollars, against Spain and specifically against East Florida.[10] Spain reticently admitted this claim, and the United States asserted that it held some sort of security interest in East Florida for this unpaid amount, which was to be satisfied before Spain transferred the region to any other

5. *Id.* at 4–5.
6. *Id.*
7. *See* REMBERT W. PATRICK, FLORIDA FIASCO: RAMPANT REBELS ON THE GEORGIA–FLORIDA BORDER 1810–1815 1–3 (1954) (characterizing President Madison "as anxious . . . to annex these Spanish provinces to the United States").
8. *Id.*
9. *Id.* at 20–21.
10. *Id.*

country.[11] An additional claim arose from direct seizures of U.S. ships by Spain.[12] There was also a U.S. grievance against Spain from Spain's suspension of U.S. rights of deposit at New Orleans in 1802, shortly after Spain secretly retroceded Louisiana to France in 1800.[13] This Spanish action damaged U.S. commercial interests.[14] James Monroe, Secretary of State, held a lien against East Florida for these damages and asserted that they exceeded the value of the entire region.[15] On January 15, 1811, the U.S. Congress passed a "No Transfer Resolution" asserting that the United States would not acquiesce in an attempt by Spain to transfer its American territory to other European powers.[16]

Under existing international law, such implied liens against East Florida may have served as justification for seizing East Florida under the "doctrine of attachment and reprisal."[17] Despite the availability of this remedy and although he was keenly aware of the constraints of international law, President Madison chose to use the outstanding claims against Spain differently.[18] Security and military considerations were added to these economic claims.[19] From the U.S. perspective, Spain had manipulated Creek and Seminole Indians to attack and raid Georgians, and the United States sought to remove Spaniards and Indians in a concerted effort to secure its southern border.[20] The example of Spain, in which regiments of black militias were common, threatened the power structure that maintained slavery in the U.S. South.[21]

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11. *See id.* at 21 (noting that, rejection of the Pinckney Treaty by the Spanish Cortes notwithstanding, the United States held her claims substantiated by the signature of the Spanish foreign minister).

12. *Id.* at 27.

13. *See id.* at 21–22.

14. *See id.* at 22 (discussing the negative ramifications of Spain's retrocession of Louisiana to France).

15. *Id.* at 63.

16. J.C.A. STAGG, BORDERLINES IN BORDERLANDS: JAMES MADISON AND THE SPANISH–AMERICAN FRONTIER, 1776–1821 90–91 (2009); J.C.A. Stagg, *George Mathews and John McKee: Revolutionizing East Florida, Mobile, and Pensacola in 1812*, 85 FLA. HIST. Q. 269, 277 (2007).

17. J.C.A. Stagg, *James Madison and George Mathews: The East Florida Revolution of 1812 Reconsidered*, 30 DIPLOMATIC HIST. 23, 33 (2006); *see also* STAGG, *supra* note 16, at 43 (noting that "rather than simply seizing East Florida," the United States offered to assume on behalf of its citizens the claims arising from Spain-abetted "French spoliations" and to attach East Florida as fulfillment thereof).

18. Stagg, *supra* note 17, at 54.

19. *See id.* at 33 (noting that seizure of East Florida by the United States risked armed hostilities).

20. PATRICK, *supra* note 7, at 30–31.

21. *Id.* at 31; *see also id.* at 183–84 (noting the relative freedom that blacks experi-

Direct, purposeful occupation of the region was hindered by the Treaty of San Lorenzo (the "Pinckney Treaty") between Spain and the United States, signed in 1795, and later by the military pressures on the United States during the War of 1812.[22] Even before the War of 1812, President Madison sought congressional approval to annex East Florida.[23] In 1811, a secret act of Congress approved U.S. occupation of Florida east of the Perdido River under one of two circumstances: (1) when local authorities turned the region over to the United States, or (2) when the United States had to take the region to ensure it was not seized by a foreign power.[24] The Patriots latched onto the first justification and attempted to establish a duly constituted local authority that would almost simultaneously rebel against Spain and cede the region to the United States.[25] Direct action by the Patriots, with or without the clear sanction of the United States, was needed to obtain East Florida for the United States after "a decade of overtures, negotiations, and threats to Spain."[26]

Indeed, breaking off a portion of Spain and annexing it to the United States was not without recent precedent. Events in West Florida just two years earlier might have served as a model for President Madison and General George Mathews.[27] Stagg writes that although this process may have been in Mathews's mind as he interpreted his instructions, "Madison, in the summer of 1810, devised a separate policy for East Florida, . . . which the State Department, through the agency of Senator William Harris Crawford of Georgia, entrusted to Mathews."[28] This was a period

enced under Spanish rule and how that "[c]ontinued freedom depended on Spanish retention of East Florida"); *id.* at 251 (referencing the contemporary fear that "war would bring an invasion of the South by the black militia of Spain").

22. For a brief description of the Treaty of San Lorenzo, see *Treaty of San Lorenzo/Pinckney's Treaty, 1795*, HISTORY.STATE.GOV, https://history.state.gov/milestones/1784-1800/pickney-treaty [https://perma.cc/P6MU-MKER] (last visited Mar. 6, 2017). For the text of the treaty, see *Treaty of Friendship, Limits, and Navigation Between Spain and the United States; October 27, 1795*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/sp1795.asp [https://perma.cc/G83F-JAPP] (last visited Mar. 6, 2017).

23. PATRICK, *supra* note 7, at 3–4.

24. *Id.* at 4; Stagg, *supra* note 17, at 34–35.

25. PATRICK, *supra* note 7, at 11–15, 57.

26. *Id.* at 29.

27. For information on development in West Florida, see Séan Patrick Donlan, *Entangled up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, 1803–1810*, *in* ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES 213–50 (Thomas Duve ed., 2014); ANDREW MCMICHAEL, ATLANTIC LOYALTIES: AMERICANS IN SPANISH WEST FLORIDA 1785–1810 149–75 (2008); STAGG, *supra* note 16, at 52–86.

28. Stagg, *supra* note 17, at 31. Reflecting the practices of the independence of the

of significant political movement and change on the southern border of the United States, and the contemporary political, military, and international events in and around West Florida would have been widely known and must have served as models for action in the southern region.[29]

Patriot leaders General George Mathews—who had gathered support from President Madison—and John Houston McIntosh recruited men and planned the expedition.[30] Before leading the Patriots, Mathews had served in the Georgia Assembly and as Governor of Georgia.[31] John Houston McIntosh was the owner of a large plantation near St. Marys, Georgia, on the border of Georgia and East Florida, and held nearly 250 enslaved humans.[32] McIntosh was an educated, well-respected plantation owner with estates in Georgia and Florida who lived in East Florida under the Spanish crown.[33] His interests aligned with those of General Mathews, and McIntosh sought to have the Patriots recognized as a "constituted local authority" capable of ceding control of the region to the United States.[34] It turned out to be difficult to recruit leading citizens of Spanish East Florida for the enterprise. Many potential recruits had strong economic, religious, or social ties to established Spanish structures and rule.[35] Georgians proved to be more willing to take the risks presented

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United States, the West Florida process included a declaration of independence and constitution for the "State of Florida." *See* Donlan, *supra* note 27, at 234–42; MCMICHAEL, *supra* note 27, at 164–68; STAGG, *supra* note 16, at 62–68. For the Constitution for West Florida of 1810, see DAVID A. BICE, THE ORIGINAL LONE STAR REPUBLIC: SCOUNDRELS, STATESMEN, AND SCHEMERS OF THE 1810 WEST FLORIDA REBELLION 207–32 (2004) (providing facsimile copy); James A. Padgett, *The Constitution of the West Florida Republic*, 20 LA. HIST. Q. 881, 881–94 (1937). The Patriot Constitution did not borrow text from the Constitution of West Florida. *See* STAGG, *supra* note 16, at 76–77, 77 n.86 (describing the features of the West Florida Constitution, features at variance with those of the Patriot Constitution).

29. *See* Gene Allen Smith & Silvia Hilton, *Introduction*, *in* NEXUS OF EMPIRE: NEGOTIATING LOYALTY AND IDENTITY IN THE REVOLUTIONARY BORDERLANDS, 1760–1820 3–6 (Gene Allen Smith & Silvia Hilton eds., 2010) (sketching in brief the tumultuous political history of the regions along the United States' southern border); Samuel C. Hyde, Jr., *Introduction: Setting a Precedent for Regional Revolution: The West Florida Revolt Considered*, 90 FLA. HIST. Q. 121, 121–26 (2011) (providing an overview of the prevailing political situation).

30. PATRICK, *supra* note 7, at 56.

31. For biographical details of George Mathews, see generally G. Melvin Herndon, *George Mathews, Frontier Patriot*, 77 VA. MAG. HIST. & BIOGRAPHY 307 (1969).

32. PATRICK, *supra* note 7, at 56; CUSICK, *supra* note 4, at 68.

33. CUSICK, *supra* note 4, at 59.

34. *Id.* at 75; *see also* STAGG, *supra* note 16, at 104–05.

35. PATRICK, *supra* note 7, at 49.

for the promised rewards of land and government positions.[36] By March 1812, there were about 125 Patriots, recruited mostly from Georgia.[37]

Every rebellion or revolution deserves a declaration. The Patriots drafted theirs at Rose's Bluff on the southern bank—the Spanish side—of the St. Marys River on March 13, 1812.[38] The content of the Patriot Manifesto, or the Patriot Declaration of Independence, as it has come to be known, can only be established through reports in letters.[39] On March 14, 1812, the Patriot Manifesto was read to the Patriots.[40] It criticized Spanish rule and promised lands to its adherents.[41] Because the Patriot Manifesto and the Patriot Articles of Cession were drafted within days of each other,[42] it is likely that their contents were similar, if not identical. By March 21, 1812, Mathews sent a complete draft of the Patriot Articles of Cession and an accompanying letter of explanation to James Monroe, U.S. Secretary of State.[43] The letter sought Monroe's approval of the Articles of Cession drafted by Mathews and requested U.S. military assistance to hold the Patriots' gains.[44] Mathews attempted to explain several provisions of the Articles of Cession to Monroe, especially those articles related to maintaining East Florida ports open to free trade until May

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36. *Id.*

37. CUSICK, *supra* note 4, at 83.

38. *Id.* at 89. For the date of the Manifesto, see Copy of Letter from Gen. John Floyd to Crawford (Mar. 21, 1812), *in* MISCELLANEOUS LETTERS OF THE DEPARTMENT OF STATE 1780–1906, *microformed on* National Archives Microfilm Publications, Microcopy No. M 179, Roll 25, f. 149 (Nat'l Archives Records Serv.).

39. *See* Letter from George Mathews to James Monroe, Sec'y of State (Mar. 14, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, f. 102 (Nat'l Archives Records Serv.). The letter states that it encloses "the Manifesto and Declaration of Independence of East Florida." No documents are found with the letter. Stagg, *supra* note 17, at 291 n.61. The Patriot Manifesto was called the "Declaration of Independence" by Mathews in a letter of April 16, 1812. The letter lists a declaration, an original declaration, and the Articles of Cession as separate enclosed documents. The reel containing the letter does not include the documents. Letter from George Mathews to James Monroe, Sec'y of State (Apr. 16, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, f. 128 (Nat'l Archives Records Serv.).

40. PATRICK, *supra* note 7, at 72 n.2.

41. CUSICK, *supra* note 4, at 90.

42. PATRICK, *supra* note 7, at 72 n.2, 105.

43. *See* Letter from George Mathews to James Monroe, Sec'y of State (Mar. 21, 1812), *in* MISCELLANEOUS LETTERS OF THE DEPARTMENT OF STATE 1789–1906, *microformed on* National Archives Microfilm Publications, Jan. 1–Jun. 30, 1812, M179, Roll 25, f. 117 (Nat'l Archives Records Serv.).

44. *Id.*

1813 and to ousting Spain from Pensacola and Mobile.[45]

On March 17, 1812, under the protection of U.S. Navy gunboats, the Patriots, now a group of gun-toting settlers, crossed the international border of the St. Marys River from Georgia, United States, into East Florida, Spain.[46] Under the threat of Commodore Campbell's U.S. gunboats and outnumbered nearly five to one, Lieutenant Justo Lopez surrendered Fernandina to Lodowick Ashley, and the Patriot flag was raised.[47] The following day, just as planned, McIntosh offered to cede coastal Amelia Island and the Spanish town of Fernandina to General Mathews, who accepted it for the United States.[48] The Patriot standard was immediately replaced with the U.S. flag.[49]

After occupying Fernandina and Amelia Island, General Mathews pressed south towards St. Augustine, the jewel of East Florida.[50] Families and plantation owners between Fernandina and St. Augustine had little choice but to support the Patriots, and slightly more than a hundred residents of Spanish East Florida joined the Patriot cause.[51] On March 26, 1812, Mathews gave Governor Estrada of St. Augustine a similar ultimatum to that provision proffered at Fernandina.[52] A summary of the Patriot Articles of Cession was incorporated in the formal demand for surrender of St. Augustine, the Spanish capital of East Florida.[53]

Before Mathews could take action against St. Augustine, however, Governor Estrada learned that the United States no longer supported Mathews.[54] On April 4, General Mathews was rebuked by Monroe; his efforts were not authorized by United States law and his powers were later revoked immediately on receipt of the letter on May 9, 1812.[55] Mathews's grandiose plans to press on from a captured St. Augustine to Mobile and Pensacola and disrupt Spanish control of West Florida were an essential element in Madison's decision to withdraw U.S. support from the Patri-

45. *Id.*
46. CUSICK, *supra* note 4, at 132.
47. *Id.* at 121–25.
48. *Id.* at 127.
49. *Id.*
50. *Id.* at 84.
51. *Id.* at 150.
52. *Id.* at 149–50; PATRICK, *supra* note 7, at 103–04.
53. *See* PATRICK, *supra* note 7, at 103–04 (providing the text of Mathews's formal surrender demand).
54. CUSICK, *supra* note 4, at 166.
55. PATRICK, *supra* note 7, at 121, 125.

ots.[56] Shortly afterwards, Governor David Brydie Mitchell of Georgia was put in control of East Florida under the United States to negotiate a peaceful resolution with Spain.[57] Nonetheless, Mitchell continued U.S. occupation of East Florida and tangentially supported the Patriots.[58]

On June 18, 1812, the United States declared war on Great Britain, and this new political and military situation only strengthened calls for greater U.S. control in the Floridas.[59] By July 1812, the siege of St. Augustine was at a standstill.[60] About 400 U.S. troops under Lieutenant Colonel Smith were stationed outside the city, and Governor Kindelán had about 800 within the most impressive military structure in the province, the Castillo de San Marco adjacent to the city.[61]

This was not a propitious moment to promulgate a constitution. Until then, as a military force, the Patriots had little need of governmental structure. Patriot proclamations and statements bore signatures of ad hoc officers.[62] By mid-July 1812, the situation had changed dramatically. General Mathews no longer had credible U.S. support, the United States had declared war against Great Britain, and the Castillo de San Marcos was under new command with more Spanish troops.

Under these new conditions, on July 10, 1812, the Patriots sought to reassert their claims to legitimacy and established a government for East Florida.[63] John Houston McIntosh, as president, led an assembly of fifteen men to draft a document that expressed the Patriots' disenchantment with Spain and their desire for political independence.[64] William Hamilton served as secretary; Lodowick Ashley, William Craig, and Buckner Harris were notable members of the convention.[65] The Patriot Constitution was passed on July 17, 1812.[66]

The following week, on July 25, 1812, a plebiscite selected

56. Stagg, *supra* note 16, at 284–92.
57. CUSICK, *supra* note 4, at 139–40.
58. PATRICK, *supra* note 7, at 133–37.
59. CUSICK, *supra* note 4, at 209.
60. *Id.* at 187.
61. *Id.*; PATRICK, *supra* note 7, at 143.
62. *See* PATRICK, *supra* note 7, at 103 (referring to a "chairman" and a "Board of Officers of the Constituted Authority of East Florida").
63. CUSICK, *supra* note 4, at 212.
64. *Id.*
65. PATRICK, *supra* note 7, at 165.
66. CUSICK, *supra* note 4, at 212.

McIntosh as "Director of East Florida" and fifteen men were selected to serve on the legislative council, the legislative body under the constitution.[67] The new government held its first session the next day.[68] On July 30, 1812, Director McIntosh wrote President Madison and Secretary of State Monroe requesting formal recognition of the country of East Florida.[69] None was forthcoming, and local relations between the Patriots and U.S. forces became tense.[70] U.S. forces did as much as possible to avoid recognizing the Patriots as an authority acting in East Florida.[71]

Official U.S. claims to East Florida lost ground in Washington. On February 12, 1813, an act of Congress did not, as some hoped, provide support for military action against Spanish East Florida.[72] About a month later, on March 7, 1813, Spain extended a pardon to Patriot collaborators if they returned to live as loyal subjects.[73] And over the preceding few months, the Patriot cause and their number had diminished significantly.[74] In light of the pending withdrawal of the United States, Buckner Harris, president of the Legislative Council of the Territory of East Florida, and the remaining Patriots defended their claim to East Florida.[75] John Houston McIntosh was given dictatorial powers to manage financial and political affairs.[76] The Patriots ineffectively raised concerns for the safety and the property of their supporters.[77] Towards the end of April 1813, General Pinckney effected the process for a U.S. evacuation of East Florida.[78] East Florida surged into its new Spanish constitutional regime under the Constitution of Cádiz after it was promulgated in St. Augustine on October 17, 1812, and in Fernandina on May 8, 1813.[79] With the U.S. withdrawal, John Houston McIntosh left East Florida

67. *Id.*

68. *Id.*

69. Letter from John McIntosh to James Monroe, Sec'y of State (July 30, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, ff. 212–13 (Nat'l Archives Records Serv.).

70. PATRICK, *supra* note 7, at 166–67.

71. *Id.* at 168–69.

72. CUSICK, *supra* note 4, at 254; STAGG, *supra* note 16, at 130–31.

73. CUSICK, *supra* note 4, at 259; PATRICK, *supra* note 7, at 255.

74. PATRICK, *supra* note 7, at 259.

75. *Id.* at 259–60.

76. *Id.* at 260–61.

77. *Id.* at 261–63.

78. CUSICK, *supra* note 4, at 263–65; PATRICK, *supra* note 7, at 258–65.

79. M.C. Mirow, *The Constitution of Cádiz in Florida*, 24 FLA. J. INT'L L. 271, 280, 289 (2012).

through St. Marys and pressed his claims for damages against the United States.[80] He returned to St. Marys in September 1813 and left public life.[81]

The Patriots soon disintegrated. A splinter group of Patriots unsuccessfully attempted to create a separate territory in the Alachua District near present-day Gainesville.[82] In April 1814, the United States disavowed recognition of the Patriots' claim in Alachua, and their Director Buckner Harris was killed by Spanish-backed Seminoles on May 5, 1814, effectively ending any chances for the Patriots and their Republic of East Florida.[83]

II. TEXT

The Patriot Constitution is a simply constructed document of approximately 2,600 words. It consists of a preamble, three articles subdivided into paragraphs by ordinal numbers, and a closing paragraph.[84] The recitations in the preamble claimed to speak for "[t]he people of the province of East Florida" and compared the difficulty of living under Spanish rule with the better conditions found in the United States.[85] Religious differences were recited; Patriots did not "idolize[] their priest[s]," a clear criticism of Spanish–American Roman Catholicism.[86] Spanish maladministration and apparent concern about the instability of Spain itself, however, formed the central complaint.[87] Spain was blamed for oppressive laws and tyrannical and corrupt local royal officials.[88] The governor and, implicitly, the governor's power over and involvement with judicial affairs—no doubt a clear lack of separation of powers in the mind of the Patriots—were important elements averred by the revolutionaries.[89] The Patriots applauded the then-recent movements towards independence in South America and expressed their worry that East Florida would be sold to Great Britain, then an active belligerent against the United States.[90] Revolution and independence, as required for

80. PATRICK, *supra* note 7, at 268, 272–75.
81. *Id.* at 275.
82. *Id.* at 268–69.
83. CUSICK, *supra* note 4, at 290–91.
84. *See generally* PATRIOT CONST. of 1812.
85. *Id.* pmbl., para. 1.
86. *Id.*
87. *Id.* pmbl., para. 2.
88. *Id.*
89. *Id.*
90. *Id.*

legal cession to the United States, were the only courses of action left to these inhabitants, who wished to be "[c]itizens of a Territory of the United States."[91]

After separating the powers of government into executive, legislative, and judicial branches, Article I addressed the legislative power institutionalized through the Legislative Council of East Florida.[92] The legislative council was a fifteen-member body composed of elected free, white men over the age of twenty-one with property.[93] There were additional requirements of residency and active participation in the revolution for soldiers to be members of the council.[94] Like the constitution itself, the legislative council was a transitional institution that would cease on the territory's incorporation into the United States.[95] The council was empowered to make laws, to establish courts, to appoint officials, to tax and to spend, and to serve as a court of impeachment.[96] The council also was granted the power to confirm resolutions and ordinances established before its existence and to establish compensation for officers.[97]

Article II of the Constitution established the executive under a director, again a transitional officer, "until this Country shall be received by the United States."[98] The director had to have played an active part in the revolution, to be at least thirty years old, and to possess land and other property.[99] If the director was unable to serve, the president of the legislative council would exercise executive powers.[100] The director had the power of reprieve, of calling elections, of convening the legislative council, and of reviewing legislation.[101]

Article III is not about the judiciary but contains miscellaneous provisions. The judicial power under the Patriot Constitution was relegated to one paragraph in Article I that gave the legislative council the power to create courts.[102] In addition to hearing

91. *Id.*
92. *Id.* art. I.
93. *Id.* art. I, §§ 2–3, 7.
94. *Id.* art. I, §§ 2–5, 7.
95. *Id.* art. I, § 3.
96. *Id.* art. I, §§ 9–12, 15.
97. *Id.* art. III, §§ 2, 4.
98. *Id.* art. II, § 1.
99. *Id.* art. II, § 2.
100. *Id.* art. II, § 3.
101. *Id.* art. II, §§ 4–6.
102. *Id.* art. I, § 10.

and trying all manner of actions, the courts were given the power to execute their judgments and to administer oaths.[103] Instead of incorporating English common law, as one might expect, Article III, § 1, stating that Georgia law was known best by the inhabitants of East Florida, specifically received the laws of Georgia and the United States.[104] This was, of course, a self-serving fiction. It was the Patriots and their leaders who were most familiar with Georgia law. This provision provided a quiet yet effective method to ensure that laws recognizing and enforcing slavery in Georgia and the United States would become the laws of East Florida.[105]

The concluding paragraph stated that the Patriot Constitution established a government while reiterating that the government was temporary and was "intended to exist and be in operation only until the United States shall acknowledge this Territory as part of the United States." [106] With cession to the United States as its primary goal, the Patriot Constitution was a temporary governing document that contained many structural and institutional gaps. The constitution made reference to elections for members of the legislative council and director, but provided no mechanism for such elections.[107] The Patriot Constitution had no enumeration of rights, evidently piggybacking on its incorporation of Georgia and U.S. law for such important features of constitutional government.[108] Nonetheless, the drafters of the Patriot Constitution thought some rights had to be expressed in the text. The constitution provided for trial by judge and for freedom of the press in one article under the articles dealing with the executive.[109] Both manuscript versions of the Patriot Constitution use the expression "trial by judge" rather than the common "trial by jury," as found in the Georgia constitutions.[110]

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103. *Id.*

104. *Id.* art. III, § 1.

105. *Compare* PATRICK, *supra* note 7, at 225 (noting that recruits in the 1812 invasion of East Florida had an interest in maintaining slavery as "a necessary method of control"), *and id.* at 289 (noting that contemporary English law prohibited slavery), *and* WILLIAM S. COKER & THOMAS D. WATSON, INDIAN TRADERS OF THE SOUTHEASTERN SPANISH BORDERLANDS, 1783–1847 292–93 (1986) (similarly acknowledging that contemporary British law did not recognize slavery), *with* GA. CONST. of 1798, art. IV, §§ 11–12 (which formally recognized the existence of slavery).

106. PATRIOT CONST. of 1812, art. III, § 4, para. 2.

107. *See id.* art. I, § 3 (referencing the election of legislative-council members); *id.* art. II, § 1 (noting that the director "shall be elected by a majority of the voters present" but neglecting to specify the particulars of such a vote).

108. *See generally id.* (making no mention of individual rights).

109. *Id.* art. II, § 9.

110. GA. CONST. of 1789, art. IV, § 3; GA. CONST. of 1798, art. IV, § 5.

This was either a scribal error or it reveals the Patriots' realization that Patriot judicial institutions would not function long enough to establish a mechanism for juries or their frustration with Spanish legal process, in which the governor often sat as the judge of the tribunal. Again, following the Georgia constitutions, the writ of habeas corpus was specifically listed as a right belonging to "all persons."[111] The whole document has a haphazard organization and a contingent quality that fit the overall plan of a temporary and transitional government. It contained minimal expectations.

The transitory nature of the document is evident throughout its provisions. Even the name of the new entity created by the Patriot Constitution varied within the text. At some places the newly independent state was named a "Province" and in other places a "Territory."[112] The text of the constitution referred only twice to East Florida as a "country."[113] Indeed, the ambiguity of the precise nature of the entity created was revealed in one manuscript of the Patriot Constitution where the word "country" was struck out and replaced with "territory."[114] Not once does the Patriot Constitution use the appellation "Republic of East Florida," which was used by the Patriots elsewhere. By adopting the term used by the United States for regions that were part of it before gaining statehood, the constitution's use of the term "territory" was consistent with the Patriots' goal of annexation by the United States and reinforced the transitory nature of the government established under the constitution.[115]

There is similar imprecision in terminology elsewhere in the text. For example, the legislative power is usually labeled the legislative council, yet one article states that laws will govern "until altered by Legislative Authority."[116] Even the choice of the term "Legislative Council" seems to have been specifically pointed toward the incorporation of the territory into the United States, as the United States used this term for legislative bodies within

111. PATRIOT CONST. of 1812, art. II, § 10.

112. *Id.* pmbl., para. 2 (referring both to "Province" and "Territory"); *id.* art. III, § 4, para. 2.

113. *Id.* art. I, § 7; *id.* art. II, § 1 (referencing "Territory").

114. PATRIOT CONST. of 1812, art. II, § 2, *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, f. 203v (Nat'l Archives Records Serv.).

115. PATRICK, *supra* note 7, at 166.

116. PATRIOT CONST. of 1812, art. III, § 1.

U.S. territories. The term "Legislative Council" was in fact the term adopted for the legislative body of the Territory of Florida in 1822.[117] The concluding passages of the constitution reiterate the transitory nature of the constitution and its government. The government was intended "to exist and be in operation only until the United States shall acknowledge this Territory as part of the United States," and the constitutional delegates had confidence that the United States would ratify the Treaty of Cession.[118] Several provisions called for the terms of office or provisions to run only until the territory became part of the United States. The legislative council would cease to exist on the territory's joining the United States.[119] The chief executive officer of the territory, the director, was to hold office "until this Country shall be received by the United States."[120] Those impeached and removed from office under the Patriot Constitution might still be tried under the laws of the United States.[121] Thus, the Patriot Constitution employed a variety of terms to signal its instrumental and transitory nature as a document leading to annexation by the United States.

As a transitional document, the Patriot Constitution sought to shift sovereignty from Spain to the United States. Georgia, on the border with East Florida and the home of most of the Patriots, had a special status. George Mathews had served as Governor of Georgia in three terms from 1787 to 1788 and from 1793 to 1796.[122] It is likely that when he turned to the task of reviewing constitutional language for East Florida, he gravitated towards the language of the Georgian constitutions. As Governor in Georgia during these years, Mathews would have observed firsthand the functioning of the state under the Georgia Constitution of 1789.[123] It also appears that those charged with preparing the Patriot Constitution made substantial use of the Georgia

117. An Act for the Establishment of a Territorial Government in Florida, 17th Cong., 1st Sess., Sec. 5, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE AND TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 658 (Francis Newton Thorpe ed., 1909).

118. PATRIOT CONST. of 1812, art. III, § 4.

119. *Id.* art. I, § 3.

120. *Id.* art. II, § 1.

121. *Id.* art. I, § 12.

122. Stagg, *supra* note 16, at 271, 282 n.36.

123. *See* GA. CONST. of 1789, art. II, § 6 (stating that the Governor "shall be commander-in-chief in and over the State of Georgia and of the militia thereof").

Constitution of 1798. McIntosh, a former member of the constitutional convention that drafted the Georgia Constitution of 1798, was directly involved in the preparation of the Patriot Constitution.[124] And drafters are not ones for reinventing the wheel, or in this case, a constitution.

The text of the Patriot Constitution was prepared from provisions of the Georgia constitutions of 1789 and 1798, with several provisions being drafted specifically to meet the needs of the moment. The Patriot Constitution's borrowing of constitutional provisions was consistent with the unusual status of the Patriot Constitution as an admittedly transitional document and one that incorporated Georgia and United States law when consistent with the Patriot Constitution.[125] Of the Patriot Constitution's twenty-nine articles, twenty either draw their inspiration from the Georgia constitutions of 1789 and 1798, adopt and modify the language of these constitutions, or repeat their language verbatim. The following list notes the correspondence of the Patriot Constitution's provisions with those of the Georgia constitutions:

The Patriot Constitution	Georgia Constitution	Subject of Article
Art. I, § 1	Art. I, § 1 (1798)	separation of powers
Art. I, § 2	Art. I, § 2 (1798)	composition of legislature
Art. I, § 3	Art. I, § 2 (1789) Art. I, § 3 (1798)	election and term of legislators
Art. I, § 4	Art. IV, § 1 (1798)	qualification to vote
Art. I, § 6	Art. I, 7 (1798)	territorial apportionment of legislators
Art. I, § 10	Art. III, § 1 (1798)	erecting courts
Art. I, § 11	Art. I, § 16 (1789) Art. I, § 22 (1798)	legislative powers

124. PATRICK, *supra* note 7, at 56.
125. PATRIOT CONST. of 1812, art. III, § 1.

Art. I, § 12	Art. I, § 5 (1789)	impeachment of officers
Art. I, § 13	Art. I, § 4 (1789) Art. I, § 13 (1789) Art. I, § 13 (1798)	judge of elections to legislature & power to make internal rules
Art. II, § 1	Arts. II, §§ 1–2 (1789) Arts. II, §§ 1–2 (1798)	election and term of executive office, director or governor
Art. II, § 2	Art. II, § 3 (1789) Art. II, § 4 (1798)	qualification to serve as executive office
Art. II, § 3	Art. II, § 4 (1789) Art. II, § 4 (1798)	succession of executive office on death
Art. II, § 4	Arts. II, §§ 6–7 (1789) Arts. II, §§ 6–7 (1798)	executive official as Commander in Chief & power to pardon
Art. II, § 5	Art. II, § 8 (1789) Art. II, § 8 (1798)	power to convene legislature
Art. II, § 6	Art. II, § 10 (1789) Art. II, § 10 (1798)	veto power and two-thirds override
Art. II, § 7	Art. II, § 11 (1789) Art. II, § 13 (1798)	great seal of the territory or state
Art. II, § 9	Art. IV, § 3 (1789) Art. II, § 9 (1798)	trial by judge and freedom of the press
Art. II, § 10	Art. IV, § 3 (1789) Art. IV, § 9 (1798)	habeas corpus
Art. III, § 3	Art. I, § 20 (1798)	convicts not eligible for public office

The table reveals that the Patriot Constitution borrowed heavily in structure and substance from the Georgia Constitution of 1798 and, to a slightly lesser extent, from the similar Georgia Constitution of 1789, especially in the Patriot Constitution's articles setting out the legislative and executive functions. As an example, two articles from the Patriot Constitution and the Georgia Constitution of 1798 may be compared. The Patriot Constitution provided the director with the following power:

> He shall issue writs of Election to fill all vacancies that may happen in the Legislative Council; & shall have power to convene the Legislative Council on extraordinary occasions, And shall give them from time to time information of the state of the Territory & recommend to their consideration such measures as he may deem necessary & expedient.[126]

The Georgia Constitution of 1798 stated of the governor:

> He shall issue writs of election to fill up all vacancies that happen in the senate or house of representatives; and shall have power to convene the general assembly on extraordinary occasions; and shall give them, from time to time, information of the state of the republic, and recommend to their consideration such measures as he may deem necessary and expedient.[127]

The third article of the Patriot Constitution deviates substantially from the Georgia models because the Patriots did not see the need to create a lasting system of courts as covered by the Georgia constitutions.

The most interesting articles are those original provisions that were created out of whole cloth to meet the transitional and international demands of the moment. These provisions addressed the transitional concerns of ceding East Florida to the United States and thus operated on an international level. The Patriot Constitution adopted a rhetoric of revolution. The Patriots did not admit to being an invading group of Georgians, but pre-

126. *Id.* art. II, § 5.
127. GA. CONST. of 1798, art. II, § 8.

tended to be Spanish subjects justly casting away the yoke of oppressive Spanish domination.[128] They sought to repeat the paradigm of 1776. Thus, the Patriot Constitution spoke of revolution. The franchise was limited to "free white m[e]n . . . and every soldier who [had] taken an active part in our Revolution."[129] Similar qualifications were required for membership in the legislative council or for holding the office of director.[130] Citizenship was extended to volunteers who engaged in the revolution.[131] Thus, the Patriot Constitution tied valid political action to participation in a "revolution" that defined the polity and provided a path to the constitution.[132] The Patriots asserted that they were part of a larger international movement of necessary revolution against Spain. Thus, the Patriots declared themselves "free and independent" with the further and unique hope expressed in a constitution to "become a Territory and a Component part of the Government of the United States."[133] It was only in the interim period of independence before cession to the United States that some government of the Territory was needed and therefore expressed in the articles of the Patriot Constitution.[134]

III. CONTEXT

The constitution served an international purpose and sought to address an international audience, particularly after the United States disavowed General Mathews's actions. The constitution signaled to the United States and to other nations that the Patriots had established some form of a legally cognizable international entity, even if the Patriot Constitution could not come to consistent terminology about what it had in fact created. As Stagg notes on this point, "In March 1812, the Patriots were no more than 'a set of men, in an inchoate state of revolution,' and

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128. PATRICK, *supra* note 7, at 64–68.

129. PATRIOT CONST. of 1812, art. I, § 4.

130. *Id.* art. I, § 7; *id.* art. II, § 2.

131. *Id.* art. I, § 5.

132. *Id.* pmbl.; *id.* art. II, § 2; *see* Horst Dippel, *A Nineteenth-Century "Truman Doctrine"* avant la lettre? *Constitutional Liberty Abroad and the Parliamentary Debate about British Foreign Policy from Castlereagh to Palmerston*, *in* CONSTITUTIONALISM, LEGITIMACY, AND POWER: NINETEENTH-CENTURY EXPERIENCES 23 (Kelly L. Grotke & Markus J. Putsch eds., 2014) (exploring the relationship between revolution and constitution and arguing that "[m]odern constitutionalism is the result of revolution"); Horst Dippel, *Modern Constitutionalism: An Introduction to a History in Need of Writing*, 73 LEGAL HIST. REV. 153, 153–69 (2005) (further exploring the foundations of constitutionalism).

133. PATRIOT CONST. of 1812, pmbl.

134. *Id.*

as such they were not a 'local authority,' whereas they could be so regarded after having 'gone thro[ugh] all the forms by which the U.S. themselves have arrived at a complete state of organization.'"[135]

In this regard, the Patriot Constitution serves as an example of the international dimension of American constitution-making recently explored in the work of David Golove and Daniel Hulsebosch.[136] The Patriot Constitution reached the U.S. federal government when the United States itself was still constructing and negotiating the international effects of its own Constitution.[137] Hulsebosch asserts that "American constitution-making began as an international process. All the American constitutions of the Founding Era, state and federal, were made with foreign, as well as domestic, audiences in mind."[138] The expectation for a "revolutionary portfolio" of related constitutional and international documents essential to international support for the United States during its founding helps explain the collection of documents McIntosh used to promote his international goals of East Floridian independence from Spain and subsequent cession to the United States.[139] The Patriot Constitution may be read as a constituent part of a package of Patriot revolutionary documents directed towards several audiences on several levels, from local property owners (including those claiming property in enslaved human beings) to international actors and heads of state. Similar to the portfolio of documents Americans unwrapped when seeking European help, the Patriots constructed their own portfolio to bolster recognition of independence, legal statehood, and commercial trustworthiness.[140] The early U.S. portfolio consisted of early state constitutions, the Declaration of Independence, the Articles of Confederation, and the Model Treaty of commerce.[141]

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135. Stagg, *supra* note 17, at 54 n.99 (quoting Crawford to Monroe (Aug. 6, 1812), *in* JAMES MONROE PAPERS (Library of Congress)).

136. *See* Hulsebosch, *supra* note 2, at 759–822 (observing that the drafting of the United States Constitution was a diplomatic and cultural endeavor designed to encourage Europe to view the United States as a legitimate nation); *see generally* Golove & Hulsebosch, *supra* note 2 (arguing that a primary purpose of the United States Constitution was to obtain recognition and acceptance in the international community).

137. Golove & Hulsebosch, *supra* note 2, at 1015–18 (noting that these effects lasted until at least the end of the War of 1812).

138. Hulsebosch, *supra* note 2, at 761.

139. *Id.*

140. *See* Golove & Hulsebosch, *supra* note 2, 1016 (noting that U.S. diplomats to European countries often provided a copy of the U.S. Constitution).

141. Hulsebosch, *supra* note 2, at 761, 764; *see also* ARMITAGE, *supra* note 2, at 35;

The Patriot portfolio consisted of the Patriot Manifesto (Declaration of Independence), the Patriot Constitution, and the Patriot Articles of Cession. As mentioned above, we know little about the Manifesto, although it seems likely the language found in the preamble of the Patriot Constitution reflected the sentiments that such a declaration contained. Mathews stated that he sent a copy of the "Declaration of Independence" and a "certified copy of an original declaration" to James Monroe on April 16, 1812.[142]

This indicates that Mathews used a separate document other than the constitution, sometimes called the Manifesto and sometimes called the Declaration of Independence, in his international dealings with the United States. As Hulsebosch notes, declarations of independence set the stage for characterizing armed conflict under international law.[143] He further observes that declarations of independence, like declarations of war, have a typical structure of setting out grievances recording the patience of the oppressed people, and as a result, justifying a declaration of a change in status. Declarations were one step towards shifting a rebellion to a justified war. A proper war had internationally recognized rules for maintaining neutral trade and for establishing the status of other countries.[144]

If the assertions of the Patriot Manifesto (Declaration of Independence) can be extrapolated from the preamble of the Patriot Constitution, several grievances were averred to justify the Patriot revolution. The Patriots claimed an unsupportable bondage under Spain, oppressive Spanish laws, tyrannical rule, corrupt justice, and fears of East Florida being sold to another foreign power.[145] Religious oppression also appeared as a theme, but only secondarily. One portion of the preamble complains that the Patriots saw a common nature in all people and did not "idolize[] their priest[s]," presumably as Roman Catholics did.[146]

Golove & Hulsebosch, *supra* note 2, at 1063.

142. Letter from George Mathews to James Monroe, Sec'y of State (Apr. 16, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, f. 128 (Nat'l Archives Record Serv.).

143. Hulsebosch, *supra* note 2, at 772–75.

144. Hulsebosch, *supra* note 2, at 791–93; *see also* ARMITAGE, *supra* note 2, at 14, 21, 31–35, 141; BILLIAS, *supra* note 2, at 16–22; Golove & Hulsebosch, *supra* note 2, at 941–43.

145. PATRIOT CONST. of 1812, pmbl.

146. *Id.*

The extent of the contemplated religious settlement was expressed only in the Patriot Articles of Cession.[147] One provision of the Patriot Articles of Cession guarantees East Floridians under the United States "the full and free enjoyment of religious toleration either agreeable to the rites of the Roman Catholic Church or any other form of adoration that may suit their conscience."[148] Another portion of the Patriot Articles of Cession guaranteed that priests would continue to enjoy the same subvention they received from Spain for life or as long as they resided in East Florida while performing their religious function.[149] Such concessions to Roman Catholicism were most likely contemplated as necessary appeasements to East Florida's Roman Catholic population despite the Patriots' apparent disdain of Roman Catholicism's links to the Spanish monarchy.

Thus, the Patriot Constitution reflected the Patriots' awareness that documents were needed to establish sufficient international legal personality to engage in cession negotiations with the United States. Decades earlier, American revolutionaries (perhaps among them General George Mathews) knew a constitution was central to claims of independence and international recognition for the United States.[150] As Hulsebosch writes:

> [A]lmost all revolutionaries agreed it was important to latch onto written constitutions as a way to make a claim for nationhood. To act and to be seen as a nation, a polity had to have a constitution, and the brand-new revolutionary states seeking diplomatic relations could not easily make their case based on local scripts of customary or ancient constitutions.[151]

When McIntosh wrote Monroe on July 30, 1812, he explicitly adopted this explanation for the recent promulgation of a constitution, stating:

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147. *See* Patriot Articles of Cession, art. II.
148. *Id.*
149. *Id.* art. IV.
150. *See* Golove & Hulsebosch, *supra* note 2, at 935 ("[A] core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states."); *id.* at 981–82 (discussing how the Framers balanced their twin goals of "popular sovereignty and international respectability in the design of the new constitutional system").
151. Hulsebosch, *supra* note 2, at 766.

> Firmly confiding in the assurances and declarations of General Mathews and in the full belief that we and our country want to be taken under the protection of the United States, a temporary form of Government was adopted merely to prevent confusion and to enable us to make a cession to the United States. This form answered our intention, until lately, when it was thought advisable to establish a more detailed one, lest the first should not be considered as sufficient to authorize a cession.[152]

The challenges were similar, at least from the perspective of a colony seeking not to conquer the imperial power and take over its entire realm but rather to shear off a portion of territory that would be recognized as independent and internationally autonomous. Hulsebosch notes that Adams's solution was a revolutionary portfolio of documents establishing international autonomy.[153] In a move calculated to mirror U.S. independence under the parallel and historically rich title of "Patriot," McIntosh similarly produced documents to effect this surgical excision of sovereignty for a portion of an empire.

Hulsebosch soundly reminds us that commerce and property, in addition to domestic politics and international relations, were essential parts of such portfolios.[154] Just as the U.S. portfolio contained the Model Treaty, the Patriot portfolio contained the Articles of Cession that addressed several aspects of commerce and property related to the transfer of East Florida to the United States. The Model Treaty sought to protect neutral shipping during war and open trade during peace.[155] The Patriot Articles of Cession covered several issues not addressed in the Patriot Constitution, but as part of the Patriot revolutionary portfolio, the Patriot Articles of Cession completed the constitutional package propounded by the Patriots. Issues addressed in the Patriot Articles of Cession included religion, property rights, the transfer of

152. Letter from John McIntosh to James Monroe, Sec'y of State (July 30, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, f. 212 (Nat'l Archives Records Serv.).

153. Hulsebosch, *supra* note 2, at 799–800.

154. *Id.* at 763.

155. *Id.* at 795–98.

Spanish officials and soldiers to equivalent U.S. positions, shipping, the permission for dissenters from cession to emigrate, planned hostilities against Pensacola and Mobile, and the possibility of East Florida rejoining Spain by majority vote of East Floridians in the future.[156]

The property and trade provisions of the Patriot Articles of Cession reveal the commercial side of the Patriots' revolutionary portfolio. They guaranteed titles obtained from Spain or through processes valid under Spanish law.[157] Licenses to cut timber, an important economic benefit, would be respected until May 1, 1813.[158] The Articles also made provision for revolutionaries who had not received lands from Spain in the same amount such individuals were expecting from Spain.[159] The trade provisions were even more important from the international standpoint. Subject to ordinarily imposed duties, East Florida would be open to "a liberal intercourse with Great Britain or any other nation" until May 1, 1813.[160] Property owners wishing to leave East Florida were granted a year to remove their property, including enslaved humans unless going to a free state, and to appoint agents to sell their property.[161]

The Patriot portfolio also recognized the interests that international traders and local property holders asserted over land, trade, and human beings through slavery. The process of shifting East Florida from Spanish to U.S. sovereignty necessarily had to account for foreign owners and actors in the region. As the United States moved towards war with Great Britain in 1812, it recognized the utility of good relations with the British merchants who traded with Indians in the area.[162] These traders had established an extensive network of trading posts, stores, and facilities that extracted substantial wealth from native communities through the fur and pelt trade.[163] Holding a de facto monopoly on this trade was Panton, Leslie and Company, whose partners were Scots merchants, including William Panton, John Leslie,

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156. Patriot Articles of Cession, arts. II–VI.
157. *Id.* art. III.
158. *Id.* art. IV.
159. *Id.* art. III.
160. *Id.* art. IV.
161. *Id.*
162. Stagg, *supra* note 16, at 276–77.
163. COKER & WATSON, *supra* note 105, at 31–35.

and John Forbes.[164] The trading house was known under various combinations of these names at different times and locations.[165] Eschewing political complications in commerce, the Patriots tolerated Forbes's activities as a merchant.[166] Forbes, too, had assurances from Mathews that his company would be protected if East Florida were occupied by the United States.[167] These concerns were directly addressed in the provision of the Articles of Cession addressing free trade.[168]

From the U.S. standpoint, the Patriot Articles of Cession were unexpectedly conciliatory on the subject of trade, especially because Great Britain would be one of the beneficiaries of open ports in U.S. East Florida. Patriot and U.S. interests alike sought to maintain good relations with traders, even British traders such as John Forbes, who could keep the wheels of commerce turning and could ensure relatively peaceful interactions with native populations.[169] In this light, Article IV of the Articles of Cession required that ports of East Florida remain open to Great Britain until at least May 1813. Mathews later argued for May 1814.[170] Stagg observes that the provision would have had a doubly beneficial effect for the Patriots and the cession of East Florida to the United States. First, it would remove the concerns of "local merchants and planters, whose prosperity was heavily dependent on British trade."[171] Second, it would have the practical effects of permitting John Forbes and Company to continue its operations.[172] Protecting the House of Panton and Forbes was also a personal benefit to Mathews, who had sought to purchase land from Forbes.[173]

Thus, the Patriots' revolutionary portfolio addressed the same concerns and topics found in the American revolutionaries' documents. The Patriot Manifesto served as a declaration of independence and set out East Florida as a separate sovereign for purposes of establishing international recognition and appropri-

164. *Id.* at 15.
165. *Id.* at 1–30.
166. Stagg, *supra* note 16, at 276.
167. *Id.* at 283–84; *id.* at 117.
168. Patriot Articles of Cession, art. IV.
169. Stagg, *supra* note 16, at 276–77.
170. *Id.* at 288 n.55 (citing Letter from George Mathews to President James Madison (Apr. 16, 1812), *in* MADISON PAPERS: PRESIDENTIAL SERIES 4:327 (Library of Congress)).
171. *Id.* at 289.
172. *Id.* (citing a March 21, 1812 letter from George Mathews to James Monroe).
173. *Id.* at 293–94.

ate treatment in war. The Patriot Constitution provided internal government and a written document setting out the foreign-relations law of East Florida. The Patriot Articles of Cession addressed important questions of trade, commerce, property, and religion. The East Florida Patriots were following a pattern established by the American Patriots several decades earlier, or, in the words of their chief executive, Director John Houston McIntosh, "as some of their forefathers had done in '76."[174]

Modeling their actions on revolutionary practices at the birth of the United States provided the Patriots with an intellectual structure of "documentary constitutionalism," to use Billias's term.[175] There were, however, additional regional constitutional pressures at play. On March 19, 1812, Spain promulgated the Constitution of Cádiz, which was to serve as the basic text of its constitutional monarchy until 1814 on the Iberian Peninsula and in the Americas, including East Florida.[176] If Spain found a written constitution useful as it faced a French invasion and an absent throne, how much more would this band of a few hundred soldiers and adventurers benefit from written documents. The Patriot revolutionary portfolio, with the Patriot Constitution as its centerpiece, sought to establish the legitimacy of its government in the process of asserting independence and negotiation with the United States. Despite their small numbers, questionable status, and relative legal and political simplicity, the Patriots could not ignore the pressures of the Age of Constitutions in the Americas.[177] Without a constitution, the Patriots must have felt like an illegitimate actor surrounded by great powers with recently written constitutions. The Patriot Constitution was essential in their international goal of splitting East Florida from Spain and attaching it to the United States.

IV. CONCLUSION

The Patriot Constitution was the product of the perceived po-

174. Letter from John H. McIntosh to James Monroe, Sec'y of State (July 30, 1812), *in* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publications, Reel 2, Jan.–Dec. 1812, ff. 212v–213 (Nat'l Archives Record Serv.).

175. BILLIAS, *supra* note 2, at 8.

176. *See generally* M.C. MIROW, FLORIDA'S FIRST CONSTITUTION, THE CONSTITUTION OF CÁDIZ: INTRODUCTION, TRANSLATION, AND TEXT (2012); Mirow, *supra* note 79, at 271.

177. M.C. Mirow, *The Age of Constitutions in the Americas*, 32 L. & HIST. REV. 229, 233–34 (2014) (explaining the influence that American institutions have had on Latin American constitutional developments).

litical necessity of justifying the Patriots' military actions with a document that would clothe their conduct in the rhetoric of justified rebellion. The Patriots had first relied only on their Manifesto or Declaration of Independence, but as U.S. support for their enterprise waned and eventually collapsed, the Patriots turned to a fuller expression of their sovereignty and independent political action through a constitution. The Patriot Constitution increased the likelihood that the executive it established would be recognized by officials of other governments, particularly the United States. It sought to transform a group of military adventurers from Georgia into a nation capable of conducting foreign relations.

The Patriot Constitution could only go so far. The preamble of the Patriot Constitution gave a relatively cursory list of grievances against Spain and its tyranny over East Floridians. The Patriots expressed their feelings of bondage, particularly when comparing their lot to citizens of the United States. Spain was divided and under attack and might even offer East Florida up for sale. Without specificity, the Patriots noted Spain's oppressive laws, the tyranny of its governor, and the corruption of its judges. Based on these grievances, the Patriots declared their independence. It was not, however, to be a lasting independence. The Patriots sought to create a transitional territory that would immediately be subsumed into the United States.

The drafters of the Patriot Constitution relied heavily on the Georgia constitutions of 1789 and 1798. Mathews and McIntosh would both have been familiar with these texts, and indeed, the Georgian majority within the Patriots might also have found these provisions comfortably familiar, especially as they related to the legality and regulation of slavery.

The United States is mentioned several times in the Patriot Constitution as the ultimate goal of East Florida's independence, and indeed, the Patriot Constitution claims that the signers wished to be "[c]itizens of a territory of the United States."[178] Despite the sensibilities of the Patriots, political considerations on the part of the United States meant that it was unable to assist the Patriots and their claim of an independent East Florida anxious to join the United States. The greater political structure afforded by the Patriot Constitution was too little and too late.

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178. PATRIOT CONST. of 1812, pmbl., para. 2.

The Patriot Constitution speaks to broader questions concerning the use and development of constitutions in early nineteenth-century America. Hulsebosch and others have written about packages of documents that serve internal, domestic constitutional aims and external, international goals. The Patriot Manifesto (Declaration of Independence), the Patriot Articles of Cession, and the Patriot Constitution formed a "constitutional portfolio" that reflected the international constitution-making of the period.

APPENDIX I
[THE PATRIOT CONSTITUTION][179]

[Provisional Government assented to and passed the 17 July 1812.][180]

[200] The Constitution [of][181] East Florida

Preamble

The people of the province of East Florida have lived for years under a bondage almost unsupportable, and though many of them have felt and all of them had witnessed the happiness which their neighbors, divided from them only by the river St. Marys experienced, they remained in this abject state, [one word struck out] sensible of their situation until they discovered that new attempts were made to oppress and degrade them. It might have been expected that a people who neither idolized their priest nor could think it an honor to lick the dust from the feet of their oppressors, but who know that man, in whatever garment he might be clothed, to whatever power he might be elevated, was like themselves, liable to all the imperfections and weaknesses of our common nature, with probably a larger pro-

179. This transcript was prepared from the text found in STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publication, Reel 2, Jan.–Dec. 1812, ff. 200–05 (Nat'l Archives Records Serv.) [hereinafter State Department Copy]. This text appears to be a contemporaneous copy prepared by Patriot Secretary William Hamilton. *See* STATE DEPARTMENT TERRITORIAL PAPERS, FLORIDA SERIES 1777–1824, *microformed on* National Archives Microfilm Publication, Reel 2, Jan.–Dec. 1812, f. 205 (Nat'l Archives Record Serv.). Folio numbers are provided in square brackets in the text. There is also a digital copy of the text and transcription in frames 5 to 30 of *The Patriot Constitution of 1812*, FLORIDA MEMORY STATE LIBRARY AND ARCHIVES OF FLORIDA, https://www.floridamemory.com/items/show/264067?id=1 [https://perma.cc/AAD8-TSVP] (last visited Mar. 7, 2017) [hereinafter Florida Memory copy]. This copy has served as a guide while I prepared the transcript, and I have tried to note differences between the two manuscripts. The series description of the Florida Memory copy states, "This series consists of a handwritten copy of the 1812 Patriot Constitution of the Republic of East Florida, and miscellaneous documents related to the Patriot Rebellion of 1812-1813. The location of the original, or any other copies, is unknown." *See Series Description*, FLORIDA MEMORY STATE LIBRARY AND ARCHIVES OF FLORIDA, https://www.floridamemory.com/collections/constitution/series.php [https://perma.cc/ZV8F-H9YJ] (last visited Mar. 7, 2017). The State Department copy used here provides a second known copy of the Patriot Constitution.

180. Notation taken from Florida Memory copy.

181. Inserted above line with caret. State Department Copy, Reel 2, Jan.–Dec. 1812, f. 200.

portion of its vices, would have been the first in the Spanish Territory to have ["been the first" struck out][182] declared themselves free and independent. They saw however their Brethren of the south seize this honour, and with the liveliest sympathy, wished them every success.

Aware of the dangers ever attendant on revolutions, it was not until after mature deliberation that the people of East Florida took up arms against a Government whose Territories in both Hemispheres are divided, conquered, and Revolutionized. And who could no longer afford that protection, without which its allegiance cannot be claimed without enumerating the many impolitic & oppressive Laws and Acts of the Spanish Government, which the unhappy man [200v] living under it only can be familiar with, and which are tyrants, the one in [the][183] character of Governor with brutal violence and the other in that of Judge with the most shocking corruption, latterly enforced upon us, we have discovered in order that our degradation might be complete, that we have been offered with our Country for Sale, to both the Great Belligerents of Europe, patience and submission yielded to the duties we owed ourselves and our posterity, we declared ourselves free and independent and we have driven our oppressors with their mercenaries within the walls of the Theatre of their vile Acts, and over the dungeons of their wretched victims.

We acknowledge with grateful hearts the Goodness of the Great Legislator of the Universe, for the mercies already afforded us, and we hope through his providence shortly to become a Territory and a Component part of the Government of the United States, but until it can become our pride and boast to feel that we are Citizens of a Territory of the United States, and under rules and regulations of that Government, it becomes highly necessary that a Government should be established in this Province to prevent Anarchy and Confusion. Therefore we the delegates of the freemen of East Florida chosen and assembled for the Express purpose of framing a Constitution under the Authority of the people do declare that a Government for this Territory shall be established in the manner and form following, to wit:

182. *Id.*
183. *Id.* at Reel 2, Jan.–Dec. 1812, f. 200v.

Article 1st

The Executive, Legislative, and Judiciary Departments, shall be separate and distinct so that neither exercise the powers of the other, nor shall any person exercise the powers of the other more than one of them at the same time [201] except that the Judges of the Inferior Courts and Justices of the Districts shall be eligible to the Legislative Council.

2nd. The Legislative Authority shall be composed of fifteen members and be called the Legislative Council of East Florida.

3rd. The Members of the Legislative Council shall be elected by the inhabitants of this Territory as pointed out by this Constitution and shall exist until the Territory shall be received by the United States, and become subject to the laws thereof and other officers in manner and form of other Territories of the United States.

4th. Every free white man of twenty one years of age and every soldier who has taken an active part in our Revolution, and shall have been a resident in the Territory one year previous to the first day of April last, and will swear or affirm that he considered East Florida his only and actual place of residence at the commencement of the Revolution shall be duly qualified to vote agreeable to this Constitution for the Legislative Council and Director.

5th. All volunteers who may have been engaged in the Revolution with the people of East Florida, shall at the fall or surrender of St. Augustine be entitled to all the privileges of free Citizens of the Territory.

6th. The Territory of East Florida shall be divided into two Districts, to be known by the appellation of the North and South Districts, the Nausau River shall be the dividing line commencing at the mouth of said River and continuing [201v] up its stream according to the Ancient Boundary. The North District to send Eight Members and the South District to send seven Members.

7th. No person shall be eligible to a seat in Council unless he is a free white man of the age of twenty one years and hath been a former subject of this Territory or has been an actual resident in the Country one year previous to the first of April last and considered himself an actual resident before the Revolution nor unless he be legally seized and possessed in his own right of a

free hold Estate or of personal property to the value of one thousand dollars.

8th. The Legislative Council shall be chosen at or near the five mile house on the twenty fifth of July and shall assemble on the twenty seventh at Mr Zepheniah Kingsleys[184] plantation on the west side of St Johns River and at such other times and places as they may think necessary and [not less than 2 thirds of the Legislative Council][185] shall constitute a quorum for doing business, but a less number may attend and adjourn from day to day and compel the attendance of absent members.

9th. No Bill or Resolve of the Council shall become a law and have force as such until it shall have been laid before the Director for his revisal, and if he upon such revision approve thereof, he shall signify his approbation by signing the same, but if he have any objections to the passing [of] such bill or resolve he shall return the same together with his objections thereto in writing to the Council who shall enter the objections made by the Director on the [202] Records and proceed to reconsider the said Bill or Resolution, but after such reconsideration, two thirds of the Council present shall notwithstanding said objection agree to pass the same, it shall have the force of law.

10th. The Council shall have full power and authority to erect and constitute Judicatures and Courts of record or other Courts to be held in the Name of the Territory for the hearing, trying and determining all manner of crimes, offences, pleas, processes, plaints, actions, matters and things whatever arising or [happening][186] within the Territory, or between or concerning persons inhabiting, residing, or brought within the same, whether the same, be criminal or civil, and whether the said pleas be real, personal or mixed and for the awarding and making out Executions thereupon to which Courts and Judicatures are hereby given and granted full power and Authority from time to time to administer Oaths or Affirmations for the better discovery of truth in any matter in controversy or depending before them.

11th. And further, full power and authority is hereby given

184. For information on Zephaniah Kingsley, see JANE G. LANDERS, COLONIAL PLANTATIONS AND ECONOMY IN FLORIDA 99–100, 167–71 (2000), and see generally DANIEL L. SCHAFER, ZEPHANIAH KINGSLEY JR. AND THE ATLANTIC WORLD: SLAVE TRADER, PLANTATION OWNER, EMANCIPATOR (2013).

185. Inserted above line with caret. State Department Copy, Reel 2, Jan.–Dec. 1812, f. 201v.

186. Inserted above line with caret. *Id.*

and granted to the said Legislative Council from time to time to make ordain and establish all manner of wholesome and reasonable Orders, Laws, Statutes, and ordinances and instructions either with penalty or without (so as the same be not repugnant to the Constitution) as they shall judge to be for the welfare and happiness of this Territory, and for the Government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the Government thereof, and to name and appoint as is hereafter provided for, All Civil and Military [202v] Officers of this Territory, and the forms of such oaths and affirmations as may respectively be administered unto them for the Execution of their several offices and places so as the same be not repugnant to the Constitution of this [one word struck out] Territory, and to impose and Levy all proportional, and reasonable assessments rates and taxes upon all the inhabitants of, and persons resident within the said territory and also to impose and levy reasonable duties and Excises upon any produce, goods, wares, merchandize and commodities whatsoever, brought into, produced, manufactured, or being within the same, to be issued and disposed of by warrant under the hand of the Director of this Territory, with the advice and consent of the Legislative Council, for the Public Service, in the necessary defense and support of the said Territory and the protection and preservation of the Citizens thereof, according to such acts as are and shall be in force within the same.

12th. The Legislative Council shall be a court with full authority to hear and determine all impeachments made by the petition of any fifty of the people of the Territory against any officer or officers of this Territory, for misconduct or maladministration in their office. But previous to every impeachment the members of the Council shall respectively swear truly and impartially to try and determine the charge in question, according to evidence. Their judgment however, which must consist of at least two thirds of the members present, shall not extend further than removal from office under this Territory, but the party so convicted shall be nevertheless liable to indictment, trial judgment and punishment according to the laws of this Territory or those of the United States.

[203] 13th. The Legislative Council shall appoint a president from their own body, and shall judge of the Elections, returns and qualifications of its own members and may determine the

rules of their own proceedings, punish their members for disorderly conduct, and with the consent of two thirds of the members present expel a member.

14th. The members of the Legislative Council shall take the following oath, I do solemnly swear that I will give my vote on all questions that may come before me as a representative of the people, in such a manner as in my judgment may best promote the good of this Territory, and that I will bear true faith and allegiance to the same and to the utmost, of my power, observe, support, and defend the same.

15th. All officers immediately attached to the Government of the Territory, as Secretary, Treasurer etc. and all officers attached to the Judiciary, as Judges of the Superior and Inferior Courts, Justices of the Peace, Attorney General, Sheriff and Coroner, and all military officers but Captains and Subalterns shall be chosen by the [Legislative][187] Council with the consent of the Director, But should the Director dissent to any such appointment, it shall nevertheless be confirmed by the concurrence of two thirds of the members present.

Article 2

1st. The Executive of the Territory of East Florida shall be vested in a Director who shall hold his office until this Country shall be received by the United States and become subject to her laws [203v] and regulations, he shall be elected by a majority of the voters present, and at the same time and in the same manner, as the Legislative Council, and should no person have a majority of the voters present, the Legislative Council shall have full power to elect him by ballot provided that he is not a member of their own body.

2nd. No person shall [be][188] eligible to the office of Director who shall not have born an active part in the revolution of this ["Country" struck out][189] Territory and who hath not attained to the age of thirty years and who does at this time possess five hundred acres of Land in his own right within the Territory and other species of property to the amount of fifteen hundred Dol-

187. Inserted above line with caret. *Id.*
188. Inserted above line with caret. *Id.*
189. *Id.*

lars.

3rd. In case of Death, Resignation disability or necessary absence of the Director the president of the Legislative Council shall exercise the Executive powers of Government until such disability or necessary absence be removed.

4th. He shall be Commander in Chief in and over the Territory of East Florida, and of the Militia thereof. He shall have power to grant reprieves for offences against the Territory, Except in cases of impeachment, and to grant pardons in all cases after conviction Except for Treason or murder, in which cases he may respite the Execution, and make a report thereof to the Legislative Council, by whom a pardon may be granted.

5th. He shall issue writs of Election to fill all vacancies that may happen[190] in the Legislative Council, and shall have power to convene the Legislative Council on extraordinary occasions [204] And shall give them from time to time information of the state of the Territory and recommend to their consideration such measures as he may deem necessary and expedient.

6th. He shall have the revision of all bills, resolves and appointments passed by the Legislative Council before the same be valid or becomes a law, But two thirds of the Legislative Council present may pass a law or make an appointment, notwithstanding his dissent, or should he not inform the Legislative Council within three days after the same shall be presented to him the same shall be considered valid as if it had received his signature.

7th.The great seal of the Territory shall be deposited in the office of Secretary and it shall not be affixed to any instrument of writing without it be by order of the Director and Legislative Council.

8th. All persons who shall be chosen or appointed to any office of trust before entering on the Execution thereof shall take the following oath or affirmation, "I do solemnly swear or affirm (as the case may be) that I will to the best of my abilities discharge the duties of ["my" struck through] the office to which I am appointed and preserve, protect and defend the Constitution of this Territory."

9th. The trial by Judge and freedom of the press shall be held inviolate.

10th. All persons shall be entitled to the benefit of the writ of

190. "Happen" repeated in text. *Id.*

Habeas Corpus.

Article 3

1[st.] The inhabitants of the Territory [of][191] East Florida being generally better acquainted with [204v] the laws of the State of Georgia than of other States, the laws of this said State and of the United States shall be considered as the Laws of this Territory as far as they agree with the Constitution of the same, and until altered by the Legislative Authority.

2nd. The Legislative Council shall have power to confirm all the resolutions and ordinances of the Constituted Authority which have or may be passed prior to the session of the Legislative Council.

3rd. No person who hath been Convicted of felony before any Court of the United States, shall be Eligible to any office or appointment of honor profit or trust within this Territory.

4th. The Legislative Council with the advice and consent of the Director, shall have power in all cases to make reasonable compensation to all Public Officers in such manner as they may by law direct.

This form of Government was assented to and passed this seventeenth of July one thousand eight hundred and twelve, in Convention of the Delegates of the freemen of East Florida. But it is expressly unequivocally and unanimously Declared by them, that it is intended to Exist and be in operation only until the United States shall acknowledge this Territory as a part of the United States. And they have full confidence that the Justice of the United States will direct them to ratify the Treaty of Session made between the Commissioners of this Territory [205] and their Agent, and that they will also Enable the people of this Territory to fulfil such Contracts as their necessities and perilous [situation][192] have or may oblige them hereafter to make.

John H. McIntosh President
Lod[owic]k Ashley
T. Hollingsworth

191. Inserted above line with caret. *Id.* at Reel 2, Jan.–Dec. 1812, f. 204.
192. Inserted above line with caret. *Id.* at Reel 2, Jan.–Dec. 1812, f. 205.

Nath[anie]l Hall
Z. Kingsley
D. L. H. Miller
John C. Houston
B. Harris
Nathaniel Mason
William Braddock
William G. Christopher
W. Craig
John D. Braddock
Hugh Slellings
W. Hamilton
Sec[retar]y.

APPENDIX II
[ARTICLES OF CESSION][193]

[119] Whereas the Inhabitants of East Florida being called upon by a variety of the most interesting considerations to themselves and their posterity to emancipate themselves from the Spanish Yoke and its galling effects and to take the management of their own affairs into their own hands and willing to participate in the advantages of a Government founded upon the principal of rational liberty, they offer unto the Government of the United States the Province of East Florida upon the following terms of cession:

Article 1st

We cede unto the United States all the lands belonging unto the said province metes and bounds as designated by the Spanish Government including all the Islands Harbors and inlets that belong to said Province together with all the houses arms and ordinances military stores and fortifications with everything that unto appertaining and every species of public property to which the Spanish Government had any claim when we took possession thereof.

Article 2nd

The United States agrees to receive the Province of East Florida under its protection as an integral [119v] part of its territory and doth guarantie unto its inhabitants the full and free enjoyment of religious toleration either agreeable to the rites of the Roman Catholic Church or any other form of adoration that may suit their conscience and also to protect and govern them agreeable to the rules and institutions of the liberal Government that constitutes their policy – by granting to them a territorial Gov-

193. Patriot Articles of Cession, *in* MISCELLANEOUS LETTERS OF THE DEPARTMENT OF STATE 1789–1906, *microformed on* National Archives Microfilm Publications, Jan. 1–June 30, 1812, M179, Roll 25, ff. 119–122 (Nat'l Archives Record Serv.). Another copy was sent to John McKee on March 25, 1812. *See* Stagg, *supra* note 16, at 288 (citing Mathews to McKee (Mar. 25, 1812), *in* MCKEE PAPERS). I have modernized spellings and extended abbreviations. I have left homonyms spelt as in the manuscript: thus, "principal" instead of "principle," and "their" instead of "there," for example.

ernment which as soon as their local situation will admit shall be upon a similar form and constitution with the territories bordering upon the Western States.

Article 3d

The United States Guaranties their titles to their lands as well as their titles to all lands obtained by Patents Warrant or in any other mode or manner from the Spanish Government as fully and amply as if they had been carried into complete effect by pursuing the method that the Spanish usages made necessary.

The United States agrees to give, grant [120] and confirm unto all those who have taken an active part in the revolution and who wish to become inhabitants of the Province who have not heretofore had grants of lands in consequence of being subjects to each and every one a tract equal in quantity and upon similar terms to those granted by the Spanish Government to the residents and as the volunteers in the late revolution were promised a certain number of acres not exceeding [blank of approximately four words' length]. Warrants for the performance of said promise which is held sacred and inviolate shall be granted.

Article 4th

The United States agrees to receive such of the Officers and Soldiers now in the service of the Spanish Government, provided they are of suitable age and ability to perform the duties incident to a military life into their service should they request it and to grant unto them, agreeable to their respective grade, the same pay and emoluments as Offices and Soldiers now in the service of the United States enjoy in which case the United States may either incorporate them into their own army or cause them to serve in separate Corps and those of the Army who are rendered unfit for duty by age, infirmities, or other disabilities should receive a pension [120v] equal to provision made by the United States for their infirm and disabled soldiers, which shall continue no longer than until they remain citizens of the United States, and as the Officers and Soldiers who may thus attach themselves and enter in the service of the United States may have arrearages of pay due to them from their Government which they will be precluded receiving. The United States will either by installment

as in their wisdom may seem proper cause to be paid unto such Officers and Soldiers the amount of the pay they were entitled to receive from the Spanish Government at the time they joined the Army of the United States, and further as their may be residents who aided and abetted in the cause of the revolution and who wish by resident to partake of its advantages who have debts due from the Spanish Government of which they must be debarred recovery by their adherence to the revolution – The United States doth agree to have all such claims liquidated and paid by installments as may be convenient.

The United States having a due respect for the church which the Fathers in the province have subventioned and for them individually do engage and stipulate that they shall receive ["during their natural lives" struck out] the same amount they have heretofore been accustomed to receive from their Government for their [121] services during their natural lives or as long as they reside in the Province, in the performance of their duties of their holy functions – and to prevent as many temporary inconveniences as possible resulting from revolution it is stipulated that the ports and harbors of East Florida shall be open to a liberal intercourse with Great Britain or any other Nation until the first of May One Thousand Eight Hundred and Thirteen, subject only to the Tonage and other customary duties payable in the ports of the United States, and as there are several who have obtained licenses to cut timber within said Province it is further stipulated that they shall have the full enjoyment of such privileges agreeable to its tenor until the first of May One Thousand Eight Hundred and Thirteen and as their may be some who from disaffection and other cause may wish to remove with their effects out of the Province, they are hereby permitted so to do taking and carrying with them their property, and any of that description may make and constitute an agent or agents for the purpose of vending any part or portion of their property. They shall have full and free right so to do and such agent may proceed in the execution of their trust unmolested for and during twelve months from the first of May One Thousand Eight Hundred and Twelve, and it is further stipulated that the [121] Inhabitants of East Florida shall have free right to emigrate from thence carrying with them their property of every description including their Negroes unless to some state where slavery is by law forbidden and that the inhabitants of other states shall have free

ingress with their property either to have in the province or for other purposes, and that should the Negroes belonging to any one in the Province be removed by and circumstances growing out of the revolution or incidental thereto the right shall remain sacred and inviolate, in the owner any law or usage to the contrary notwithstanding.

Article 5th

["X" placed before paragraph] Whereas the Government at Pensacola and Mobile will probably be excited to great exhilaration in consequence of this revolution and as they border upon tribes of Indians who might be engaged in acts of hostility their reduction is rendered indispensable for the security of East Florida, ["and we with subjects of East Florida" added] having prior to the cession proceeded to raise an army and to appoint the Officers for the revolution for said plans and having rendered ourselves incompetent to it by yielding up our funds to the United States, the United States doth agree to carry the same into full effect unless in their wisdom it should be deemed imperious to the province or the United States.

The United States granting unto [121v] the Officers and soldiers the same pay and emoluments as the Officers and soldiers in their service now enjoy. ["X" placed after paragraph]

Article 6th

This revolution not proceeding from a disgust as the cause for which the Spanish nation is now contending to whom and to their prosperity in their present struggle, the authors of sincerely wish well but from imperious necessity growing out of their local situation and the United States coinciding in the sentiment of prosperity to the cause of Spain – It is therefore ["further" struck out] stipulated and agreed that should the Spanish Government be successful and as a Nation assume her ranks among the nations of the Earth that provided a majority of the inhabitants of East Florida should wish to return and live under their former Government, that they shall have permission so to do provided that Spain first pays or secures to be paid unto the United States the full sum of damages for withdrawing the right to deposit at New Orleans and also the full sum of damages for

unjust Spanish Spoliations upon and of the property of the Citizens of the United States – also all expenses that may arise from protecting, defending, and governing the same – while under the United States Jurisdiction.

The inhabitants of East Florida agree [122] to yield a proper obedience to the laws and constituted authorities of the United States and to take the oath prescribed to support the Constitution of the United States as soon as thereto required.

JUSTICE STEVENS'S RELIGION CLAUSE JURISPRUDENCE AND HIS SYMPATHETIC INTERPRETERS: A CRITIQUE

KEVIN PYBAS*

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INTRODUCTION

Justice John Paul Stevens joined the U.S. Supreme Court in 1975 and retired nearly thirty-five years later as the third-longest-serving Justice in the Court's history.[1] During his tenure on the Court, he wrote, by my rough estimate, approximately thirty opinions involving free-exercise and establishment issues, most of which were concurring or dissenting opinions.[2] Over the course of his time as a Justice, the Court changed its approach to the Free Exercise Clause and to certain Establishment Clause issues, though Stevens's view of both remained constant from the outset. Throughout his tenure on the Court, he consistently sought to minimize religion's presence in the public sphere. He thus opposed, among other things, almost all public aid to religion, regardless of whether it took a direct or indirect route in getting there and no matter what it purchased.[3] He opposed

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1. CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE 1 (2015).

2. I say that my count is an estimate because, although I do not believe I have overlooked a Religion Clause opinion authored by Justice Stevens, it is possible that I have.

3. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 684–86 (2002) (Stevens, J., dissenting) (arguing that state law providing tuition assistance to students enrolled in religious schools violates the Establishment Clause); Mitchell v. Helms, 530 U.S. 793, 867, 903 (2000) (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (arguing that federal law providing instructional materials such as library books, media materials, and computers to religious schools violates the Establishment Clause); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 863–64 (1995) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (objecting that the Establishment Clause prohibits university from paying printing costs of newspaper produced by student-run religious organization); Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., joined by Brennan, Blackmun, & Stevens, JJ., dissenting) (arguing that Establishment Clause is violated by law allowing families of children attending parochial schools a tax deduction for school expenses); Comm. for Pub. Educ. v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (objecting to the use of public funds to administer standardized exams in religious schools); Wolman v. Walter, 433 U.S. 229, 264–66 (1977) (Stevens, J., concurring in part and dissenting in part) (agreeing with plurality that the Establishment Clause permits state-funded provision of health services to parochial school students at religiously neutral locations but prohibits state from loaning instructional materials to religious schools and from paying for religious-school field trips and dissenting from plurality opinion permitting state to purchase secular textbooks and loan them to religious schools, and allowing state to reimburse parochial schools for cost of standardized testing and scoring), *overruled by Mitchell*, 530 U.S. 793; Roemer v. Bd. of Pub. Works, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) (arguing that law providing financial grants to religious colleges for secular education violates the Establishment Clause). There is one case, however, in which Justice Stevens believed that the Establishment Clause did not prohibit the public benefit at issue. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), Justice Stevens was part of a unanimous decision holding that there was no Establishment Clause violation in allowing a college student to use neutrally available state vocational-rehabilitation-assistance funds at a Christian college to prepare for a career in ministry. *Id.* at 481, 483–85.

state-sanctioned prayers,[4] religious displays on public property,[5] religious exemptions from neutral laws of general applicability,[6] and some but not all statutory grants of heightened protection to religious believers.[7] When he joined the Court, he was regularly in the majority interpreting the Establishment Clause to require a "high wall" of separation between church and state.[8] But by the time he retired, the Court had abandoned the high-wall view and thus was more accepting of religion in the public sphere, at least with respect to public aid.[9] While changes in the composition of the Court eventually led it away from the high-wall approach, those same changes led it to Justice Stevens's understanding of the Free Exercise Clause. That is, in 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[10] the Court recast the requirements of the Free Exercise Clause, holding that it prohibits only laws that intentionally dis-

4. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (objecting that certain school-district policies, including a policy of permitting student-led, student-initiated prayer before football games, violate the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (objecting that an Alabama statute authorizing one minute of silence for "meditation or voluntary prayer" is a violation of the Establishment Clause).

5. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 708 (2006) (Stevens, J., dissenting) (objecting to monument displaying Ten Commandments on state capitol grounds); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 798 n.3 (1995) (Stevens, J., dissenting) (objecting to placement of Latin cross on state capitol grounds); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 650–51 (1989) (Stevens, J., concurring in part and dissenting in part) (agreeing the crèche display violated Establishment Clause and arguing that menorah display did too), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

6. *See, e.g.*, Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (joining the majority opinion holding that the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote); United States v. Lee, 455 U.S. 252, 261–62 (1982) (Stevens, J., concurring in judgment) (arguing that an objector should bear the burden of justifying his exemption from a generally applicable law). Justice Stevens did, however, support religious exemptions he believed necessary to remedy religious discrimination. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment) (citing *Lee*, 455 U.S. at 264 n.3).

7. *Compare* Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (joining unanimous opinion rejecting Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act), *with* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (arguing that Religious Freedom Restoration Act favors religion in violation of the Establishment Clause).

8. In reality, what the wall metaphor, as used by the Supreme Court, is intended to separate is religion and the state. "Religion" and "church" are used interchangeably by the Court and by scholars. They are not the same thing. Nevertheless, in this Article I follow convention and use them interchangeably.

9. The title of Erwin Chemerinsky's review of Justice Stevens's Establishment Clause jurisprudence captures well the Court's shift and Justice Stevens's constancy: Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 Nw. U. L. REV. 587, 588 (2012).

10. 494 U.S. 872 (1990).

criminate against religion, and thus does not exempt religiously motivated conduct from the operation of generally applicable laws—a position Justice Stevens had articulated in four concurring opinions in the 1980s.[11]

Justice Stevens's preferred policy of religious liberty—on the one hand requiring a "'high and impregnable wall' between church and state"[12] and on the other refusing to lift burdens on religion unless legislators intentionally discriminate against it—does not admit of a straightforward theory of religious freedom. Because Justice Stevens's religion jurisprudence "subject[s] [religion] to all the burdens of government" while permitting it "few of the benefits[,]"[13] some commentators argue that he has no basic theory of religious freedom, and that he is simply hostile to religion.[14] Gregory P. Magarian asserts, in fact, that it "has become conventional wisdom" that Justice Stevens was biased against religion.[15] In recent years Magarian, along with Andrew Koppelman[16] and Eduardo Moisés Peñalver,[17] sought to refute the charge that Justice Stevens was hostile to religion.[18] These

11. *See infra* notes 34–69 and accompanying text.

12. Wolman v. Walters, 433 U.S. 229, 266 (1977) (Stevens, J., concurring in part and dissenting in part) (quoting Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 18 (1947)).

13. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1010 (1990).

14. *See, e.g., id. See also* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 245–48 (2010) (discussing sources accusing Justice Stevens of antireligious bias); Gregory P. Magarian, *Justice Stevens, Religion, and Civil Society*, 2011 WIS. L. REV. 733, 743–45 (2011).

15. Magarian, *supra* note 14, at 734.

16. Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 NW. U. L. REV. 567, 568 (2012).

17. Eduardo Moisés Peñalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241, 2241 (2006).

18. Alan Brownstein, *Continuing the Constitutional Dialogue: A Discussion of Justice Stevens's Establishment Clause and Free Exercise Jurisprudence*, 106 NW. U. L. REV. 605, 606–07 (2012), is a detailed examination of Justice Stevens's religion jurisprudence. Brownstein notes but does not concern himself with the charge that Justice Stevens harbors antireligious bias. While not uncritical of the Justice's jurisprudence, the admiring tone of the article suggests that, as with Koppelman, Magarian, and Peñalver, Brownstein likewise rejects the charge of antireligious bias. The same is true of Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 FORDHAM L. REV. 2177 (2006). In his brief essay, Eisgruber does not mention the hostility charge but he implicitly rejects it, arguing that the main animating principle of Justice Stevens's approach to religious freedom is the "value of equal membership." *Id.* at 2177. In making this argument Eisgruber focuses on the fact that Justice Stevens emphasized the principle of equality in both free-exercise and establishment cases. *Id.* at 2179–80. It is true, as I argue below, see *infra* notes 33–70 and accompanying text, that concern with equality or equal treatment appears to be the sole value guiding Justice Stevens's free-exercise jurisprudence. However, as I also show below, Justice Stevens argued that the Establishment Clause promotes not only equality but also freedom of conscience, and guards against social fragmentation and the corruption of religion. *See infra* notes 97–145 and accompa-

scholars are not without criticism of Justice Stevens's religion jurisprudence, as both Peñalver and Magarian are critical of his free-exercise views, and Koppelman argues that he had a high view of religion about which he should have been more candid.[19] Nevertheless, all three argue that political principle, not antireligious bias, drove his religion jurisprudence.

This Article examines Justice Stevens's religion jurisprudence and the arguments of Peñalver, Koppelman, and Magarian, his friendly interpreters. To this end, Part I explores Justice Stevens's religion opinions for the purpose of highlighting the justifications he gives for interpreting the Religion Clause the way he does. As is well-known, Justice Stevens argued that the Establishment Clause required a high wall of separation between religion and the state, and he is the principal architect behind the Court's shift to its current position that the Free Exercise Clause prohibits only intentional discrimination against religion. As I show below, he argued variously, depending on the issue, that equal treatment, liberty of conscience, protecting religion from corruption, and protecting society from religiously inspired social conflict all required the high-wall separationism he preferred. On the other hand, equality or equal treatment singularly drove his free-exercise approach.

In Part II, I examine the arguments of Peñalver, Koppelman, and Magarian. As noted, these scholars offer rebuttals to the charge that Justice Stevens's religion jurisprudence is animated by hostility to religion. Their accounts helpfully illuminate Justice Stevens's views and are thoughtful alternatives to the hostility thesis. I argue, however, that there are weaknesses in their explanations that leave open the possibility that Justice Stevens's critics could be right, that Justice Stevens was hostile to religion. But I do not argue that Justice Stevens's critics are right. Instead, I argue for a more benign interpretation, although one that will not necessarily be any better received by his friendly interpreters. I argue that instead of being born of animus, his religion jurisprudence is largely boilerplate marked by presumptuousness and

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nying text. Of these additional claims about the Establishment Clause made by Justice Stevens, Eisgruber notes only the Justice's assertion that one of the Establishment Clause's aims is to protect against religious division. Eisgruber, *supra* note 18, at 2181–83.

19. Koppelman, *supra* note 16, at 568 (arguing that Justice Stevens's desire to prevent the corruption of religion by the government indicates that he believes it is a "distinctive human good" but that he should have taken greater care in explaining that his religion jurisprudence is rooted in this belief).

incuriousness. His opposition to free-exercise exemptions and his high-wall separationism seem a priori and are rooted in a dogma about religion and how liberal society can be made to work. Specifically, Justice Stevens understood religion mostly in negative terms and thus had a distorted view of religion, at least as it has been lived and practiced in this country for nearly two-and-a-half centuries. He thus had an excessive fear that (1) exempting religiously motivated conduct from the operation of neutral general laws would result in destructive factionalism and (2) any Establishment Clause interpretation other than high-wall separationism would lead to religious war. In Part III, I summarize and restate my arguments.

I. JUSTICE STEVENS ON THE MEANING OF RELIGIOUS FREEDOM

Justice Stevens believed that government should as far as possible have nothing to do with religion, and that religion should be confined to the private sphere where its health and well-being depend entirely on voluntary initiative.[20] This requires that religion receive no support from government.[21] On the establishment side this means a high wall of separation prohibiting, among other things, financial assistance to religious schools and colleges,[22] religious displays on public property,[23] and government involvement with prayer.[24] On the free-exercise side it means not lifting burdens imposed on religion by generally applicable laws and carefully scrutinizing discretionary accommodations to make sure they comport with the Establishment Clause.[25]

The language of the First Amendment[26] does not compel Justice Stevens's approach to church-and-state issues, leaving open

20. *See* Chemerinsky, *supra* note 9, at 589 (describing Justice Stevens's strict separationism).

21. *Id.* at 600; *see also* Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

22. *Mitchell*, 530 U.S. at 867–68 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

23. Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting).

24. Marsh v. Chambers, 463 U.S. 783, 822–24 (1983) (Stevens, J., dissenting).

25. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (arguing that Religious Freedom Restoration Act favors religion in violation of the Establishment Clause); Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (Justice Stevens joined the majority opinion, which stated, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

26. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I.

as it does a range of possible choices regarding the best policy of religious freedom. However, as I illustrate below, Justice Stevens reached the results he did by emphasizing multiple political values. With free exercise, he emphasized the equal treatment of religion and irreligion.[27] With the prohibition on the establishment of religion, the values or concerns he emphasized depended on the particular context—sometimes he stressed equality, and other times the need to protect religion from corruption,[28] or the divisiveness of religion, or safeguarding rights of conscience, or some combination of these values.

A. Free Exercise and Statutory Religious Accommodations

1. Free Exercise Exemptions

The free exercise of religion would seem to strongly implicate liberty interests—the liberty of individuals and groups to generally live according to how their religious beliefs and traditions require them to live. Since *Employment Division v. Smith*,[29] however, the Court has read the Free Exercise Clause to forbid only laws intentionally targeting religiously motivated conduct.[30] That is, *Smith* allows the restraint of religion as long as it is incidental rather than the aim of the law.[31] Laws that treat everyone the same, even if heavily burdening religion, are constitutionally permissible.[32] *Smith* thus effectively makes the core aim of the Free Exercise Clause the promotion of equality, not liberty. Justice Scalia wrote for the *Smith* majority,[33] but to a large extent

27. Brownstein, Peñalver, and Eisgruber all make this argument. *See* Brownstein, *supra* note 18, at 626; Peñalver, *supra* note 17, at 2248; Eisgruber, *supra* note 18, at 2178 n.4.

28. This is a theme in Justice Stevens's no-establishment jurisprudence that is often overlooked but which is emphasized by Koppelman. *See* Koppelman, *supra* note 16, at 585 (suggesting that Justice Stevens's anticorruption rationale subverts his critics' claims about his hostility to religion).

29. 494 U.S. 872 (1990).

30. *Id.* at 878–79.

31. *See id.* at 878 (analogizing laws that incidentally affect religious freedoms to a generally applicable tax on publishing companies that incidentally affects freedom of the press, stating "that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the [statute] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended").

32. *See id.* at 879 (reaffirming "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

33. *Id.* at 874.

Smith follows the contours Justice Stevens fashioned in four concurring opinions in the 1980s—*United States v. Lee*,[34] *Goldman v. Weinberger*,[35] *Bowen v. Roy*,[36] and *Hobbie v. Unemployment Appeals Commission of Florida*.[37]

Lee involved an Amish business owner who asserted a free-exercise objection to paying Social Security taxes for his business and employees.[38] The Court agreed that Lee's religion was burdened, which triggered the then-prevailing approach to adjudicating free-exercise claims.[39] This placed the burden on government to show that the restriction on religious liberty was "essential to accomplish an overriding governmental interest."[40] The Court concluded that the government's interest in maintaining the solvency of the tax system satisfied the burden, and thus rejected the free-exercise claim.[41] Justice Stevens agreed with the result but objected to the balancing test employed by the majority, arguing that the majority's approach means that "[g]overnment always bears a heavy burden of justifying the application of neutral general laws to individual conscientious objectors."[42] The better approach, he argued, is to require religious claimants to "shoulder the burden of demonstrating that there is a unique reason for allowing [them] a special exemption from a valid law of general applicability."[43] He added, moreover, that it was appropriate to "place[] an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" and that this standard in fact more accurately explained "most of this Court's [free exercise] holdings than does the [majority's balancing] standard."[44] Justice Steven's rationale for wanting to

34. 455 U.S. 252 (1982).
35. 475 U.S. 503 (1986).
36. 476 U.S. 693 (1986).
37. 480 U.S. 136 (1987).
38. United States v. Lee, 455 U.S. 252, 254–55 (1982).
39. *See id.* at 257–58 (noting that the Court cannot determine whether a law has violated the tenets of a religion and thus must take the offended religious adherent's complaint at face value before then analyzing whether the government had an overriding interest).
40. *Id.*
41. *Id.* at 261.
42. *Id.* at 262 (Stevens, J., concurring).
43. *Id.*
44. *Id.* at 263 n.3 (citing Gillette v. United States, 401 U.S. 437 (1971) (holding that denying conscientious-objector status to an individual who objected only to the Vietnam War, not war in general, did not violate the Free Exercise Clause); Braunfeld v. Brown,

make general laws essentially immune from free-exercise challenge was to avoid potential Establishment Clause problems. His concern was that the majority's balancing test requires "evaluating the relative merits of differing religious claims[,]"[45] only some of which will prevail. This presents the "risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another[, which] is an important risk the Establishment Clause was designed to preclude."[46] Better, then, that all claims against general laws be rejected, that all be treated equally, than that some be accepted and some not.

Justice Stevens recognized that the approach he advocated in *Lee* might cast doubt on two unemployment compensation cases in which the free-exercise rights of religious claimants were vindicated.[47] In both *Thomas v. Review Board of Indiana Employment Security Division*[48] and *Sherbert v. Verner*,[49] the Court ruled that the denial of unemployment benefits for religious claimants who refused work because of their religious beliefs violated their free-exercise rights.[50]

Justice Stevens argued, however, that the religious objections to the work offered in each case were analogous to physical impairments preventing claimants from working, in which case they would be entitled to unemployment benefits.[51] That in each case the Court ruled in favor of the free-exercise claim thus "could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious

366 U.S. 599 (1961) (holding that Sunday closing laws do not violate free-exercise rights of Jewish business owners); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that child-labor laws do not violate free-exercise rights of Jehovah's Witnesses); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding that compulsory-vaccination laws do not violate the Free Exercise Clause); and Reynolds v. United States, 98 U.S. 145 (1878) (stating that federal prohibition on polygamy does not violate free-exercise rights of Mormons)).

45. *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring).

46. *Id.*; *cf.* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885, 888 (1990) (diverging from Justice Stevens's Establishment Clause concern as the basis for its ruling, reasoning instead that the pre-*Smith* balancing test "court[s] anarchy" by making "an individual's obligation to obey [a generally applicable law] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'" (quoting *Reynolds*, 98 U.S. at 167)).

47. *See Lee*, 455 U.S. at 263 n.3 (recognizing that "[t]here is also tension between this standard and the reasoning in [*Thomas* and *Sherbert*]").

48. 450 U.S. 707 (1981).

49. 374 U.S. 398 (1963).

50. *Thomas*, 450 U.S. at 719; *Sherbert*, 374 U.S. at 404.

51. *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring).

sect."[52] In other words, the Free Exercise Clause does not protect religious liberty; rather, it prohibits unequal treatment, which is to say that its aim is the promotion of equality. If the law does not recognize nonreligious reasons for refusing work, e.g., physical impairment, there is no free-exercise violation for not accommodating individuals who refuse work for religious reasons.[53] To grant religious accommodations where no comparable nonreligious exemptions exist, that is, to protect religious liberty as liberty, is to grant "favored treatment" status to religion, which is forbidden by the Establishment Clause.[54]

In *Goldman*, Justice Stevens concurred in the Court's rejection of a free-exercise challenge to a U.S. Air Force prohibition on personnel wearing headgear—in this case an Orthodox Jew wearing a yarmulke—while in uniform.[55] In upholding the regulation, the Court deferred to the Air Force's judgment that the standardized-uniform requirement was a necessary part of its efforts to promote group cohesion and sense of mission.[56] Concurring, Justice Stevens argued that there was little chance that an exemption would undermine the Air Force's effort to promote unity and purpose.[57] He emphasized, however, as he had in *Lee*, the need for equal treatment of servicemen and women of all faiths, which requires that no one be accommodated.[58] The problem is that requests for accommodation require the Air Force to evaluate religious claims in light of how they will impact its valid concern with cohesion and purpose.[59] Some accommodation requests will be granted, more likely from more mainstream religions.[60] And some will be denied, more likely from minority religions. But "[t]he Air Force has no business drawing

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52. *Id.* (Stevens, J., concurring) (explaining why he joined the majority opinion in *Thomas*, noting that the "decision in *Thomas* was clearly compelled by *Sherbert*").

53. *See id.* (differentiating *Thomas* and *Sherbert* from *Lee* by stating that those earlier cases protected against unequal treatment, but that *Lee* sought to grant favored treatment to a religious sect).

54. *Id.*

55. Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (Stevens, J., concurring).

56. *Id.* at 509–10 (majority opinion) (reasoning that "[t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment" and holding "that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity").

57. *Id.* at 511 (Stevens, J., concurring).

58. *Id.* at 512 (Stevens, J., concurring); *see also Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring).

59. *Goldman*, 475 U.S. at 512–13 (Stevens, J., concurring).

60. *Id.*

distinctions between such persons [of different faiths] when it is enforcing commands of universal application."[61] So even though an exemption allowing a serviceman to wear a yarmulke would have negligible impact on the Air Force, granting the request would open the door to Establishment Clause concerns because of the possibility that some faiths would be treated better than others.[62]

In *Bowen*, parents objected, on the basis of their Native American religious beliefs, to the requirement that they submit their child's Social Security number to the federal government in order for her to be eligible for various welfare benefits.[63] The Court accepted the government's argument that Social Security numbers help prevent fraud in its programs[64] and held, moreover, that the Free Exercise Clause does not give individuals a religious veto over how government manages its programs.[65] Concurring, Justice Stevens noted that if in the future the child seeks additional government assistance and those programs allow the omission of application information because of, say, "mental, physical, and linguistic handicaps," then "it would seem that a religious inability should be given no less deference . . . [because] . . . religious claims should not be disadvantaged in relation to other claims."[66] Again, then, for Justice Stevens the "free exercise of religion" means the right of equal treatment, not some broader liberty right.

Hobbie was another unemployment-benefits case.[67] The Court ruled that the Free Exercise Clause prohibits the state from denying unemployment benefits to a woman who lost her job because she refused to work on her Sabbath.[68] Concurring, Justice Stevens argued that because under the law at issue one could refuse work for secular reasons without forfeiting unemployment benefits, the claimant was entitled to unemployment benefits "to

61. *Id.* at 513 (Stevens, J., concurring) (citing *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring)).

62. *See id.* at 511–13 (Stevens, J., concurring) (stating that though "the uniform regulation creates almost no danger of impairment of the Air Force's military mission . . . [t]he interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths").

63. Bowen v. Roy, 476 U.S. 693, 695 (1986).

64. *Id.* at 709.

65. *Id.* at 711–12.

66. *Id.* at 721–22 (Stevens, J., concurring) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) and Sherbert v. Verner, 374 U.S. 398 (1963)).

67. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 137 (1987).

68. *Id.* at 141 (quoting *Thomas*, 450 U.S. at 717–18).

protect religious observers against unequal treatment."[69]

The foregoing cases amply illustrate that, as Alan Brownstein observes, "for Justice Stevens, equality concerns are the primary, if not the only, acceptable foundation that supports judicial intervention to protect the free exercise of religion."[70] As long as religion is treated the same as irreligion, there is no free-exercise violation.[71] Moreover, as Justice Stevens argued in *Lee* and *Goldman*, granting exemptions from generally applicable laws raises two Establishment Clause concerns—one, that a balancing test requires government to evaluate the merits of the religious beliefs of claimants seeking exemptions, and two, the possibility that religions will not be treated equally, that exotic religions will be treated less favorably than more mainstream religions.

2. Statutory Exemptions

While Justice Stevens opposed constitutionally required religious exemptions from generally applicable laws except where necessary to ensure religion's equal treatment with irreligion, his record on legislatively created, or discretionary, exemptions is mixed. The Court's decision in *Smith* is in the background of the debate over discretionary exemptions, at least those created after 1990, for there it seemed to invite legislatively created exemptions.[72] Congress responded in 1993 with the Religious Freedom Restoration Act (RFRA), which attempted to restore the pre-*Smith* balancing test requiring all laws substantially burdening re-

69. *Id.* at 148 (Stevens, J., concurring) (citing United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring)).

70. Brownstein, *supra* note 18, at 620.

71. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), involves an example of intentional discrimination against religion. Here Justice Stevens was part of a unanimous decision holding that the Free Exercise Clause had been violated. *Id.* at 522, 547. Though a free-speech decision, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), is another example of Justice Stevens opposing religious discrimination. There the Court unanimously held that a public-school district allowing private groups to use school facilities after school hours could not exclude a group expressing a religious point of view. *Id.* at 385, 396–97.

72. Writing for the *Smith* majority, Justice Scalia argued:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

ligion, even generally applicable laws, to be supported by a compelling governmental interest and be narrowly tailored to achieve that objective.[73] In *City of Boerne v. Flores*[74] the Court declared the law unconstitutional as applied against the states, determining that Congress lacked authority under Section Five of the Fourteenth Amendment for its action.[75] Justice Stevens concurred in the result but argued—the only Justice to do so—that the law also violated the Establishment Clause because it provided religious dissenters "with a legal weapon that no atheist or agnostic can obtain."[76] Just as Justice Stevens thought that mandatory Free Exercise Clause exemptions violate the Establishment Clause, *Flores* thus indicates that he also thought this about discretionary exemptions, at least those of a certain type. In other words, despite Justice Stevens's unqualified Establishment Clause objection in *Flores* to legislative accommodations, he actually supported some exemptions. For example, he joined a unanimous Court in *Cutter v. Wilkinson*[77] in rejecting an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act, a RFRA-like law, requiring, among other things, that states accommodate prisoner religious practices pursuant to the pre-*Smith* balancing test.[78] And in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[79] he again joined a unanimous Court[80] in holding that the federal government had not satisfied the requirements of RFRA, and thus could not regulate the group's use of a sacramental tea containing a banned drug.[81] Similarly, he joined the majority opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[82] rejecting an Establishment Clause challenge to the religious exemption in the Civil Rights Act of 1964 allowing religious employers to discriminate on the basis of religion in hiring for their secular activities.[83]

What then explains Justice Stevens's approval of the exemp-

73. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-(1)b, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
74. 521 U.S. 507 (1997).
75. *Id.* at 536.
76. *Id.* at 537 (Stevens, J., concurring).
77. 544 U.S. 709 (2005).
78. *Id.* at 712–14.
79. 546 U.S. 418 (2006).
80. Justice Alito took no part in the consideration or decision of the case. *Id.* at 422.
81. *Id.* at 439.
82. 483 U.S. 327 (1987).
83. *Id.* at 339–40.

tions at issue in *O Centro*, *Cutter*, and *Amos*, but not in *Flores*? The question is particularly apt with regard to *O Centro* and *Flores*, for both involved RFRA. Part of the answer to this question might be found in the majority opinion in *Amos*, which Justice Stevens joined. Writing for the Court, Justice White wrote that it is a "proper purpose" for government to "lift[] a regulation that burdens the exercise of religion," and when it does there is "no reason to require that the exemption come packaged with benefits to secular entities."[84] Justice Stevens himself made a similar point in his concurring opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*,[85] where the Court invalidated on establishment grounds the creation of a public-school district for the Satmar Hasidic, a small Jewish sect.[86] He agreed with the majority opinion that the legislation at issue was not neutral, that it favored the Satmar Hasidic over groups, religious and irreligious alike.[87] But he also asserted an additional reason as to why the school district violated the Establishment Clause: that it sought "to shield [Satmar] children from contact with others who have 'different ways,'" which meant "the State [had] provided official support to cement the attachment of young adherents to a particular faith."[88] Justice Stevens went on to contrast the impermissible way the state had sought to aid the Satmar Hasidic with state actions benefitting religion without violating the Establishment Clause, including a legislative "decision to grant an exemption from a burdensome general rule."[89]

The discretionary accommodations in *Amos* and *Cutter* are thus easy to understand as instances of government lifting burdens it had created—in the form of an antidiscrimination law (*Amos*) and the incarceration of individuals (*Cutter*). With respect to *O Centro*, it is possible to conceptualize RFRA as lifting the burden on religion imposed by neutral, generally applicable laws, but this is precisely what Justice Stevens found to violate the Establishment Clause in *Flores*. In other words, RFRA provides religion, but not irreligion, with the means of challenging incidentally burdensome laws. Justice Stevens did not explain his vote in *O Centro*, but perhaps the reason why he thought RFRA violated the

84. *Id.* at 338.
85. 512 U.S. 687 (1994).
86. *Id.* at 690.
87. *Id.* at 711–12 (Stevens, J., concurring).
88. *Id.* at 711.
89. *Id.* at 711–12.

Establishment Clause in *Flores* but not in *O Centro* is that the latter ruling is very limited in scope, applying only to the Controlled Substance Act and primarily if not almost exclusively to a very small, politically powerless sect.[90] Conversely, applying RFRA to the city-zoning ordinance at issue in *Flores* would have potentially exposed countless laws across the nation to exemption challenges. Moreover, the religious party in *Flores* was the Catholic Church, an obviously much larger and more politically engaged entity than O Centro Espirita Beneficente Uniao do Vegetal, the Christian Spiritist sect that brought the RFRA suit in *O Centro.* An alternative, or possibly additional, reason for Justice Stevens not objecting to RFRA on establishment grounds in *O Centro* is that the Controlled Substances Act permitted religious exemptions for banned substances and one had in fact been granted by the U.S. Attorney General to the Native American Church for the sacramental use of peyote, which Congress later extended to all documented Indian Tribes.[91] So perhaps here he saw RFRA as necessary to prevent government from favoring some religious group over others. In any event, whatever the reason(s) for Justice Stevens's vote in *O Centro,* it, along with *Cutter* and *Amos,* indicate that the absolutist language of his *Flores* opinion cannot be taken at face value.[92]

Justice Stevens wrote little about discretionary accommodations. From what little he wrote, and from the opinions he joined, it appears that his approach to them is (unsurprisingly) similar to his treatment of mandatory objections. That is, the Establishment Clause sets the parameters of permissible exemptions except with regard to those that lift regulatory burdens.[93]

90. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425 (noting that at the time of litigation the American branch of O Centro Espirita Beneficente Uniao do Vegetal had about 130 members).

91. *Id.* at 433.

92. Additional legislative-accommodation cases during Justice Stevens's tenure on the Court, of which he was in the majority in each, include *Texas Monthly v. Bullock,* 489 U.S. 1 (1989) (holding that a state law that exempted religious, but not nonreligious, publications from state sales tax violates Establishment Clause by preferring religion over irreligion); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (holding that a state law that gave private-sector employees the absolute right not to work on their Sabbath violates Establishment Clause by favoring religion over other interests); and *Larson v. Valente,* 456 U.S. 228 (1982) (holding that a state law that exempted some religious organizations from mandatory reporting requirements violates the Establishment Clause by favoring some religions over others).

93. *See* City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (noting where he believes the parameters of permissible exemptions should be placed); *see also O Centro,* 546 U.S. at 434 (discussing exemptions to generally applicable regulatory burdens).

The Establishment Clause prohibits accommodations favoring religion over irreligion or some denominations over others except when lifting a regulatory burden.[94] Even here, however, as his opinion in *Flores* and votes in *Cutter* and *O Centro* suggest, the possible beneficiaries of the exemption must be relatively small.[95]

For Justice Stevens, then, religious liberty generally means religious equality; there is no independent liberty interest in the free exercise of religion beyond that involving the canceling of some regulatory burdens. For the most part, religious liberty is subordinate to religious equality. Beyond sometimes lifting regulatory burdens, religious freedom means the right to be free of religious discrimination and no more. Allowing religiously motivated conduct greater constitutional space than secularly motivated conduct violates religious neutrality and hence the Establishment Clause. Similarly, legislative accommodations are permissible only to the extent they cancel regulatory burdens and must be limited in scope. Accommodations exceeding these limits favor religion and therefore also violate the Establishment Clause. Justice Stevens thus filters claims of religious liberty through the Establishment Clause, which for him marks the bounds both of the Free Exercise Clause and discretionary accommodations. In other words, for Justice Stevens the Establishment Clause does most of the work in defining religious liberty—that is to say, in defining an individual's obligation to government. It also, of course, defines the scope of government's permissible involvement with religion. Let us now turn to that body of law to examine Justice Stevens's arguments about the proper understanding of the Establishment Clause.

B. The Establishment Clause

While equality is the near-exclusive value guiding Justice Stevens's free-exercise jurisprudence, it is but one of several concerns animating his belief that the Establishment Clause requires a "'high and impregnable wall' between church and state."[96] In addition to equality, Justice Stevens in his no-establishment jurisprudence also stresses liberty of conscience, protecting reli-

94. *See Flores*, 521 U.S. at 537 (Stevens, J., concurring) ("This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.").

95. *See O Centro*, 546 U.S. at 425 (noting that the American branch of O Centro Espirita Beneficente Uniao do Vegetal had a small membership of about 130 individuals).

96. Wolman v. Walter, 433 U.S. 229, 266 (1977) (Stevens, J., concurring in part and dissenting in part) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

gion from the corrupting influence of government, and social peace.

1. Equality

It is perhaps not saying much to note that Justice Stevens believes the Establishment Clause should promote equality, and that it forbids government from preferring religion over irreligion or one or some religions over others.[97] This is simply another way of saying that government should act neutrally towards religion, neither favoring nor disfavoring it. Justices often disagree about what neutrality requires in a given case, but there has been broad agreement on the Court for decades that government must pursue a course of neutrality with respect to religion, even as commentators have long observed that genuine neutrality is impossible.[98] Equality is thus a theme running through Justice Stevens's Establishment Clause jurisprudence. Consider two school-prayer cases in which Justice Stevens wrote the majority opinions.

In *Wallace v. Jaffree*[99] the Court struck a law requiring public-school days to begin with a moment of silence for students to meditate or voluntarily pray.[100] Because the statute encouraged students to pray, the state was, Justice Stevens wrote, treating prayer as a "favored practice" contrary to "the established principle that the government must pursue a course of complete neutrality toward religion."[101] The Establishment Clause helps guarantee "equal respect" for all, not only among different Christian denominations but also for "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[102]

In *Santa Fe Independent School District v. Doe*,[103] the Court struck a public-school policy allowing students to decide if a student-led

97. *See* Van Orden v. Perry, 545 U.S. 677, 733–34 (2005) (Stevens, J., dissenting) (claiming that "[t]he principle that guides my analysis is neutrality" and that "[t]he basis for that principle is firmly rooted in our Nation's history and our Constitution's text").

98. *See, e.g.*, STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 128–38 (2014) (describing the concept of "secular neutrality," its appeal, and the difficulty in achieving a peaceful religious pluralism). For defense of a modest version of neutrality, *see generally* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013).

99. 472 U.S. 38 (1985).

100. *Id.* at 61.

101. *Id.* at 60.

102. *Id.* at 52.

103. 530 U.S. 290 (2000).

prayer would be given before high school football games and, if so, also to pick the student to give it.[104] For Justice Stevens and the majority, the policy unconstitutionally promoted religion "because it [sent] the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[105] Though not the only reason public-school prayers are unconstitutional,[106] such prayers violate the equality principle in that they favor some students over others—those who subscribe to the religion being promoted by the prayers—over those of different religions and of irreligion.[107]

As with school prayer, equality is a theme in Justice Stevens's opposition to religious displays on public property. According to him, "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."[108] In fact, although there were few religious-symbols cases during Justice Stevens's tenure, in every case he deemed the display to constitute an endorsement of the particular faith(s) represented, and thus to be a violation of the Establishment Clause.[109] In *Van Orden v. Perry*,[110] for example, he argued that the Establishment Clause "demands religious neutrality," which means that "government may not exercise a preference for one religious faith over another" or over irreligion by placing a monument with the Ten Commandments engraved on it on state capitol grounds.[111] Such displays make reli-

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104. *Id.* at 301.

105. *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

106. *See infra* notes 113–15 and accompanying text.

107. *Sante Fe*, 530 U.S. at 309–10 (quoting *Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring)).

108. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 650 (1989) (Stevens, J., concurring in part and dissenting in part), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

109. *Id. See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (Justice Stevens joining the majority); Van Orden v. Perry, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting); *Donnelly*, 465 U.S. at 694 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting). Additionally, both *Salazar v. Buono*, 559 U.S. 700 (2010), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), tangentially involved religious displays, but in both cases the question of whether the display violated the Establishment Clause was not before the Court. *Salazar*, 559 U.S. at 714; *Summum*, 555 U.S. at 464.

110. 545 U.S. 677 (2005).

111. *Id.* at 709 (Stevens, J., dissenting).

gious dissenters "and nonbelievers 'feel like [outsiders] in matters of faith, and [strangers] in the political community.'"[112] The Establishment Clause requires government to treat people equally, to show equal respect for all, which forbids, then, religious displays that to Justice Stevens inescapably favor some citizens over others.

2. Liberty of Conscience/Anticoercion

Along with the promotion of equality, liberty of conscience is another justification Justice Stevens gives in arguing that the Establishment Clause requires a high wall of separation between church and state. Justice Stevens is not unique in this, as the Supreme Court has long held that liberty of conscience is one of the animating concerns of the Establishment Clause.[113] Indeed, Justice Stevens, writing for the Court, states that "the individual's freedom of conscience [is] the central liberty that unifies the various Clauses in the First Amendment."[114] Government neutrality towards religion protects freedom of conscience, and departures from neutrality infringe on rights of conscience. As Justice Stevens wrote in *Wallace*, "the interest in respecting the individual's freedom of conscience" guarantees one the "right to select any religious faith or none at all," which precludes public schools from sponsoring prayers.[115]

Similarly, respect for rights of conscience is a justification for interpreting the Establishment Clause to prohibit religious symbols on public property. In objecting to the Ten Commandments monument at issue in *Van Orden*, Justice Stevens, in addition to arguing that it violates the principle of equality, quoted the passage from *Wallace* just noted, arguing that the monument promoted monotheism to the detriment of rights of conscience of religious dissenters and the irreligious.[116]

Respect for freedom of conscience is also one of the rationales behind Justice Stevens's opposition to public funding for religious schools and colleges. He opposed such funding on the

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112. *Id.* at 720 (quoting *Pinette*, 515 U.S. at 799 (Stevens, J., dissenting)).

113. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 9 n.6, 11 n.9 (1947) (citing colonial and Founding Era documents that advocate for liberty of conscience).

114. Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

115. *Id.* at 53.

116. *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting) (quoting *Wallace*, 472 U.S. at 52–53).

grounds that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[117] He wrote few opinions on this issue, and those he wrote emphasized strong Establishment Clause enforcement to protect the purity of religion[118] and guard society against religiously motivated social conflict.[119] He joined opinions, however, opposing public aid on freedom-of-conscience grounds. For example, Justice Stevens joined Justice Souter's dissents in *Mitchell v. Helms*[120] and *Zelman v. Simmons-Harris*[121] arguing that the aid at issue violated the Establishment Clause because, among other reasons, it violated the rights of conscience of taxpayers. In *Mitchell* Justice Souter wrote that "compelling an individual to support religion violates the fundamental principle of freedom of conscience . . . liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."[122] Similarly, in *Zelman* Justice Souter argued, implausibly, that Thomas Jefferson and James Madison gave us the authoritative meaning of the Establishment Clause. He cites Jefferson for the proposition that tax funds spent in religious schools violate rights of conscience by infringing upon the principle that no one "shall be compelled to . . . support any religious worship, place, or ministry whatsoever"[123] and he cites Madison for the belief that freedom of conscience is violated by any "authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment"[124] Pursuant to Jefferson and Madison, then, "[a]ny tax to establish religion is antithetical

117. Wolman v. Walter, 433 U.S. 229, 265 (Stevens, J., concurring in part and dissenting in part) (quoting *Everson*, 330 U.S. at 16). Despite the categorical language, Justice Stevens did once vote to uphold state aid to religion, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), where the Court unanimously held that there was no Establishment Clause violation in allowing a college student to use neutral state vocational-rehabilitation-assistance funds at a Christian college to prepare for a career in ministry.

118. *See infra* notes 126–39 and accompanying text.

119. *See infra* notes 140–45 and accompanying text.

120. 530 U.S. 793, 867 (2000) (Souter, joined by Stevens & Ginsburg, JJ., dissenting).

121. 536 U.S. 639, 711 (2002) (Souter, joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

122. *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting) (citation omitted).

123. *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citations omitted) (quoting Thomas Jefferson's Virginia Bill for Establishing Religious Freedom).

124. *Id.* (citation omitted).

to the command that the minds of men always be wholly free."[125]

For Justice Stevens, the Establishment Clause thus promotes not only equality but also liberty. It obligates government to treat people equally; in its policies and actions it cannot prefer one or some religions over others or religion over irreligion. And it promotes liberty of conscience by preventing government from promoting religion and from having taxpayers financially support the religion of others.

3. Preventing the Corruption of Religion

The first religion opinion authored by Justice Stevens was a three-sentence dissent in *Roemer v. Board of Public Works of Maryland*[126] in which a plurality upheld a state-grant program providing public funds to religious colleges as long as they (1) did not award only seminary or theology degrees, and (2) did not use the funds for sectarian purposes.[127] Justice Stevens agreed with Justice Brennan's dissent that the limitations on the aid did not prevent it from violating the Establishment Clause and noted that he was writing "to add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it."[128] That is, for Justice Stevens, one reason to interpret the Establishment Clause as categorically prohibiting public support of religious institutions is to protect the religious from the temptation to compromise their faith in order to receive public assistance.[129] This "disease of entanglement"[130] should be avoided by forbidding aid to religious schools and colleges. The following year, in *Wolman v. Walter*,[131] Justice Stevens again asserted the protection of religion as a rationale for objecting to aid to religious schools, quoting Clarence Darrow for the proposition that "[t]he realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the

125. *Id.* (quoting *Mitchell*, 530 U.S. at 871).

126. 426 U.S. 736 (1976).

127. *Id.* at 746–47.

128. *Id.* at 775 (Stevens, J., dissenting).

129. Andrew Koppelman emphasizes more than other commentators what he calls the "religion-protective" nature of Justice Stevens's religion jurisprudence. Koppelman, *supra* note 16, at 572.

130. *Roemer*, 426 U.S. at 775 (Stevens, J., dissenting).

131. 433 U.S. 229 (1977).

religion that it would pretend to serve."[132] As evidence of harm to religion, Justice Stevens cited the fact that an eligibility requirement of the aid at issue prohibited religious schools from making a "distinction as to . . . creed . . . of either its pupils or of its teachers" and his belief that "sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State."[133]

Justice Stevens's concern with the purity of religion was not confined to the issue of financial assistance. For example, in objecting to the placement of a Latin cross on a public plaza next to the state capitol building in Columbus, Ohio, he again approvingly cited Clarence Darrow in support of his contention that government support of religion harms it.[134] Similarly, in urging the removal of the Ten Commandments monument in *Van Orden*, Justice Stevens cited James Madison's argument that the mixing of government and religion "has a corrupting influence on both"; consequently, both will "exist in greater purity, the less they are mixed together."[135]

An additional concern Justice Stevens expressed about protecting religion from corruption involves preventing government from distorting free religious choice. The concern here is with the state trying to force religion upon individuals. For example, the law at issue in *Wallace* required that public-school days begin with a moment of silence for students to engage in "meditation or voluntary prayer."[136] Writing for the Court, Justice Stevens wrote that the law violated the Establishment Clause because, among other reasons, it contravened "the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."[137] Because the law encouraged students to pray, their prayers, if any, presumably could not be truly voluntary, making them inauthentic or corrupt—something which the Establishment Clause prevents.[138] There is thus a liber-

132. *Id.* at 264 (Stevens, J., concurring in part and dissenting in part) (citation omitted), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

133. *Id.* at 266 n.7 (citation omitted).

134. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 812 n.19 (Stevens, J., dissenting) (citations omitted).

135. Van Orden v. Perry, 545 U.S. 677, 725 n.25 (2005) (Stevens, J., dissenting) (citation omitted).

136. Wallace v. Jaffree, 472 U.S. 38, 41 (1985).

137. *Id.* at 53.

138. As Koppelman notes, concern with uncorrupted religion is an idea also ex-

ty-promoting dimension to Justice Stevens's concern with the purity of religion. As Koppelman notes, for Justice Stevens "[u]ncorrupted religion . . . consists in the liberty of the individual to seek God unimpeded by the state. Only beliefs generated by the exercise of that liberty are 'worthy of respect.'"[139]

Thus, for Justice Stevens the Establishment Clause prevents the corruption of religion by prohibiting government's involvement with it, either in the form of aid or mixing of sacred symbols with symbols of government. The Clause also guards the purity of religion by preventing government from encouraging religious belief; it preserves religion as a way of life to be voluntarily chosen free of state influence.

4. Preventing Social Conflict

The final justification offered by Justice Stevens for strong enforcement of the Establishment Clause, and for a high wall of separation between religion and state, is the need to protect society from religiously motivated social strife. For example, in arguing that the school-choice program at issue in *Zelman* was prohibited by the Establishment Clause, Justice Stevens argued that his view was informed by "the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."[140] He added that the Court's decision determining that the voucher program was a neutral-benefit program that did not favor religion withdrew "a brick from the wall that was designed to separate religion and government, [thereby] increas[ing] the risk of religious strife and weaken[ing] the foundation of our democracy."[141]

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pressed in many opinions joined by Justice Stevens. Koppelman, *supra* note 16, at 570 n.14.

139. *Id.* at 572 (citing Justice Stevens, *Wallace*, 472 U.S. at 53, who in turn is citing James Madison (citation omitted)). Brownstein makes a similar point. Brownstein, *supra* note 18, at 611–12.

140. Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

141. *Id.* In addition to writing a dissent in *Zelman*, Justice Stevens also joined the separate dissenting opinions of Justices Souter and Breyer, both of whom argued, among other things, that the Establishment Clause was adopted in part to prevent religiously inspired social conflict. *Id.* at 715–17 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting); *id.* at 717 (Breyer, J., joined by Stevens & Souter, JJ., dissenting). *See also*, Mitchell v. Helms, 530 U.S. 793, 872, 872 n.2 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting) (arguing that the aid at issue established religion, which "is inextricably linked with conflict," the avoidance of which was "a motivating concern" of the men who wrote and adopted the Establishment Clause). I question the claim that one of the original motivations behind the adoption of the Establishment Clause was to prevent reli-

Justice Stevens's concern with social fragmentation also extended to the religious-symbols cases. In addition to arguing that religious symbols on public property violate the Establishment Clause because they corrupt religion and violate the equality principle and rights of conscience, he also argued that they are unconstitutional because they are divisive, and that they foment social fragmentation along religious lines. In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,[142] for example, he argued that religious displays could be offensive to those who did not share the faiths represented by the symbols as well as to those who do share the faiths but object to the purposes of the displays.[143] However, "[t]he Establishment Clause does not allow public bodies to foment such disagreement."[144] Similarly, Justice Stevens argued that the Ten Commandments monument at issue in *Van Orden* was an "official state endorsement of the message that there is one, and only one, God[,]" which flouted "[g]overnment's obligation to avoid divisiveness and exclusion in the religious sphere."[145]

In sum, Justice Stevens argues that the Establishment Clause requires a high wall of separation between church and state for the purposes of promoting: (1) social cohesion, (2) the purity of religion, (3) freedom of conscience, and (4) equality.

II. THEORIES OF JUSTICE STEVENS'S RELIGION JURISPRUDENCE

Justice Stevens's approach to religion is not a picture of unremitting opposition to it, seeing that he believes government should be prohibited from singling it out for unequal treatment and that discretionary exemptions are sometimes justified. Still, his approach to the Religion Clauses requires religion to accept the ever-expanding intrusion of the contemporary regulatory state, to be treated the same as irreligion and abide by all generally applicable laws, no matter how burdensome to religious practices they may be. Yet when it comes to religion's involvement with government (in terms of the messages and money government sends and spends), he argues that religion is different and should be treated unequally, that it cannot partake of

giously motivated social strife. *See* Kevin Pybas, *Does the Establishment Clause Require Religion to Be Confined to the Private Sphere?*, 40 VAL. U. L. REV. 71, 104–09 (2005).

142. 492 U.S. 573 (1989).

143. *Id.* at 650–51 (Stevens, J., concurring in part and dissenting in part).

144. *Id.* at 651.

145. Van Orden v. Perry, 545 U.S. 677, 709, 712 (2005) (Stevens, J., dissenting).

the benefits of government the way irreligion can. At first blush, then, Justice Stevens's religion jurisprudence seems intended to fetter religion. Religion has to endure the same burdens as irreligion but cannot share in the benefits available to irreligion. Are his critics thus on to something when they accuse him of hostility to religion? The scholars whose writings I consider below explicitly reject the claim that Justice Stevens is hostile to religion. Their accounts of Justice Stevens's religion jurisprudence differ from each other but are in agreement that it is guided by a principled religion-neutral or even religion-friendly philosophy.

A. *Eduardo Moisés Peñalver*

Eduardo Moisés Peñalver argues that instead of "being moved by a reflexive hostility towards religion,"[146] Justice Stevens's religion jurisprudence is guided by the principle of "respectful apprehension."[147] That is, according to Peñalver, Justice Stevens views "religion as an important, but dangerous, category of behavior that is, for the most part, able to fend for itself in the political process."[148] Although Peñalver argues that Justice Stevens sees religion as an important human activity, he is critical of him for largely treating "religion as no more valuable than other valuable categories of expressive activity."[149] That Justice Stevens believes religion is no more important than some other human pursuits helps explain why he thinks it is unfair (and a violation of the Establishment Clause) to exempt, in any broad sense, only religion from the obligations of general laws.[150] Similarly, though, Justice Stevens appeared to believe as well that religion is no less important than other human activities, as he supported free-exercise exemptions when the law exempted analogous secular activity.[151]

Peñalver argues that there is a uniqueness to religion that justifies exempting it from the operation of general laws, and he is thus critical of Justice Stevens's (and the Court's) Free Exercise Clause jurisprudence because it guards against only intentional discrimination against religion but does nothing to protect vulnerable religious minorities from the burdens of oppressive gen-

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146. Peñalver, *supra* note 17, at 2241.
147. *Id.*
148. *Id.* at 2247.
149. *Id.* at 2241.
150. *See supra* notes 34–69 and accompanying text.
151. *See supra* notes 49–53, 63–69 and accompanying text.

eral laws.[152] There is much to agree with in Peñalver's account, but I question whether Justice Stevens's jurisprudence indicates that he wants to leave religion to the push and pull of politics. That is, apart from subjecting religion to general laws, it seems to me that leaving religion to fend for itself is a situation Justice Stevens very much does not want to allow. For as we saw above, Justice Stevens's *Flores* concurrence indicates strong opposition to political accommodations, unless they lift regulatory burdens or are very narrowly targeted.[153] And Justice Stevens's Establishment Clause jurisprudence indicates that he opposed almost every benefit religion achieved through politics.[154] I am not suggesting that Justice Stevens should accept the outcomes of the political process, but the claim that he believes religion can take care of itself politically implies that he is mostly willing to live with those results. But Justice Stevens was interventionist regarding religion—with free exercise to make sure religion is treated no better than irreligion and with establishment to deny it government support. This asymmetrical treatment of religion—requiring it to bear the same regulatory burdens as irreligion but denying it benefits available to the latter—is the basis for the charge that Justice Stevens is hostile to religion. However wise or defensible Justice Stevens's religion jurisprudence is, Peñalver's contention that he is mostly willing to allow religion "to fend for itself in the political process"[155] does not seem to fully capture his jurisprudence.

B. Andrew Koppelman

As I discussed above, one of the reasons Justice Stevens gives for strong enforcement of the Establishment Clause is to protect religion from the corrupting influence of government.[156] This is a facet of Justice Stevens's religion jurisprudence emphasized by Andrew Koppelman[157] but which is overlooked by Christopher L. Eisgruber and Peñalver. Koppelman argues, in fact, as the title of his article indicates, that Justice Stevens is a "religious enthusiast" whose religion jurisprudence is strongly motivated by concern for protecting the purity of religion from the corrupting in-

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152. Peñalver, *supra* note 17, at 2251–54.
153. *See supra* notes 72–92 and accompanying text.
154. *See supra* notes 98–145 and accompanying text.
155. Peñalver, *supra* note 17, at 2247.
156. *See supra* notes 126–39 and accompanying text.
157. Koppelman, *supra* note 16, at 574.

fluence of the state.[158] Justice Stevens's high-wall separationism is thus in the service of that end. That Justice Stevens wishes to protect religion from the corrupting influence of the state means, according to Koppelman, that he views "religion [as] a good thing deserving of protection."[159] The charge that Justice Stevens is hostile to religion is therefore "confused to the point of perversity."[160]

Koppelman rightly stresses the extent to which protecting the purity of religion is an expressed concern of Justice Stevens. Though this might indicate that Justice Stevens is not hostile to religion, it nevertheless seems to me that something about his purported desire to safeguard religion from the corrupting influence of government does not add up. That is, although Justice Stevens's self-understanding may be that he is a friend of religion, his commitment to protecting religion from the corrupting influence of the state seems hollow in that it does no real work in his jurisprudence. In every case in which he cites the protection of religion as a rationale for his vote, it is at best a secondary or even tertiary rationale.[161] Thus, in no case in which he asserts the necessity of protecting the purity of religion as a reason for opposing the policy at issue would his conclusion have been different had he omitted this rationale.

An additional reason for questioning the depth of Justice Stevens's concern with the purity of religion is that he mostly only states conclusions and appeals to authority. For example, in *Van Orden* he cites Madison for the proposition that the mixing of government and religion has a "corrupting influence on both"; consequently, both will "exist in greater purity, the less they are mixed together."[162] Similarly, he twice quoted Clarence Darrow's assertion that "[t]he realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the

158. *Id.* at 568.

159. *Id.* at 585.

160. *Id.*

161. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 798 (1995) (Stevens, J., dissenting) (arguing against the installation of unattended religious symbols on public property because it might communicate a religious message, not because religion required protection from commercialization); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 650–51 (1989) (arguing the Establishment Clause bars the display of religious symbols on public property because it foments disagreement between religious bodies and not because of government's corrupting influence on religion).

162. Van Orden v. Perry, 545 U.S. 677, 725 n.25 (2005) (Stevens, J., dissenting) (citation omitted).

arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."[163] Justice Stevens treats the declarations of Madison and Darrow as axiomatic, self-evidently true in all times and places, requiring neither explanation nor qualification. Madison's and Darrow's words are well-sounding, but what do they mean? Are their words even true? What is "pure" religion; what is "pure" government? Do benchmarks exist for assessing "purity" and "corruption," or do we simply know them when we see them? Does change equal corruption? Does all mixing of government and religion corrupt both, or only some types of mixing?

What I mean, to take a brief example, is that in the cases in which Justice Stevens cites the anticorruption statements of Madison (*Van Orden*) and Darrow (*Wolman* and *Pinette*), the issues were whether the Establishment Clause is violated by, respectively, a Ten Commandments monument on state capitol grounds which includes irreligious monuments, the provision of state-funded public-school-like benefits to religious schools, and the placement of a Latin cross within an area of state capitol grounds deemed by state officials to be a public forum. The Court, with Justice Stevens (and others) dissenting, held that neither the placement of the Ten Commandment monument nor the cross violated the Establishment Clause.[164] With the religious-school benefits in *Wolman,* Justice Stevens was in the majority upholding the provision of on-site diagnostic services and off-site therapeutic services and striking funds for instructional materials and equipment, but dissented from the Court's decision allowing the loaning of secular textbooks and state-funded standardized testing and scoring.[165] How the seasonal display of the Latin cross by the Klu Klux Klan in *Pinette* promoted the corruption of both government and religion, Justice Stevens did not explain. Nor did he explain how the Ten Commandments monument in *Van Orden* promoted the alleged corruption there. In contrast, we should note that in *Wolman* Justice Stevens argued that the aid at issue induced corruption because a condition of the aid prohib-

163. *See Pinette,* 515 U.S. at 812 n.19 (Stevens, J., dissenting) (citations omitted); Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., concurring in part and dissenting in part) (citation omitted), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

164. *Van Orden,* 545 U.S. at 691–92; *Pinette,* 515 U.S. at 770.

165. *See Wolman,* 433 U.S. at 264–66 (Stevens, J., concurring in part and dissenting in part) (citation omitted), *overruled by Mitchell,* 530 U.S. 793.

ited private schools from requiring teachers and students to adhere to any particular religious creed.[166] He also worried that the lure of secular, state-provided textbooks would cause religious schools to forego religiously oriented textbooks.[167] In *Wolman* he thus appears to equate change, or even the possibility of it, to religious corruption. Maybe it is, but how can he know? This question gets to the nub of the matter in that the anticorruption rationale wrongly presumes both that there is such a thing as "true" religion—or true Christianity, or true Judaism, or true Islam, etc.—and that it can be defined. But what resources are available to distinguish, say, pure Christianity from impure Christianity? As I have argued elsewhere,[168] moreover, the anticorruption rationale cannot be a basis for decision because the Establishment Clause prohibits the Court from defining true religion.[169] From the perspective of the Constitution there is no distinction between "pure" religion and "corrupt" religion. There is simply religion and how it is lived and practiced by individuals and groups. Disabled from defining true religion, the Court is not in a position to say, as Justice Stevens does, that some state actions are corrupting of religion.[170]

Consider, too, the purity of religion and free exercise. Although the anticorruption rationale plays no role in Justice Stevens's—or any Justice's—free-exercise jurisprudence, it is not unreasonable to expect a Justice who professes concern for the ways the state may, through its involvement with religion, corrupt or misshape it to also be alert to this possibility with respect to how the state uses its regulatory power. As discussed above, however, Justice Stevens believes religion should bear the same burdens of the administrative state that irreligion does, though he allows for statutory accommodations when they cancel regulatory burdens and are limited in scope.[171] His reasons for this are not

166. *See id.* at 266 n.7.

167. *Id.*

168. Pybas, *supra* note 141, at 100–02. Koppelman argues similarly, and more comprehensively, in Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

169. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969); United States v. Ballard, 322 U.S. 78, 81–82 (1944).

170. Relatedly, and perhaps trivially, we should note that involving the Supreme Court in protecting the purity of religion would seem to implicate the state in promoting religion, something the Court itself holds to be prohibited by the Establishment Clause. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 616–17 (1971).

171. See *supra* notes 34–92 and accompanying text.

out of the mainstream, but he betrays no interest in how the state's regulatory power might be harmful to religion. It goes beyond this, actually, in that he once suggested that state power should be used to wean children away from the religious beliefs of their parents.[172] He opposed the accommodation the State of New York had made with the Satmar Hasidic, a small Jewish sect, on the grounds that the creation of the public-school district at issue would "shield [Satmar] children from contact with others who have 'different ways,'" effectively, with state backing, "cement[ing] the attachment of young adherents to a particular faith."[173] Implicit in his argument is the idea that public or government schools should be instruments for controlling or weakening religion, of making it more difficult for parents to pass on their beliefs to their children. The notion that the state should educate children away from the beliefs and commitments of their parents is not a novel view,[174] but it does not easily fit with the claim that Justice Stevens is a friend of religion who wishes to protect it from the corrupting influence of the state.

I am not suggesting that we should be unconcerned with the state's potential to corrupt religion, of it trying to manipulate religion to serve its own ends. The idea that church and state should be separated to protect the church from the corrupting influence of the state is, after all, as Koppelman notes, centuries old, with many eminent advocates.[175] My point is simply that the anticorruption rationale does no work in Justice Stevens's jurisprudence and that it is not an expression of a meaningful commitment to protecting religion from the state. What is more, rather than protecting religion, in the contemporary context of an expansive regulatory state the anticorruption rationale itself distorts religion by pushing religion deeper into the private

172. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711 (Stevens, J., concurring) (criticizing the special New York school district that segregated Satmar schoolchildren).

173. *Id.*

174. In Plato's *Republic*, for example, Socrates offers, perhaps ironically, an elaborate state system of education requiring, among other things, that children above the age of ten be sent from the city so that they can be educated toward the Good and the city's needs and away from inherited familial beliefs and loyalties. *See* PLATO, THE REPUBLIC 220 (Allan Bloom trans., HarperCollins, 2d. ed. 1968); *see also* Paula Abrams, *The Little Red School House: Pierce, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 84 n.144 (2003).

175. Koppelman, *supra* note 16, at 570 (stating that Justice Stevens's view is associated with "John Milton, Roger Williams, John Locke, Samuel Pufendorf, Elisha Williams, Isaac Backus, Thomas Jefferson, Thomas Paine, John Leland, and James Madison").

sphere.[176] As the scope of the state expands, the anticorruption rationale, to keep religion "pure" or separate, requires religion to recede, to become more and more private with less and less of a public dimension. This is all well and good if religion's self-understanding is that it is wholly a private matter involving nothing more than the adherent's own conscience and perhaps joining together with like-minded individuals for worship or study or both. But for many people, religion makes a public claim on them, impelling them, individually and collectively, to acts of charity like operating hospitals, schools, foster homes, adoption agencies, homeless shelters, soup kitchens, addiction-recovery centers, relief agencies, and the like, and can shape the operation of for-profit businesses they create and run.[177] This is not to say that in conflicts between religion and the state that religion should necessarily prevail. It is to say, however, that a genuine commitment to the flourishing of religion would do more than simply insist that, as the state expands, religion must contract, that the public sphere is the domain of the state and other secular entities alone.

In brief, then, and with all due respect to Koppelman, there are considerable grounds for doubting that Justice Stevens is a "religious enthusiast." The anticorruption rationale does no work in his jurisprudence and, of course, cannot because the Establishment Clause prohibits the Court from declaring religious truth. Moreover, there is no meaningful analysis in his deployment of the anticorruption rationale; he simply states conclusions and appeals to authority as though words and principles articulated long ago in different contexts involving different issues exactly fit today's context and issues. Further fueling my skepticism that Justice Stevens had a serious interest in guarding religion from the corrupting influence of the state is his silence about this in free-exercise cases. Free-exercise and statutory exemptions obviously do not involve the same doctrines as establishment cases, but there is no apparent reason why concern for the corrupting potential of the state should not also extend to

176. This is also true of the wall-of-separation metaphor, which Justice Stevens repeatedly invoked. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 266 (1977) (Stevens, J., concurring in part and dissenting in part), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

177. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (holding that the "contraception care" mandate of the Affordable Care Act, as applied to for-profit, closely-held corporations, violates RFRA).

how the state uses its regulatory power. For these reasons, Justice Stevens's expressions of concern about the purity of religion have the appearance, not of a deep, reflective commitment, but of throw-away lines, of simply checking a box on a form.

While I am unpersuaded that Justice Stevens had a consequential commitment to protecting the purity of religion, we should not let his *chutzpah* pass without comment. That is, an important part of the anticorruption rationale is that religion has to be protected from itself, that it is unable to resist the baubles government offers it, the price of which is its corruption. To cite but one example, the anticorruption rationale, as I observed earlier, was one of Justice Stevens's arguments against the Ten Commandments monument at issue in *Van Orden*.[178] Yet various religious interests filed amicus briefs in support of the constitutionality of the monument.[179] Justice Stevens's message to these citizens and others[180] is that they do not understand their own religion, that their support of the public display of the monument corrupts it. The possibility that government might seek to co-opt religion for its own purposes is a legitimate concern—for the religious themselves, but not the Supreme Court. It is up to the religious to maintain and sustain their beliefs and practices. In fact, only they can do it. As I argued above, from the perspective of the Constitution, the categories of "pure" and "corrupt" religion are meaningless.[181] There is only religion, as its adherents practice it, in all of its glories and profanities. There is thus more than a little presumptuousness in Justice Stevens's purported desire to protect the purity of religion.

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178. *See supra* note 135 and accompanying text; Van Orden v. Perry, 545 U.S. 677, 725 n.25 (2005) (Stevens, J., dissenting).

179. *See, e.g.*, Brief of The Becket Fund for Religious Liberty as Amicus Curiae Supporting Respondents, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 227231; Brief for Focus on the Family and Family Research Council as Amici Curiae Supporting Respondents, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 263788; Brief of The National Jewish Commission on Law and Public Affairs as Amicus Curiae Supporting Respondents, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 263786.

180. Gallup polling conducted in 2003, roughly the same timeframe as the *Van Orden* litigation and decision, indicated that "7 in 10 Americans approve of the display of a Ten Commandments monument in a public area," of which undoubtedly a fair number were Christians and Jews who do not see public Ten Commandments displays as inconsistent with their religions. Frank Newport, *Americans Approve of Public Displays of Religious Symbols*, GALLUP (Oct. 3, 2003), http://www.gallup.com/poll/9391/americans-approve-public-displays-religious-symbols.aspx [https://perma.cc/CK4S-SGFT].

181. See *supra* notes 166–70 and accompanying text.

C. Gregory P. Magarian

Gregory P. Magarian agrees with Justice Stevens's critics that he has an "undeniable record of disfavor for religious claims and claimants."[182] Rather than seeing this as an indication of bias against religion, however, Magarian argues, like Peñalver and Koppelman, that political principle animates Justice Stevens's religion jurisprudence. According to Magarian, the driving force in Justice Stevens's religion jurisprudence is worry that religion, as an institution, will, if not closely checked, threaten individual liberty and social cohesion.[183] This is not a fear born of hostility to religion, Magarian contends, but is a subset of broader concern with private associations as a whole. That is, Justice Stevens's "disfavor for religious claims and claimants [is] simply one component . . . of a broadly, consistently skeptical approach toward constitutional autonomy claims of powerful institutions of civil society."[184] Justice Stevens worried both that "powerful institutions of civil society would use constitutional cover to exert coercive power over individuals" and that "excessive constitutional protection for civil society institutions would encourage factionalism and undermine national unity."[185] As Magarian indicates, not all private associations worried Justice Stevens, only those that are powerful. Specifically, he found the "factional and coercive tendencies" of religion, political parties, and private associations like the Boy Scouts "unacceptably dangerous and/or insufficiently justifiable."[186] By contrast, he was receptive, through most of his years on the Court, to the constitutional claims of "racial affinity associations" like the NAACP.[187] Racial-affinity groups were different, "not because they avoided factionalism and coercion, but because they deployed those forces to overcome, rather than perpetuate, established structures of social and political power."[188] Magarian's argument is thus that Justice Stevens's treatment of religion was not unique, that he did not disfavor it as such. But that he consistently opposed the constitutional claims of it and political parties and some private associations because he believed that to do otherwise "threatened to fa-

182. Magarian, *supra* note 14, at 735.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 763.
187. *Id.* at 760–61.
188. *Id.* at 762.

cilitate those institutions' exercise of coercive power and/or to interpose factionalism against shared national commitments and values."[189]

As Magarian sees it, controlling factionalism or social instability was the guiding norm of Justice Stevens's free-exercise jurisprudence, while limiting religion's coerciveness drove his establishment jurisprudence.[190] Magarian does not dispute that equality was central to Justice Stevens's free-exercise jurisprudence, but emphasizes that he did not value equal treatment for its own sake but rather as a means of promoting "national unity over what [he believed to be] divisive rights claims."[191] In support of this contention Magarian helpfully calls attention to an obscure footnote in a dissent by Justice Stevens in a takings case where he indicates that his objection to mandatory exemptions was rooted in *Federalist 10* and James Madison's concern with factions.[192] Magarian is critical of Justice Steven's opposition to mandatory accommodations, arguing that diversity among private associations is generally politically beneficial because of private associations' role in "developing, debating, and promoting ideas that enrich public debate."[193] Magarian thus regards Justice Stevens's antifactionalism as "unduly rigid,"[194] which blinds him to the fact that antifactionalism "can coerce people away from their chosen associations and toward a stultifying nationalism."[195] Antifactionalism therefore "makes people more vulnerable to coercive [state] authority," especially adherents of minority religions.[196] Conversely, constitutional "accommodations can bring minority believers closer to equal footing with adherents of religions whose interests the political majority routinely facilitates."[197] Justice Stevens also "fail[ed] to distinguish religious-accommodation claims from other types of autonomy claims raised by civil society institutions."[198] In consistently opposing religious claims of all varieties, he failed to understand that ac-

189. *Id.* at 753.

190. *Id.* at 739–43.

191. *Id.* at 739.

192. *Id.* at 738. The case is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1072 n.7 (Stevens, J., dissenting) (comparing the rule of generality in takings cases to the rule of generality in free-exercise cases).

193. Magarian, *supra* note 14, at 771.

194. *Id.* at 770.

195. *Id.* at 772.

196. *Id.*

197. *Id.* at 773.

198. *Id.* at 770.

commodation claims are generally "idiosyncratic" in nature, arising from "peculiar combinations of belief and circumstance," like the Jewish Air Force officer in *Goldman v. Weinberger* who wanted to wear a yarmulke while on duty.[199] In other words, granting exemptions generally benefits only a small number of people, and thus presents "no serious danger of exacerbating factionalism."[200] For Magarian, then, Justice Stevens's equality-driven antifactionalism is an ill-suited lens through which to evaluate mandatory accommodation claims.

With respect to the Establishment Clause, Magarian argues that anticoercion was the primary value undergirding Justice Stevens's approach to it but that antifactionalism sometimes played a role too.[201] While Magarian is critical of Justice Stevens's free-exercise jurisprudence, he argues that his Establishment Clause jurisprudence is appropriate and wise.[202] Specifically, Magarian argues that Justice Stevens was right to oppose the claims of religion and other private associations because of the threat that those entities "will use increased increments of constitutionally grounded autonomy to exercise coercive authority over individuals."[203] Justice Stevens's establishment views, Magarian writes, "reflect careful consideration of the tension between individual dignity and institutional authority."[204] What Magarian means here is that Justice Stevens supported the right of religious institutions to control issues of internal governance, as in, for example, *Amos*, where the Court, with Justice Stevens in the majority, upheld the statutory right of a religious employer to hire fellow believers even for some seemingly nonministerial positions.[205] But he drew the line at claims he believed would result in coercing religious belief, as in, for example, the public-schooling cases.[206] On Magarian's account, then, a desire for robust social uni-

199. *Id.* at 774–75; *see also* Goldman v. Weinberger, 475 U.S. 503 (1986).

200. Magarian, *supra* note 14, at 775.

201. *Id.* at 740–41.

202. *Id.* at 764–70.

203. *Id.* at 764.

204. *Id.* at 768.

205. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 329–30 (1987).

206. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (striking down a public-school policy allowing student-led prayer before high school football games); Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) (striking down a state law calling for public-school days to begin with meditation or voluntary prayer). *See also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring) (arguing that the public-school district at issue would, if permitted, make it difficult for children to leave the faith of their parents, thereby implying that children would be co-

ty and to protect individuals from private coercive power, not bigotry, best explains Justice Stevens's religion jurisprudence.

Magarian's placement of Justice Stevens's religion jurisprudence in the larger context of his concerns about private associations as a whole is the more thorough and perhaps most interesting of the defenses of the Justice considered here. His critique of Justice Stevens's free-exercise antifactionalism is thoughtful and well-done, so my comments here mostly pertain to Justice Stevens's establishment jurisprudence and his defense of it. But with respect to Justice Stevens's objections to free-exercise exemptions on the grounds that they threaten social unity, one must note that for him the Free Exercise Clause is a guarantor of social stability, not religious freedom. Civic stability is of course important and makes possible the meaningful enjoyment of all of our rights. Justice Stevens is thus not wrong to worry that the government's own actions could lead to harmful factionalism. But to know if religious exemptions threaten civic stability, one needs to know just what builds and maintains it. Justice Stevens does not investigate this but is nevertheless certain that exemptions threaten it. His casual, unexamined assumptions about the requirements of social cohesion make it easy for him to, as Magarian's analysis indicates, dismiss factions or private associations as inherently harmful, as contributing little benefit to our politics. Magarian is thus right in arguing that Justice Stevens's thinking about mandatory exemptions and factionalism is "unduly rigid"[207] and thus misguided.

But whereas Magarian thinks Justice Stevens's analytical errors are limited to his free-exercise jurisprudence, it seems to me that the same criticism Magarian has of it—that it is excessively rigid—also applies to his establishment jurisprudence. Magarian argues that concern with the coercive potential of religious groups drove Justice Stevens's establishment jurisprudence, though he notes that antifactionalism sometimes played a role too. As I documented above, however, in addition to these principles[208] Justice Stevens sometimes also justified his separationism on the basis of equality and preventing the corruption of religion.[209] It is thus not clear that one value was primary. He was

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erced in their faith by their parents).

207. Magarian, *supra* note 14, at 770.

208. *See supra* notes 113–25, 140–45 and accompanying text.

209. *See supra* notes 97–112 and 126–39 and accompanying text.

committed to a high wall of separation, and any rationale would do, it seems, depending on circumstances. In other words, his high-wall separationism appears to be a priori rather than the result of careful examination and analysis, to which he appended different rationales depending on the issues and context. This is not to say that the reasons Justice Stevens gives for a high wall of separation are inappropriate issues of concern. Rather, he considers them in such an "unduly rigid" fashion, to borrow Magarian's characterization of his free-exercise jurisprudence, that his position seems preordained from the outset. Instead of a searching inquiry into how liberty can best be protected and promoted in the contemporary, expansive regulatory state, much of Justice Stevens's establishment jurisprudence seems perfunctory, as guided by nothing more than a determination to confine religion.

As an example of the rigidity of Justice Stevens's establishment jurisprudence, consider his dissenting opinion in *Zelman v. Simmons-Harris*, a case Magarian does not examine. Justice Stevens asserted that the Court's decision upholding the Cleveland school-voucher program against an Establishment Clause challenge was "profoundly misguided."[210] He wrote:

> [I]n reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.[211]

It is not a dismissal of the evil of religiously inspired violence to question Justice Stevens's view that recent and ongoing conflicts in different countries with different histories and cultures and complicated mixes of political, ethnic, and religious issues are instructive for evaluating the meaning of the Establishment Clause.[212] Moreover, in invoking the early North-American set-

210. Zelman v. Simmons-Harris, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting).
211. *Id.* at 685–86 (Stevens, J., dissenting).
212. *See* WILLIAM CAVANAUGH, THE MYTH OF RELIGIOUS VIOLENCE 3–5 (2009) (re-

tlers who fled established churches and the violence of civil authorities attempting to coerce religious belief, Justice Stevens is obligated, it seems to me, to explain how, for example, the funding arrangement at issue in *Zelman*—a scheme that diversified schooling options—could give rise to the type of conflict that resulted from governmental efforts to impose uniformity of belief.

What is more, Justice Stevens ignores American history in supposing that what he opposes is new and novel, threatening to upset a hard-won *denouement* where religion was finally, for the sake of social peace and political stability, banished to the private sphere. In other words, implicit in Justice Stevens's worry that any approach to the Establishment Clause other than high-wall separationism will lead to religious strife is a refusal to note that in the United States religion has never been strictly confined to the private sphere, as he wishes it to be, and yet ours has been a history without deep or enduring religious conflict. Recall that prior to 1947 there was no understanding that the Establishment Clause limited the involvement of the states with religion, and the states promoted religion in a variety of ways without producing lasting or enduring religious strife.[213] Consider, moreover, that in the last half century or so, as Justice O'Connor noted in her *Zelman* concurrence, billions of federal dollars have been directed to religious entities "through public health programs such as Medicare . . . and Medicaid . . . through educational programs such as the Pell Grant program . . . and the G.I. Bill of Rights . . . and through childcare programs such as the Child Care and Development Block Grant Program," all without engendering religious conflict.[214] This is not to deny the reality of religious violence and antireligious bigotry, particularly against minority groups like Catholics, Mormons, and Jehovah's Witnesses.[215] It is to say, though, that religion has always been a part

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jecting the traditional secular identification of religious violence as distinct from other aspects of power).

213. *See generally* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

214. *Zelman*, 536 U.S. at 666–68 (O'Connor, J., concurring).

215. For an account of one episode of anti-Catholic violence, see Elizabeth M. Geffen, *Violence in Philadelphia in the 1840's and 1850's*, 36 PA. HIST. 381, 398–405 (1969), and on anti-Catholic bigotry more recently, see generally Thomas Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001). On anti-Mormon violence, see, for example, PATRICK Q. MASON, THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH (2011). On violence against Jehovah's Witnesses, see, for example, SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000).

of public life in the United States and yet—Justice Stevens's worry about bloody religious conflict notwithstanding—America has largely been a peaceful, tolerant nation.[216]

But let us return to Magarian's argument that Justice Stevens's establishment philosophy is animated by "deep concerns about coercion," by the worry that religious groups "will use increased increments of constitutionally grounded autonomy to exercise coercive authority over individuals."[217] An illuminating example of Justice Stevens's anticoercion reasoning is his concurring opinion in *Board of Education of Kiryas Joel Village School District v. Grumet.* In *Kiryas Joel* the Court ruled that the State of New York had violated neutrality in creating a public-school district to accommodate a small Jewish group, that the state had impermissibly favored the group over both other religious groups and the irreligious.[218] Justice Stevens agreed that the state had departed from neutrality in creating the school district, but also argued that it violated the Establishment Clause in its operation.[219] This was because, he wrote:

> [It] unquestionably increased the likelihood that [Satmar Hasidic children] would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith.[220]

Justice Stevens here indicates that the state, through its public schools, should work to make it less likely that the Satmar children will become "faithful adherents of their parents' religious faith."[221] To be sure, the Satmar Hasidic lead lives at some re-

216. *But see* DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 3–4 (2011) (arguing that intolerance of and bigotry against religious minorities and religious dissenters is more the norm than the exception, and that the state's coercive power was often used towards those ends).

217. Magarian, *supra* note 14, at 764.

218. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (Souter, J., plurality opinion) (concluding that the state had violated the Establishment Clause because state benefits flowed solely to a single religious group).

219. *Id.* at 711–12 (Stevens, J., concurring).

220. *Id.* at 711.

221. *Id.*

move from the American mainstream.[222] Even so, the school was a public school with a public-school curriculum for special-needs students. Justice Stevens's suggestion that the state should stand as an obstacle to parents transmitting their religious beliefs to their children is, to quote Justice Stevens himself, "not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."[223]

Magarian does not comment on the lack of neutrality in Justice Stevens's opinion. Rather, he approvingly cites it as an instance of the Justice "extend[ing] his anti-coercion concern to encompass children within a religious community."[224] Parents and guardians may, of course, parent in ways that are harmful to children, in which case the state is justified in intervening. Here, however, Justice Stevens's concern was that the public school lacked diversity, that Satmar Hasidic children would not be exposed to different ways of life, thus making it easier for their parents to pass on their beliefs to their children.[225] What this has to do with preventing coercion is unclear. In other words, that the school may have lacked diversity does not, alone, mean that the Satmar parents improperly coerced their children. Where the line between good parenting and improper coercion is, moreover, Justice Stevens does not say. But if protecting children from inappropriate parental coercion is a goal of the Establishment Clause, some account of the boundary between acceptable and unacceptable coercion is necessary. Moreover, just how diverse must a public school be before it can be said that parents are not trying to "shield children from contact with others who have 'different ways'"?[226]

Governmental efforts to coerce religious belief are immoral and are justly prohibited by the Establishment Clause. But Justice Stevens's belief that the mere existence of a homogeneous public-school district consisting of the special-needs children of religious parents coerces the children's religious beliefs threatens to make anticoercion an all but meaningless Establishment Clause

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222. *See, e.g.*, Nomi Maya Stolzenberg, Board of Education of Kiryas Joel Village School District v. Grumet*: A Religious Group's Quest for Its Own Public School*, *in* LAW AND RELIGION: CASES IN CONTEXT, 203–30 (Leslie C. Griffin ed., 2010) (describing the Satmars' separation from the existing township and formation of a separate municipality where they could enact their own rules).

223. Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

224. Magarian, *supra* note 14, at 743.

225. *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., concurring).

226. *Id.*

principle. One is tempted to dismiss his *Kiryas Joel* concurrence as a one-off, as not really representative of his understanding of coercion. But consider Justice Stevens's argument in *Van Orden v. Perry* that the Ten Commandments monument set on the grounds of the Texas state capitol coerced religious belief.[227] The monument, he argued, "never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze."[228] He contrasted the coerciveness of the monument with the religious rhetoric of elected officials, which he characterized as "examples of benign government recognitions of religion."[229] Whatever plausible grounds exist for believing that the Ten Commandments monument violates the Establishment Clause, the notion that it coerces or attempts to coerce religious belief is not among them. Justice Stevens's acknowledgement that individuals are free to avert their eyes would seem to undermine his coercion claim.[230] Consider, too, that one is free to reject the message of the monument. Consequently, it is difficult to see any coercion, actual or attempted, in the passive stone display. It seems to me, then, here as in *Kiryas Joel,* that Justice Stevens stretches the anticoercion principle beyond its capacity to retain meaning, to such an extent that it suggests that his conceptual errors are not really about free exercise, as Magarian (and Peñalver) would have it, but are broader and more problematic.

As noted, Magarian praises the expansiveness of Justice Stevens's understanding of coercion because it prevents religious and other institutions of civil society "from replicating the socially harmful effects of state coercion."[231] With respect, this strikes me as question-begging. As I have suggested, it is far from established that what Justice Stevens deems coercive always is. In other

227. *See* Van Orden v. Perry, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting) ("The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the 'Judeo-Christian' God.").

228. *Id.* at 723. Magarian cites both Justice Stevens's objection to the Ten Commandments monument in *Van Orden* and his dissent in *Salazar v. Buono,* 559 U.S. 700, 735 (2010) (Stevens, J., dissenting) (objecting to a land transfer by the U.S. government intended to cure an Establishment Clause violation created by the placement on federal land of a Latin cross memorializing Americans killed in World War I), as laudable stands against governmental coercion of religious belief. Magarian, *supra* note 14, at 742.

229. *Van Orden,* 545 U.S. at 722–23 (Stevens, J., dissenting) (distinguishing early American rhetoric invoking the divine from the Ten Commandments monument on capitol grounds).

230. *Id.* at 723.

231. Magarian, *supra* note 14, at 772.

words, given the capaciousness of Justice Stevens's view of coercion, what he sometimes opposed did not come close to mimicking the injuriousness of state coercion. For example, it is a rather ordinary parental objective to place one's children in a school with values and beliefs consistent with one's own. Whether children attend a public school or a private school, I dare say this true. Yet for Justice Stevens, as his *Kiryas Joel* concurrence indicates—a case, recall, involving a public school with a public-school curriculum for special-needs students—this commonplace familial dynamic is unconstitutional because it implicates the state in the family's coercion of religious belief.[232] Or as Magarian puts it, it is an instance of an institution of civil society—the family—attempting to "replicat[e] the socially harmful effects of state coercion."[233] The vastness of what constitutes prohibited coercion for Justice Stevens raises a concern Magarian noted in his critique of Justice Stevens's opposition to mandatory exemptions, to wit, that it leads to "a stultifying nationalism."[234] A better description, though, is "a stultifying secularism." Space considerations prevent examination of the issue here, but Justice Stevens's seemingly boundless notion of what constitutes unconstitutional coercion, combined with his hyper-aversion to factions, leaves increasingly little space for any religion but highly privatized forms whose self-understanding pertains only to one's interior orientation.

Magarian believes that situating Justice Stevens's religion jurisprudence in his broader concern with civic institutions vindicates him from the charge of harboring antireligious bias.[235] Notably, though, Magarian is critical of Justice Stevens's approach to free exercise, believing that he seriously overstates the potential for mandatory exemptions to lead to socially harmful factionalism.[236] Just as Justice Stevens exaggerates the likelihood of harm from free-exercise exemptions, my critique of his establishment jurisprudence suggests that his analytical errors are not limited to free exercise, and that he likewise inflates the existence of religious coercion. There is thus an aggressive overstating of the harm of religion in his First Amendment jurispru-

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232. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

233. *See* Magarian, *supra* note 14, at 772.

234. *Id.*

235. *Id.* at 735.

236. *See supra* notes 188–200 and accompanying text.

dence. This is not surprising given that his view of religion appears to be mostly if not wholly shaped by "the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."[237] But it is not simply those events shaping his view of religion, it is (1) his dogmatic view of those events and (2) his belief that those events constitute the totality of how one should think about religion in the public sphere. Virtually all public support of religion, as in the Cleveland school vouchers and the *Van Orden* monument, are taken to be identical to past European attempts to impose uniformity of religious belief. Hence, almost every instance of religion in the public sphere portends bloody violence like that plaguing parts of the globe today, about which he reduces complex political, ethnic, racial, and religious differences to nothing but religious conflict.

One need not attribute Justice Stevens's dogmatism to antireligious bigotry, though that would explain it. Instead, it seems to me that a more benign explanation is that Justice Stevens was intellectually lazy and incurious about liberty, religion, and society. That is, he had preconceived ideas about them and was simply uninterested in examining his preconceptions. He was certain that a vibrant, stable society requires an aggressively secular stand against religion because religion at its best is mostly, if not wholly, suppressed conflict always on the cusp of erupting into the open. To him, free-exercise exemptions and anything but high-wall seperationism herald the coming of a religious war—notwithstanding nearly two-and-a-half centuries of American history suggesting otherwise. Lest the reader think I am unfair to Justice Stevens, recall that both Magarian and Peñalver are critical of Justice Stevens's opposition to free-exercise exemptions. The most significant difference between my criticism and theirs is that they believe his errors are somehow compartmentalized or quarantined, that they do not also express themselves in his Establishment Clause jurisprudence. As I have suggested, however, there is reason to doubt this. The problem, in other words, is not simply a free-exercise problem but is the shallow, blinkered way he thinks about religion as a whole.

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237. Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

III. CONCLUSION

By the lights of the inexact labels of "liberal" and "conservative," Justice Stevens's Religion Clause jurisprudence may seem puzzling. That is, his high-wall approach to the Establishment Clause is conventionally liberal but his belief that the Free Exercise Clause prevents only intentional discrimination against religion resonated only with the more conservative Justices on the Court. The uniqueness of Justice Stevens's approach to religion perhaps contributes to the view that hostility against it best explains his views. After all, he put it to religion, so to speak, coming and going—generally affording religion no relief from the sprawling regulatory state that was not also available to irreligion, but allowing only irreligion to partake of the state's ample supportive resources, to which religious citizens have, of course, contributed via tax payments. Peñalver, Koppelman, and Magarian make plausible anti-hostility arguments about Justice Stevens's views on the Religion Clauses. As I have argued, however, their interpretations do not seem to adequately capture his religion jurisprudence. But I do not argue that Justice Stevens was hostile to religion. Rather, I have argued for a more benign, though still critical, interpretation—that his religion jurisprudence was animated by incuriousness, dogma, and fear, which gave him tunnel vision. In his view, virtually every contemporary Establishment Clause dispute arising in our expansive regulatory state is not meaningfully distinguishable from old-style European efforts to impose the one true religion, and every request for a religious exemption, no matter how low the cost to the state, portends a religious factional war. He was thus committed to privatizing religion, to allowing it as little public space as possible. Whereas Peñalver, Koppelman, and Magarian identify values each believes animates Justice Stevens's approach to religion, it seems to me that his guiding principles were simply comforting dogmas that made him certain that any religion other than highly privatized forms is always and everywhere harmful to social peace, and then he cast about for norms justifying the outcome he desired—any of which could be made to work—depending on the issue.

I have made no claims here about where the just boundary between religion and the government should lie. Nor do I necessarily disagree with all outcomes Justice Stevens reached. Instead, my point is that Justice Stevens gives us little reason to think that

his line-drawing is rooted in anything much at all other than his incurious, dogmatic notions about liberal society and the place of religion in it. This is unfortunate because, as Magarian writes, Justice Stevens's "majority opinions on religion will affect a central aspect of many people's lives for decades to come, and his dissenting opinions will continue to provide templates for reform of the prevailing doctrine on religious liberty."[238] Would that such influence was rooted in a richer, sharper understanding of religion's long and mostly constructive involvement in the American public square and the complexity and challenges the ever-expanding regulatory state presents to religious liberty.

238. Magarian, *supra* note 14, at 735.

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