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# Religious Freedom, Human Rights, and Peaceful Coexistence

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# Religious Freedom, Human Rights, and Peaceful Coexistence

Leslie C. Griffin\*

*At the Second Vatican Council, Fr. John Courtney Murray, S.J., persuaded the Catholic Church to abandon its long, and absolute, opposition to the separation of church and state. He brought a new concept of religious freedom to the Catholic Church. In honor of Murray, this essay looks at several current ways “religious freedom” harms individual rights.*

*The article describes the ministerial exception, which gives religious organizations the right to dismiss many employment discrimination lawsuits brought against them. It studies women’s right to contraceptive access, which has long been opposed by the Catholic hierarchy, and where employers have earned a legal right not to offer women contraceptive insurance. And it looks at LGBTs’ right to marry, which has received constant opposition from the church, even after the Supreme Court legalized it.*

*These three topics give us reason to reconsider how much religious freedom religious institutions should enjoy.*

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## INTRODUCTION

At the beginning of our country’s constitutional history, people “believed that the individual, not the state *or the church*, should decide matters of faith.”<sup>1</sup> Unfortunately, today the state’s actors have

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1. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 180 (2003) (emphasis added).

empowered church institutions while neglecting individuals. Religious institutions have become places where constitutional and statutory legal rights are lost, without a penalty to the offending institution or any benefit to the individual.

Religious freedom is causing happiness in some institutions but sorrow to many individuals. Women, the aged, the disabled, and LGBTs are repeatedly fired by religious institutions.<sup>2</sup> Employees lack any chance to go to court under a legal doctrine called the ministerial exception.<sup>3</sup> Employers often legally limit women's reproductive freedom.<sup>4</sup> LGBTs face numerous religious blocks to their new constitutional right to marry.<sup>5</sup>

Many people defend such situations as a great victory for the First Amendment and the institutions' religious freedom. In my view, however, the individuals are too often forgotten.

This situation is reminiscent of John Courtney Murray's career. Murray was the priest whose brilliant work is the focus of this conference. During Murray's lifetime, the Roman Catholic Church taught that separation of church and state was sinful and always wrong.<sup>6</sup> The church completely opposed the principles of the First Amendment.<sup>7</sup> After a lifetime of opposition and silencing from his church, Murray eventually persuaded the Second Vatican Council to view the American situation more favorably, and to recognize that *every individual* has the right to religious freedom.<sup>8</sup> My hope is that current-day Murrays will eventually persuade all religions to accept their members' constitutional and statutory rights instead of opposing them.

Part I of this paper identifies why Murray's work was unique and brilliant. Parts II, III, and IV identify three areas where religious freedom limits individuals' rights. Part II describes the ministerial exception. Part III explores women's rights to contraceptive access. Part IV examines LGBTs' rights to marry. The Conclusion explains why things should be different, one day.

## I. THE LEGACY OF JOHN COURTNEY MURRAY

For some of us, there is no Catholic who can match the experience and accomplishment of John Courtney Murray. He confronted an irresolvable problem and nonetheless solved it. Faced with church teaching that said

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2. *See infra* Part II.

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See infra* Part I.

7. *See infra* Part I.

8. *See infra* Part I.

Roman Catholicism must always be the established church of every nation because error has no rights,<sup>9</sup> Murray's teaching about the United States eventually persuaded the church to adopt a much broader notion of religious freedom—namely, that it is everyone's individual right.<sup>10</sup>

Murray's work influenced our first—and still only—Catholic president, John Fitzgerald Kennedy.<sup>11</sup> *Time* magazine put Murray on its cover after Kennedy's election in recognition of the intellectual work he had done to demonstrate that Catholics could be American citizens, politicians, and presidents.<sup>12</sup> Kennedy is now criticized by Republicans *and* Democrats for being too strict a separationist between church and state.<sup>13</sup> Nonetheless, Murray and Kennedy had a message that people like me—or should I say women like me?—still find valuable.

First, let us remember why Murray was so important and unique in the Catholic world.

During the 1940s, Catholics were struggling with the problem of “intercredal cooperation,” where people of different faiths were collaborating in social justice work after World War II. Intercredal cooperation sounds like a great thing, especially today, but Catholics back then were troubled that working with different religions could lead followers to lose their belief that their religion was true.<sup>14</sup> And Catholicism was the only true religion.<sup>15</sup>

Murray proposed a solution to this difficulty, namely that members of

9. See John Courtney Murray, *Religious Freedom*, in FREEDOM AND MAN 131, 134–35 (J.C. Murray ed., 1965) (describing the church's teachings that Catholicism is the only true religion).

10. Pope Paul VI, *Dignitatis Humanae*, Declaration on Religious Freedom para. 7 (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html) [hereinafter *Dignitatis Humanae*].

11. *The Religious Affiliations of U.S. Presidents*, PEW RES. CTR. (Jan. 15, 2009), <http://www.pewforum.org/2009/01/15/the-religious-affiliations-of-us-presidents/>.

12. Boris Chaliapin, *John Courtney Murray*, TIME (Dec. 12, 1960), <http://content.time.com/time/covers/0,16641,19601212,00.html>; *To Be Catholic and American*, TIME (Dec. 12, 1960), <http://content.time.com/time/magazine/article/0,9171,871923,00.html>.

13. See R. Albert Mohler Jr., *My Take: Santorum's Right, JFK Wrong on Separation of Church and State*, BELIEF BLOG (Feb. 29, 2012, 11:14 AM), <http://religion.blogs.cnn.com/2012/02/29/my-take-santorums-right-jfk-wrong-on-separation-of-church-and-state/> (Quoting Rick Santorum stating, “The idea that the church can have no influence or no involvement in the operation of the state is absolutely antithetical to the objectives and vision of our country.”); Joan Frawley Desmond, *Was JFK Right to Uphold an 'Absolute' Separation of Church and State?*, NAT'L CATH. REG. (Apr. 10, 2012), <http://www.ncregister.com/daily-news/was-jfk-right-to-uphold-an-absolute-separation-of-church-and-state> (Quoting Robert Kraynak who said “Santorum was largely correct about Kennedy's speech being disturbing and even embarrassing for Catholics . . .”).

14. JOHN COURTNEY MURRAY, S.J., BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 4 (J. Leon Hooper, S.J. ed., 1994); J. LEON HOOPER, S.J., THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY 14 (1986).

15. John Courtney Murray, *Christian Co-operation*, 3 THEOLOGICAL STUD. 413, 414 (1942).

all religions could find common ground in the natural law, even while disagreeing about their religions.<sup>16</sup> The natural law provides common principles to all human persons of different religious beliefs.<sup>17</sup> Murray later explained how different religious groups could work together for peace. In contrast, his contemporary theologians were not as accommodating and opposed much intercredal cooperation. They did not want people from different religions to work together.<sup>18</sup> They wanted to protect the truth from any threat in any circumstances.

Unlike other Catholics of his era, Murray accepted religious pluralism, especially in the United States. At the same time, he insisted that Catholicism is true.<sup>19</sup> Even at this early date, Murray recognized that Catholics, especially American Catholics, live within a “religiously pluralistic” world.<sup>20</sup> In his words, “Whether we like it or not, we are living in a religiously pluralist society at a time of spiritual crisis; and the alternatives are the discovery of social unity, or destruction.”<sup>21</sup> Catholics, he wrote, must be taught to understand the grounds on which they cooperate and to understand that such cooperation is not inconsistent with their faith in the one true church.<sup>22</sup>

Faced with difficult problems, Murray was very practical—like lawyers should be. And that is one main reason why this lawyer admires him. Murray acknowledged frankly—and practically—that “Catholic social action alone, for all its intrinsic resources, is simply not up to the enormity of the task that confronts it with frightening urgency.”<sup>23</sup>

Murray became very sophisticated in explaining how people of different faiths could live together:

- (1) we can reach an important measure of agreement on the ethical plane; (2) we must agree to disagree on the theological plane; (3) but we can reach harmony of action and mutual confidence on the political plane, in virtue of the agreement previously established on the ethical

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16. *Id.* at 418.

17. *Id.* at 430.

18. MURRAY, *supra* note 14, at 4.

19. Murray, *supra* note 15, at 414.

20. John Courtney Murray, *Co-operation: Some Further Views*, 4 THEOLOGICAL STUD. 100, 100 (1943).

21. John Courtney Murray, *Intercredal Co-operation: Its Theory and Its Organization*, 4 THEOLOGICAL STUD. 257, 274 (1943).

22. *Id.* at 275 (“[E]very affirmation of human nature, insofar as it is an affirmation, puts one on the way to Christ.”).

23. JOHN COURTNEY MURRAY, S.J., *The Pattern for Peace and the Papal Peace Program*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 6, 14 (J. Leon Hooper, S.J. ed., 1994).

plane, as well as in virtue of a shared concern for the common good of the political community, international and national.<sup>24</sup>

This was one of Murray's most practical lessons: People of different religions find common ground in the political plane.<sup>25</sup> Agreement looks possible but more difficult on the ethical plane.<sup>26</sup> And—do not forget—there is no agreement on theology. There we just have to agree to disagree.<sup>27</sup>

It was one thing for Catholics to work with non-Catholics in social organizations, or in groups committed to social reform, but quite another for Catholics and non-Catholics to cooperate in political society, and specifically in the state. Murray identified politics as common ground for different religious individuals,<sup>28</sup> but this argument had serious implications for the institutional relationship of church to state. As he developed his account of the Catholic relationship to the state, Murray battled both liberals and Catholics.<sup>29</sup>

In 1954, Rome ordered him to stop writing about church and state. In a letter, Murray wrote,

All the books on Church and State and on allied topics have been cleared from my room, in symbol of retirement, which I expect to be permanent. When Frank Sheed returns, I shall cancel the agreement I had with him to edit and revise the articles on Church and State for a book. Fortunately, my gloomy prescience impelled me to refuse an invitation to give the Walgreen Lectures at the U. of Chicago. And all other practical measures will be taken to close the door on the past ten years, leaving all their mistakennesses to God.<sup>30</sup>

He began to send his manuscripts to Rome for approval before publication, which was at times denied.<sup>31</sup>

In their formal language, many Catholic writers in Murray's age believed that the thesis is church establishment; the hypothesis is non-establishment.<sup>32</sup> The thesis is good; the hypothesis is evil. Thesis, hypothesis. A non-Catholic state (like the United States) was the "hypothesis" that had to be tolerated as an evil.<sup>33</sup> Catholics could tolerate

24. John Courtney Murray, *Freedom of Religion: I. The Ethical Problem*, 6 THEOLOGICAL STUD. 229, 239–40 (1945).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Paul Hanly Furfey, *To the Editor*, 4 THEOLOGICAL STUD. 467, 471 (1943).

30. DONALD E. PELOTTE, JOHN COURTNEY MURRAY: THEOLOGIAN IN CONFLICT 53 (1976).

31. *Id.* at 52–53.

32. Murray, *supra* note 9, at 134–35.

33. John Courtney Murray, *Current Theology: On Religious Freedom*, 10 THEOLOGICAL STUD.

the hypothesis, but were obligated to change the hypothesis to thesis when they could do so.<sup>34</sup> The slogan connected to this theory was “error has no rights.”<sup>35</sup> True religion, Catholicism, had rights to public worship, but other—false—religions did not.<sup>36</sup> This slogan was significant for the question of public worship. It meant that Catholics in the minority and the majority clearly have the right to public worship; their religion is true. But error does not have “rights” to public worship.<sup>37</sup> Consequently, non-Catholics in the majority and the minority should not have the right to public worship. But true Catholics should.<sup>38</sup>

If the thesis/hypothesis dichotomy is the correct account of Roman Catholic church-state theory, then the separation of church and state is clearly wrong, an evil to be tolerated, and changed whenever it can be.

John F. Kennedy’s advisors consulted with Murray as Kennedy faced those charges in his presidential campaign and as he prepared his famous address to the Houston ministers.<sup>39</sup> Murray argued that Catholic participation in the United States was not the toleration of an evil, but “has been a matter of conscience and conviction, because its motive was not expediency in the narrow sense—the need to accept what one is powerless to change.”<sup>40</sup> The church’s teaching about the state, he wrote, must reflect historical change.<sup>41</sup> Murray argued that the thesis is the freedom of the church, not the establishment of the church.<sup>42</sup>

And he amazingly won that battle at the Second Vatican Council in 1965. In *Dignitatis Humanae*,<sup>43</sup> the Declaration on Religious Freedom, the church acknowledged that religious freedom is “the right of the person.”<sup>44</sup> Not just the right of Catholics. The right of everyone. Back at home, Murray wrote that the First Amendment is not “articles of faith;”

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409, 420 (1949).

34. Murray, *supra* note 9, at 134–35.

35. *Id.* at 134.

36. *Id.* at 134–35.

37. *Id.*

38. RICHARD P. MCBRIEN, *THE HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM* 662, 1233 (Richard P. McBrien ed., 1995) (describing “indifferentism” and “Syllabus of Errors”).

39. PELOTTE, *supra* note 30, at 76; *Address of Senator John F. Kennedy to the Greater Houston Ministerial Association*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (Sept. 12, 1960), <https://www.jfklibrary.org/Asset-Viewer/ALL6YEBJMEKYGMCntnSCvg.aspx>.

40. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 43 (1960).

41. *Id.*

42. *Id.*

43. *Dignitatis Humanae*, *supra* note 10.

44. *Id.* See Murray, *supra* note 9, at 134–35 (discussing the church teaching that Roman Catholicism must always be the established religion of each nation).

it does not assert a theological truth.<sup>45</sup> Catholics support the First Amendment as “articles of peace.”<sup>46</sup> Articles of peace, *not* articles of faith.

Murray later relied upon a prudential aspect of the law to argue that the church should not oppose the decriminalization of contraception in Massachusetts law.<sup>47</sup> Murray’s essay on contraception was written before *Humanae Vitae*, the 1968 encyclical letter that reiterated the church’s traditional ban on artificial contraception.<sup>48</sup> *Humanae Vitae* was greeted with dissent and disobedience by lay Catholics, who then, and now, use contraceptives in numbers similar to other religious and nonreligious American women.<sup>49</sup> Nonetheless, American Catholic officials rely on the encyclical to block individual Catholics from making their own decisions about contraceptive use. Murray did not question the church’s teaching to Catholics.<sup>50</sup> Catholics should affirm the ban on contraception as a matter of private morality but should not enforce this ban as a matter of law.<sup>51</sup> In Murray’s eyes, it was difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right.<sup>52</sup> In a pluralistic society, a minority must not impose its comprehensive views as law. Enforcing a religion on one’s fellow citizens would be illegal coercion.

John Courtney Murray died in 1967, before Pope Paul VI issued his encyclical letter, *Humanae Vitae*, prohibiting artificial contraception in 1968, and before the Supreme Court’s abortion decision in *Roe v. Wade*.<sup>53</sup> Murray did not live to join the ecclesial debate about

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45. MURRAY, *supra* note 40, at 49.

46. *Id.*

47. JOHN COURTNEY MURRAY, S.J., *Memo to Cardinal Cushing on Contraception Legislation*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 81–86 (J. Leon Hooper, S.J. ed., 1994).

48. Encyclical Letter from Pope Paul VI, *Humanae Vitae* (July 25, 1968), [https://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae.html](https://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html) [hereinafter *Humanae Vitae*].

49. *Contraceptive Use in the United States*, GUTTMACHER INST. (July 2018), <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states#6>.

50. See JOHN COURTNEY MURRAY, S.J., *Appendix: Toledo Talk*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 334, 336 (J. Leon Hooper, S.J. ed., 1994) (On birth control, “[t]he church reached for too much certainty too soon, it went too far. Certainty was reached in the absence of any adequate understanding of marriage. This, many would hold—I would hold—is today no longer theologically tenable. . . . It is also psychologically untenable.”); MURRAY, *supra* note 47, at 81–86 (discussing the encyclical letter reiterating the church’s traditional ban on artificial contraception).

51. MURRAY, *supra* note 47, at 81–86.

52. *Id.*

53. *Humanae Vitae*, *supra* note 48 (Pope Paul VI’s encyclical letter condemning contraception); see generally *Roe v. Wade*, 410 U.S. 113 (1973).



contraception that consumed Catholics after the pope's ban. Murray, who had written so extensively about religious pluralism, did not survive to address today's significant questions of moral pluralism among Americans about the morality of employment discrimination, contraception, and marriage. In contrast, today the United States government frequently interprets religious freedom to protect institutions and ignores the interests of religious individuals *even when their constitutional rights are at stake*.

Reading Murray from a constitutional lawyer's perspective, three powerful points are present in his arguments. First, the right to religious freedom belongs to every human individual, not just to the individual church or just to Catholics.<sup>54</sup> Second, people of different faiths can find *political* common ground even while agreeing to disagree about *theology*.<sup>55</sup> Third, the established church is not a valid legal or political ideal.<sup>56</sup>

We could still profit in the United States if we followed those three principles today. But many of Murray's successors, both Catholic and non-Catholic, in courts, legislatures, and voting booths, have instead remained overwhelmingly committed to their own religious truth instead of to everyone's religious rights. Some people maintain their religious freedom while many people lose it and other constitutional rights to equality and liberty.

Murray's point that the right to religious freedom belongs to the individual was an important idea in the early United States.<sup>57</sup> "The American Revolution broke many of the intimate ties that had traditionally linked religion and government, . . . and turned religion into a voluntary affair, a matter of individual free choice."<sup>58</sup> Americans of that era—and since—broke away from traditional religious organizations and pursued individual liberty. They "believed that the individual, not the state *or the church*, should decide matters of faith."<sup>59</sup> The Establishment

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54. See Murray, *supra* note 9, at 134–35 (detailing Murray's position on religious freedom, arguing that the First Amendment is not "articles of faith;" and it does not assert a theological truth).

55. Murray, *supra* note 24, at 6 (discussing Murray's belief that people of different religious faiths should live together in the same nation).

56. See *supra* notes 32–37 and accompanying text (examining tension in Roman Catholic beliefs between religious freedom and the Catholic right to public worship).

57. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 576 (2009) ("The American Revolution broke many of the intimate ties that had traditionally linked religion and government, . . . and turned religion into a voluntary affair, a matter of individual choice.").

58. *Id.*

59. LAMBERT, *supra* note 1, at 180 (emphasis added).

Clause was supposed to limit churches as well as states.<sup>60</sup> The combination of church and state was troubling because both organizations could, and still do, harm individuals. Some people realized that when the Declaration on Religious Freedom was adopted.<sup>61</sup>

As Murray noted, regardless of whether Catholics liked it, the United States was a “religiously pluralist society at a time of spiritual crisis,” and the alternatives were either to accept it and unify as a society or to fail as one.<sup>62</sup> If we continue to build a political system where constitutional rights consistently lose to religious freedom, we are bound to destroy, instead of build, our political order. Today, churches need *more* Murrays, who have the courage to dissent from and then *change* their church’s teaching on important constitutional rights. Father Joseph Fenton once wrote about Murray:

In the event that Fr. Murray’s teaching is true . . . then it would seem that our students of sacred theology and of public ecclesiastical law have been sadly deceived for the past few centuries. . . . It is hard to believe that any Catholic could be convinced that an entire section of Catholic teaching about the Church itself could be so imperfect.<sup>63</sup>

Yet, Murray was right and still provides an example to follow. He is a great model of slowly effectuating change in favor of rights in a rights-unfriendly world. Just as Murray fought successfully for religious freedom, today women and LGBTs need to convince both church and state that they have rights. The next three sections describe how employment discrimination law, contraception law, and same-sex marriage are limited today by religious freedom.<sup>64</sup>

## II. EMPLOYMENT DISCRIMINATION LAW

Title VII of the Civil Rights Act, the federal employment discrimination law, protects individuals from employment discrimination on the basis of race, color, religion, sex, and national origin.<sup>65</sup> Congress

60. U.S. CONST. amend. I.

61. *Dignitatis Humanae*, *supra* note 10.

62. Murray, *supra* note 21, at 274.

63. BARRY HUDOCK, STRUGGLE, CONDEMNATION, VINDICATION: JOHN COURTNEY MURRAY’S JOURNEY TOWARD VATICAN II 170 (2015).

64. *See infra* Parts II, III, and IV.

65. In 1964, Congress passed the Civil Rights Act, which prohibits discrimination by public and private employers on the basis of religion. According to Title VII,

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;

or

(2) to limit, segregate, or classify his employees or applicants for employment in any

anticipated the question whether the application of Title VII to religious organizations constitutes unconstitutional government interference in religious practice. Accordingly, they passed the following exemption from religious discrimination lawsuits for religious organizations that hire on the basis of religion: “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.”<sup>66</sup>

The wording of the statute, moreover, raised many additional questions for religious institutions. Religious leaders did not want churches to be liable for racial or sexual discrimination if it accords with their beliefs. They did not want a church to be liable for sex discrimination if it refuses to treat women equally, racial discrimination if it refuses to hire African Americans, or sexual orientation discrimination if it fires LGBTs. Religious administrators also wanted the exemption to extend to all employment at church-run institutions, from janitors to clergy. They wanted all religious organizations, from the local mosque to the YMCA, to be protected from discrimination suits.<sup>67</sup>

Time favored the institutions’ leaders over the individual members. The statute clearly prohibits religious institutions from discriminating based on gender, race, color, and national origin without exemption.<sup>68</sup> Nonetheless, courts have repeatedly ruled that the First Amendment’s “ministerial exception” dismisses many Title VII suits against employers.<sup>69</sup> If an employee is a minister, an employer may win because of this affirmative defense.<sup>70</sup> The ministerial exception also applies to other state and federal discrimination, contract, and tort lawsuits.<sup>71</sup>

Since 1972, every court in the United States has recognized the

way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)-(2) (2012).

66. 42 U.S.C. § 2000e-1(a).

67. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 2000 (2007); Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exemption to Religion-Based Employment Decisions*, 54 *VAND. L. REV.* 481, 483 (2001).

68. 42 U.S.C. § 2000e-2(a)(1)-(2).

69. See *infra* notes 73-88 and accompanying text (discussing the facts and holding of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*).

70. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

71. See *infra* note 74 and accompanying text (discussing the expanding ministerial exception achieved through various case holdings).

exception, culminating with the Supreme Court's decision affirming its validity in 2012.<sup>72</sup> The Fifth Circuit created the ministerial exception in 1972 when it dismissed Mrs. Billie McClure's equal pay lawsuit against the Salvation Army.<sup>73</sup> After that, federal and state courts repeatedly expanded the exception to reject lawsuits by elementary and secondary school teachers, school principals, university professors, music teachers, choir directors, organists, administrators, administrative secretaries, communications managers, and public relations personnel alleging violations of the Americans With Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the Fair Labor Standards Act, the Family & Medical Leave Act, workers' compensation laws, and numerous state tort and contract laws.<sup>74</sup>

The Supreme Court confirmed the wisdom of those cases in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.<sup>75</sup> Cheryl Perich was an elementary school teacher at Hosanna-Tabor Evangelical Lutheran Church and School, a K–8 school in Redford, Michigan.<sup>76</sup> The school's personnel manuals stated that she, like any other schoolteacher, was protected by employment discrimination laws.<sup>77</sup> As the 2004–05 school year approached, Perich suddenly and unexpectedly became ill.<sup>78</sup>

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72. *Hosanna-Tabor*, 565 U.S. at 188.

73. *McClure v. Salvation Army*, 460 F.2d 553, 561 (5th Cir. 1972).

74. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (director of the Department of Religious Formation could not bring an Equal Pay Act claim); *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (seminarian could not bring state minimum wage claim); *McCants v. Ala.-W. Fla. Conference of United Methodist Church, Inc.*, 372 F. App'x 39 (11th Cir. 2010) (African American pastor could not bring § 1981 race and retaliation claim); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009) (rabbi's breach of contract claim dismissed); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (priest could not bring Title VII racial discrimination claim); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (college chaplain could not bring Title VII sex discrimination claim); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring ADEA claim), *abrogated by Hosanna-Tabor*, 565 U.S. 171; *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (Hispanic communications manager could not bring Title VII national origin claim); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choirmaster's ADA claim dismissed); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (former clergy member could not bring pregnancy discrimination claim); *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306 (N.D. Ga. 2007) (director of Worship Arts (music director) barred from bringing § 1981 claim); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005) (director of music precluded from bringing FMLA suit); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. Dist. Ct. App. 2006) (priest could not bring state workers' compensation claim).

75. *Hosanna-Tabor*, 565 U.S. at 188.

76. *Id.* at 177–78.

77. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 (6th Cir. 2010), *rev'd*, 565 U.S. 171 (2012).

78. *Id.* at 773.

When she tried to return to class from disability leave, the school suggested that she voluntarily resign.<sup>79</sup> Perich refused and was fired after she threatened to talk to the Equal Employment Opportunity Commission (EEOC) about a disabilities discrimination lawsuit.<sup>80</sup> She then sued Hosanna-Tabor under the antiretaliation provisions of the ADA, claiming they had retaliated against her for being disabled.<sup>81</sup>

The Supreme Court unanimously denied Perich her day in court. In *Hosanna-Tabor*, the Court ruled that the First Amendment requires the ministerial exception to dismiss employment lawsuits.<sup>82</sup> In practice, the ministerial exception is a court-created doctrine holding that the First Amendment requires the dismissal of many employment discrimination cases against religious employers, even when the antidiscrimination statutes authorize litigation.<sup>83</sup> Many Catholic women have had their lawsuits dismissed even though their church never ordains women, making it implausible that women employees are actually ministers.<sup>84</sup> In the long run, constitutional rights are weakened if their biggest opponents have the legal right to oppose and undermine them. Human rights and peaceful coexistence are protected only if we go beyond where Murray went in his day and stop the churches from having so much freedom to limit the legal rights of their disagreeing members.

Pre-*Hosanna-Tabor*, a Catholic school principal fired Madeline Weishuhn for reporting to state authorities that she thought a student's friend was being sexually abused.<sup>85</sup> Although state law required Weishuhn to report abuse, Michigan state courts dismissed her whistleblower's lawsuit based on the ministerial exception.<sup>86</sup> Now, with *Hosanna-Tabor* on the books, courts continue to dismiss lawsuits against religious institutions. The Kentucky Supreme Court, for example, allowed a tenured Jewish professor of Jewish Studies who taught academic courses about the history of religion to sue Lexington

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79. *Id.* at 774.

80. *Id.* at 774–75.

81. *Id.* at 775.

82. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012).

83. *Id.*

84. *See, e.g.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003).

85. *See generally* *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513 (Mich. Ct. App. 2010); *see also* *Supreme Court Considers Whistleblower Protection for “Ministerial Employees,”* WHISTLEBLOWER PROTECTION BLOG (Mar. 28, 2011), <https://www.whistleblowersblog.org/2011/03/articles/corporate-whistleblowers/supreme-court-considers-whistleblower-protection-for-ministerial-employees/>.

86. *Weishuhn*, 787 N.W.2d at 522.

Theological Seminary, but the court did not allow a Methodist Episcopal Church pastor and teacher who taught religious courses at the seminary and occasionally preached there to sue the same seminary.<sup>87</sup>

Some Catholic schools have recently fired numerous employees, especially openly gay and lesbian schoolteachers who became more visible after same-sex marriage became a constitutional right. Post-*Hosanna-Tabor*, a few Catholics succeeded in their lawsuits while numerous others failed. A few non-Catholics or purely lay Catholic teachers have not yet been treated as ministers at Catholic schools.<sup>88</sup>

Technically, *Hosanna-Tabor* only affirmed what other courts had been doing since 1972.<sup>89</sup> But what it did was very serious. It gave institutional churches the right to fire many employees and robs those employees of any legal right to sue their employers. As with many religious freedom rules, the general protection goes to institutions over religious individuals. In practice, the Court's rule protected the institutional administrators and not the individual members.

The chain of events associated with arguing the ministerial exception is perplexing, especially for female plaintiffs. After a woman files a lawsuit alleging discrimination, a religious employer will likely claim First Amendment protection, arguing the employee's lawsuit must be dismissed because she is a minister. This defense is puzzling to many employees. In many cases, the employee knows her hierarchical employer does not ordain women. She is a schoolteacher, principal, or nurse, and never a priest. The court explains that whether she is a minister, or not, is a theological question that courts cannot resolve.<sup>90</sup> The employee finds out that she does not possess any employment rights because her employer has just ordained her under a theory of religious freedom called either the "ministerial exception" or the "ecclesiastical abstention" theory of the First Amendment.

The woman whose church ordains women and preaches their equality with men fares no better. Her lawsuits for equal pay, gender discrimination, and pregnancy discrimination are all dismissed because she is an actual minister or priest. She is at least as puzzled as the non-

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87. See generally *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597 (Ky. 2014).

88. See generally *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012); *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014); *Bohnert v. Roman Catholic Archbishop of S.F.*, 136 F. Supp. 3d 1094 (N.D. Cal. 2015); *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042 (Mass. Supp. Dec. 16, 2015).

89. See note 74, *supra*.

90. See, e.g., *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003).

ordained woman. Why is an employer that believes in women's equality and ordains women allowed to fire or demote her when she is pregnant, or to pay her less, or treat her less fairly, than equally qualified males?

The list of post-*Hosanna-Tabor* cases is very long. For example, Christa Dias, a non-Catholic, lesbian technology coordinator at Holy Family School and St. Lawrence School in the Archdiocese of Cincinnati, Ohio, was initially fired for becoming pregnant outside of marriage, and then for using artificial insemination to become pregnant.<sup>91</sup> Dias was able to win a jury verdict because she was non-Catholic and therefore not a Catholic minister.<sup>92</sup> Emily Herx, a South Bend schoolteacher, was allowed to win a jury verdict for gender discrimination for using in vitro fertilization.<sup>93</sup> As in those cases, a few non-Catholics or purely lay Catholic teachers have not been dismissed as ministers at Catholic schools.<sup>94</sup> Alexandria Kelley, a maintenance and childcare employee at Decatur Baptist Church, was fired because she was pregnant and unmarried.<sup>95</sup> Because of her job duties, however, the court was unable to declare her a minister.<sup>96</sup>

Many Catholic women, however, have had their lawsuits dismissed even though their church never ordains women, making it implausible that women employees are actually ministers. The Second Circuit recently ruled that a Catholic laywoman, who was principal of a Catholic parochial school, was a minister.<sup>97</sup> That court also ruled that New York Methodist Hospital was a religious institution, even though it had a long history of emphasizing its secular identity.<sup>98</sup> Therefore, Marlon Penn, a chaplain there, was fired on racial grounds with no lawsuit.<sup>99</sup> And here in the Seventh Circuit, recently a Jewish schoolteacher who argued that

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91. *Ohio Jury Rules in Favor of Mom Who Was Fired by Catholic Archdiocese for Using Artificial Insemination*, N.Y. DAILY NEWS (June 5, 2013, 1:15 PM), <http://www.nydailynews.com/news/national/jury-rules-favor-ohio-mom-fired-catholic-archdiocese-artificial-insemination-article-1.1363923>.

92. *Id.*

93. *Herx*, 772 F.3d at 1086.

94. *See* *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at \*8 (S.D. Ohio Mar. 29, 2012) (finding that Christa Dias, a non-Catholic technology coordinator at a Catholic school, is not a minister); *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014); *Bohnert v. Roman Catholic Archbishop of S.F.*, 136 F. Supp. 3d 1094 (N.D. Cal. 2015); *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042 (Mass. Supp. Dec. 16, 2015) (allowing all three lawsuits to proceed).

95. *Kelley v. Decatur Baptist Church*, No. 5:17-CV-1239-HNJ, 2018 WL 2130433, at \*1 (N.D. Ala., May 9, 2018).

96. *Id.* at \*5.

97. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 209 (2d Cir. 2017).

98. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 419, 425–26 (2d Cir. 2018).

99. *Id.* at 421.

teaching about Judaism at a Jewish school was cultural and historical, not religious, lost her case because the court said she too was a minister.<sup>100</sup> Father John Gallagher was a Catholic priest who exposed some of his church's sexual abuse. He sued his diocese for defamation in its news articles, letters, press, and media statements.<sup>101</sup> Although the trial court voted to hear his case, the appeals court reversed.<sup>102</sup> Evelyn Kelly's defamation, negligence, fraud, misrepresentation, and age and sex discrimination lawsuit against St. Luke's Methodist Church was also dismissed.<sup>103</sup>

There are numerous other cases across the country by LGBT employees, or music employees, fired for their marriages or relationships, including Sandor Demkovich, John Colin Collette, and Stanislaw Sterlinski, who in this area unsuccessfully sued the Archdiocese of Chicago for their firings, having their age, disability, and other discrimination lawsuits dismissed.<sup>104</sup>

Professor Caroline Mala Corbin has repeatedly reminded her readers that the law offers a clearer, better approach, namely to

apply employment discrimination law to a religious employer in the same way it would be applied to a secular employer. . . . To start, if the religion condemns discrimination, then applying antidiscrimination law does not impose a substantial burden. Furthermore, even if the religion advocates discrimination or retaliation, the government's interest in protecting employees might outweigh the church's.<sup>105</sup>

The same argument applies to all these legal cases. Some employees would win their cases; others would lose. But the facts would be in the record instead of hidden behind the ministerial title.

The same rules should apply to contraception, the subject of Part III.

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100. Grussgott v. Milwaukee Jewish Day Sch. Inc., 260 F. Supp. 3d 1052, 1061 (E.D. Wis. 2017).

101. Diocese of Palm Beach, Inc. v. Gallagher, 249 So. 3d 657, 660–61 (Fla. Dist. Ct. App. 2018).

102. *Id.* at 665.

103. Kelly v. St. Luke Cmty. United Methodist Church, No. 05-16-01171-CV, 2018 WL 654907, at \*11 (Tex. App. Feb. 1, 2018).

104. See generally Collette v. Archdiocese of Chi., 200 F. Supp. 3d 730 (N.D. Ill. 2016); Demkovich v. St. Andrew the Apostle Parish, No. 1:16-cv-11576, 2017 WL 4339817 (N.D. Ill. Sept. 29, 2017); Sterlinski v. Catholic Bishop of Chi., 203 F. Supp. 3d 908 (N.D. Ill. 2016); see also Ginalski v. Diocese of Gary, No. 2:15-CV-95-PRC, 2016 WL 7100558 (N.D. Ind. Dec. 5, 2016) (Plaintiff Mary Beth Ginalski, as principal of a Catholic school, was considered a minister when she brought a case for sex, age, and disability discrimination.); Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668, 674 (N.D. Ill. 2012) (Catholic schoolteacher filed a suit alleging age, sex, and marital status discrimination, who the court found to be a minister due to her status as a "called teacher" regardless of her secular duties).

105. Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951, 970 (2012).



## III. CONTRACEPTION AND REPRODUCTIVE ACCESS

The story of women's legal contraceptive access in the United States is anything but straight. One narrative, however, has not changed over the last century. The United States' Roman Catholic bishops have consistently opposed contraception. Their steady opposition and recent legal victories limiting contraception suggest that the government and the church have misunderstood the nature of religious freedom.

The bishops' first joint public statement against contraception appeared in 1919, when they went public to counter the successes of Margaret Sanger's birth control movement.<sup>106</sup> Since then, their opposition to contraceptive access has been nonstop. Many Catholics thought church teaching against contraception would change in 1968, when a papal commission recommended that church teaching should transform and allow contraception.<sup>107</sup> Pope Paul VI ignored his committee's ruling. Instead, he released *Humanae Vitae*, the 1968 encyclical letter that reiterated the church's traditional ban on artificial contraception.<sup>108</sup>

*Humanae Vitae* was greeted with dissent and disobedience by lay Catholics, who then and now use contraceptives in numbers similar to other religious and nonreligious American women.<sup>109</sup> Nonetheless, American Catholic officials rely on the encyclical to block individual Catholics from making their own decisions about contraceptive use. The bishops' lobbying against and public criticism of the contraceptive mandate of the Affordable Care Act (ACA), which requires employer health plans to offer preventive reproductive care coverage, forced Obama administration officials into a series of accommodations that gutted contraceptive coverage.<sup>110</sup>

The bishops successfully characterized their efforts against the ACA as a battle *for* religious freedom rather than *against* reproductive rights.<sup>111</sup> As I noted when the ACA was new:

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106. LESLIE WOODCOCK TENTLER, CATHOLICS AND CONTRACEPTION: AN AMERICAN HISTORY 40–41 (2004) (describing John A. Ryan's letter condemning contraception).

107. Russell Shaw, *Church Birth Control Commission Docs Unveiled*, OSV NEWSWEEKLY (Feb. 16, 2011), <https://www.osv.com/OSVNewsweekly/Story/TabId/2672/ArtMID/13567/ArticleID/2023/Church-birth-control-commission-docs-unveiled.aspx>.

108. See generally *Humanae Vitae*, *supra* note 48.

109. GUTTMACHER INST., *supra* note 49.

110. See generally Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, *et seq.* (2012).

111. See generally Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); Office of the General Counsel Letter, Re: Interim Final Rules Relating to Coverage

Through litigation they worked in conjunction with a broad range of Catholic institutions—universities, colleges, dioceses, hospitals, and parishes—that buttressed their religious freedom argument. This [group of associations] allowed them to achieve legal and political success even though a majority of their membership—*i.e.*, individual Catholics—continues to use contraception as well as support contraceptive access for [all individuals].<sup>112</sup>

When President Obama originally introduced his health insurance plan, the bishops orchestrated a sustained campaign of public appearances, lobbied in Congress, commented on the regulatory process, and pursued extensive litigation to abolish the contraceptive mandate. Although the ACA was supposed to provide reproductive care for everyone, Obama originally offered churches an exemption from the reproductive preventive services requirement.<sup>113</sup> The initial reason for the exemption was that everyone in a church agrees about the morality of contraception. Completely unnoticed by both church and state was that most Catholics dissent from their church’s teaching on contraception and use it whenever they can.<sup>114</sup> The bishops were unhappy with Obama’s original exemption. As I noted when Obama’s original exemption was articulated:

The bishops’ desired exemption would include not only religious and secular nonprofit and for-profit *employers*, but also individual *employees* who did not want to participate in an insurance plan that sponsored contraceptive coverage. . . .

In exempting employees as well as employers, [the Catholic] proposal undermined the whole structure of the ACA, which depends on having all insureds in the insurance pool.<sup>115</sup>

The bishops also sponsored a litigation series that aided employers not covered by the exemption.<sup>116</sup>

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of Preventive Services (Sept. 17, 2010), <http://www.usccb.org/issues-and-action/human-life-and-dignity/contraception/upload/regarding-interim-final-rules-relating-to-coverage-of-preventive-services.pdf>.

112. Leslie C. Griffin, *The Catholic Bishops vs. the Contraceptive Mandate*, 2015 RELIGIONS 1411, 1412 (2015).

113. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); 45 C.F.R. § 147.131(a) (2017).

114. See GUTTMACHER INST., *supra* note 49 (finding that only two percent of sexually active Catholic women, including those who attend church service monthly, depend on natural family planning methods).

115. Griffin, *supra* note 112, at 1421; see also Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 548 (2012) (“In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses.”).

116. See, e.g., Belmont Abbey Coll. v. Sebelius, 878 F. Supp. 2d 25 (D.D.C. 2012), *held in abeyance sub nom.* Wheaton Coll. v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012).

Belmont Abbey College, a Benedictine college in North Carolina, filed the first lawsuit challenging the regulations as a violation of the Religious Freedom Restoration Act (RFRA), the First Amendment, and the Administrative Procedures Act. The college and the government agreed that the college was not exempt from the mandate “because it employs and serves many individuals who do not share its religious values and because it is not a church and does not otherwise qualify as an organization described in the relevant sections of the IRS Code.” But the college argued it should be exempt. Other [institutional] lawsuits by religious nonprofits soon followed. . . .

. . . .

The president’s sensitivity to the bishops’ concerns affected the litigation of the mandate. In court, the government argued that it was considering accommodations for religious nonprofits like Belmont Abbey. The [nonprofit] legal cases were put on hold while [the Department of Health and Human Services] (HHS) and the Obama administration reconsidered their accommodation options . . . .<sup>117</sup>

Obama even met with New York Archbishop Timothy Dolan and other critics of the mandate.<sup>118</sup>

While the nonprofit cases were on hold, the religious for-profit cases continued. Those cases culminated in the Supreme Court’s decision in *Burwell v. Hobby Lobby*, where the Court ruled five to four that religious for-profits were entitled to a Religious Freedom Restoration Act (RFRA) exemption from the contraceptive mandate.<sup>119</sup> The *Hobby Lobby* plaintiffs opposed only four of twenty contraceptives because they believed they were abortifacient.<sup>120</sup> But, the opinion set a strong precedent for all opposition to contraception. The bishops voiced support for *Hobby Lobby*, which was consistent with their goals to restrict the contraceptive mandate wherever possible.<sup>121</sup>

The bishops remained unhappy when HHS released details of the accommodation that had been promised at the beginning of the nonprofits’ litigation.<sup>122</sup> The government offered an accommodation

117. Griffin, *supra* note 112, at 1421 (citations omitted).

118. Laurie Goodstein, *Bishops Open ‘Religious Liberty’ Drive*, N.Y. TIMES (Nov. 14, 2011), at A14.

119. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev’d*, 723 F.3d 1114 (10th Cir. 2013), *aff’d sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

120. *Hobby Lobby Stores*, 134 S. Ct. at 2759.

121. Archbishop Joseph E. Kurtz & Archbishop William E. Lori, *USCCB Statement on Supreme Court “Hobby Lobby” Decision*, U.S. CONF. OF CATH. BISHOPS (June 30, 2014), <http://www.usccb.org/issues-and-action/religious-liberty/hhs-mandate/usccb-hobby-lobby-case-statement-june-2014.cfm>.

122. See *HHS Final Rule Still Requires Action in Congress, by Courts, Says Cardinal Dolan*,

while the bishops wanted a complete exemption.

The regulations proposed that nonprofit entities that held themselves out as religious organizations and had religious objections to contraceptive services could request the new accommodation. Each of the newly-accommodated organizations would have to “self-certify” to its insurer that it qualified for the accommodation and list what services it opposed. Self-certification [allegedly] protects religious liberty because it keeps the government from deciding who qualifies for the accommodation by parsing through the entity’s beliefs. HHS offered an accommodation and not an exemption because, [they believed that,] unlike the churches, the nonprofits’ employees were “less likely . . . to share such religious objections of the eligible organizations. . . .”

Once the self-certification was in the insurer’s hand, the insurance company “would assume sole responsibility, independent of the eligible organization and its plan, for providing contraceptive coverage without cost sharing, premium, fee, or other charge to plan participants and beneficiaries.”<sup>123</sup>

The Obama administration saw this accommodation as a means for employees to receive contraception while their employers’ conscience was protected. The bishops, however, had another perspective. They refused accommodation no matter what form it took—sign here, notify there, distance yourself from your insurance carrier everywhere—because exemption was the real goal. The government found itself in constant negotiations with nonprofits that would not compromise, negotiating against itself by offering various accommodating alternatives while the nonprofits just said no.

Eventually, seven of eight United States courts of appeals rejected the plaintiffs’ arguments that the notification provisions of the accommodation substantially burdened plaintiffs’ religion under the RFRA. Once the Eighth Circuit ruled for the plaintiffs, however, there was a circuit split.<sup>124</sup> The circuit split persuaded the Supreme Court to grant certiorari in *Zubik v. Burwell*.<sup>125</sup> The Court decided to hear seven nonprofit contraceptive cases from four different courts of appeals.<sup>126</sup>

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U.S. CONF. OF CATH. BISHOPS (July 3, 2013), <http://www.usccb.org/news/2013/13-137.cfm> (expressing concern about the religious ministries’ level of “accommodation” under the exemption for those excluded from the definition of “religious employers”).

123. Griffin, *supra* note 112, at 1424 (citations omitted) (referencing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013)).

124. See generally *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2013 WL 6858588 (E.D. Mo. 2013), *aff’d*, 801 F.3d 927 (8th Cir. 2015), *vacated sub nom.* *Dep’t of Health & Human Servs. v. CNS Int’l Ministries*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

125. See generally *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

126. See *id.* at 1560 (vacating judgments and remanding cases in the DC, Third, Fifth, and Tenth

*Zubik* hit the Court, however, after Justice Antonin Scalia had died. In an eight-justice *per curiam* opinion, the Court remanded the seven cases to the lower courts, asking the parties to come to their own resolution of the problem.<sup>127</sup> In particular, the Court did not decide the RFRA issues of “whether petitioners’ religious exercise ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [were] the least restrictive means of serving that interest.”<sup>128</sup> Instead, according to the Court, “the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”<sup>129</sup>

Officially, protecting both employers and employees had always been the goal of the negotiations between church and state. The Court’s optimistic remand, however, quickly failed. By January 9, 2017, over 54,000 public comments were posted on the lawsuit’s website about a possible compromise.<sup>130</sup> The website’s repeated and disagreeing comments, which merely restated everything that had already been litigated in the courts, eventually persuaded the government to notify the courts that agreement was impossible. The Obama administration concluded, based on the 54,000 comments, that “no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.”<sup>131</sup> On January 10, 2017, the Department of Justice’s attorneys filed a brief in the DC Circuit reporting the effort’s failure.<sup>132</sup> The government’s move allowed

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Circuits).

127. *Id.*

128. *Id.*

129. *Id.* (quoting Supplemental Brief for the Respondents at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191)).

130. *Coverage for Contraceptive Services No. CMS-9931-NC*, REGULATIONS.GOV (Comment period closed Sept. 20, 2016), <https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=commentDueDate&po=54200&D=CMS-2016-0123>.

131. Marcia Coyle, *54,231 Comments Later, a Contraceptive Coverage Dispute is Still Unresolved*, NAT’L L.J. (Jan. 10, 2017, 2:54 PM), <https://www.law.com/nationallawjournal/almID/1202776490632/54231-Comments-Later-a-Contraceptive-Coverage-Dispute-Is-Still-Unresolved/?back=GA>.

132. See Josh Blackman, *DOJ Moves to Postpone Post-Zubik Contraceptive Mandate Cases Until February 28, 2017*, JOSH BLACKMAN’S BLOG (Dec. 2, 2016), <http://joshblackman.com/blog/2016/12/02/doj-moves-to-postpone-post-zubik-contraceptive-mandate-cases-until-february-28-2017/> (criticizing *Zubik* for its “failure to address ‘self-insured’ plans”); Adelaide Mena, *Department of Justice Announces Settlement in HHS Mandate Suits*, NAT’L CATH. REG. (Oct. 21,

the self-certification rules to the health insurance issuer, third-party administrator, or HHS to remain in place for the time being.

The Trump administration made the institution's exemption, not the individual's right, even broader and easier for contraceptive opponents to claim. After the president announced "we will not allow people of faith to be targeted, bullied or silenced anymore," Attorney General Jeff Sessions ordered that federal employees support the position that "workers, employers and organizations may claim broad exemptions from nondiscrimination laws on the basis of religious objections."<sup>133</sup> Some journalists suggest that hundreds of thousands of women will lose their contraceptive benefits under this new policy.<sup>134</sup> Sessions also ruled that "sex" in the Civil Rights Act did not include transgender people, and that LGBTs did not need full legal protection, thus cutting back on antidiscrimination rights.<sup>135</sup>

Under the United States Constitution and *Griswold v. Connecticut*,<sup>136</sup> choosing to use contraception—or not—is first the individual woman's moral, religious, and constitutional right. Nonetheless, all three branches of the federal government, plus many states, back the religion's decision to block its employees from contraception, whether they want or do not want to use it.<sup>137</sup> The courts and the administrations have ruled for the

2017), <http://www.ncregister.com/daily-news/department-of-justice-announces-settlement-in-hhs-mandate-suits> (discussing the US Department of Justice's settlements with at least seventy plaintiffs who challenged the HHS's contraceptive mandate); Adelaide Mena, *Department of Justice Announces Settlement in HHS Mandate Suits*, CATH. NEWS AGENCY (Oct. 16, 2017), <https://www.catholicnewsagency.com/news/department-of-justice-announces-settlement-in-hhs-mandate-suits-41813> (discussing the same settlements); David Nussman, *DOJ Closes 70+ Contraceptive Mandate Lawsuits*, CHURCH MILITANT (Oct. 17, 2017), <https://www.churchmilitant.com/news/article/doj-closes-70-hhs-suits> (explaining that the Department of Justice settlements confirm that "employers in question will not have to financially support things they deem 'morally unacceptable'").

133. Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>.

134. *Id.*

135. Office of the Attorney General, Memorandum on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>.

136. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Black, J., concurring).

137. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (stating that "petitioners have made the Government aware of their view that they meet 'the requirements for exemption from the contraceptive coverage requirement on religious grounds'"), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016); GUTTMACHER INST., *supra* note 49 (explaining that millions of women rely on public and private insurance coverage to afford contraceptive supplies and services); *State Policies on Contraception*, GUTTMACHER INST., [https://www.guttmacher.org/united-states/contraception/state-policies-contraception?gclid=EA1aIQobChMI0YPvoZWa3QIVC61pCh0mXgmcEAAAYASAAEgJrTvD\\_BwE](https://www.guttmacher.org/united-states/contraception/state-policies-contraception?gclid=EA1aIQobChMI0YPvoZWa3QIVC61pCh0mXgmcEAAAYASAAEgJrTvD_BwE) (last visited Sept. 22, 2018) (stating that more than 20 million women required publicly-funded contraceptive

hierarchy of a church even when its members do not support the hierarchy. Today, in Catholic places, even bad Catholics, former Catholics, and non-Catholics lose most of the right to contraception the courts originally gave them as individuals.

This subject, contraception, does not even take into account the tremendous influence of Catholic hospitals, which are growing more predominant in American health care every year, and the effects of that number on reproductive health.<sup>138</sup> There was a “22 percent increase in . . . Catholic hospitals between 2001 and 2016.”<sup>139</sup> One in six Americans now receives care at a Catholic hospital.<sup>140</sup>

By 2016, [a] study found, 14.5 percent of all U.S. acute care hospitals were Catholic, including 10 of the 25 largest health care systems in the country. In some states with fewer hospitals, Catholic providers are a dominant presence in the market. In five states (Alaska, Iowa, Washington, Wisconsin, and South Dakota), more than 40 percent of acute care beds were Catholic-owned or -affiliated in 2016.<sup>141</sup>

The effect on reproductive health care is strong: “Catholic hospitals reduce the per-bed annual rates of inpatient abortions by 30 percent, and tubal ligations, or sterilization, by 31 percent.”<sup>142</sup> They limit reproductive care in the same way many religious organizations strive to limit the constitutional right to marry, the subject of Part IV.

#### IV. THE RIGHT TO MARRY

Despite long, bitter, religious, Bible-based opposition to interracial

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services in 2014); *Contraceptive Failure in the United States: Estimates from the 2006–2010 National Survey of Family Growth*, GUTTMACHER INST. (Feb. 28, 2017), <https://www.guttmacher.org/journals/psrh/2017/02/contraceptive-failure-united-states-estimates-2006-2010-national-survey-family> (finding a statistical decline in contraception failure rates from 2006 to 2010); *Reproductive Health in Crisis*, GUTTMACHER INST., <https://www.guttmacher.org/tags/reproductive-health-crisis> (last visited Sept. 22, 2018) (stating that the federal government is taking measures to undermine reproductive rights); Diana Degette, Opinion, *Trump Birth Control Edicts: Another Blatant Attack on Women’s Health*, THE HILL (Oct. 13, 2017, 1:25 PM), <http://thehill.com/blogs/congress-blog/healthcare/355335-trump-birth-control-edicts-another-blatant-attack-on-womens> (criticizing the federal government’s recent decision allowing employers to deny employees contraceptive coverage altogether).

138. Casey Ross, *Catholic Hospitals Are Multiplying, and So Is Their Impact on Reproductive Health Care*, STAT (Sept. 14, 2017), <https://www.statnews.com/2017/09/14/catholic-hospitals-reproductive-health-care/>.

139. *Id.*

140. Jerry Filteau, *Catholic Hospitals Serve One in Six Patients in the United States*, NAT’L CATH. REP. (Oct. 20, 2010), <https://www.ncronline.org/news/catholic-hospitals-serve-one-six-patients-united-states>.

141. Ross, *supra* note 138.

142. *Id.*

marriage, the unanimous Supreme Court in *Loving v. Virginia*<sup>143</sup> did not even hint at religious exemptions for racial discrimination, and state and federal legislatures did not enact them.<sup>144</sup> In contrast, four dissenting Justices in three separate *Obergefell v. Hodges* dissents fretted about the impact of same-sex marriage equality on religious freedom.<sup>145</sup> Chief Justice Roberts, Justice Clarence Thomas, Justice Samuel Alito, and the late Justice Antonin Scalia all raised questions promoting religion's rights to oppose or block same-sex marriage.<sup>146</sup>

In *Obergefell*, Justice Kennedy wrote for the majority that "same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."<sup>147</sup> For that reason, Kennedy rejected religion-based marriage laws. According to Justice Kennedy's reasoning,

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, 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.<sup>148</sup>

Justice Kennedy's opinion also recognized the First Amendment speech right that allows same-sex marriage critics to voice their opposition to the practice.<sup>149</sup>

In contrast, the four dissenters (Justices Roberts, Scalia, Thomas, and Alito) emphasized the religious view of heterosexual monogamy and its decisiveness for marriage law.<sup>150</sup> Thus, only one justice's vote spared the country from continued LGBT discrimination relating to marriage. The dissenters believed that the right to *exercise* religion was at risk from Kennedy's reasoning.<sup>151</sup> All four dissenters suggested that religion must play a greater role in the marriage laws.<sup>152</sup>

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143. See generally *Loving v. Virginia*, 388 U.S. 1 (1967).

144. See generally James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 109–110 (2015).

145. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting) ("Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . .").

146. *Id.*

147. *Id.* at 2602 (majority opinion).

148. *Id.*

149. *Id.* at 2607.

150. *Id.* at 2611 (Roberts, C.J., dissenting).

151. *Id.* at 2625 (Roberts, C.J., dissenting).

152. See generally *id.* at 2611–43.



The extensive reaction to *Obergefell* demonstrates how complex the relationship of religion to the state is under current law. Marriage opponents have proposed and/or passed all kinds of legislation that grants them conscience rights to deny LGBT marriage, in one form or another.<sup>153</sup>

LGBT couples face numerous threats of not being married by some clerks and being denied everything connected with marriage, from cakes to flowers and food, wedding dresses, and a place to hold their weddings. Religious opponents of same-sex marriage defended their right not to provide commercial services for same-sex weddings. These situations include the refusals of florists to provide flowers;<sup>154</sup> bakers to bake cakes;<sup>155</sup> photographers to take pictures;<sup>156</sup> bed and breakfasts, innkeepers, and wedding halls to rent facilities;<sup>157</sup> and catering companies to provide food. Government and commercial employees have repeatedly asked for exemptions from marriage services or products.<sup>158</sup> Many states exempt their employees from dealing with gay marriages. One state said individuals, in their words,

shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such

153. Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 257, 263–64 (Micah Schwartzman et al. eds., Oxford Univ. Press 2016).

154. Order Den. Defs' Mot. For Summ. J. at 7, *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015), *aff'd*, 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018).

155. *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017); *Craig v. Masterpiece Cake Shop, Inc.*, CR 2013-0008, Colorado Office of Administrative Courts (Dec. 6, 2013), available at [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf); Bobby Ross Jr., *Religious Freedom vs. Gay Rights: Have Your Cake and Read Both Sides of the Story, Too*, GET RELIGION (Dec. 19, 2014), <http://www.getreligion.org/getreligion/2014/12/19/religious-freedom-vs-gay-rights-have-your-cake-and-read-both-sides-of-the-story-too>; Deborah Munn, *It Was Never About the Cake*, ACLU (Dec. 9, 2013, 4:00 PM), <https://www.aclu.org/blog/religion-belief-lgbt-rights/it-was-never-about-cake>.

156. *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013).

157. *Mattoon Couple Challenge Denial of Services at Two Illinois Bed and Breakfast Facilities*, ACLU OF ILL. (Nov. 2, 2011), <http://www.aclu-il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/>; *Baker and Linsley v. Wildflower Inn*, ACLU, <https://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn> (last updated Aug. 23, 2012); Associated Press, *Iowa Venue Settles Bias Complaint Filed By Gay Couple, Will Discontinue All Weddings*, LGBTQ NATION (Jan. 29, 2015), <http://www.lgbtqnation.com/2015/01/iowa-venue-settles-bias-complaint-filed-by-gay-couple-will-discontinue-all-weddings/>.

158. See, e.g., *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. 2015) (order denying motion to stay a preliminary injunction against a court clerk who claimed that issuing marriage licenses to same-sex couples infringed on her constitutional rights); *Ermold v. Davis*, 855 F.3d 715 (6th Cir. 2017) (allowing a same-sex couple to seek an injunction based on a county clerk's denial of a marriage license to them).

services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith.<sup>159</sup>

Those exemptions freed the organizations from civil suits and government penalties (including fines and loss of tax exemptions) for refusal to comply with the same-sex marriage laws.

Confronted with these situations of businesses that choose to discriminate, many states debated using their RFRAs and other statutes to codify the right to discriminate as a matter of religious freedom. A group of prominent law professors even drafted a Marriage Conscience Protection Act that, among other things, freed religious associations from “treat[ing] as valid any marriage.”<sup>160</sup> The “treat as valid any marriage” language takes the exemption “far outside the marriage [ceremony] context and permit[s] discrimination against same-sex couples throughout the life of their (marital) relationships,”<sup>161</sup> thereby limiting the same-sex couples’ rights “during the entire course of a relationship, from food and shelter to healthcare and legal representation.”<sup>162</sup> Second, that section not only prohibits LGBT couples from suing organizations under the antidiscrimination laws but also prohibits any government penalties “including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.”<sup>163</sup>

The Supreme Court recently decided a First Amendment case brought by a cake baker, Jack Phillips, from Masterpiece Cakeshop who does not believe in gay marriage and refused to bake a cake when a gay couple told him they were getting married.<sup>164</sup> That is illegal sexual orientation discrimination under Colorado law, and state actors there repeatedly ruled

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159. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 299 (2010) (quoting An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same-Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 17 (2009)).

160. Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL’Y 318, 367 (2010).

161. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1176 (2012).

162. Oleske, *supra* note 144, at 138.

163. Wilson, *supra* note 160, at 368.

164. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719 (2018). Details regarding *Masterpiece* are available at *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/>.

for the couple.<sup>165</sup>

Most commentators expected the Court to decide the case on free speech grounds. Instead, in a seven to two opinion, the Court surprisingly ruled that the Colorado Civil Rights Commission had violated the baker's free exercise rights by not meeting the norm of religious neutrality and instead treating him with religious hostility.<sup>166</sup> The Court overruled the Colorado courts' conclusion that the Court's famous free exercise decision, *Department of Human Resources of Oregon v. Smith*, required the baker to follow the neutral and general sexual orientation discrimination laws.<sup>167</sup>

Justice Kennedy's evidence of the Commission's "clear and impermissible hostility toward the [baker's] sincere religious beliefs" was weak.<sup>168</sup> His reasoning was consistent with the Court's trend of being too positive toward religion, as it was when it ruled against civil rights in *Hosanna-Tabor* and *Hobby Lobby*. In a first Commission meeting, Kennedy wrote,

One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."<sup>169</sup>

That statement is not hostile to religion. It displays a commissioner commenting on the actual state of free exercise law, which is supposed to mean that everyone must obey the law despite personal preferences. Instead, Justice Kennedy concluded that the comments were "inappropriate and dismissive."<sup>170</sup> He made similar comments about a second meeting, where one commissioner said:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>171</sup>

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165. See generally *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev'd sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

166. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

167. See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

168. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

169. *Id.* (alteration in original) (citations omitted).

170. *Id.*

171. *Id.*

That statement is sad, *but true*. Nonetheless, Kennedy characterized it as unfairly hostile to religion. Only two dissenters disagreed with his analysis.<sup>172</sup> Thus, *Masterpiece* reflects the Court's ongoing preference for religious freedom over antidiscrimination rights.

#### CONCLUSION

Imagine if, instead, the Court preferred individuals to organizations. That Court would allow individuals to get into court for employment discrimination lawsuits. It would ensure they got contraception. It would protect their right to marry against discrimination.

Ideally, with its Free Exercise and Establishment Clauses, the Constitution mandates secular laws that apply to everyone, without religious exception.<sup>173</sup> According to *Smith*, the leading Free Exercise decision, "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).'"<sup>174</sup> The Establishment Clause is supposed to ban religion-based government.

Yet, even with *Smith* on the books, the Court nonetheless ruled that the First Amendment's Free Exercise and Establishment Clauses require the ministerial exception. Moreover, Congress also undermined *Smith* by passing the Religious Freedom Restoration Act, which the courts have strongly enforced. Under RFRA, neutral laws that substantially burden religion are invalidated unless the government can prove it used the least restrictive means to reach a compelling interest to pass those laws.<sup>175</sup> That very demanding test provides a big advantage to institutions over individuals. Both the *Hobby Lobby* and the *Zubik* plaintiffs enjoyed their greatest success under RFRA.<sup>176</sup> Finally, *Smith* was undermined with the Court's free exercise decision in *Masterpiece*, which found religious hostility where none existed.

On the Court, it is unlikely that anything about religion will change any time soon. Justice Neil Gorsuch, who replaced Justice Antonin Scalia

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172. *Id.* at 1748 (Ginsburg, J., dissenting).

173. U.S. CONST. amend. I.

174. *Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)); *see also* *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

175. 42 U.S.C. § 2000bb-1(a)–(b) (2012).

176. *See generally supra* notes 119–134 and accompanying text.

on the Supreme Court, may share the late justice's views of law and religion. Gorsuch joined the seven-justice majority in *Masterpiece*.<sup>177</sup> In the Tenth Circuit's en banc version of *Hobby Lobby*,<sup>178</sup> then-Judge Gorsuch wrote a strong opinion concluding that the Greens had already won their case. According to Gorsuch, RFRA "doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."<sup>179</sup> Gorsuch sternly disagreed with his colleagues who had found no substantial burden on the Greens' religion.<sup>180</sup> Gorsuch also joined his dissenting colleagues in his court's other contraceptive case, *Little Sisters of the Poor v. Burwell*.<sup>181</sup>

Newer-Justice Brett Kavanaugh has also been praised as a "warrior for religious liberty."<sup>182</sup> Although his DC Circuit colleague, Judge Nina Pillard, wrote an opinion dismissing a RFRA case against the contraceptive insurance requirement of the Affordable Care Act, Judge Kavanaugh dissented from the court's refusal to rehear the case en banc.<sup>183</sup> Kavanaugh wrote in that dissent that following *Hobby Lobby* and other Supreme Court cases, he would have ruled for the anti-contraception plaintiffs.<sup>184</sup> As a judge and as an advocate, he has also participated in several pro-prayer cases.<sup>185</sup> He too is expected to be a pro-religion Supreme Court justice.

Many people are happy with this situation, just as, in Murray's era, most Catholics opposed the morality and legality of the First Amendment. They might not care that current law harms numerous individuals who are trying to live a religious or moral life. The present

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177. See generally *Masterpiece Cakeshop*, 138 S. Ct. 1719.

178. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).

179. *Id.* at 1152–53.

180. *Id.* at 1121.

181. *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315, 1316–18 (10th Cir. 2015) (Hartz, J., dissenting) (Justice Gorsuch joined this dissent.).

182. Justin Walker, *Judge Brett Kavanaugh: A Warrior for Religious Liberty*, NAT'L REV. (July 6, 2018), <https://www.nationalreview.com/2018/07/judge-brett-kavanaugh-religious-liberty-warrior/>.

183. See *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015) (denying rehearing en banc of *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), vacated and remanded sub nom. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

184. See *id.* at 14 (Kavanaugh, J. dissenting).

185. See generally Frank Ravitch, *Judge Kavanaugh on Law and Religion Issues*, SCOTUSBLOG (July 30, 2018), <http://www.scotusblog.com/2018/07/judge-kavanaugh-on-law-and-religion-issues/>; *Americans United Opposes Trump Supreme Court Nominee Brett Kavanaugh*, AMERICANS UNITED (July 9, 2018), <https://www.au.org/media/press-releases/americans-united-opposes-trump-supreme-court-nominee-brett-kavanaugh>.

should remind us why Murray concluded as he did, against his own church's teaching, that all individuals, not just Catholic institutions, have the right to religious freedom.<sup>186</sup> If we listen to him, we might realize that people of different faiths need to find political common ground even while agreeing to disagree about theology. The law protects women's rights, reproductive rights, and gay and lesbian rights. It should be up to individuals, not their church's hierarchy, to decide whether to exercise those rights. Further, civil rights law needs to be set by the state, not by the state at the direction of the church.

Against all odds, the Roman Catholic Church accepted Murray's thought. He still provides an example to follow. He is a great model of slowly effectuating change in favor of rights in a rights-unfriendly world. Just as Murray fought successfully for religious freedom, today women, gays, lesbians, and transgender people need to convince both church and state that they have rights.

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186. *See supra* notes 32–37 and accompanying text.