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Are Catholic Bishops Seeking a Religious Preference or Religious Freedom?

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ARE CATHOLIC BISHOPS SEEKING A RELIGIOUS PREFERENCE OR RELIGIOUS FREEDOM?

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Using the Catholic Bishops' litigation strategy in challenging the Affordable Care Act as an example, this Article suggests that the Supreme Court's interpretation of the First Amendment religion clauses has emboldened religious organizations to seek preferred treatment, i.e., "to become a law unto [themselves]." The religion clauses have a common goal, religious freedom, but they are often in tension and require a delicate balance. Beginning with the Rehnquist Court, and continuing with the Roberts Court, the interpretation of the religion clauses, in combination with the free speech clause, has eliminated the wall of separation between religion and government. The wall has been replaced by an open border. As a result, government is heavily involved in subsidizing religion and religion is heavily involved in utilizing the government subsidy while attempting to exempt itself from government rules with which it disagrees.

Well-funded religious institutions and their advocacy groups, operating under the banner of religious freedom, are doing exactly what was forecast by the Court in Reynolds *nearly 140 years ago—seeking to exempt themselves from religion-neutral laws of general applicability. The Catholic Bishops and their allied religious institutions want to, for example, become large employers in the public square but not abide by the rules that govern other public square employers. They want to be free to discriminate, particularly based on gender; they want to enlist the help of government in enforcing their doctrines on others who do not agree with those doctrines. In short, they seek a specific religious preference based on the Constitution and laws that are designed to promote broad religious freedom.*

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I. INTRODUCTION

More than 130 years ago, and less than 100 years after the adoption of the First Amendment, the Court, in *Reynolds v. United States*, rejected a Free Exercise Clause[1] challenge to a federal law that prohibited polygamy where the accused claimed that his Mormon religion required that he have multiple wives.[2] Reynolds argued that the Free Exercise Clause required an exemption from otherwise valid criminal laws, but the Court rejected his argument.[3] The Chief Justice of the Court wrote:

> [A]s a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. 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*. Government could exist only in name under such circumstances.[4]

More than 100 years later, in *Employment Division v. Smith*, the Court rejected a Free Exercise Clause challenge to an Oregon law that included "religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug" and permitted Oregon "to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[5] Justice Scalia, writing for the Court, invoked *Reynolds* in reaching his conclusion:

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or [not of] the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

2. Reynolds v. United States, 98 U.S. 145, 161–62, 167–68 (1878).

3. *Id.* at 162, 164–67.

4. *Id.* at 166–67 (emphasis added).

5. Emp't Div. v. Smith, 494 U.S. 872, 874, 890 (1990).

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a 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*,"—contradicts both constitutional tradition and common sense.[6]

Fast-forward to May 2012, approximately one month before the Supreme Court upheld the key provisions of the Patient Protection and Affordable Care Act (PPACA).[7] The United States Conference of Catholic Bishops (Catholic Bishops) spearheaded a religious-freedom attack[8] on a provision of the PPACA that requires most health insurance plans to provide "essential health benefits," including "[p]reventive and wellness services," as defined by the Secretary of Health and Human Services.[9] There are a number of exemptions and safe-harbor provisions available to certain employers, including: an

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6. *Id.* at 885 (emphasis added) (internal citations omitted) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988); *Reynolds*, 98 U.S. at 167).

7. 26 U.S.C. § 5000A (2012), *upheld in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600, 2608 (2012).

8. There are a variety of lawsuits with different plaintiffs, including a few Catholic colleges and universities, but the complaints were obviously coordinated. *See, e.g.*, Complaint, Roman Catholic Archbishop of Wash. v. Sebelius, No. 1:12-cv-00815 (D.D.C. filed May 21, 2012) [hereinafter Complaint, Roman Catholic Archbishop], *dismissed as not ripe*, 920 F. Supp. 2d 8 (D.D.C. 2013), *appeal held in abeyance*, 2013 WL 3357814 (D.C. Cir. June 21, 2013); Complaint and Demand for Jury Trial, Franciscan Univ. of Steubenville v. Sebelius, No. 2:12-cv-00440 (S.D. Ohio filed May 21, 2012), *dismissed for lack of jurisdiction*, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013); Complaint, Trautman v. Sebelius, No. 1:12-cv-00123 (W.D. Pa. filed May 21, 2012), *dismissed as not ripe sub nom.*, Persico v. Sebelius, 919 F. Supp. 2d 622 (W.D. Pa. 2013). Since then, many more lawsuits have been filed and new decisions are issued regularly. *See, e.g.*, Roman Catholic Archdiocese of N.Y. v. Sebelius, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013). The landscape of this litigation changes almost daily, so I will not attempt to provide an exhaustive list of either the cases or the decisions. Suffice it to say, the results have been mixed. I wonder whether Pope Francis was thinking, at least in part, about these lawsuits when he commented in September 2013 about the Catholic Church being "obsessed" with abortion, gay marriage, and contraception. Laurie Goodstein, *Pope Says Church Is 'Obsessed' with Gays, Abortion, Birth Control*, N.Y. TIMES, Sept. 20, 2013, at A1.

9. 42 U.S.C. § 18022(b) (Supp. V 2012); *see also Women's Preventive Services Guidelines*, HRSA.GOV, http://www.hrsa.gov/womensguidelines/ (last visited Mar. 28, 2014).

exemption for "religious employers";[10] an exemption for "grandfathered" health plans;[11] a temporary safe-harbor provision ensuring that no department will take enforcement action against non-profit employers and their group health plans that "on and after February 10, 2012, do not provide some or all of the contraceptive coverage otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization";[12] and an exemption for employers with fewer than fifty employees, which do not have to provide employees with a health insurance plan.[13] Prior to the litigation organized by the Catholic Bishops, the Obama administration proposed a compromise,[14] but that did not satisfy the Catholic Bishops,[15] so they, and others, proceeded with the litigation.[16] Several weeks after the litigation was initiated, the Catholic Health Association (CHA), comprised of 2,000 Catholic hospitals, health systems, and related organizations, expressed its deep concern about the compromise, even though it had initially supported it.[17] Surveys suggest the Catholic

10. 45 C.F.R. § 147.130(a)(1)(iv)(B) (2012) (setting out the criteria for this exemption).

11. *Id.* § 147.140(a)(1)(i). Plans in which individuals were enrolled on March 23, 2010, are not subject to the preventive services provision. *Id.* § 147.140(a)(1)(ii).

12. *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,502–03 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (providing a safe-harbor that "is in effect until the first plan year that begins on or after August 1, 2013"); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (same).

13. 26 U.S.C. § 4980H(c)(2)(A) (2012).

14. *See* Office of the Press Sec'y, White House, *Fact Sheet: Women's Preventive Services and Religious Institutions*, WHITEHOUSE.GOV (Feb. 10, 2012), http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions. The *Fact Sheet* states:

> Under the new policy to be announced today, women will have free preventive care that includes contraceptive services no matter where she works. The policy also ensures that if a woman works for a religious employer with objections to providing contraceptive services as part of its health plan, the religious employer will not be required to provide, pay for or refer for contraception coverage, but her insurance company will be required to directly offer her contraceptive care free of charge.

Id.

15. *See* Complaint, Roman Catholic Archbishop, *supra* note 8; *see also infra* note 17 and accompanying text.

16. *See, e.g.*, Complaint, Roman Catholic Archbishop, *supra* note 8.

17. Emily Douglas, *Catholic Health Association Pulls Support from Contraception Mandate*, THE NATION (June 20, 2012, 6:01 PM), http://www.thenation.com/blog/168509/catholic-health-association-pulls-support-contraception-mandate. The CHA listed its concerns in a letter to the Department of Health and Human Services. Letter from Carol Keehan,

Bishops are presenting the "corporate" or institutional version of religious freedom, not the version of a substantial percentage of Catholics who use contraceptive devices.[18]

This Article is not intended as an exhaustive brief for either side in the Catholic Bishops' litigation, although it will question the Bishops' legal position,[19] as well as the purpose of the litigation.[20] More generally,

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Robert V. Stanek, and Joseph R. Swedish, Catholic Health Ass'n., to Marilyn Tavenner, Acting Adm'r, Ctrs. for Medicare and Medicaid Servs., Dep't of Health and Human Servs. (June 15, 2012), *available at* http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/06/15/SocialIssues-Religion-Immigration/Graphics/061512CHAComments_ANPRM_WomensPreventiveServices.pdf.

18. *See* RACHEL K. JONES & JOERG DREWEKE, COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 3–8 (2011), *available at* http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf (noting that among "sexually active women who are not pregnant, postpartum or trying to get pregnant," 68% of Catholic women in that universe used "highly effective methods"—32% sterilization, 31% pill, and 5% IUD). In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court gave Free Exercise Clause protection to Thomas's version of what his religion, Jehovah's Witness, required, not the institution's "official" version. *Id.* at 711, 715–16. Are the Catholic Bishops asking the courts to impose the institutional version of Catholicism on the government at the expense of a substantial number of Catholics who disagree with that version and, in fact, want the benefit provided by the PPACA?

19. Similar litigation by religious institutions challenging state laws that required employers providing group health insurance coverage to employees to include prescription contraceptives in the insurance coverage has been unsuccessful. *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007).

20. When I learned of the litigation, I questioned whether the race of the President played a role in the Catholic Bishops' decision to initiate litigation, but I decided not to pursue that issue here. More recently, I became aware of a brief article written by Most Rev. John R. Quinn, Archbishop Emeritus of San Francisco, addressing a "demand from many Catholic bishops and lay leaders that the University of Notre Dame rescind its invitation to President Obama to deliver the 2009 commencement address." John R. Quinn, *A Critical Moment: Barack Obama, Notre Dame and the Future of the U.S. Church*, AMERICA: NAT'L CATH. REV. (Mar. 30, 2009), http://americamagazine.org/issue/692/100/critical-moment. Archbishop Quinn stated that three "hard and penetrating questions" occurred to him. *Id.* Most relevant here is the third:

> 3. If the president is forced to withdraw, how will that fact be used? Will it be used to link the church with racist and other extremist elements in our country? Will the banishment of the first African-American president from Catholic university campuses be seen as grossly insensitive to the heritage of racial hatred which has burdened our country for far too long? Will it be used to paint the bishops as supporters of one political party over another? Will this action be seen as proof that the bishops of the United States do not sincerely seek dialogue on major policy questions, but only acquiescence?

Id. Does the Catholic Bishops' attack on PPACA raise the same "hard and penetrating" questions? Incidentally, President Obama did deliver the 2009 commencement address at

this Article questions the validity of the expressed concern about religious freedom, or freedom of conscience as some express it. In a country where at least mainstream religion enjoys substantial freedom, are the Catholic Bishops attempting "to become a law unto [themselves]"?[21] Indeed, religious freedom is important, particularly for *individuals*, but when does governmental gerrymandering to accommodate one group's religious beliefs or practices interfere with the freedom of others, including some members of the group?

For example, does the decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, holding that the First Amendment requires a "ministerial exception" to federal antidiscrimination laws, restrict the freedom of the victims of such discrimination, including retaliation?[22] Assuming *Hosanna-Tabor* gives religious institutions the freedom to discriminate on the basis of race,[23] it limits the freedom of the victims of such discrimination.[24] When religious employers seek a ministerial exception that would permit them to discriminate, for example, on the basis of race in filling certain positions, they are seeking "to become a law unto [themselves]."[25]

If the Catholic Bishops are successful in their litigation and they are exempted from the challenged provisions of the PPACA, the freedom of non-Catholic employees of the exempt Catholic institutions, as well

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Notre Dame. *See Obama Notre Dame Speech*, HUFFINGTON POST (June 17, 2009, 6:12 AM), http://www.huffingtonpost.com/2009/05/17/obama-notre-dame-f_n_204387.html. Shortly after the election on November 6, 2012, Vincent Miller, the Gudorf Chair of Catholic Theology and Culture at the University of Dayton, wrote that "President Obama's narrow victory among Catholic voters this week will be seen by many as a political loss for the U.S. Catholic bishops, who appeared to be openly opposing Obama during the presidential campaign." Vincent Miller, *My Take: Catholic Bishops' Election Behavior Threatens Their Authority*, CNN BELIEF BLOG (Nov. 8, 2012, 10:18 AM), http://religion.blogs.cnn.com/2012/11/08/my-take-catholic-bishops-election-behavior-threatens-their-authority. While defending the Church's right to conduct a campaign on religious liberty, Miller indicated that "its 'Preserve Religious Freedom' yard signs were clearly designed to be placed alongside partisan candidate signs." *Id.* He also stated that "the bishops' posture toward the administration during the election poses a major risk to the Church because it left the impression that there was only one legitimate Catholic choice for president—Mitt Romney." *Id.*

21. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878).

22. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012); *see also* discussion *infra* Part IV.

23. While *Hosanna-Tabor* did not involve race discrimination, it is not clear that the Court would treat race discrimination differently. *See Hosanna-Tabor*, 132 S. Ct. at 710.

24. A license to discriminate on the basis of race deprives some (usually racial minorities) of equal opportunity in employment, which is a denial of freedom.

25. *See Reynolds*, 98 U.S. at 167.

as the Catholic employees who have a different view of what it means to be Catholic—to choose when to procreate and when not to do so—will be limited.[26] In effect, the Catholic Bishops are asking government to help enforce their anti-contraception rule by punishing those Catholics who choose to use prescription contraceptives. Is requiring the "good" Catholic employees of a Catholic religious institution covered by the PPACA, who participate in its health insurance program but choose not to use the contraception benefit, to subsidize the "bad" Catholic employees, who use their health insurance to purchase prescriptive contraceptives, a greater infringement of religious freedom or freedom of conscience than the government-imposed obligation to support religious instruction or worship through an educational voucher program that benefits primarily Catholic elementary and secondary schools?[27]

In short, the Catholic Bishops want to promote their institutional religious freedom even though that freedom is often at the expense of individuals' freedom, including many Catholic women who support and

26. Of course, they are free to purchase prescription contraceptives but not all women have the financial resources to do so. The "non-conforming" Catholics are free to work for an employer that complies with the PPACA, just as the Catholic institutions are free to avoid becoming an "employer." *See Contraceptive Coverage: Stories from the Front Lines*, ASS'N OF REPROD. HEALTH PROF'LS, https://www.arhp.org/Policy-and-Advocacy/Policy-Recommendations/Contraceptive-Coverage/stories (last visited Apr. 2, 2014).

27. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 647, 681 (2002) (majority opinion & Thomas, J., concurring) (noting that in the 1999–2000 school year, 96% of all voucher recipients attended religious schools and that thirty-five of forty-six (76%) of the religious schools were Catholic). The recently adopted Indiana school voucher program, An Act to Amend the Indiana Code Concerning Education, Pub. L. No. 92-2011, § 10, 2011 Ind. Acts 1024 (codified as amended at IND. CODE ANN. § 20-51-4 (LexisNexis Supp. 2013)), prohibits "eligible school[s]" from discriminating "on the basis of race, color, or national origin," IND. CODE ANN. § 20-51-4-3(a), but it does not prohibit "religious instruction or activities" in the "eligible school[s]," *id.* § 20-51-4-1(a)(1). Thus, one whose conscience or religious beliefs dictate that she not support Catholic religious instruction or activities is left with no choice, i.e., she must pay the taxes that support the "choice scholarship[s]." *See id.* § 20-51-4-1(a)(1). The Court, in *Arizona Christian School Tuition Organization v. Winn*, recognized that "[a] dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience." Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)); *see also* Mitchell v. Helms, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) ("[C]ompelling an individual to support religion violates the fundamental principle of freedom of conscience.").

would utilize the insurance required by the challenged provisions in the PPACA.[28]

II. CATHOLIC BISHOPS' LITIGATION

Although there are many lawsuits, I will provide a brief description of one of them, *Roman Catholic Archbishop of Washington v. Sebelius*, filed in the U.S. District Court in the District of Columbia.[29] All of the plaintiffs in this case are corporations,[30] emphasizing that this case is about the religious freedom of *certain* Catholic institutions that are

28. *See* Ian Millhiser, *Catholic Nuns File Brief Supporting Affordable Care Act*, THINK PROGRESS (Feb. 23, 2012, 11:30 AM), http://www.thinkprogress.org/justice/2012/02/23/431147/catholic-nuns-file-brief-supporting-affordable-care-act/.

29. Complaint, Roman Catholic Archbishop, *supra* note 8. There are other lawsuits filed by individuals who own or operate for-profit employers and who claim they run the business in a manner consistent with their religious beliefs. On November 26, 2013, the Court agreed to hear two of these cases—*Conestoga Wood Specialties Corp. v. Secretary of U.S. Health and Human Services*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). In the latter, the Tenth Circuit reversed the denial of a preliminary injunction and remanded after deciding corporations are "persons" within the meaning of the Religious Freedom Restoration Act of 1993 (RFRA). *Hobby Lobby*, 723 F.3d at 1121, 1128–29, 1147. In the former, the Third Circuit affirmed the denial of a preliminary injunction, holding a for-profit secular corporation could not assert a Free Exercise Clause claim, and it could not engage in religious exercise under the Free Exercise Clause, and therefore, could not assert a RFRA claim. *Conestoga*, 724 F.3d at 388–89. Further, the court held that the shareholders likely did not have a viable claim that implementation of the women's preventive healthcare regulation under PPACA against the corporation violated their right to free exercise of religion. *Id.*; *see also* Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 627–28 (6th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3318 (U.S. Nov. 12, 2013) (No. 13-591); Autocam Corp. v. Sebelius, 730 F.3d 618, 620 (6th Cir. 2013) (rejecting the religion-based challenge to the mandated preventive and wellness provisions of the PPACA), *petition for cert. filed*, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1154, 1169 (E.D. Mo. 2012) (dismissing a challenge to the preventive services coverage provision of the PPACA, 42 U.S.C. § 300gg-13(a) (Supp. V. 2012), based on the religion clauses and the Free Speech Clause of the First Amendment, RFRA, and the Administrative Procedure Act); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (issuing a preliminary injunction enjoining federal officials and agencies from applying or enforcing the substantive requirement imposed by 42 U.S.C. § 300gg-13(a)(4), and the application of the penalties in 26 U.S.C. §§ 4980D, 4980H (2012), and 29 U.S.C. § 1132), *aff'd*, 542 F. App'x 706 (10th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3468 (U.S. Jan. 31, 2014) (No. 13-919).

30. Complaint, Roman Catholic Archbishop, *supra* note 8. Other plaintiffs are The Consortium of Catholic Academies of the Archdiocese of Washington, Inc., Archbishop Carroll High School, Inc., Catholic Charities of the Archdiocese of Washington, Inc., and The Catholic University of America. *Id.*

employers,[31] rather than individual Catholics. The opening sentences in the complaint state: "This lawsuit is about one of America's most cherished freedoms: the freedom to practice one's religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception."[32] It goes on to say that government is free to make these services more readily available; however, "the Government seeks to require Plaintiffs—all Catholic entities—to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those services."[33]

These Catholic entities "provide a wide range of spiritual, educational, and social services to residents in the greater Washington, D.C., community, Catholic and non-Catholic alike."[34] Students enrolled in the archdiocesan schools "are taught faith—not just the basics of Christianity, but how to have a relationship with God that will remain with them after they leave their Catholic school."[35] In summarizing the work of the Archdiocese, the complaint says "[it]—and the entire Catholic Church—is committed to serving anyone in need, regardless of religion," and "[i]n addition to serving individuals of all faiths, [it] also

31. *Id.* Any "religious employer" is exempt from the contraception services requirement. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B) (2012); *see also infra* notes 134–35 and accompanying text. "Religious employer" is defined as an organization that meets four criteria: (1) its purpose is the "inculcation of religious values"; (2) it employs primarily "persons who share [its] religious tenets"; (3) it "serves primarily persons who share [its] religious tenets"; and (4) it "is a nonprofit organization," as described in the Internal Revenue Code. 45 C.F.R. § 147.130(a)(1)(iv)(B). Further, only "large employers," those with at least fifty employees, are covered by the requirement. 26 U.S.C. § 4980H(c)(2)(A).

32. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶ 1.

33. *Id.* What exactly is the sincerely held religious belief of these entities—that Catholics should not use contraception, or that Catholics should neither use nor subsidize others' use of contraception? If it means the latter, is it improper for such an entity to pay wages to someone who uses the wages to purchase either contraception or an abortion? It is not clear who is financing the litigation, but it is certainly possible that the contributions of individual Catholics who favor and support the challenged provisions of the PPACA are being utilized, contrary to their sincerely held beliefs, based on their version of Catholicism so that Catholic employers should make full benefits available to all employees.

34. *Id.* ¶ 2.

35. *Id.* ¶ 33. The complaint does not indicate whether the archdiocesan schools receive government funds. *See generally id.* Government-funded education vouchers are available in Washington, D.C. and more than one-half of the students receiving vouchers attend Catholic schools. Lyndsey Layton & Emma Brown, *Quality Control on D.C. School Vouchers? 'A Blind Spot.*,' WASH. POST, Nov. 18, 2012, at A1. Congress appropriated $20 million for the D.C. vouchers, *id.*, so federal taxpayers are subsidizing Catholic schools in D.C.

employs individuals of all faiths."[36] If the Archdiocese "is committed to serving anyone in need, regardless of religion," apparently it does not violate its "sincerely held religious beliefs" to subsidize activity that is sinful if engaged in by a Catholic.[37]

In their complaint, the plaintiffs assert nine separate legal claims attacking the challenged law and regulations: a substantial burden on religious exercise in violation of the Religious Freedom Restoration Act of 1993 (RFRA)[38] and the Free Exercise Clause of the First Amendment;[39] excessive entanglement in violation of the Free Exercise and Establishment Clauses of the First Amendment;[40] religious discrimination in violation of the Free Exercise and Establishment Clauses of the First Amendment;[41] interference in matters of internal church governance in violation of the Free Exercise and Establishment Clauses of the First Amendment;[42] compelled speech in violation of the Free Speech Clause of the First Amendment;[43] and three counts alleging violations of the Administrative Procedure Act.[44]

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36. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 37–38. What the complaint omits is the fact that the Archdiocese wants to be allowed to impose its religious beliefs related to prescriptive contraceptives on all of those students and employees. *See generally id.* Of course, no student is required by law to attend a Catholic school, and no one is required to work for a Catholic employer; similarly, no Catholic institution is required by law to establish a school or become an employer, or if it chooses to become an employer and has less than fifty employees, make health insurance available. *See* 26 U.S.C. § 4980H(c)(2)(A).

37. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 1, 37. For example, it appears that a woman in need because she used her scarce resources to pay for an abortion would be eligible for assistance from the Archdiocese.

38. *Id.* ¶¶ 177–93 (Count I); *see also* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006), *invalidated as applied to states by* City of Boerne v. Flores, 521 U.S. 507 (1997).

39. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 194–212 (Count II).

40. *Id.* ¶¶ 213–22 (Count III).

41. *Id.* ¶¶ 223–32 (Count IV) (claiming the "narrow exemption for certain 'religious employers' but not others discriminates on the basis of religious views or religious status"). This claim could be addressed by eliminating the "narrow exemption."

42. *Id.* ¶¶ 233–47 (Count V) (claiming the law interferes with the plaintiffs' internal decisions in that the plaintiff institutions must comply with the decision of the Catholic Church on "these issues"). This argument appears to be a stretch because the government is not interpreting church doctrine; rather, it is imposing a requirement that the plaintiffs say is inconsistent with church doctrine, as in *Smith*. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–80 (1990).

43. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 248–61 (Count VI) (claiming the law compels the plaintiffs "to subsidize, promote, and facilitate education and counseling services regarding [practices that violate their religious beliefs]"). As a taxpayer in

The Catholic Bishops' claim that "the Government seeks to require Plaintiffs—all Catholic entities—to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those services,"[45] if accurate, is the result of a series of non-government decisions made independent of PPACA. Any alleged conflict between "sincerely held religious beliefs"[46] and the requirements of the PPACA arises only because the Catholic entities decided voluntarily to become employers and provide health insurance, and because of "a series of independent decisions by health care providers and patients covered by [an employer's] plan."[47] More than thirty years ago in *United States v. Lee*, the Court addressed conflicts created by the voluntary action of religious institutions:

Indiana, I am compelled to support religious speech through the voucher program. *See* IND. CODE ANN. § 20-51-4-1 (LexisNexis Supp. 2013).

44. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 262–305 (Counts VII–IX) (claiming violations of 5 U.S.C. § 706(2)(A), (D) (2012)).

45. *Id.* ¶ 1.

46. *See id.* I will not address the question whether an entity, Catholic or otherwise, can have "sincerely held religious beliefs." A related question—"[c]an a corporation exercise religion?"—was raised but not resolved in *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (referring to it as a question of first impression), *aff'd*, 542 F. App'x 706 (10th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3468 (U.S. Jan. 31, 2014) (No. 13-919). *See also* Korte v. Sebelius, 735 F.3d 654, 659 (7th Cir. 2013) (reversing the denial of a preliminary injunction with instructions to enter such injunctions in favor of the two Catholic families and their closely held secular, for-profit corporations), *petition for cert. filed*, 82 U.S.L.W. 3476 (U.S. Feb. 6, 2014) (No. 13-937); Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 627–28 (6th Cir. 2013) (rejecting the religion-based challenge to the mandated preventive and wellness provisions of the PPACA), *petition for cert. filed*, 82 U.S.L.W. 3318 (U.S. Nov. 12, 2013) (No. 13-591); Autocam Corp. v. Sebelius, 730 F.3d 618, 620 (6th Cir. 2013) (same), *petition for cert. filed*, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (raising but declining "to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment").

47. *See O'Brien*, 894 F. Supp. 2d at 1159. This analysis is similar to that used by the Court in *Zelman v. Simmons-Harris*, rejecting an Establishment Clause challenge to education vouchers utilized by parents to pay for their children's education in, for example, Catholic schools. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (holding that the Ohio voucher program allows "individuals to exercise genuine choice among options public and private, secular and religious"). The Court described the voucher system as a program "of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. Because of the "true private choice," the Court said "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Id.* at 649, 655.

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in [26 U.S.C.] § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.[48]

More generally, the court in *O'Brien v. U.S. Department of Health and Human Services* stated:

> However, the challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. Frank O'Brien is not prevented from keeping the Sabbath, from providing a religious upbringing for his children, or from participating in a religious ritual such as communion. Instead, plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [O'Brien Industrial Holdings'] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. This [c]ourt rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.[49]

RFRA, according to the court in *O'Brien*, "is a shield, not a sword" and is "not a means to force one's religious practices upon others."[50]

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48. United States v. Lee, 455 U.S. 252, 261 (1982) (rejecting employer's Free Exercise Clause challenge to forced payment of social security taxes).

49. *O'Brien*, 894 F. Supp. 2d at 1159 (rejecting plaintiffs' claim based on RFRA).

50. *Id.*

Referring to the burden on the plaintiffs as remote, the court indicated that "the health care plan will offend plaintiffs' religious beliefs only if an [O'Brien Industrial Holdings] employee (or covered family member) makes an independent decision to use the plan to cover counseling related to or the purchase of contraceptives."[51] In short, what the Catholic Bishops complain of actually happens as a result of a series of independent private decisions, not directly as a result of the requirements of PPACA and its implementing regulations.

III. SUMMARY OF RELEVANT CONSTITUTIONAL PRINCIPLES

With a few exceptions, the Free Exercise Clause of the First Amendment has not been a reliable source of religious freedom. For nearly thirty years prior to the decision in *Smith*, plaintiffs relying on the Free Exercise Clause could point to *Sherbert v. Verner* to support their argument that claims based on the Free Exercise Clause trigger strict scrutiny.[52] This is confirmed by several post-*Sherbert* cases challenging the denial of unemployment compensation benefits to individuals who lost their jobs for refusing to work in a manner that they believed was inconsistent with their religious beliefs.[53] Between *Sherbert* and *Smith*, it was generally assumed that Free Exercise Clause claims trigger strict scrutiny, requiring the government to show a compelling interest and a close connection between its interest and the means utilized to achieve that interest.[54] Nevertheless, despite the heavy burden that strict scrutiny supposedly imposes, the government was generally successful in defeating Free Exercise Clause claims that did not challenge the denial of unemployment compensation benefits.[55] However, "hybrid" cases, such as *Wisconsin v. Yoder*, where the plaintiffs raised not only a Free Exercise Clause claim, but also a claim based on another constitutional provision (substantive due process in *Yoder*), were more successful.[56]

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51. *Id.* at 1160.

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

53. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

54. *See, e.g.*, *Hobbie*, 480 U.S. at 141–42 (citing *Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. 398).

55. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982).

56. Wisconsin v. Yoder, 406 U.S. 205, 208–09, 214, 234 (1972) (holding that the First and Fourteenth Amendments preclude a state from forcing Amish parents to send their children,

The decision in *Smith* drastically changed the standard of review, if not the results, by substituting rational basis for strict scrutiny in cases where plaintiffs challenge religion-neutral laws of general applicability.[57] The Court 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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. . . .
>
> . . . [D]ecisions have consistently held 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)."[58]

Shortly after *Smith*, in 1993, Congress passed the RFRA, creating a statutory free exercise claim designed to restore the compelling interest test utilized in *Sherbert* and *Yoder*.[59] However, a few years later in *City of Boerne v. Flores*, the Court declared RFRA unconstitutional as applied to state and local governments because Congress lacked the authority under Section 5 of the Fourteenth Amendment to expand the scope of rights protected by Section 1 of the Fourteenth Amendment.[60]

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who have graduated from eighth grade, to high school until the children reach the age of sixteen).

57. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990).

58. *Id.* (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment)).

59. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2006)), *invalidated as applied to states by* City of Boerne v. Flores, 521 U.S. 507 (1997).

60. *Flores*, 521 U.S. at 536. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423, 425, 439 (2006), the Supreme Court applied RFRA to the federal government and held that the religious use of a tea for communion is protected, even though it appears on Schedule I of the Controlled Substance Act. However, the Court did not expressly address whether RFRA is constitutional as applied to the federal government. *Id.* at 438–39. While *Gonzales* may support a challenge to the contraception mandate in the PPACA, it is possible to give effect to both statutes by upholding the PPACA on the grounds that it does not impose a substantial burden on religion, and it is the least restrictive means of serving a compelling government interest. *See* Seven-Sky v. Holder, 661 F.3d 1, 4–5 & n.4 (D.C. Cir. 2011) (rejecting a RFRA challenge to the "individual mandate" portion of PPACA because it does not place a substantial burden on the exercise of plaintiffs' Christian faith and, even if it does, it is the least restrictive means of serving a compelling governmental interest), *cert. denied*, 133 S. Ct. 63 (2012); *see also* United States v. Wilgus, 638 F.3d 1274, 1279 (10th Cir. 2011); Kikumura v. Hurley, 242 F.3d 950, 958–59 (10th Cir. 2001); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296, 1299–300 (D. Colo. 2012) (issuing a preliminary injunction

The same year RFRA was passed, in *Church of the Lukumi Babalu Aye*, *Inc. v. City of Hialeah*, the Court applied strict scrutiny and found a violation of the Free Exercise Clause because the city ordinance at issue was specifically aimed at the Santeria worship service.[61] In other words, the city ordinance was neither religion-neutral nor a law of general applicability, and therefore, *Smith* did not control.[62] Later, in *Locke v. Davey*, the Court rejected a Free Exercise Clause challenge to a state scholarship program designed to assist academically gifted students with post-secondary education expenses, but the scholarship was not available to a student who pursued a degree in theology at an eligible educational institution.[63] Here, the Court distinguished *Lukumi*, stating "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits."[64] While the state could have funded the education at issue without violating the Establishment Clause of the U.S. Constitution,[65] the Court concluded that the state's interest in not funding pursuit of a devotional degree, in light of the state constitutional provision prohibiting appropriation of public money "to any religious worship, exercise or instruction, or the support of any religious establishment,"[66] is "substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."[67]

In sum, since 1990 the Free Exercise Clause has not been a reliable source of religious freedom except in situations where government takes

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enjoining application of the contraception requirement in PPACA to the plaintiffs, based on the religious objections of the owners of a private, secular, for-profit corporation, and summarily concluding, based on *Wilgus*, that the RFRA is constitutional as applied to the federal government), *aff'd*, 542 F. App'x 706 (10th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3468 (U.S. Jan. 31, 2014) (No. 13-919). RFRA addresses conflicts between it and other federal statutes and provides that subsequent laws are subject to RFRA "unless such [a] law explicitly excludes such application by reference to this chapter." Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3(b), *invalidated as applied to states by Flores*, 521 U.S. 507.

61. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545–47 (1993).

62. *See id.* at 531–32 ("These ordinances fail to satisfy the *Smith* requirements.").

63. Locke v. Davey, 540 U.S. 712, 715 (2004).

64. *Id.* at 724 (citing *Lukumi*, 508 U.S. 520).

65. *Id.* at 719.

66. *Id.* at 719 & n.2 (quoting WASH. CONST. art. I, § 11) (internal quotation marks omitted).

67. *Id.* at 725.

direct aim at a particular religion or religion more generally.[68] The "hybrid" cases provide little comfort because, in those relatively rare cases, religious freedom depends on other constitutional provisions, such as substantive due process in *Yoder*.[69] After *Flores* and its narrow interpretation of Section 5 of the Fourteenth Amendment, a broad federal legislative fix aimed at state and local government is unlikely.[70] While it is beyond the scope of this Article, reasonable people can differ on whether *Smith* and its rational basis approach to religion-neutral, generally applicable rules provides the proper interpretation of the Free Exercise Clause. The question is whether religious freedom really requires that all legislation be gerrymandered to avoid conflict with religious practices.

In recent years, the Court has also limited the Establishment Clause as a source of religious freedom. First, as the Court held in *Zelman v. Simmons-Harris*, government is now free to subsidize religious instruction and worship under the guise of private choice in directing government-issued educational vouchers to religious schools.[71] The Court had previously ruled in *Mitchell v. Helms* that government is free to provide materials and equipment to private religious schools with little concern about diversion of the government subsidy for use in furtherance of religious purposes.[72] Justice O'Connor, along with Justice Breyer, supplied necessary votes in *Mitchell*, but expressed concern about actual diversion because of the absence of true private choice.[73] However, Justice O'Connor's concern went away in *Zelman* because she

68. During this period, the Supreme Court increased the constitutional protection of religious institutions by applying First Amendment freedom of speech and association principles. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978, 2995 (2010) (considering whether the First Amendment right of free speech was violated, but holding that denial of Registered Student Organization status to an organization that barred students based on religion and sexual orientation, in violation of the law school's nondiscrimination policy, was viewpoint neutral and reasonable).

69. *See* Wisconsin v. Yoder, 406 U.S. 205, 208–09, 214 (1972).

70. City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997). More limited legislation, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc–2000cc-1 (2006), tied to federal financial assistance, offers some protection. *See* Cutter v. Wilkinson, 544 U.S. 709, 714, 726 (2005) (rejecting a facial Establishment Clause challenge to RLUIPA by a prison, but leaving open as-applied challenges).

71. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

72. Mitchell v. Helms, 530 U.S. 793, 831, 835 (2000).

73. *Id.* at 840–42 (O'Connor, J., concurring).

perceived the education vouchers as subsidizing private religious schools only by virtue of parental choice.[74]

Second, government displays of religious symbols, such as the Ten Commandments, will not violate the Establishment Clause so long as the religious message is not dominant.[75] This means government is free to display religious symbols, as long as it is careful to disguise its real purpose and include enough nonreligious content to discount the religious nature of the display.[76] Another way for government to proliferate the display of religious symbols on its property is to create a limited public forum in which private parties are allowed to display items, including religious symbols.[77] This is a bit risky because disfavored religions might decide to take advantage of the forum and display unpopular symbols.[78] The recently expanded "government as speaker" concept may open another door for government displays, but the Court, in *Pleasant Grove City v. Summum*, did not have to address the Establishment Clause implications.[79]

Third, enforcement of the Establishment Clause has become more difficult because the Court has expanded the prudential limitation on standing in cases challenging government expenditures in support of religious institutions. In *Flast v. Cohen*, the Court created an exception for Establishment Clause cases to the prudential limitation on taxpayer standing, i.e., the federal courts' reluctance to hear cases asserting a "generalized grievance[]" in which the plaintiffs' alleged injury flows

74. *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring).

75. *Compare* Van Orden v. Perry, 545 U.S. 677, 681–83, 691–92 (2005) (holding that a passive display of the Ten Commandments outside the state capitol surrounded by other monuments does not violate the Establishment Clause because even though it sends dual messages, religious and secular, the secular message predominates), *with* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 850, 869 (2005) (holding that display of the Ten Commandments on the walls in two county courthouses violated the Establishment Clause because the displays lacked a secular purpose).

76. *See supra* note 75 and accompanying text.

77. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758, 770 (1995) (holding that precluding the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio Statehouse violated the Klan's freedom of speech and allowing it would not violate the Establishment Clause).

78. *See id.*

79. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009). The Establishment Clause was "neither raised nor briefed." *Id.* at 485–86 (Souter, J., concurring). Two Justices were confident that the park display at issue does "not violate *any* part of the First Amendment." *Id.* at 482–83 (Scalia & Thomas, JJ., concurring). Two other Justices noted that government speakers are bound by the Establishment and Equal Protection Clauses. *Id.* at 482 (Stevens & Ginsburg, JJ., concurring).

from their status as taxpayers.[80] The exception is for cases where plaintiffs challenge "exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution," on the grounds that the spending at issue "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," such as the Establishment Clause.[81] As a result, in *Flast*, the plaintiffs were allowed to proceed with their federal court litigation seeking to enjoin the expenditure of federal funds, pursuant to Titles I and II of the Elementary and Secondary Education Act of 1965,[82] on the grounds that the funds were being used to finance instruction in religious schools, as well as the purchase of textbooks and other instructional material.[83]

However, the *Flast* exception has been narrowed to the point that it covers nothing other than *Flast* itself.[84] Most recently, in *Arizona Christian School Tuition Organization v. Winn*, the Court held that Arizona taxpayers do not have standing to challenge Arizona tax credits for contributions to school tuition organizations that provide scholarships to students attending private schools, many of which are religious.[85] *Flast* did not control because it provided a narrow exception for "governmental expenditures," not tax credits, because the contributions to the private religious schools "result[ed] from the

80. Flast v. Cohen, 392 U.S. 83, 102–06 (1968).

81. *Id.* at 102–03.

82. *Id.* at 85 (citing Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–7941 (2012))).

83. *Flast*, 392 U.S. at 85, 87.

84. *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587 (2007) (denying standing for plaintiffs to challenge expenditures by the President as part of the Faith-Based and Community Initiatives program, with three Justices saying *Flast* is limited to specific congressional appropriations and does not include executive expenditures from a general appropriation, and two Justices saying *Flast* should be overruled); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 480–82 (1982) (holding that taxpayers lack standing to challenge a federal government decision to transfer property to a religious institution, pursuant to Article IV, Section 3, because it is not an "expenditure"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 211, 227–28 (1974) (holding that citizen and taxpayer standing is denied to plaintiffs seeking to enjoin members of Congress from serving in the military reserves, based on Article I, Section 6, and noting that "[o]ur system of government leaves many crucial decisions to the political processes"); United States v. Richardson, 418 U.S. 166, 167, 175 (1974) (holding that a taxpayer lacked standing to challenge the Central Intelligence Agency Act of 1949, as inconsistent with Article I, Section 9, Clause 7, because his challenge was not based on the taxing or spending power).

85. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011).

decisions of private taxpayers regarding their own funds."[86] As stated by Justice Kagan, dissenting in *Winn*, "the Court's arbitrary distinction threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion."[87]

On a brighter note, by a slim margin, government-sponsored prayer was found to violate the Establishment Clause when made part of graduation ceremonies in *Lee v. Weisman*,[88] and when it was made part of the opening ceremonies at high school football games in *Santa Fe Independent School District v. Doe*.[89] Of course, the decision in *Zelman*, approving education vouchers, opens the door to government subsidizing prayer and religious worship at private religious schools.[90]

While there are restrictions on government-sponsored prayer as part of government activities, the amount of government subsidies provided to religious institutions is staggering.[91] Justice O'Connor touched on this in her concurring opinion in *Zelman*, in which she said the $8.2 million of public funds that flowed to religious schools in Cleveland in one year "is no small sum, [but] it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions."[92] She then summarized the ways in which government subsidizes religious institutions, with some indications of the amount of money at stake.[93]

Although the Establishment Clause is supposed to be a co-guarantor of religious freedom,[94] it no longer does much of the heavy lifting.

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86. *Id.* at 1447–48. This reasoning appears to expand the rationale in *Zelman*, which allows government to circumvent the Establishment Clause by involving private citizens in the process of directing government funds to religious institutions. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002). Justice Kagan, in dissent, says this "novel distinction . . . has as little basis in principle as it has in our precedent" because "[e]ither way, the government has financed the religious activity." *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

87. *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

88. Lee v. Weisman, 505 U.S. 577, 599 (1992).

89. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315, 317 (2000).

90. *Zelman*, 536 U.S. at 662–63.

91. *See id.* at 665–68 (O'Connor, J., concurring).

92. *Id.* at 665.

93. *Id.* at 665–68. For example, Justice O'Connor refers to the numerous income and property tax deductions and exemptions, as well as federal health and education dollars, available to religiously affiliated organizations. *Id.*

94. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 881–82 (2005) (O'Connor, J., concurring).

Maybe those truly interested in religious freedom should spend more resources promoting a robust Establishment Clause, rather than attempting to place themselves above the law. Neither the Catholic Bishops nor the church in *Hosanna-Tabor* appears concerned about government subsidizing religion.

IV. APPLICATION OF RELEVANT CONSTITUTIONAL PRINCIPLES TO CATHOLIC BISHOPS' LITIGATION AND *HOSANNA-TABOR*

The Court, in *Hosanna-Tabor*, adopted a "ministerial exception" to the application of the retaliation provision in the Americans with Disabilities Act (ADA) to a religious institution.[95] In short, the Equal Employment Opportunities Commission (EEOC) filed a lawsuit on behalf of Ms. Perich, a teacher at a small school operated by Hosanna-Tabor, alleging that she had been fired in retaliation for threatening to file an ADA lawsuit.[96] Hosanna-Tabor alleged that it discharged her for "'insubordination and disruptive behavior' . . . as well as . . . damage she had done to her 'working relationship' with the school by 'threatening to take legal action.'"[97] In seeking summary judgment, Hosanna-Tabor claimed Perich was a minister who had been fired for a religious reason—"that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[98] The trial court agreed that the suit was barred by the ministerial exception; however, the court of appeals reversed, stating that Perich did not qualify as a minister because her duties as a "called" teacher were identical to her duties as a lay teacher.[99]

In a unanimous decision, with several concurring opinions, the Court sided with Hosanna-Tabor:

> 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

95. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 701, 710 (2012); *see also* 42 U.S.C. § 12203(a) (2006).

96. *Hosanna-Tabor*, 132 S. Ct. at 700–01.

97. *Id.* at 700 (quoting Joint Appendix at 55, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2940670, at *55).

98. *Id.* at 701.

99. *Id.* (citing EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 778–81 (6th Cir. 2010); EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 891–92 (E.D. Mich. 2008)).

> 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, 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.[100]

Even though the Court recognized that the ADA prohibition on retaliation is a valid and neutral law of general applicability, it held that *Smith* does not control the case because it "involved government regulation of only outward physical acts," while this case "concern[ed] government interference with an internal church decision that affect[ed] the faith and mission of the church itself."[101]

Instead of relying on *Smith*, the Court in *Hosanna-Tabor* relied on two other cases.[102] In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, the Court held that applying a New York statute to determine which archbishop had the right to use a cathedral violated the First Amendment because the controversy over the right to use the cathedral was "strictly a matter of ecclesiastical government."[103] In *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, the Court overturned an Illinois Supreme Court decision purporting to reinstate a removed bishop because the proceedings resulting in his removal failed to comply with church laws and regulations.[104] The Court reversed the state supreme court because it had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the church.[105] These

100. *Id.* at 706.

101. *Id.* at 707 (citing Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)). The Court referred to its language in *Smith* "distinguishing the government's regulation of 'physical acts' from its 'lend[ing] its power to one or the other side in controversies over religious authority or dogma.'" *Id.* (alteration in original) (quoting *Smith*, 494 U.S. at 877).

102. *Hosanna-Tabor*, 132 S. Ct. at 704–05 (relying on *Serbian Eastern Orthodox Diocese for U.S. and Canada v. Milivojevich*, 426 U.S. 696 (1976), and *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952)).

103. *Kedroff*, 344 U.S. at 95–97, 115, 119.

104. *Milivojevich*, 426 U.S. at 719–20.

105. *Id.* at 720.

cases, according to the Court, "confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."[106]

After concluding that the religion clauses of the First Amendment require a ministerial exception to at least some cases brought under a federal antidiscrimination law, the Court had to decide whether the exception applies in the *Hosanna-Tabor* situation.[107] First, the Court concluded that the "exception is not limited to the head of a religious congregation," but the Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister."[108] Rather, the Court simply concluded that "the exception covers [Ms.] Perich, given all the circumstances of her employment."[109] Several factors led to this conclusion: the formal title, "Minister of Religion, Commissioned"; the substance reflected in the title—"a significant degree of religious training followed by a formal process of commissioning"; and the important religious functions Ms. Perich performed for the church—"conveying the Church's message and carrying out its mission," "'lead[ing] others toward Christian maturity,'" and "'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'"[110] Ironically, determining who is a minister, for purposes of applying the ministerial exception, brings the courts much closer to deciding religious doctrine than does the determination of whether a particular prohibited characteristic, such as race, sex, or disability, was a motivating factor in the challenged adverse employment action.[111]

The Court identified three errors committed by the court of appeals—the failure to find relevance in the fact that Perich was a commissioned minister, according "too much weight to the fact that lay teachers at the school performed the same religious duties as Perich," and placing too much emphasis on the amount of time Perich spent performing religious functions.[112] Although Perich abandoned her claim for reinstatement, the Court found that immaterial because she

106. *Hosanna-Tabor*, 132 S. Ct. at 704.

107. *Id.* at 707.

108. *Id.*

109. *Id.*

110. *Id.* at 707–08 (alterations in original) (quoting Joint Appendix, *supra* note 97, at 48).

111. *See* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 1008–12 (2013).

112. *Hosanna-Tabor*, 132 S. Ct. at 708–09.

"continue[d] to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees."[113] Such relief, according to the Court, would have required a determination that Hosanna-Tabor was wrong in discharging Perich, and the relief would constitute a penalty on Hosanna-Tabor for discharging an unwanted minister.[114]

In response to the suggestion "that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual," the Court stated that the "suggestion misses the point" because the "purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason," rather, the exception "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone."[115] In an apparent attempt to limit its decision, the Court stated:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.[116]

Despite the Court's attempt to limit its decision to the situation presented by Ms. Perich's discharge,[117] the decision certainly has the potential to disrupt enforcement of all federal antidiscrimination laws, as well as other state and federal employment laws. Extending the notion of what constitutes a minister to reach teachers like Perich opens the door to job descriptions giving a wide range of employees "a role in conveying the [religious organization's] message and carrying out its mission."[118] Religious organizations already have a statutory exemption, in Title VII and the ADA, that allows them to discriminate on the basis of religion,[119] and now the Court has opened the door to a broad

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113. *Id.* at 709.

114. *Id.*

115. *Id.* (internal citation omitted) (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952)).

116. *Id.* at 710.

117. *Id.*

118. *Id.* at 708.

119. *See* 42 U.S.C. § 2000e–1 (2006) (Title VII). In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–39 (1987), the Court

constitutional exemption from cases alleging discrimination based on race, gender, national origin, disability, and age.

When combined with the fact that "small" employers are exempted from the federal antidiscrimination laws,[120] religious institutions may now have a broad license to discriminate. For example, what would the Court do with a Title VII claim brought by a fully qualified Lutheran minister whose application for a real ministerial position was rejected because of his race? It is not clear that the analysis in *Hosanna-Tabor* would lead to a different result. The end of the Court's opinion in *Hosanna-Tabor* suggests the rejected minister would lose[121]:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[122]

If the First Amendment has really "struck the balance for us," presumably the Court would refuse to allow society's great interest in eliminating race discrimination in employment to trump the First Amendment interest in religious freedom.[123] Of course, a court with a different view of race discrimination could conclude that the Thirteenth Amendment, along with the Equal Protection Clause of the Fourteenth Amendment, "has struck the balance for us."[124] At least in cases where, for example, race or sex discrimination in the selection of a minister is

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rejected an Establishment Clause challenge to this exemption, even as applied to nonreligious jobs. *See* 42 U.S.C. § 12113(d) (2006 & Supp. V 2012) (ADA). In *Hosanna-Tabor*, Ms. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 775 (6th Cir. 2010). The lawsuit filed on her behalf by the EEOC alleged "retaliation for threatening to file an ADA lawsuit." *Hosanna-Tabor*, 132 S. Ct. at 701. Both the EEOC and Perich argued, and Hosanna-Tabor did not dispute, that the religious exemptions in the ADA do not apply to retaliation claims. *Id.* at 701 n.1.

120. Employers with less than fifteen employees are exempted from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A), and those with less than twenty employees are exempted from the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (2012).

121. *See Hosanna-Tabor*, 132 S. Ct. at 710.

122. *Id.*

123. *See id.*

124. *See, e.g.*, *id.*; Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

not tied to religious doctrine, it is not obvious why the religion clauses of the First Amendment should trump the equality principle reflected in the Thirteenth and Fourteenth Amendments, as well as Title VII of the Civil Rights Act of 1964.[125]

The brief Establishment Clause portion of the decision in *Hosanna-Tabor*, holding that "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause,"[126] is a bit curious. While that statement may be true, it does not fit the facts because the antidiscrimination laws do not really give "the state the power to determine which individuals will [be employed]" by religious institutions.[127] Rather, under those laws, employers retain wide discretion in determining whom their employees will be, losing only the discretion to discriminate "because of" certain prohibited factors.[128]

The common thread between the Catholic Bishops' litigation and *Hosanna-Tabor* is that the religious institutions in both cases are seeking an exemption from religion-neutral, employment-related laws of general applicability, i.e., seeking "to become a law unto [themselves]."[129] In both situations, the religious institution has opted to get into the business of employing people, but having done so, it does not want to

125. U.S. CONST. amends. I, XIII–XIV; 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. V 2012). In *Smith*, the Court recognized that applying strict scrutiny to free exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to . . . laws providing for equality of opportunity for the races." Emp't Div. v. Smith, 494 U.S. 872, 888–89 (1990) (internal citation omitted) (citing *Bob Jones Univ.*, 461 U.S. at 603–04; Gillette v. United States, 401 U.S. 437 (1971)).

126. *Hosanna-Tabor*, 132 S. Ct. at 706. Most cases addressing government involvement in the resolution of internal disputes of religious institutions refer to the First Amendment, without identifying a specific clause. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 597, 602 (1979). However, some cases also refer to the "free exercise of religion." *See, e.g.*, Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 115–16 (1952); Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith Inc., 684 F.3d 413, 418 (3d Cir. 2012). Both the Free Exercise Clause and the Establishment Clause seem relevant.

127. *Hosanna-Tabor*, 132 S. Ct. at 706; *see also infra* note 128 and accompanying text.

128. In discrimination cases, the courts do not act as a super-human resources department or personnel board "charged with evaluating the general quality of employment decisions." Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908, 922 (7th Cir. 2007); *see also* Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 697 (7th Cir. 2006).

129. Reynolds v. United States, 98 U.S. 145, 167 (1878); *see also Hosanna-Tabor*, 132 S. Ct. at 701, 707; Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 134, 155, 226.

play by the rules governing other employers.[130] Hosanna-Tabor wanted to be treated differently than other employers, i.e., it sought, and obtained from the Supreme Court, an exemption that allows it to discriminate and retaliate in at least some circumstances.[131]

The Catholic Bishops seek a similar exemption from a provision in the PPACA[132] that requires non-grandfathered plans and issuers to provide, among other preventive services identified in guidelines adopted by Health Resources and Services Administration (HRSA), contraceptive services.[133] The guidelines include a note referring to a regulation authorizing HRSA to establish exemptions from the contraceptive-services requirement for health plans established and maintained by "religious employers."[134] A "religious employer" is defined as an organization that meets four criteria: (1) its purpose is the "inculcation of religious values"; (2) it employs primarily "persons who share [its] religious tenets"; (3) it "serves primarily persons who share [its] religious tenets"; and (4) it "is a nonprofit organization," as described in the Internal Revenue Code.[135] As stated above, the ADA provides a statutory defense for religious entities, allowing them to give a "preference in employment to individuals of a particular religion to

130. The Catholic organizations challenging the contraceptive-services requirement not only opted to get in the business of employing people, they also opted to get in the business of providing health coverage. *See supra* note 47 and accompanying text. In commenting on proposed final rules related to the controversial requirement, "[s]ome religiously-affiliated employers warned that, if the definition of religious employer is not broadened, they could cease to offer health coverage to their employees in order to avoid having to offer coverage to which they object on religious grounds." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

131. *See Hosanna-Tabor*, 132 S. Ct. at 701, 710.

132. 42 U.S.C. § 300gg-13(a)(4) (Supp. V 2012) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— . . . (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

133. *See Women's Preventive Services Guidelines*, *supra* note 9. The HHS Guidelines for Health Insurance Coverage require "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *Id.*

134. *Id.*; *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A) (2012).

135. 45 C.F.R. § 147.130(a)(1)(iv)(B). In the complaint, four of the plaintiffs allege that none of them qualify for this exemption, and the fifth says it is unclear whether the government will conclude that it qualifies for this exemption. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 40, 54, 63, 73, 89.

perform work connected with the carrying on by such [an entity] of its activities,"[136] and allowing them to "require that all applicants and employees conform to the religious tenets of such [an entity]."[137] Therefore, both of the laws at issue, PPACA and ADA, include exemptions for religious organizations, but neither Hosanna-Tabor nor the Catholic Bishops are satisfied with the exemptions.

Another common thread between the Catholic Bishops' litigation and *Hosanna-Tabor* may be the organizations' insensitivity to gender equity in the workplace.[138] As noted by Professor Griffin in her article, *The Sins of* Hosanna-Tabor, the victims of the ministerial exception are frequently women.[139] The comments accompanying the final rules implementing the contraception-services requirement state: "Congress determined that both existing health coverage and existing preventive services recommendations often did not adequately serve the unique health needs of women" and that the "disparity places women in the workforce at a disadvantage compared to their male co-workers."[140] Further, the contraceptive coverage requirement is "designed to serve the compelling public health and gender equity goals" identified above.[141] In fact, this requirement will actually save money for the employers.[142]

The Catholic Bishops attempt to avoid the holding in *Smith* by "arguing" in their complaint that the contraception requirement is "not a neutral law of general applicability because it is riddled with exemptions for which there is not a consistent, legally defensible basis," in that "[i]t offers multiple exemptions from its requirement that employer-based health plans include or facilitate coverage for abortion-inducing drugs, sterilization, contraception, and related education and

136. 42 U.S.C. § 12113(d)(1) (2006 & Supp. V 2012); *see also supra* note 119 and accompanying text.

137. 42 U.S.C. § 12113(d)(2). The parties agreed that these exemptions do not apply to retaliation claims. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 701 n.1 (2012).

138. Griffin, *supra* note 111, at 990–92.

139. *Id.*

140. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

141. *Id.* at 8729.

142. *Id.* at 8727 (citing a 2000 study estimating "that it would cost employers 15 to 17 percent more not to provide contraceptive coverage in employee health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and the indirect costs such as employee absence and reduced productivity").

counseling," and "because it discriminates against certain religious viewpoints and targets certain religious organizations for disfavored treatment"[143] This argument is not convincing.[144] However, the absence of a convincing argument did not prevent the Court from distinguishing *Smith* in *Hosanna-Tabor*.[145] Although it conceded that "the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability," the Court said, "a church's selection of its ministers is unlike an individual's ingestion of peyote" because the latter is simply an "outward physical" act.[146] In contrast, *Hosanna-Tabor* "concerns government interference with an internal church decision that affects the faith and mission of the church itself."[147] This analysis is suspect for the reasons stated by Professor Griffin.[148]

But, even if the Court is correct in *Hosanna-Tabor*, does its analysis—"outward physical acts" versus the "internal church decision that affects the faith and mission of the church itself"—distinguish *Smith* in the cases challenging the contraception requirement in the Catholic

143. Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 200–01.

144. It is interesting that the plaintiffs, who seek a larger exemption for religious employers, use the existing exemption as the basis for the argument that the PPACA is not a religion-neutral law of general applicability. *Id.* ¶¶ 134, 155 (noting that "the U.S. Government Mandate contains a narrow religious exemption," which burdens their practice of faith and that at a minimum, the Government could provide a "broader exemption for religious employers"). One way to understand whether a law satisfies the *Smith* criterion is to contrast it with the ordinance at issue in *Lukumi*. *Compare* Emp't Div. v. Smith, 494 U.S. 872, 874 (1990) (deciding the issue of whether Oregon's drug laws violated members of the Native American Church's constitutional rights when those members ingested peyote as part of a sacramental ceremony), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 526 (1993) (deciding the issue of whether Hialeah's city ordinance prohibiting unnecessary animal killings violated members of the Santeria church's constitutional rights when Santerian ceremonies include animal sacrifice). Clearly the PPACA is more like the Oregon drug laws at issue in *Smith* than the ordinance at issue in *Lukumi*, which was aimed at a particular religious group and its animal sacrifice ritual. *See Lukumi*, 508 U.S. at 524, 526.

145. *See* Griffin, *supra* note 111, at 992–94; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

146. *Hosanna-Tabor*, 132 S. Ct. at 707 (citing *Smith*, 494 U.S. at 877).

147. *Id.*

148. *See* Griffin, *supra* note 111, at 992–94 ("What could 'affect[] the faith and mission of the church itself' more than punishing individuals like Smith for participation in a religious ritual? And what 'internal church decision that affects the faith and mission of the church itself' is involved in the firing of a disabled employee in a church that does not preach disabilities discrimination?" (alteration in original) (quoting *Hosanna-Tabor*, 132 S. Ct. at 707)).

Bishops' litigation?[149] In *Smith*, the Court said 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).'"[150] Unless the right of free exercise means something different for a religious "institution" than it means for an "individual," this sentence should end the discussion. It does not appear that the litigation supported by the Catholic Bishops will require the courts to get involved in the selection of ministers or the interpretation of Catholic faith and doctrine.

Unlike the plaintiff in *Smith*, the Catholic institutions challenging the PPACA in the litigation organized by the Catholic Bishops have a claim based on RFRA.[151] This Act, found unconstitutional in *Flores* as applied to state and local government,[152] attempts to restore strict scrutiny analysis to Free Exercise Clause claims, and the Court has not decided whether RFRA is constitutional as applied to the federal government.[153] At least one court of appeals has rejected a RFRA claim in a case challenging the "individual mandate" portion of the PPACA.[154]

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149. *Hosanna-Tabor*, 132 S. Ct. at 707. Hopefully, the Court is not saying "religious individuals must obey neutral laws of general applicability" but religious institutions do not. *See* Griffin, *supra* note 111, at 992.

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

151. *Compare* Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 177–93, *with Smith*, 494 U.S. at 874.

152. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (noting that even Congress' broad powers under the Fourteenth Amendment could not justify the RFRA). This is because the source of power relied upon by Congress to regulate state and local government was Section 5 of the Fourteenth Amendment and the Court concluded that Congress exceeded its Section 5 power because the RFRA greatly expanded the First Amendment free exercise right, as defined in *Smith*. *Flores*, 521 U.S. at 519, 534–36 (1997).

153. *See* Seven-Sky v. Holder, 661 F.3d 1, 4–5 & n.4 (D.C. Cir. 2011) (rejecting a RFRA challenge to the "individual mandate" portion of PPACA because it does not place a substantial burden on the exercise of plaintiffs' Christian faith and, even if it does, it is the least restrictive means of serving a compelling governmental interest), *cert. denied*, 133 S. Ct. 63 (2012); *see also* Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296, 1298–99 (D. Colo. 2012) (issuing a preliminary injunction enjoining application of the contraception requirement in PPACA to the plaintiffs based on the religious objections of the owners of a private, secular, for-profit corporation, and summarily concluding, based on *Wilgus*, that the RFRA is constitutional as applied to the federal government), *aff'd*, 542 F. App'x 706 (10th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3468 (U.S. Jan. 31, 2014) (No. 13-919).

154. *Seven-Sky*, 661 F.3d at 4–5.

In sum, the claims asserted in the Catholic Bishops' sponsored litigation challenging the contraception services requirement imposed by PPACA and implementing regulations should face an uphill battle, at least under current interpretation of the First Amendment. Of course, the same was true of the challenge in *Hosanna-Tabor*, which resulted in a unanimous decision in favor of the religious institution.[155] *Hosanna-Tabor* confirms that "separation of church and state," at least as understood until the Rehnquist Court began to shrink the Establishment Clause, is clearly a doctrine of the past.[156] It remains to be seen whether RFRA will trump the controversial provision in the PPACA.[157]

V. CONCLUSION

My initial reaction to the decision in *Smith* was that the Court got it wrong. I thought that Free Exercise Clause claims should trigger strict scrutiny so non-mainstream religions, those least powerful in the political process,[158] would have a better chance of protecting themselves through litigation. A few years after *Smith*, the decision in *Lukumi* provided some comfort, as the Court held that strict scrutiny still controls Free Exercise Clause challenges to laws that are neither religion-neutral nor of general applicability.[159] It also became apparent,

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

156. *See supra* Part III (discussing the Court's recent holdings on the Establishment Clause).

157. *See supra* note 60.

158. The Court in *Smith* recognized that:

> [L]eaving 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 or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Emp't Div. v. Smith, 494 U.S. 872, 890 (1990). It may be that RFRA undermines this concern, although RFRA generated broad support because mainstream religions prefer a broad interpretation of the Free Exercise Clause as it gives them a hammer they can use in the legislative process. *See* Richard T. Foltin, *Reconciling Equal Protection and Religious Liberty*, 39 HUM. RTS., Jan. 2013, at 2.

159. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). Such laws, which target a particular religion because of animosity toward it or its practices, or both, should also violate the Equal Protection Clause, as interpreted in *Romer v. Evans*, 517 U.S. 620, 634–35 (1996), which held that laws "born of animosity toward the class of persons affected" violate equal protection because there is no legitimate governmental purpose, *id.*

as religions proliferated in this country, that imposing on legislative bodies the equivalent of a religious impact statement for each piece of legislation could make it very difficult to govern.[160] Further, the tension between the two religion clauses increases as the Free Exercise Clause gets larger, i.e., Establishment Clause concerns are greater when the Free Exercise Clause is interpreted as requiring religion-based exemptions from religion-neutral laws of general applicability.[161] Finally, the shrinking of the Establishment Clause, to the point that there are virtually no constitutional checks on governmental subsidies to religious institutions, should be accompanied by fewer Constitution-imposed exemptions for religious institutions to avoid giving such institutions an advantage over competing nonreligious institutions. For example, the Catholic institutions that are plaintiffs in the litigation promoted by the Catholic Bishops may be subsidized by the government, like their nonreligious competition, but they are seeking an advantage in the form of an exemption from certain requirements of the PPACA.[162] For these reasons, I have changed my view of *Smith*.

The proliferation of exemptions over the years has created a sense of entitlement. When religious institutions are not successful in obtaining an exemption through the legislative process, they may seek a First Amendment-based exemption from the courts, as in *Hosanna-Tabor*.[163] Further, when religious institutions are partially successful in obtaining exemptions through the legislative process, as they were with PPACA,

160. In rejecting strict scrutiny in *Smith*, the Court said any society that applies strict scrutiny across the board "to all actions thought to be religiously commanded[] . . . would be courting anarchy" and "that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Smith*, 494 U.S. at 888.

161. My concern about establishment problems when government exempts religious institutions from such laws is not shared by the current Supreme Court. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 714, 726 (2005) (holding that section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 3, 114 Stat. 803, 804 (codified at 42 U.S.C. § 2000cc-1(a) (2006)), insofar as it requires accommodation of religious practices in prisons, does not violate the Establishment Clause); Locke v. Davey, 540 U.S. 712, 719 (2004) (referring to the "play in the joints" between the two clauses (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)) (internal quotation marks omitted)).

162. *See* Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 134, 155, 226. Similarly, in *Hosanna-Tabor*, the religious institution sought, and obtained, an exemption from federal anti-discrimination laws governing employers. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 701, 707, 710 (2012).

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

they are free to seek additional exemptions from the courts.[164] This is what the Catholic Bishops are doing. Hopefully, the courts will understand that the Catholic Bishops are really seeking a religious preference and block their efforts.

164. Ironically, as pointed out earlier, the Catholic Bishops' attempt to use the exemptions provided by the legislature against the government is an attempt to show that the PPACA is not a neutral law. *See* Complaint, Roman Catholic Archbishop, *supra* note 8, ¶¶ 200–01; *see also supra* note 143 and accompanying text.