Loyola University Chicago Law Journal

Volume 54
Issue 2 *Winter 2022*

Article 11

2023

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Independent and Overlapping: Institutional Religious Freedom and Religious Providers of Social Services

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Roughly two decades ago, scholarly interest in the limits of government involvement in religious institutions exploded. Scholars explored distinctions between the spiritual and temporal dimensions of human activity and identified numerous individual, social, spiritual and civic goods associated with independent religious groups. From these foundations, they defined and refined areas of protection and immunity from government intervention. A shared premise of much of this work was that religious matters belong to religious believers and their institutions, and that the internal governance and operations of these institutions must be kept from state interference. In 2012, this scholarship bore fruit when the Supreme Court recognized a "ministerial exception" from employment discrimination laws, and again in 2020 when the Court construed this exception expansively and grounded it in a "broad" and "general principle of church autonomy."

In recent years, however, the rapid acceleration of culture war battles over family, sexuality and reproductive choice has been pushing a new set of issues before courts and scholars, and these issues have involved aspects of institutional governance that are at once internal and outward-facing. The most vexing conflicts, and those that are the focus of this paper, arise where religious and government entities are working together to advance the public good through programs that are funded by the government or through highly regulated areas of joint activity like health care and child welfare. In these shared areas of activity, both religious groups and governments have important interests as stake, and the values of religious independence and inclusion must also be preserved.

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* Senior Fellow and McDonald Distinguished Fellow, Center for the Study of Law and Religion, Emory University. Many thanks to Emory's McDonald Distinguished Fellows and to participants in the Loyola University Chicago Law Journal conference on "Religious Liberty at a Historic Crossroads" and the 2021 Annual Law and Religion Roundtable for very helpful feedback and comments. I am also grateful for invaluable written comments by Steven J. Heyman and Andrew Koppelman and to Ismail Royer for his assistance in understanding Islamic institutional life. Work on this paper was made possible by a grant from the John Templeton Foundation to the Religious Freedom Institute for a research project on the Freedom of Religious Institutions in Society.

In this Article, I examine the regulation of religious providers of health care and other social services and present my analysis as an illustration of a new framework for defining the scope of institutional religious freedom under the First Amendment. This framework draws on the founding-era history that informed the adoption of the First Amendment, the earlier lessons of history that shaped founding-era perspectives and help to illuminate them, and the judicial doctrine that has drawn on these past lessons and history to articulate and refine specific principles in light of developing challenges and experiences. I also propose my framework as part of charting a new direction for free exercise jurisprudence in the wake of the Court's 2021 decision in Fulton v. City of Philadelphia. While the Fulton *Court declined to revisit precedent limiting most protections under the Free Exercise to instances of religious discrimination, a majority of justices expressed dissatisfaction with the Court's precedent, and a number of justices seemed to be looking for nuanced and workable approaches adapted to specific categories of cases. I offer such a framework for institutional religious freedom.*

INTRODUCTION

Religion and the state naturally attract. Religious belief and practice arise from the human person's orientation to the ground or source of all being, and religious belief systems reach deep into all aspects of human

life. In the divine, religious believers understand who they really are and how they should act, both as individuals and as members of communities. All of life comes under divine judgment, including the state.

Religious communities and their leaders often speak these judgments. "Woe to him who builds his house by unrighteousness, and his upper rooms by injustice. . ., " God rebuked King Jehoiakim of Judah through Jeremiah, his priest and prophet.[1] "Wash yourselves; make yourselves clean . . . cease to do evil, learn to do good; seek justice, rescue the oppressed, defend the orphan, plead for the widow," God warned the rulers of Judah through Isaiah.[2] It is natural that those who judge may also be attracted to more direct influence, even to participating in state rule. It is also not surprising when religious communities seek the protection of state power to promote and preserve higher values.

Likewise, those who rule are often attracted to the power that religion exerts over individuals and communities. Religion can shore up the efforts of the state to promote peace, prosperity, and other civic goods. It builds social bonds and unites peoples; it legitimizes government authority and promotes common values. Religion can also be harnessed for darker ends by those who use it to preserve their own power. Governments of all types are wary of religion's independence. Its judgments threaten the status quo, and its transcendent claims limit the loyalty of their citizens.

Not surprisingly, then, close connections between religious and political institutions are a recurring feature in human history. Indeed, as one of the preeminent historians of church-state relations in medieval Europe reminded his readers, "theocracy is a normal pattern of government" in human societies.[3] In Western history, in particular, there are many examples of the mutual attraction of church and state, and, at times, both claimed power to rule the other.[4]

However, the relationship between religion and government in the West has also been marked as much by a countervailing force. In ancient Rome, the emperor was at once supreme political ruler and high priest or "Pontifex Maximus."[5] Popular participation in worship of the Roman gods was viewed as essential to the survival and prosperity of the empire,

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1. *Jeremiah* 22:13.
2. *Isaiah* 1:16–17.
3. BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 1050–1300 131 (1964).
4. For the competing claims of royal and papal theocracy in Europe in the eleventh through thirteenth centuries, see *id*.
5. HUGO RAHNER, S.J., CHURCH AND STATE IN EARLY CHRISTIANITY 7 (Leo Donald Davis, S.J., trans., Ignatius Press 1992) (1961).

and the Roman rites also benefited from state support.[6] Christianity entered the Roman world as a small, powerless minority sect that held no political power and claimed none.[7] Its change of fortune in the fourth century with the conversion of Emperor Constantine led naturally to church-state entanglement, but its founding texts and earliest tradition taught principles that resisted this entanglement. "Give therefore to the emperor the things that are the emperor's, and to God the things that are God's,"[8] said Jesus, and he preached that "[m]y kingdom is not from this world."[9] In his letter to the Roman Christians, the apostle Paul described the purpose of the state as the punishment of wrongdoers.[10] Christians are to submit to the governing authorities as a power instituted by God, but the reach of this power is limited.[11] "There are two," wrote Pope Gelasius to Emperor Anastasius four hundred years later during the long-running dispute over Monophysitism, "by which this world is governed, the sacred authority [*auctoritas*] of priests and the royal power [*potestas*]."[12] The emperor has "received the power to govern mankind, nonetheless you must bow your head to those who have charge of divine affairs and must seek from them the means of your salvation."[13] This dualism has been a central feature of church-state relations in the West even if, as John T. Noonan, Jr. wrote, "[t]he space between [them] was sometimes uncomfortably small."[14]

The adoption of the First Amendment's religion clauses in the new American republic is part of this history as is their subsequent interpretation by courts, legislatures, and the broader American public. Our constitutional guarantees reflect lessons about the dangers of church-state involvement that had, by the late eighteenth century, been learned and relearned through centuries, and poignantly for Americans, in recent European wars and colonial experience.[15] Efforts by religious communities to use, or seek protection from, the state risk government interference with the independence of religious bodies and the distortion

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6. ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM 8 (2019).

7. *See id*. at 9–16.

8. *Matthew* 22:21.

9. *John* 18:36.

10. *Romans* 13:3–4.

11. *Romans* 13:1–7.

12. Letter from Pope Gelasius to Emperor Anastasius (494), *in* RAHNER, *supra* note 5, at 173, 174.

13. *Id*.

14. JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 48 (1998).

15. JOHN WITTE, JR. ET AL., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 9–12 (5th ed. 2022).

and even co-option of religious teaching by secular actors and interests. The suppression of religious dissent deprives religious communities of essential voices of reform and renewal and is ultimately futile. The importance of religious belief and practice to believers means that forces of renewal are always present in religious communities as members seek to engage and better understand religious truth in developing circumstances. Resorting to state power to stifle dissent leads to destructive conflict rather than conformity, and it also undermines free assent, which is an essential aspect of faith and a hallmark of human dignity. Efforts by the state to use religion for civil purposes or to control or tame its expressions also threaten civic peace, and they undermine political authority and legitimacy. All of these insights informed the First Amendment's protections for religious liberty.[16]

However, another lesson from history that has also shaped our constitutional tradition is the impossibility of fully separating religion and government, even religious and political institutions. While too close a connection between church and state has proven dangerous to both, their interests often overlap. They frequently share the same spaces and engage in similar activities. For example, Constantine and later Roman and Byzantine emperors interfered with the early church in significant part because they believed that religious divisions threatened the cohesion of the empire and the peace and prosperity that depended on it.[17] When Pope Gregory VII sought to reform the church by reclaiming the church's power over the appointment of bishops during the Investiture Controversy of the eleventh and early twelfth centuries, King Henry IV of Germany fought back because bishoprics were at once spiritual offices and also quasi-governmental entities with possession and control over landed estates.[18] During the Reformation, reformers divided over whether marriage, inheritance, education, and charitable programs belonged to church or state;[19] clearly both had an interest in each of these areas. There are many interfaces between religion and government. Human persons do not have one foot in the spiritual realm and another in the temporal sphere as if they can be easily divided. Conflicts between

16. For discussion see *infra* Section III.

17. RAHNER, *supra* note 5, at 46–49, 149, 185, 188–89, 232, 240.

18. TIERNEY, *supra* note 3, at 25, 45–47, 74, 85. The fight between popes and kings over the investiture of bishops was finally settled by the Concordat of Worms between Henry V and Pope Calixtus II in 1122. *Id.* at 86.

19. *See generally* JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM (2007) [hereinafter WITTE, THE REFORMATION OF RIGHTS], and JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION (2002) [hereinafter WITTE, LAW AND PROTESTANTISM], to compare their treatment by Lutheran reformers, Calvinist reformers, and the Anglican Church.

religious institutions and the state often arise because both have interests in what is at stake.

Areas of conflict shift over time as circumstances change and new issues become salient. In the founding era, Americans agreed that religion was necessary for sustaining virtue and virtue necessary for democratic self-government.[20] They divided over tax support for churches.[21] Many Americans believed that tax revenues were essential to maintain religious congregations, but others disagreed and argued that tax support would threaten the independence and vitality of religious communities, breed civil strife, and undermine the shared value of religious equality.[22] The adoption of the First Amendment at the federal level did not settle this question for the states. Indeed, it was not until 1833 that Massachusetts finally abandoned America's last system of tax support for churches.[23]

Today our conflicts are different. When the First Amendment was adopted in 1791, the rapid growth in religious pluralism that fueled conflicts over aid to religious schools in the nineteenth century was yet in the future.[24] Long-running disputes over government aid to religious schools have now shaped the Supreme Court's Religion Clause jurisprudence for over seventy years.[25] So have clashes over the use of religious language and symbolism in civic contexts, and these conflicts have also been fed by America's expanding religious diversity.[26] Some of our most bitter fights in recent years can be traced, in significant part,

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20. For further discussion of this relationship, see KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 106–07 (2015).

21. *Id*. at 122–23.

22. *Id*. at 122–27 (discussing the founding-era debate surrounding public support for religion).

23. *Id*. at 127.

24. For an exploration of the effect of growing anti-Catholicism on the understanding of the separation of church and state in nineteenth-century America, *see generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

25. The Court's landmark decision in *Everson v. Board of Education* was decided in 1947. 330 U.S. 1 (1947). For recent cases about government aid to religious schools, see Carson v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000).

26. Recent cases addressing the government's use of religious language and symbolism include Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). In *Marsh v. Chambers*, Justice Brennan, in dissent, observed that "[o]ur religious composition makes us a vastly more diverse people than were our forefathers," and for him that meant that a practice approved by the first Congress is not necessarily constitutional today. 463 U.S. 783, 817 (1983) (Brennan, J., dissenting) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring)) (upholding the practice of paid legislative chaplains).

to America's increasing moral pluralism. In the founding era, the members of America's different faiths shared a common morality.[27] Now Americans are increasingly divided over the ethics of family, sexuality, and reproductive choice, and these divisions often fall along religious lines.[28] Instead of being welcome, religious reasoning in policy debates has become problematic,[29] and now religious institutions and government officials are clashing over rules that require faith-based schools, hospitals, and other social services providers to follow changing public norms.[30] In its recent decision in *Fulton v. City of Philadelphia*, the Court ruled in favor of a Catholic nonprofit organization challenging a city requirement that its foster care program certify same-sex couples, but the decision was narrow and limited in reach.[31]

In all of these areas, interactions between church and state that had once been unobjectionable have become problematic as the demographics and normative commitments of America's communities have shifted and new divisions have sparked competing claims for independence, inclusion, and control. Complicating many of these disputes has been the growing size and reach of the state. Government and religious institutions now share responsibilities for many social goods like health care, education, and care for the poor and neglected.[32]

In this Article, I will examine some of our current conflicts over the regulation of faith-based providers of health care and other social services as I propose and illustrate a new framework for defining the scope of freedom for religious organizations under the First Amendment. When religious groups and the state clash over government regulation, the dangers of church-state involvement must shape our understanding of institutional religious freedom. So must their inevitable interaction,

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27. In Thomas Jefferson's words, "the moral branch of religion" that "instructs us how to live well and worthily in society" is "the same in all religions." Letter from Thomas Jefferson to Thomas Leiper (Jan. 21, 1809), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 236, 236–37 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

28. *See* PEW RSCH. CTR., AMERICA'S ABORTION QUANDARY 22–23 (2022) (surveying attitudes towards abortion among adherents of different faiths); PEW RSCH. CTR., UNITED STATES RELIGIOUS LANDSCAPE STUDY (2014), https://www.pewresearch.org/religion/religious-landscape-study/views-about-same-sex-marriage/ [https://perma.cc/7K8Y-QCF4] (reporting views about same-sex marriage by religious group, attitudes, and practice).

29. The academic literature proposing limitations on the use of religious arguments in public political reasoning and decision-making is vast. For a survey covering these and other proposed guidelines for "public reason," *see* Jonathan Quong, *Public Reason*, STAN. ENCYC. PHIL. (2022), https://plato.stanford.edu/entries/public-reason/ [https://perma.cc/Y7UX-V22Q].

30. For examples of these conflicts, see discussion *infra* Section IV.B.

31. Fulton v. City of Phila., 141 S. Ct. 1868 (2021). For further discussion of this case, see *infra* notes 73–75 and 316–332 and accompanying text.

32. The justices in *Fulton* describe this evolution in the context of foster care. *Id*. at 1874–75; *id*. at 1885 (Alito, J., concurring in the judgment).

especially when religious groups and government cooperate for the public good. Many of today's most intractable disputes involve religious organizations that reach out to serve and employ members of the larger community and have long worked with government agencies, often with few conflicts over government oversight. In contexts like these, religious and governmental interests both matter. Constitutional protections for religious groups must be defined in a way that preserves the independence of these groups and their autonomy over religious mission while also recognizing the government's interests in achieving public goals and protecting the rights of those interacting with religious institutions. The definition of institutional religious freedom in these contexts must also reflect the fact that social services are an area of shared concern and shared activity. Governments have assumed greater responsibility in this area, but this assumption of responsibility cannot justify pushing religious groups out or conditioning their participation on absorption into state programs or conformity with contested state norms when such conformity is not truly necessary to achieve public goals.

As I develop my approach to religious group freedom, my analysis will draw on concepts from Supreme Court precedent including the Court's recent religion clause jurisprudence. In its recent cases, the Court has begun to articulate a doctrine of church autonomy over matters integral to the institution's central mission, and the Court's discussions draw from founding-era history and earlier formative lessons from European history as well as prior precedent.[33] My proposals build on the reasoning that grounds this emerging doctrine as well as the full range of principles that the Court has articulated in its earlier cases addressing institutional religious freedom.[34] In other recent cases, the Court has turned away from separationist values. In cases addressing government funding of religious institutions, the Court has paid attention to the ways in which religious groups and governments often pursue similar ends and coexist together in shared environments, and this has meant the strong embrace of nondiscrimination with respect to access to public benefits.[35] This Article does not address the funding of religious groups, but it does draw upon some of the insights that have informed these decisions, including the recognition that the inclusion of religious groups in areas of shared activity is an important free exercise value.

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33. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

34. *See* discussion *infra* Part III for a discussion of these precedents and principles.

35. *See* Carson v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

I. RELIGIOUS PROVISION OF SOCIAL SERVICES: NEW CHALLENGES IN NEW CIRCUMSTANCES

Roughly two decades ago, scholarly interest in the limits of government involvement in religious institutions exploded. A contributing factor was surely the entrenchment of Supreme Court precedent sharply curtailing protections for religious conscience under the Free Exercise Clause. In 1990, the Court had reversed the course of its free exercise jurisprudence and largely abandoned prior precedent construing the Free Exercise Clause to afford robust protection when the government places substantial burdens on religious practice. Prior to 1990, laws substantially burdening religious practice were subject to strict scrutiny, and regardless of whether the government intended to inhibit religious practice, it had to show that the application of its rule to the believer was the least restrictive means of meeting a compelling state interest.[36] In its decision in *Employment Division v. Smith* in 1990, the Court construed the Free Exercise Clause more narrowly as primarily a protection against religious discrimination.[37] Strict scrutiny still applies where laws are not neutral or generally applicable,[38] but otherwise the Clause provides little relief from burdensome regulation.[39] However, the *Smith* Court left open additional sources of protection for religious groups when it affirmed earlier precedent limiting government involvement in intrachurch disputes over property and repeated that the state may not "lend its power to one or the other side in controversies over religious authority or dogma."[40] Other prior cases suggesting additional constitutional limitations on government involvement in religious

36. *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963); Wis. v. Yoder, 406 U.S. 205, 215, 219–20 (1972).

37. Emp. Div. v. Smith. 494 U.S. 872, 877–79 (1990).

38. *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1876–77 (2021); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). Recently the Court has construed these concepts broadly. In *Tandon v. Newsom*, the Court stated that laws are not neutral and generally applicable and, thus, trigger heightened scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021) (per curiam) (citation omitted) (granting application for injunctive relief).

39. The Court in *Smith* preserved heightened scrutiny for cases involving "hybrid situation[s]" combining free exercise claims with another constitutional protection, *Smith*, 494 U.S. at 881–82, and in cases where the government "has in place a system of individual exemptions" that provides for "governmental assessment of the reasons for the relevant conduct." *Id*. at 884. In *Fulton*, the Court viewed laws that provide a mechanism for individualized exceptions as not generally applicable. *Fulton*, 141 S. Ct. at 1877.

40. *Smith*, 494 U.S. at 877 (citing Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445, 452 (1969); Kedroff v. Saint Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 95–119 (1952); Serbian E. Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696, 708–25 (1976)).

organizations were also left intact,[41] and these precedents became a springboard for scholarly work exploring the boundaries between religious groups and government power.[42]

Additional factors also contributed to the growth of scholarly interest in institutional religious freedom. These included a new focus on the ways in which individual religious belief draws and depends upon religious communities and their organizational forms,[43] as well as the integral role that groups play in human culture and discourse more broadly.[44] Scholars also explored the distinction between the spiritual and temporal dimensions of human activity, including the benefits of their separation and the dangers of their entanglement.[45] Additionally, many of these same scholars and others delved into the numerous social benefits associated with independent religious groups, including their important role in supporting free societies by limiting and checking state power,[46] promoting healthy pluralism,[47] reinforcing constitutionalism

41. These include NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979); U.S. v. Ballard, 322 U.S. 78 (1944).

42. *See, e.g.*, Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 166–71, 179 (2009); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1635–37 (2004); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 44–51, 54–56 (1998).

43. *See, e.g.*, Brady, *supra* note 42, at 1675–76; Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274, 294–95 (2008) [hereinafter Garnett, *Do Churches Matter?*]; Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 64, 71–73, 82 (2007) [hereinafter Garnett, *Freedom of the Church*]; Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J. L. & RELIGION 503, 522–23 (2006). *See also* the earlier work of Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 107, 115–16 (1989).

44. *See* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) [hereinafter Horwitz, *Churches as First Amendment Institutions*]; PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 174–93 (2013).

45. *See* Esbeck, *supra* note 42, at 67–70; Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 40, 84, 87–88, 91–92 (2002).

46. *See* Berg, *supra* note 42, at 173; Esbeck, *supra* note 42, at 67–70; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 525 (2007); Lupu & Tuttle, *supra* note 45, at 40, 84.

47. *See* Berg, *supra* note 42, at 175, 185; Brady, *supra* note 42, at 1705–06; Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 156, 158 (2004); Garnett, *Freedom of the Church*, *supra* note 43, at 82–83.

and human rights,[48] and cultivating democratic virtues and values.[49]

While rich and varied, this body of scholarship had a common focus for many years. Scholars defined and refined areas of protection or immunity from government intervention and developed justifications for the lines they drew in a wide range of individual, social, spiritual, and civic goods as well as in the dualist strains of Western history discussed above.[50] A shared premise of much of this work was that religious matters belong to religious believers and their institutions and that the internal governance and operations of these institutions must be kept from state interference. Some scholars, like myself, described religious group affairs in general as a broad area of autonomy and then drew specific limits on this autonomy.[51] Others carved out specific areas of protection for core matters of governance or "jurisdictional" limits on government power.[52] Either way, the focus was on the limits of government power and the boundaries between church and state. Naturally, the specific applications discussed by these scholars concentrated on matters of internal governance presumptively under the control of religious groups,

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48. *See* Garnett, *Freedom of the Church*, *supra* note 43, at 71–72; Garnett, *supra* note 46, at 525; Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, *in* CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 267, 269 (John Witte, Jr. & Frank S. Alexander eds., 2010).

49. *See, e.g.*, PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 162–63, 194 (2d ed. 1996); Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 121, 123–25, 131–33 (1992). This theme had been an early focus of much scholarship exploring the beneficial roles of independent civil society institutions. However, for other scholars, the role of religious groups and other mediating institutions in supplying values and skills for democratic self-government meant an essential role for the state in ensuring congruence between these institutions and liberal democratic norms. For further discussion, see Brady, *supra* note 42, at 1700–02; Brady, *supra* note 47, at 150–55.

50. For work drawing on the historical concept of the "freedom of the church" or *libertas ecclesiae*, see Garnett, *Freedom of the Church*, *supra* note 43; Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249 (Austin Sarat ed., 2012) [hereinafter Smith, *Freedom of Religion or Freedom of the Church?*]; Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, 122 HARV. L. REV. 1869, 1869–70, 1873–80 (2009) [hereinafter Smith, *Discourse in the Dusk*]. For work drawing on the concept of "sphere sovereignty" developed by Dutch theologian, philosopher, journalist, and politician Abraham Kuyper and connecting Kuyper's thought to founding-era ideas, see Horwitz, *Churches as First Amendment Institutions*, *supra* note 44; HORWITZ, *supra* note 44, at 174–93.

51. *See* Kathleen A. Brady, *Religious Group Autonomy: Further Reflections about What is at Stake*, 22 J.L. & RELIGION 153, 169–73 (2006); Brady, *supra* note 42, at 1664–68, 1698; Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373–74, 1394, 1402–03 (1981).

52. *See* Berg, *supra* note 42, at 170–71, 174–77; Esbeck, *supra* note 42, at 10–11, 54, 77, 104–09; Garnett, *supra* note 48, at 273–74; Douglas Laycock, *Church Autonomy Revisited*, GEO. J.L. & PUB. POL'Y 253, 266–68 (2009); Lupu & Tuttle, *supra* note 45, at 40, 78–79, 83–84.

such as property disputes, church discipline, labor, and employment.[53]

In 2012, this body of scholarship bore fruit when the Supreme Court recognized a "ministerial exception" from employment discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[54] The religion clauses "give[] special solicitude to the rights of religious organizations," the Court stated,[55] and it distinguished "internal church decision[s]" such as the choice of clergy from the "outward physical acts" regulated in *Smith*.[56] Justifications drawing on founding-era and earlier Western history as well as precedent from the Court's intrachurch dispute cases reflected the groundwork laid by these scholars.[57]

However, just as soon as the Court recognized this important area of religious autonomy in *Hosanna-Tabor*, the rapid acceleration of culture war battles over family, sexuality, and reproductive choice pushed a new set of issues before scholars and the courts.[58] A month after the Supreme Court's decision in *Hosanna-Tabor*, the Obama administration finalized regulations under the Affordable Care Act requiring employers to include cost-free coverage of all FDA-approved women's contraceptives in their health insurance plans.[59] This "contraceptive mandate" included a narrow exemption designed for churches and their integrated auxiliaries and limited to institutions primarily serving and employing members of the same faith.[60] While the exemption was later amended to eliminate the requirement that covered groups primarily serve and hire members of their own faith, the exemption remained narrow and left out many religious nonprofits, including social services organizations, hospitals,

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53. *See e.g.,* Berg, *supra* note 42 (addressing employment and matters involving clergy); Brady, *supra* note 42 (addressing labor and employment issues); Brady, *supra* note 47 (addressing labor issues); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U.L. REV. COLLOQUY 156 (2011) (addressing matters of employment) [hereinafter Horwitz, *Act III*]; Horwitz, *Churches as First Amendment Institutions*, *supra* note 44 (addressing property disputes, employment and church discipline); Laycock, *supra* note 51 (addressing labor matters); Laycock, *supra* note 52 (addressing clergy selection and supervision); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes between Religious Institutions and their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119 (2009) (addressing ministerial employment); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789 (addressing clergy selection and supervision).

54. 565 U.S. 171 (2012).

55. *Id*. at 189.

56. *Id*. at 190.

57. *Id*. at 182–87.

58. For examples of these proliferating legal conflicts, see *infra* notes 59–77, and see Section IV.B for further examination of these legal issues.

59. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012).

60. *Id*. at 8726, 8727.

and schools.[61] The fierce backlash from religious groups with objections to covering some or all contraceptives in their health plans led the Obama administration to develop an "accommodation" that shifted the provision and cost of this coverage to the insurance providers of objecting religious nonprofits,[62] but many religious groups still objected to the tie between the contraceptive coverage and their health plans.[63] Litigation over the mandate continued for eight years until the Supreme Court finally rejected challenges to Trump-era regulations providing for broader relief.[64] Part of the reason for the intensity of the fight over the contraceptive mandate was the convergence of deep concerns on both sides. On the one hand, aligning employee benefits with institutional religious identity is a critical matter of institutional governance, but federal regulators also claimed a compelling interest in public health and equalizing access to health care for female workers, many of whom did not share the same faith as their employers.[65] The battle over the contraceptive mandate was about an aspect of institutional governance that was at once internal and outward-facing.

Similar fights over other points of intersection between institutional

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61. Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013) (codified at 45 C.F.R. § 147.131; 29 C.F.R. § 2590.715–2713A; 26 C.F.R. § 54.9815-2713A). This change was intended to simplify and clarify the exemption, not to expand the universe of covered employers. *Id*. at 39,874.

62. Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. at 39,870.

63. A number of these cases reached the Supreme Court, which addressed them in Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam) (vacating the judgments below and remanding the cases to the circuit courts to give the parties an opportunity to reach an agreement that would accommodate the organizations' free exercise concerns and the government's interests).

64. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pa., 140 S. Ct. 2367 (2020) (rejecting claims that the government lacked authority to promulgate the new regulations and that the rules were procedurally invalid). The Trump administration's regulations were finalized in November 2018. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (codified at 45 C.F.R. §§ 147.131, 147.132; 29 C.F.R. § 2590.715-2713A, 26 C.F.R. §54.9815-2713A). These new rules provided broad exemptions for religious groups and other employers with religious objections to the mandate and made the accommodation adopted by the Obama administration optional. The administration also adopted slightly narrower protections for employers with nonreligious moral objections to the mandate. *See* Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 45 C.F.R. §§ 147.131, 147.133; 29 C.F.R. § 2590.715-2713A; 26 C.F.R. § 54.9815-2713A). In early 2023 the Biden administration proposed new rules that would retain the religious exemption, eliminate the moral exemption, and add a new "independent pathway" for individuals whose health plans lack contraceptive coverage because of a religious exemption to access contraceptive services at no cost. Coverage of Certain Preventative Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (Feb. 2, 2023).

65. Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. at 39,872.

and public life were simultaneously emerging in other areas. Religious groups with traditional views regarding marriage and sexuality sought exemptions from federal, state, and local government policies designed to equalize access of LGBTQ Americans to employment, health care, public accommodations, and other social benefits. For example, religious hospitals challenged regulations adopted by the Obama administration under the Affordable Care Act requiring health care providers receiving federal funds to provide gender transition services if they offer similar forms of care to others.[66] These rules were also written to prohibit providers from excluding coverage for such procedures from their employee health insurance plans.[67] A Trump-era rule designed to reverse these policies was quickly enjoined in relevant part by two federal district courts,[68] and litigation continued as the Biden administration announced that it would construe the Act's prohibition on sex discrimination to include discrimination on the basis of gender identity.[69] Now the Biden administration is developing new regulations to replace the Trump administration rule. The proposed regulations provide a mechanism for the Department of Health and Human Services's Office of Civil Rights to evaluate claims for exemption under existing federal conscience and religious liberty legislation.[70] If these new regulations are finalized and upheld in courts, conflicts may re-emerge over the government's balance of religious claims and the interests of transgender individuals. In the

66. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (implementing prohibitions against sex discrimination in Section 1557 of the Affordable Care Act).

67. *Id*. at 31,471–72.

68. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020), *preliminarily enjoined in part by* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Serv., 485 F. Supp. 3d 1 (D.D.C. 2020); Walker v. Azar, 480 F. Supp. 3d 417 (E.D.N.Y. 2020).

69. *See* Franciscan Alliance, Inc. v. Becerra, 553 F. Supp. 3d 361 (N.D. Tex. 2021) (granting, under the Religious Freedom Restoration Act, permanent injunctive relief from requirement to provide or cover gender transition procedures), *aff'd*, 47 F.4th 368 (5th Cir. 2022); Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113 (D.N.D. 2021) (same), *aff'd sub nom*. Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022). In May 2021 the Biden administration announced that it would interpret the Affordable Care Act's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity. Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021). During this period transgender individuals have also brought cases challenging discrimination by religious hospitals under the Affordable Care Act. *See* Hammons v. Univ. of Md. Med. Sys. Corp., 551 F. Supp. 3d 567 (D. Md. 2021) (rejecting motion to dismiss claim under Section 1557 of the Affordable Care Act); *see also* C.P. *ex rel*. Pritchard, 536 F. Supp. 3d 791 (W.D. Wash. 2021) (rejecting motion to dismiss in case brought under Section 1557 of the Affordable Care Act challenging exclusion of coverage for gender transition services in Catholic Health Initiatives Medical Plan).

70. The Administration published its new proposed rules in the summer of 2022. *See* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,841, 47,918–19 (Aug. 4, 2022).

meantime, transgender individuals have also challenged discrimination by religious hospitals under state law.[71]

Religious adoption and foster care agencies have also sought exemptions from state and local requirements that they certify or recommend same-sex couples as foster or adoptive parents.[72] In *Fulton v. City of Philadelphia*, the Supreme Court ruled in favor of Catholic Social Services, a long-time provider of foster care services in Philadelphia, but it did so on narrow grounds with limited reach.[73] The Court held that the city's standard foster care contract was not generally applicable because it included a system for granting exceptions to its nondiscrimination rules[74] and that the city failed to offer a compelling reason for refusing an exception to Catholic Social Services while making them available to others.[75] *Fulton* left the case of a generally applicable nondiscrimination requirement unaddressed.

Legal rules designed to facilitate access to abortion have been another flashpoint. For example, in a controversial decision in 2011, the federal government denied an otherwise-qualified Catholic organization a contract to help victims of human trafficking because of its refusal to refer victims for contraception or abortion.[76] More recently, religious employers in several states have been challenging requirements that they include abortion in their employee health insurance plans.[77] New

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71. *See, e.g.*, Minton v. Dignity Health, 39 Cal. App. 5th 1155 (Cal. Ct. App. 2019) (rejecting dismissal of claim under California's Unruh Civil Rights Act and holding that the claim is not barred by the First Amendment), *cert. denied*, 142 S. Ct. 455 (2021).

72. *See* Fulton v. City of Phila., 141 S. Ct. 1868 (2021); New Hope Family Serv., Inc. v. Poole, 966 F.3d 145 (2d Cir. 2020), *on remand*, No. 5:18-CV-01419 (MAD/TAD), 2022 WL 4094540 (N.D.N.Y. Sept. 6, 2022) (granting permanent injunction in favor of adoption agency); Buck v. Gordon, 429 F. Supp. 3d 447 (W.D. Mich. 2019). In January 2022, the state of Michigan and the Catholic adoption and foster care agency in *Buck v. Gordon* reached a settlement allowing the agency to follow its religious understanding of marriage. *See* Jonah McKeown, *Catholic Adoption Agency in Michigan Wins Settlement Allowing It to Operate in Accord with the Faith*, CATH. NEWS AGENCY (Jan. 25, 2022), https://www.catholicnewsagency.com/news/250213/catholic-adoption-agency-in-michigan-wins-settlement-allowing-it-to-operate-in-accord-with-the-faith [https://perma.cc/P3AR-NZX5].

73. *Fulton*, 141 S. Ct. at 1876–77.

74. *Id*. at 1878–79.

75. *Id*. at 1881–82.

76. *See* Jerry Markon, *Abortion, Birth Control Access at Issue in Dispute over Denial of Grant to Catholic Group*, WASH. POST (Nov. 11, 2011), www.washingtonpost.com/politics/abortion-birth-control-access-at-issue-in-dispute-over-denial-of-grant-to-catholic-group/2011/11/11/gIQA36sYDN_story.html [https://perma.cc/7B24-3GSM]. For additional discussion, see Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1372–74 (2016).

77. *See* Foothill Church v. Watanabe, 3 F.4th 1201 (9th Cir. 2021), *on remand*, No. 2:15-CV-02165-KJM-EFB, 2022 WL 3684900 (E.D. Cal. Aug. 25, 2022); Skyline Wesleyan Church v. Cal.

conflicts may emerge in the wake of the Supreme Court's decision to reverse *Roe v. Wade*[78] in *Dobbs v. Jackson Women's Health Organization*.[79] In all of these conflicts, what is internal and external to religious organizations overlap.

In truth, earlier line-drawing between religious and temporal affairs had always glossed over the many ways in which the activities of religious institutions and those of the public sector are deeply intertwined even at the core of institutional life. Religious institutions make use of corporate, contract, and property law. They follow and benefit from safety regulations in their worship spaces, and they commonly offer even those in the most religiously sensitive positions, including clergy, employee benefits regulated by federal and state law. Thus, independence in internal church affairs is less a matter of separate "jurisdictions" or autonomous "spheres" than it may have once appeared, at least for most of America's faiths. The conflicts that end up in the courts reflect this reality, such as conflicts over property rights when churches split, contract claims brought by church employees, and suits by church members and employees for relief under a variety of protective statutes and common law principles.[80]

However, the sites of today's most bitter conflicts involve greater interdependence between religion and government because they occur at points where mission-related programs reach out into the larger world to serve or hire those outside the faith. The most vexing conflicts, and those that are the focus of this Article, arise where religious and government entities are working together to advance the public good through programs that are funded by the government or through highly regulated

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Dep't of Managed Health Care, 968 F.3d 738 (9th Cir. 2020); Roman Cath. Diocese of Albany v. Vullo, 127 N.Y.S.3d 171 (N.Y. App. Div. 2020), *appeal dismissed*, 36 N.Y.S.3d 927 (N.Y. 2020), *vacated and remanded sub nom*., Roman Cath. Diocese of Albany v. Emami, 142 S. Ct. 421 (2021), *aff'd on remand*, 168 N.Y.S.3d 598 (N.Y. App. Div. 2022), *appeal denied*, 39 N.Y.3d 1060 (N.Y. 2023).

78. 410 U.S. 113 (1973).

79. 142 S. Ct. 2228 (2022).

80. Cases reaching the Supreme Court include disputes over labor and employment law protections, *see* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Nat'l Lab. Rel. Bd. v. Cath. Bishop of Chi., 440 U.S. 490 (1979), as well as many intrachurch disputes over property. *See* Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral of the Russ. Orthodox Church in N. Am., 344 U.S. 94 (1952); Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

areas of joint activity like health care and child welfare. Governments and religious organizations have long cooperated to alleviate poverty, assist the elderly, care for the sick, and meet the needs of other vulnerable members of society. Religious hospitals, for example, receive federal and state funding, and they are heavily regulated in ways that are mutually beneficial.[81] Religious social services providers receive government grants, contracts, and other resources to care for vulnerable members of society, and much of what they do is shaped by the design, criteria, and priorities of government programs. There have long been battles over government funding of religious programs.[82] However, conflicts over the substance of government regulations in areas of joint activity had been relatively uncommon, at least outside of the abortion context where an uneasy truce between proponents and opponents of abortion rights had been brokered through federal and state "conscience protections" for health care providers with religious and moral objections to offering or facilitating abortion.[83] However, now that conflicts among Americans over their understandings of family and human sexuality have deepened and widened, and competing sides have increasingly demanded a moral perfectionism in the public sphere,[84] this interdependence between

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81. *See*, *e.g.*, *National Health Expenditure Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS. (2020), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet [https://perma.cc/K7JJ-5FZE] (detailing growth in federal spending for health care); *Health and Hospital Expenditures*, URBAN INSTITUTE (2019), https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/health-and-hospital-expenditures [https://perma.cc/8LAP-RGFM] (detailing state and local government expenditures on health and hospitals).

82. For Supreme Court cases addressing funding for the types of activities that are the focus of this Article, see Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding the constitutionality of the Adolescent Family Life Act on its face); Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding federal funding for a hospital run by a religious order).

83. For an overview of these protections in federal law, see Lynn D. Wardle, *Protections of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 27–45 (2010). Over the years Republican administrations have used regulatory authority to strengthen protections under federal law while Democratic administrations have cut these regulatory protections back. *See id*. at 32–34, 38–43; Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,174–79 (May 21, 2019) (detailing the history of these regulations and giving reasons for new Trump administration rules); Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820, 823–25 (Jan. 5, 2023) (also detailing this history and proposing new rules that rescind large portions of the Trump administration rules, retain other portions with modifications, and generally reinstate the Obama-era framework).

84. *See supra* notes 58–77 (discussing legal conflicts arising from these divisions). For descriptions of these dynamics, *see* Douglas Laycock, *The Campaign Against Religious Liberty*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 231, 231–32, 242–46 (Micah Schwartzman et al. eds., 2016) [hereinafter Laycock, *Campaign Against Religious Liberty*]; Douglas Laycock,

religion and government in the provision of health care and other social services has become both more visible and more problematic.

One response has been to assert the government's control over areas of public funding and regulation. When religious organizations contract with the government, they "stand in the government's shoes performing government functions," lawyers for the city of Philadelphia argued in *Fulton*.[85] Governments can insist that their contractors follow the same nondiscrimination rules that they apply to their own operations.[86] Scholars have also envisioned religious recipients of state funds as "private conduits . . . for the provision of public services" properly subject to "government control."[87] For some, even where religious organizations are not recipients of government funds but act in areas heavily regulated by the government, they essentially offer public services appropriately subject to public rules.[88] In these views, religious institutions drop from sight and become subsumed in the areas of government activity that they participate in. Catholic Social Services' certifications of foster parents are "government-funded, secular social services," argued the city of Philadelphia, erasing the religious significance of what they do.[89] There are parallels between this view and similar arguments that religious organizations which step out into the commercial sphere or offer public services should be subject to the same rules that apply to other public entities.[90] There is room for institutional independence in these views, but the space is narrow. Institutional activities that concern only group

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Religious Liberty and the Culture Wars, 2014 U. ILL. L. REV. 839. Laycock describes and criticizes what he sees as a "Puritan mistake, in which each faction [seeks] liberty for itself and its allies, but oppose[s] liberty for those with whom it deeply disagree[s]." Laycock, *Campaign Against Religious Liberty*, *supra*, at 231.

85. Transcript of Oral Argument at 58, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-123_o758.pdf [https://perma.cc/XK65-36MW].

86. *See id.* at 57–58 (arguing that contractors exercise "delegated government power" and that "[t]he government has broad powers to impose conditions on contractors").

87. Thomas C. Berg & Alan Brownstein, *Giving Our Better Angels a Chance: A Dialogue on Religious Liberty and Equality*, 21 J. APP. PRAC. & PROCESS 325, 356 (2021) (referencing a section by Alan Brownstein).

88. This was the view of New York's Office of Children and Family Services when it equated privately-funded adoption services with "government services." New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145, 182 (2d Cir. 2020).

89. Letter from the City of Philadelphia to Catholic Social Services (May 7, 2018), *quoted in* Fulton v. City of Phila., 922 F.3d 140, 150 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

90. *See, e.g.,* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 670 (2016); Jennifer C. Pizer, *It's Not About the Cake: Against "Altaring" the Public Marketplace*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 385, 386–87, 393–95, 397–98 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 38–39 (2015).

members are properly protected from government interference burdening religious mission and perhaps also outward-facing activities that are privately funded. However, when religious groups step outside the private sphere or spend government money, they must follow the government's rules that protect the larger society and its members.

A very different response has been to prioritize religious interests over competing government claims. Religious organizations seeking relief from burdensome regulations typically argue that the government's rules are not neutral and generally applicable and, thus, strict scrutiny is required under the Free Exercise Clause.[91] All but the most compelling government interests must yield to religious needs.[92] This argument has made good sense as a litigation strategy, but it also reflects a broader tendency to pit church and state against one another and to focus on religious needs. Indeed, some scholars and advocates express suspicion about the government's purposes in applying progressive rules to religious groups, and they view resistance to religious accommodation as part of an effort to force traditionalist religious entities to conform to prevailing public norms or exit from the public sphere.[93] Parallels to this suspicion can be seen in the distrust of government regulation during the coronavirus pandemic. Opposition to government restrictions on religious worship reflected concerns that the government's rules unfairly favored commercial and recreational interests over religious needs as well as unease with the regulation of activity at the heart of religious life, and the Court shared both of these concerns.[94] However, opposition was also generated by a tendency to view government as dangerously insensitive to religious concerns. As one advocacy group bringing challenges on behalf of religious groups put it: this has been a time of

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91. For example, in *Fulton*, Catholic Social Services argued that Philadelphia's rules were neither neutral nor generally applicable. *Fulton*, 922 F.3d at 153, *rev'd*, 141 S. Ct. 1868.

92. Where laws are not neutral or generally applicable, the Court applies "the most rigorous of scrutiny." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); *see also* Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (quoting *Lukumi*, 508 U.S. at 546) (same); Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (stating that "strict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests'") (quoting *Lukumi*, 508 U.S. at 546).

93. *See, e.g.*, Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 124, 143 (2018); Emilie Kao & Monica G. Burke, Masterpiece Cakeshop *and Authentic Pluralism in a Post-*Obergefell *World*, 24 TEX. REV. L. & POL. 97, 120–21, 125 (2019). By "progressive rules," I mean rules that reflect developing public norms, including norms that have been resisted by traditionalist religious believers.

94. *See Tandon*, 141 S. Ct. at 1297–98; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020). In *Diocese of Brooklyn*, the Court observed that "restrictions . . . effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at 68.

"contemptuous, all-out assault on our constitution and faith community."[95] The readiness of many religious groups to challenge government restrictions reflected, in part, this attitude.

Both of these views are too one-sided and miss that health care and other social services are shared spaces where room must be made for both government interests and priorities as well as the independence and integrity of religious groups and their missions. In the founding era, a narrow understanding of the purposes of government obscured the potential for the clashes we see today. When Thomas Jefferson described government's role as preventing acts injurious to others[96] and unhesitatingly affirmed that "the moral branch of religion . . . is the same in all religions,"[97] he and others like him expected few conflicts between state action and religious practice.[98] Where limited government disavowed direct interference in religious matters, religion and government could appear to be separate "jurisdictions" or "spheres" as James Madison and others envisioned.[99] However, even in the colonial and founding era, governments depended on religious groups to meet the needs of society's needy and vulnerable members and supported them in doing so.[100] As the country grew and industrialized, the role of the state expanded over time, and it was natural for governments to become more actively involved in meeting these needs. It was also natural for them to cooperate with religious institutions in this work. Indeed, in a democracy, members of religious groups are simultaneously agents of government power as they exercise roles as voters and leaders, and government policy easily becomes an area of shared efforts to advance the common good.

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95. First Liberty Institute, *COVID-19 Victories and Breaking Cases: History in the Making*, FIRST LIBERTY, https://firstliberty.org/covidvictories/ (last visited June 10, 2021) [https://.web.archive.org/web/20210606125106/https://firstliberty.org/covidvictories/] [perma.cc/JJU9-QMMR]. For additional discussion of this position, see also Daniel Bennett & Andrew Lewis, *Church Closures, Religious Freedom, and the Coronavirus Pandemic: Assessing the Christian Legal Movement's Response*, CANOPY FORUM (Oct. 2, 2020), https://canopyforum.org/2020/10/02/church-closures-religious-freedom-and-the-coronavirus-pandemic/ [https://perma.cc/69PT-PSPK].

96. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. N.C. Press 1955) (1787).

97. Letter from Thomas Jefferson to Thomas Leiper, *supra* note 27, at 236–37.

98. *See* discussion in BRADY, *supra* note 20, 116–18, 164.

99. Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910) (using the term "jurisdictions"); DECLARATION OF THE VIRGINIA ASSOCIATION OF BAPTISTS (Dec. 25, 1776), *reprinted in* 1 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON: 1760 TO 1776, at 660, 661 (Julian P. Boyd et al. eds., Princeton University Press 1950) (using the term "spheres").

100. *See e.g.*, WITTE, THE REFORMATION OF RIGHTS, *supra* note 19, at 310; John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 378–79 (1991).

Government funding and regulation can enhance the effectiveness of private efforts to meet social needs and broaden their reach. Close relationships like the partnership between Catholic Social Services and the city of Philadelphia in meeting the needs of foster youth have easily developed over time.[101] While America's most insular faiths interact much less with government, the provision of social services by America's largest denominations has become intertwined with government activity.[102] Indeed, this interdependence has deepened in recent decades as Supreme Court decisions have relaxed constitutional restrictions on government funding of religious programs,[103] and federal policies at both the legislative and executive level have welcomed greater inclusion of religious groups in government efforts to meet societal needs and protected the ability of groups to retain their religious character in these partnerships.[104] Today's deep moral divides over family, sexuality, and reproductive choice have made these connections more problematic, but neither assertions of government control nor diminishment and suspicion of government concerns adequately reflect all the interests at stake. Nor does a framework that envisions the institutional affairs of religious

101. For the development of these close relationships in the context of foster care, *see* Fulton v. City of Phila. 141 S. Ct. 1868, 1874–75 (2021) (describing the evolution of the Catholic Church's assistance to needy children in Philadelphia); *id*. at 1885 (Alito, J., concurring in the judgment) (describing the development of these relationships across jurisdictions and involving various religious groups).

102. The religious hospitals and foster care agencies that are involved in the disputes discussed in this Article provide examples. *See e.g.*, *id.* 1874–75 (detailing the Catholic Church's assistance with foster care in the city of Philadelphia).

103. For the most recent of these decisions, see Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000). Under the Free Exercise Clause, the Court has also increasingly struck down government exclusions from otherwise available funding programs serving secular purposes. *See* Carson v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017). For further discussion of these free exercise cases, see *infra* Part III.B.

104. In 1996, as part of welfare reform legislation, Congress adopted the first of its "charitable choice" rules. Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 604a (2018)), was designed to make more room for faith-based organizations in welfare-related social services programs funded by the federal government. It included provisions protecting their religious autonomy and their ability to retain their religious character, *id*. at § 604a(d), while also protecting the religious freedom of program beneficiaries. *Id*. at §604a(e). Congress added similar provisions to several additional statutes during the Clinton presidency. *See* CARL H. ESBECK ET AL., THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS 15–16, 109–10 (2004). Early in his first term, President George W. Bush created the White House Office of Faith-Based and Community Initiatives to foster additional partnerships between faith-based organizations and federally-funded social services programs. *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 1–3, 8 (2005). Every president since then has retained the office, with President Biden following President Obama in naming the office the White House Office of Faith-Based and Neighborhood Partnerships. *See* Exec. Order No. 14015, 86 Fed. Reg. 10007 (Feb. 14, 2021).

groups as internal matters to be protected from state interference. Religious independence is critically important, but where religion and government work together to pursue shared goals, the preservation of this independence requires more nuanced distinctions. Constitutional doctrine must reflect both the reality of overlap between church and state and the values of religious inclusion and independence.

II. RELIGIOUS GROUPS AS SACRED SPACES

An adequate framework for understanding the scope of institutional religious freedom must begin with a consideration of the nature and functions of religious groups and their distinctive character. Religious organizations share many features with other institutions of civil society, but their subject matter is unique. At the heart of religious belief and practice is the relationship between persons and the ultimate power or reality that grounds all that is.[105] Religious belief systems arise out of humanity's capacity for self-reflection and self-transcendence. Humans do not simply exist but exist with the ability to reflect upon their lives, and self-reflection at once discloses both a limited perspective and an infinite horizon. The ground or source of their existence and all that is confronts them as a question and concern. This capacity for self-reflection is coupled with a drive for meaning and an interest in right living. Human beings are moral agents, and this moral agency is exercised in the shadow of this mystery. For religious believers, this mystery does not remain undefined, and the power or powers by which they and all else exist is not just a question or possibility. It is something present to them as a very real part of their lives, and it is experienced as good and trustworthy. The religious person worships, yields, bows down, loves, and connection with the divine becomes their highest end, disclosing meaning, resolving guilt, and taking human finitude into what is eternal, absolute, and perfect.[106]

Of course, there is enormous diversity among religious belief systems. I have explored this diversity in other work.[107] Religions differ in their understandings of the nature of the divine, the type of divine-human connection they seek, and the paths they follow. For some the divine is understood as impersonal and for others as personal. For some it is transcendent and for others immanent. For some it is unitary and for others plural. In many faiths, the divine partakes of both poles of one or

105. For further development and discussion of the understanding of religion presented here, including illustrations from the religious views of founding-era Americans and a variety of world religions, see BRADY, *supra* note 20, at 82–85.

106. *Id*. at 82–84.

107. *See id*. at 85–92.

more of these antinomies.[108] Likewise, the relationship between the believer and the divine that is at the heart of religious faith may be more or less intimate, more or less immediate, and more or less mediated by reason and the intellect. Connection with the divine may require more or less divine assistance with obstacles involving the mind or will or both. Religious traditions also differ regarding how much can be known about the divine and how to acquire knowledge, and depending on the tradition, more or less of what is said is spoken symbolically. There are also some traditions that are widely regarded as religious that reject the existence of a divine reality grounding the phenomenal world. For example, Buddhism began as a pragmatic, not metaphysical, tradition, and Theravada Buddhism still follows the earliest teachings that human liberation is perfect extinction rather than a form of identification with the Absolute as the larger Mahayana tradition teaches today.[109] There are also magical elements in all religious traditions that view the divine-human connection more as a means to control human circumstances than as an end in itself.[110] However, at the heart of the vast majority of world religions is a promise of human liberation, fulfillment or salvation tied to a divine-human relationship that reaches deep into all facets of human life, enlightening the understanding, transforming the heart and will, and guiding conduct in all spheres of life.[111]

At the most basic level, religious belief and practice are individual experiences.[112] As with all human activity involving the intellect and will, individuals are the fundamental agents of the religious life. It is the individual person who questions the meaning and purpose of human life and whose questions bring them to confront the ground or source of all

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108. For example, many faiths with multiple deities are at root monotheistic or monistic. *Id*. at 86.

109. *Id*. at 88–89, 90–92. For more about the different branches of Buddhism, see HANS WOLFGANG SCHUMANN, BUDDHISM: AN OUTLINE OF ITS TEACHINGS AND SCHOOLS (1973). Jainism, a small but ancient tradition from India, also rejects the existence of an absolute reality grounding the phenomenal world. *See* A.L. Basham, *Jainism*, *in* THE CONCISE ENCYCLOPEDIA OF LIVING FAITHS 261, 265 (R.C. Zaehner ed., 1959). Salvation in Jainism is understood as a form of liberation achieved in a state of self-sufficient, changeless, peaceful omniscience beyond the material world and above the heavens and gods. *See* NINIAN SMART, THE RELIGIOUS EXPERIENCE 61–64 (5th ed. 1996).

110. BRADY, *supra* note 20, at 83, 91.

111. For further discussion, including examples from different religious traditions, see *id.* at 82–93.

112. In recent decades, scholarship focusing on institutional religious freedom has often emphasized the social aspects of religious belief and practice, including my own scholarship. *See supra* notes 43–44 and *infra* notes 118–20 and accompanying text. Others have emphasized the role of individual religious conscience. *See infra* note 115–16 and accompanying text. In what follows, I develop a description of religious phenomena that gives due weight to both of these aspects as well as their interactions.

that exists as an idea or concern. It is the individual who encounters the presence of the divine in a relationship lived out through prayer, worship, trust, obedience, and love. It is individuals who are saved, liberated, and fulfilled through their connection with the divine. It is individuals who find in the divine an understanding of who they are and what they should do and then pursue the moral life in light of this understanding. At the root of religious faith are questions, and persons ask them. Faith involves a turning to the divine, and persons make the turn.

However, the individual is never alone in religious pursuits, and knowing God is not a solitary affair but a group endeavor. Human persons are social by nature, and they ask questions together and reach answers in conversation. They also join together to express and live out what they have discovered and to preserve and share it with others. Religious traditions are the product of these social interactions, and they also shape the paths that thought takes, both making greater understanding possible and also trimming its next steps. The religious groups that bear these traditions also shape the individuals inside them as well as those outside, and even the solitary monk is influenced by their teachings and examples. Religious traditions do not determine the paths of change, and groups never fully assimilate their members. Individual thought and experience contribute to a process of development and renewal that often involves groups and their members in tension and even conflict. However, religious institutions function as important vehicles of the religious life, and most religious activity takes place within them or in conversation with them.[113]

Debates about the nature of religious groups have been a subtheme in recent scholarship on institutional religious freedom, and a central question has been whether religious institutions derive all their liberties from the rights of conscience and association of their individual members or whether religious groups have a distinct reality and rights of their own.[114] A related question has been whether there is anything distinctive

113. For example, Thomas Jefferson, a quintessential religious individualist, was in continual conversation with the religious traditions he criticized as well as those he admired. *See* HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 293 (1976) (writing that Jefferson "detested" Calvin and Augustine but "admired" the English Unitarians Richard Price and Joseph Priestley).

114. *Compare* Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 564–72 (2015) [hereinafter Helfand, *Religious Institutionalism, Implied Consent*] (arguing that religious institutions derive their rights from the voluntary choices of their individual members); Michael A. Helfand, *Implied Consent to Religious Institutions: A Primer and Defense*, 50 CONN. L. REV. 877, 902 (2018) [hereinafter Helfand, *Implied Consent*] (same); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 969 (2013) [hereinafter Schragger & Schwartzman, *Against*

about religious institutions that distinguishes them from other voluntary organizations or social groups in a constitutionally relevant way.[115] Those who argue that the freedom of religious groups derives from the individual liberties of their members often view these groups as essentially voluntary associations of like-minded individuals analogous to other voluntary groups with the same type of associational rights.[116] By contrast, those who assert an independent reality and rights for religious groups tend to see these groups as occupying a distinctive space or sphere of authority autonomous from that of the state and intrinsic to the social order.[117] They also argue that religious organizations provide an essential "infrastructure" or "armature" for the religious life, both supporting and nourishing individual faith.[118] Additionally, they often view religious groups as carrying a special spiritual freight that transcends the voluntarism of their forms.[119] The concept of the

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Religious Institutionalism] (arguing that the liberties of religious groups derive from the rights of conscience and association of their members); Richard Schragger & Micah Schwartzman, *Lost in Translation: A Dilemma for Freedom of the Church*, 21 J. CONTEMP. LEGAL ISSUES 15, 26–27 (2013) [hereinafter Schragger & Schwartzman, *Lost in Translation*] (same) *with* Garnett, *supra* note 48, at 268–69 (arguing that religious groups have a distinct reality and rights of their own); Garnett, *Do Churches Matter?*, *supra* note 43, at 292–95 (same); Garnett, *Freedom of the Church*, *supra* note 43, at 71–73 (same).

115. *Compare* Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33, 49–50 (2013) (answering this question in the affirmative); Garnett, *Do Churches Matter?*, *supra* note 43, at 288 (same); Garnett, *supra* note 46, at 516–17, 521–22, 533 (same); Garnett, *Freedom of the Church*, *supra* note 43, at 86 (same); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1053 (2013) (same), *with* Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 21–22 (answering in the negative); Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 967–69 (same).

116. Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 25; Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 969. *But see* Helfand, *Religious Institutionalism, Implied Consent*, *supra* note 114, at 567 (grounding institutional religious freedom in the implied consent of members and "linking that implied consent to unique religious objectives"); *see also* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1927–39 (2013) (developing a similar argument).

117. Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 177–78 (2011); Garnett, *supra* note 48, at 280; Garnett, *supra* note 46, at 523; HORWITZ, *supra* note 44, at 175–77, 183; Horwitz, *Act III*, *supra* note 53, at 161–62; Horwitz, *Churches as First Amendment Institutions*, *supra* note 44, at 87, 108–10, 121; Smith, *Freedom of Religion or Freedom of the Church?*, *supra* note 50, at 280–81; Smith, *Discourse in the Dusk*, *supra* note 50, at 1883; *see also* Esbeck, *supra* note 42, at 54–58 (affirming the independent reality of religious groups and envisioning protection from an Establishment Clause that reserves a separate jurisdiction for them).

118. Garnett, *Do Churches Matter?*, *supra* note 43, at 274, 295; *see also* Garnett, *supra* note 115, at 41; Garnett, *Freedom of the Church*, *supra* note 43, at 64, 71–73, 82; HORWITZ, *supra* note 44, at 175, 192.

119. *See* Patrick McKinley Brennan, *The Liberty of the Church: Scope, Source, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165, 167–68 (2013); STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 164–66 (2014).

"freedom of the church" or *libertas ecclesia* that has been proposed as a foundational principle for institutional religious freedom carries all of these connotations though its proponents draw from it a wide range of values that also include pluralism, constitutionalism, and limited government more broadly.[120] The view that religious organizations have their own distinct reality and rights has been resisted by those who reject what they characterize as "metaphysical" or "ontological" assertions at once superfluous and, when spiritually freighted, implausible to outsiders.[121]

As a number of scholars involved in this debate have recognized, less may turn doctrinally on these questions than may be supposed.[122] Whether religious group rights are independent or derivative of the rights of their members does not, without more, tell us what is covered by these rights, and each view can, at least in theory, support robust protections. However, the different views in this debate each recognize—and miss—important features of religious groups that are relevant to their constitutional treatment. Certainly, the protection of individual religious conscience requires protections for the collective settings in which religion is exercised. Scholars who understand religious groups as essentially voluntary associations of like-minded individuals have pointed to John Locke's definition of a church as "a voluntary Society of Men, joining themselves together of their own accord, in order to the publick worshipping of God."[123] Many founding-era Americans echoed, if not repeated, Locke's understanding of a church as a "free and voluntary Society,"[124] and this position also has deeper roots in Western

120. For an overview of many of these values, see Garnett, *supra* note 115. This concept has roots in the eleventh century Investiture Controversy. *See infra* note 154 and accompanying text for further discussion of this proposal. *See supra* note 18 and accompanying text and *infra* note 151 for discussion of the Investiture Controversy.

121. Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 345, 347–48 (Micah Schwartzman et al. eds., 2016); Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 16, 18–19, 27.

122. *See* Horwitz, *supra* note 115, at 1056; Schragger & Schwartzman, *supra* note 121, at 347.

123. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 957–58 (quoting JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (James H. Tully ed., 1983) (1689)); Helfand, *Religious Institutionalism, Implied Consent*, *supra* note 114, at 564 (quoting same passage from Locke). It is a "free and voluntary Society," Locke argued. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 958 (quoting further from Locke).

124. Thomas Jefferson kept notes of Locke's definition as well as other ideas from Locke's *Letter Concerning Toleration* for use in speeches and petitions. *See* Thomas Jefferson, Notes on Religion (c. 1776), *in* SAUL K. PADOVER, THE COMPLETE JEFFERSON 937, 944 (1943). For other echoes of Locke's understanding of the church as a free and voluntary community, see, for example,, the writings of John Leland, Baptist proponent of religious freedom. JOHN LELAND, THE

history and, indeed, in the nature of religious belief itself. While the medieval church persecuted heretics on the ground that they sinned by failing to inform their consciences correctly and betrayed their own faith,[125] the church always viewed itself as a voluntary body of consenting believers,[126] and this view is reflected in the ancient metaphor of the church as the People of God.[127] Indeed, early Christian apologists in the Roman world insisted that religion cannot be coerced, and they made arguments grounded in human nature as well as Scripture.[128] Voluntarism is essential to faith. Faith is not faith if it is not free: no one can worship for another, trust for another, or love for another. Forced participation in religious practice is hypocrisy, as Thomas Jefferson observed,[129] and being trapped in a religious group that one does not consent to join or wants to exit is a violation of the rights of conscience. So is being prevented from joining together with others to worship, pray, and practice together. The idea that the free exercise rights of individuals

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GOVERNMENT OF CHRIST: A CHRISTOCRACY (1804), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 273, 278 (L.F. Greene ed., New York, G.W. Wood 1845) (comparing church government to free republics) [hereinafter LELAND WRITINGS]; JOHN LELAND, THE VIRGINIA CHRONICLE (1790), *reprinted in* LELAND WRITINGS, *supra*, at 91, 108 (arguing that "[a] church of Christ, according to the Gospel, is a congregation of faithful persons, called out of the world by divine grace, who mutually agree to live together, and execute gospel discipline among them") [hereinafter LELAND, THE VIRGINIA CHRONICLE].

125. *See* NOONAN, *supr*a note 14, at 45–48.

126. BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT: 1150–1650, at 107 (1982).

127. This metaphor of the church as the People of God has Biblical roots. *See, e.g.*, *Deuteronomy* 4:20 ("But the LORD has taken you and brought you out of the iron-smelter, out of Egypt, to become a people of his very own possession, as you are now."); 1 *Peter* 2:9–10 ("But you are a chosen race, a royal priesthood, a holy nation, God's own people, in order that you may proclaim the mighty acts of him who called you out of darkness into his marvelous light. Once you were not a people, but now you are God's people; once you had not received mercy, but now you have received mercy."); *Hebrews* 4:9 ("So then, a sabbath rest still remains for the people of God"); *Hebrews* 8:10 ("This is the covenant that I will make with the house of Israel after those days, says the Lord: I will put my laws in their minds, and write them on their hearts, and I will be their God, and they shall be my people.").

128. *See* WILKEN, *supra* note 6, at 11–21 (discussing the arguments of Tertullian and Lactantius). "Worship cannot be forced," wrote Lactantius in the early fourth century; "it is something to be achieved by talk rather than blows, so that there is free will in it." LACTANTIUS, DIVINE INSTITUTES 5.19, at 320 (Anthony Bowen & Peter Garnsey trans., Liverpool Univ. Press 2003) (c. 304-13). "[D]ivine service requires a willing mind," argued Tertullian a century earlier, TERTULLIAN, APOLOGY ch. 28 (197), and "[n]ot even a human being would like to be honored unwillingly," *id*. at ch.24. "It is not part of religion to coerce religious practice, for it is by choice not coercion that we should be led to religion," he later repeated. TERTULLIAN, AD SCAPULAM ch. 2 (212). The translations of Tertullian are from WILKEN, *supra* note 6, at 11, 13.

129. JEFFERSON, *supra* note 96, at 160. Others had made the same argument. *See, e.g.*, ROGER WILLIAMS, THE BLOODY TENENT YET MORE BLOODY, *reprinted in* 4 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 209 (Perry Miller ed., 1963); *see also* JOHN LELAND, TRANSPORTATION OF THE MAIL (1830), *reprinted in* LELAND WRITINGS, *supra* note 124, at 564, 565 (arguing that "he who does not worship God in the way he chooses, does not worship him at all").

demand institutional religious liberty is a well-established feature of America's tradition of religious freedom,[130] and it also follows from the nature of faith and the social character of human persons.

However, religious groups are not just voluntary associations of like-minded individuals, and the roots of institutional religious freedom are deeper and broader. As those who have defended the independent reality and rights of religious organizations have observed, religious groups are not just places where individuals exercise their faith, and it is too simplistic to see them as communities whose members share the same pre-existing views.[131] Religious groups also shape and support the religious life, and individual faith grows within them. Indeed, it is also fair to say that religious groups have an agency of their own. Religious organizations develop forms of government and decision-making that yield understandings, positions, and judgments that belong to the group itself, and the group itself follows these positions. The group acts on behalf of its members, but when it does so, it may not have the agreement of all its members. Neither the group nor its members can be substituted for the other.

Even more importantly, religious groups have a unique orientation that gives them a distinctive character. In and through religious groups, individuals reach out together to discover, understand, and follow the divine. Indeed, religious organizations are not just settings where the divine is sought; they are also places where the divine is met. The forms that religious groups take vary widely among religious traditions and within the same tradition, but there are shared functions across religious communities. These functions include worship, prayer, sacraments, celebration, teaching, preaching, study and learning, discipline, dispute resolution, formation and support, evangelization, fellowship, and charitable works. In nearly all of these aspects of group life and activity, the divine becomes present to believers. The divine is discovered through study and learning, proclaimed through teaching and preaching, encountered in prayer, sacrament and worship, and imitated and made manifest in charity and communal relationships. Different metaphors and names for the church attest to this idea of divine presence in the Christian tradition. The church is the Body of Christ and Bride of Christ, according

130. *See* discussion *infra* notes 179–183 and accompanying text.

131. Richard Schragger and Micah Schwartzman acknowledge this. Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 26; Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 978. However, their paradigm remains a Lockean association of like-minded believers, and they do not develop the implications of this recognition beyond the "ministerial exception" they invoke the recognition to help justify. *Id.* For more on the ministerial exception, *see infra* notes 188–192 and accompanying text.

to the New Testament.[132] In the Catholic and Orthodox traditions, the divine is present in the Eucharist, which is at the center of liturgy and worship,[133] and the presence of the divine is also affirmed in Anglican, Lutheran, and Reformed understandings of the sacrament.[134] The Catholic Church views the Pope as the Vicar of Christ,[135] and the Holy Spirit is believed to guide the teaching of the Pope and bishops.[136] The divine is present as part of the covenants which bind together congregations in the Reformed tradition, as well as in the Word that is preached.[137] Roger Williams, one of America's quintessential religious individualists, viewed the true church, in memorable language, as a "holy" "garden and paradise."[138] "[W]here two or three are gathered in my name, I am there among them," Jesus teaches in Christian Scripture,[139] and John Locke repeated this Biblical teaching to support his definition of the church as a voluntary society.[140] In other religious traditions as well, the divine is encountered in group settings and through group activities. In Judaism, for example, communal prayer connects believers to God.[141] Where ten people are gathered in prayer, the Divine Presence is with them, the Talmud teaches.[142] In Buddhism, communities of monks live according to rules that help monks advance

132. *See e.g.*, *Romans* 12:4–8 (referring to the Body of Christ); 1 *Corinthians* 12:12–31 (same); *Colossians* 1:18, 24 (same); *Revelation* 21:9–10 (referring to the Bride of Christ); 2 *Corinthians* 11:2 (same); *Ephesians* 5:25–27 (same).

133. CATECHISM OF THE CATHOLIC CHURCH §§ 1322–27, 1333, 1343 (2d ed. 1997); M.C. Steenberg, *Eucharist*, *in* 1 THE ENCYCLOPEDIA OF EASTERN ORTHODOX CHRISTIANITY 230, 230–31, 234–35 (John Anthony McGuckin ed., 2011).

134. *See* ANGLICAN-ROMAN CATHOLIC JOINT PREPARATORY COMMISSION, AGREED STATEMENT ON EUCHARISTIC DOCTRINE (1971); APOLOGY OF THE AUGSBURG CONFESSION, ART. X (1531); THIS BREAD OF LIFE: REPORT OF THE UNITED STATES ROMAN CATHOLIC-REFORMED DIALOGUE ON THE EUCHARIST/LORD'S SUPPER 19–23, 30–34 (2010).

135. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 133, at § 882.

136. *Id*. at § 892.

137. *See* WITTE, THE REFORMATION OF RIGHTS, *supra* note 19, at 303 (describing the Puritan understanding of church covenants in New England).

138. ROGER WILLIAMS, MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED (1644), *reprinted in* 1 COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 129, 313, 392–93.

139. *Matthew* 18:20.

140. JOHN LOCKE, A LETTER CONCERNING TOLERATION 21 (Patrick Romanell ed., Bobbs-Merrill 2d ed. 1955) (1689). Thomas Jefferson also copied down this Biblical teaching in his notes. Jefferson, *supra* note 124, at 944.

141. In their challenge to severe COVID-19 restrictions on in-person worship adopted by New York in the fall of 2020, the plaintiffs in *Agudath Israel of America v. Cuomo* observed that practitioners of Judaism "understand that joining together to pray is more than a religious ceremony; it is an emotional connection to God and community." Complaint for Declaratory and Injunctive Relief at 13, Agudath Israel of Am. v. Cuomo, No. 1:20-CV-4834, 2020 WL 5983966 (E.D.N.Y. Oct. 8, 2020) (hearing and bench ruling denying motion for temporary restraining order), *reversed in part and vacated in part*, Agudath Israel of Am. v. Cuomo, 983 F.3d 620 (2d Cir. 2020).

142. LOUIS JACOBS, JEWISH PRAYER 54 (1955).

spiritually, and monasteries also function as centers of learning.[143] In mosques, Muslims learn about God through preaching and study,[144] and they gather together to bow before and draw close to God in prayer.[145] This presence of the divine in collective religious life makes religious groups sacred spaces for believers. The divine-human connection at the center of the religious faith is not just an individual experience, but also a communal one.

Of course, one may doubt whether the divine is truly present in any particular religious group or any religious community at all, but agnosticism and atheism do not alter the unique dimension of religious institutions. Scholars who reject defenses of institutional religious freedom that attribute some sort of "metaphysical," "ontological," or "transcendent" reality to churches or other religious groups miss the point.[146] The church may be the Body of Christ, or it may not be, and Roger Williams's garden may be no more than an overgrown thicket. However, demystifying religious groups does not turn them into the equivalent of any other voluntary association. Religious groups remain places where persons seek the divine and where they believe they encounter it, and this distinctive orientation has important implications for church-state relations that can be missed if it is overlooked.[147]

Likewise, one may doubt whether there are fixed boundary lines between church and state intrinsic to the social order. It is not clear that scholars who defend an autonomous space for religious activity and authority are making the type of strong ontological claim that their critics seem to see in their work,[148] but they do not need to. The nature of religious belief and institutions may demand such freedom even if our understanding of where the boundaries lie must evolve in light of experience and in view of the full range of human values. Indeed, as I will discuss further below, this is how the understanding of institutional

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143. *See* Rebecca Redwood French & Mark A. Nathan, *Introducing Buddhism and Law*, *in* BUDDHISM AND LAW: AN INTRODUCTION 1, 6, 9–10 (Rebecca Redwood French & Mark A. Nathan eds., 2014); *see also* KENNETH CH'EN, BUDDHISM IN CHINA: A HISTORICAL SURVEY 241 (1975).

144. BERNARD LEWIS & BUNTZIE ELLIS CHURCHILL, ISLAM: THE RELIGION AND THE PEOPLE 43, 48 (2009).

145. DANIEL BROWN, A NEW INTRODUCTION TO ISLAM 12–13 (3d ed. 2017); CHRISTOPHER PARTRIDGE & TIM DOWLEY, INTRODUCTION TO WORLD RELIGIONS 461–62 (3d ed. 2018). Congregational prayer protects believers from Satan, SUNAN ABI DAWUD 547, and is twenty-seven times greater than individual prayer, SAHIHAL-BUKHARI 649, the Prophet teaches.

146. For this rejection, see Schragger & Schwartzman, *supra* note 121, at 347; Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 18–19, 27.

147. *See infra* Part III (exploring these implications for church-state relations).

148. *See* Horwitz, *supra* note 115, at 1053; Steven D. Smith, *The Jurisdictional Conception of Church Autonomy*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 19, 23–24 (Micah Schwartzman et al. eds., 2016).

religious freedom has developed in our constitutional tradition.[149]

Sometimes, however, focus on the independent reality and rights of religious groups can obscure their dynamic character and the ways in which the complex interactions of group members among one another and with their traditions drive a constant process of institutional and doctrinal change and development, including fragmentation and division. Religious traditions are never static, and neither are ecclesiastical structures and forms. The early local congregations of Christians in the apostolic era evolved as ecumenical councils addressed disputes over doctrine, and over time papal leadership strengthened in part as a response to imperial assertions of ecclesiastical control in the post-Constantine era.[150] Papal leadership again became a force for reform in the eleventh century as popes led efforts to wrest ecclesiastical offices from lay control, a pattern that had rapidly accelerated with the collapse of Charlemagne's empire in the ninth century and had become intertwined with feudal structures.[151] Papal power and wealth, in turn, contributed to church corruption in the later medieval period,[152] and in response, Protestant reform movements envisioned new ecclesiastical structures by drawing on medieval ideas, classical and patristic sources, and Biblical models, including a return to the early Christian congregations of the apostolic era.[153] This quick and very incomplete sketch of some developments in Western church polity shows that evolution in religious organizational life is inevitable and complex. It is a response to new questions and changing needs and conditions, and it is shaped by many factors. Development is rooted and guided by religious principles and authorities. It makes use of beneficial ideas from outside the community and draws on the lessons of experience. It is influenced by the views and choices of individuals as well as the contingencies of historical events. It adapts to the limitations of circumstance but also envisions and creates new possibilities. Old ideas are recovered and reformulated, corrupt forms are abandoned or remade, and new ideas are developed. Individuals, in interaction, are among the agents of change, and jostling for influence and power can roil and fragment religious communities. Indeed, religious zeal, irrepressible in the committed

149. *See infra* Part III.

150. For these developments in the context of the evolving relationship between church and state in early Christianity, *see generally* chapters 2–4 of RAHNER, *supra* note 5.

151. *See* TIERNEY, *supra* note 3, at 24–26.

152. *Id*. at 160; BRIAN TIERNEY, WESTERN EUROPE IN THE MIDDLE AGES: 300–1475, at 476–79, 526–28, 577–79 (6th ed. 1999).

153. *See, e.g.*, TIERNEY, *supra* note 126, at 104; WITTE, THE REFORMATION OF RIGHTS, *supra* note 19, at 72, 91. There were, of course, reform movements inside the Catholic Church as well. See, for example, BRIAN TIERNEY, FOUNDATIONS OF THE CONCILIAR THEORY (1955).

reformer, means that development cannot be suppressed even if the path of change is a break with or off-shoot of what has come before. All of this also has important implications for church-state relations.

III. LESSONS FROM HISTORY AND PRINCIPLES FROM THE COURT

In addition to debates about the nature of religious groups, recent scholarly interest in institutional religious freedom has generated disputes about the scope of relevant historical analysis. Many of those who have defended robust religious group rights have reached back before the founding era to earlier periods of Western history for fruitful ideas and principles. These include the idea of the "freedom of the church" from the eleventh century Investiture Controversy[154] and the concept of "sphere sovereignty" with its deep roots in Dutch Reformed thought.[155] This broad and deep historical turn has been criticized as "anachronistic" and "reactionary,"[156] but these criticisms are misplaced. The American tradition of religious liberty did not begin in 1791 with the adoption of the Bill of Rights or even earlier in the colonial period. It had much deeper roots in Western history, and examining its many roots sheds light on founding-era history, yields a fuller appreciation of our constitutional values, and illuminates current experiences. In this Part, I will lay the groundwork for the framework I develop below[157] by identifying a series of lessons with roots in the founding era as well as earlier Western history and principles that the Court has drawn from them. Each of these lessons and principles reflect the characteristics of religious groups that I have discussed above,[158] and any adequate understanding of institutional religious freedom must take them into account.

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154. *See* Garnett, *supra* note 115; Garnett, *Freedom of the Church*, *supra* note 43; *see also* Smith, *Freedom of Religion or Freedom of the Church?*, *supra* note 50, at 266–69; Smith, *Discourse in the Dusk*, *supra* note 50, at 1869–70, 1873–80.

155. Paul Horwitz draws on the work of Dutch theologian, philosopher, journalist, and politician Abraham Kuyper, and he has traced Kuyper's ideas to earlier Dutch Reformed thought that influenced those in the founding era. Horwitz, *Churches as First Amendment Institutions*, *supra* note 44, at 99–100.

156. Schragger & Schwartzman, *Against Religious Institutionalism*, *supra* note 114, at 932; Schragger & Schwartzman, *Lost in Translation*, *supra* note 114, at 21, 30–31; *see also* Frederick Mark Gedicks, *True Lies: Canossa As Myth*, 21 J. CONTEMP. LEGAL ISSUES 133, 136, 144 (2013) (stating that "[i]t is not obvious . . . why the politically alien and historically remote events at Canossa should mark the birth of the 'freedom of the Church' or tell us anything else about the proper relation of church and state in the United States" though the recent revisionist retelling of this story, while "literally false, may yet be true" and useful as a form of "myth").

157. *See infra* Part IV.

158. *See supra* Part II.

A. Dangers of Church-State Involvement

The first set of lessons are associated with the dangers of church-state involvement. The distinctive character of religious groups and their complex dynamism give rise to substantial, and often unique, dangers when church and state interact, and these dangers have informed our tradition of institutional religious freedom. Those who drafted and adopted the First Amendment and state protections for religious liberty in the founding era knew these dangers. They experienced them firsthand, remembered them from the colonial era, and were familiar with examples in European history.[159] Later generations of Americans have also relearned the same lessons, and the Supreme Court has repeated them in its religion clause jurisprudence. Government officials are not competent to judge religious questions, James Madison and his contemporaries argued.[160] They lack the expertise of religious authorities in matters of faith, the Supreme Court observed nearly a century later in *Watson v. Jones*, a decision based on federal common law, but later reaffirmed under the First Amendment.[161] The problem, though, is deeper. Because religion involves the relationship of persons with the divine, religious teaching extends to all aspects of human life, and religious adherence has an importance for believers that is commensurate with its promise of salvation. This makes religion both a useful tool for government objectives and a competing source of influence to be tamed. Thus, church-state interactions involve the risk of government manipulation and exploitation. Even where governments do not act with these purposes in mind, the state's interests are primarily secular, and state involvement in the affairs of religious groups risks the distortion of religious doctrine and practice. The Supreme Court has recognized these dangers too: where the government becomes involved in religious controversies, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[162] "[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil

159. *See* WITTE, *supra* note 15, at 9–12.

160. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 301 (Robert A. Rutland & William M.E. Rachal eds., 1973).

161. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729, 732 (1872); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 114–16 (1952) (quoting and adopting the reasoning of *Watson* under the First Amendment).

162. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

magistrate,"[163] the Court has written, referring to James Madison's warning about the dangers of "employ[ing] Religion as an engine of Civil policy."[164]

Because religious organizations are sacred spaces for their members, interference in group affairs also provokes strong resistance that undermines government legitimacy and destabilizes both church and state. "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm" to promote religious uniformity, James Madison observed,[165] and religious interference that provokes widespread resistance also "tend[s] to enervate the laws in general, and to slacken the bands of Society."[166] Our system of government "has rescued the temporal institutions from religious interference" and "secured religious liberty from the invasion of civil authority," the Court said in *Watson*.[167] Indeed, we are witnessing these dangers today in America. Refusals to grant exemptions to religious organizations where laws impinge on traditionalist beliefs regarding family, sexuality, and reproductive choice have contributed to backlashes that have undermined trust in government, jeopardized our civic bonds, and, for some, even weakened commitments to liberal democracy.[168] Government policies that favor one or more religious groups over others create additional dangers. As James Madison and Thomas Jefferson observed, government favoritism feeds animosities over religious differences and disrupts civic harmony;[169] it also distorts the free development of ideas and the processes by which truth is tested and lessons are learned.[170]

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163. Engel v. Vitale, 370 U.S. 421, 432 (1962) (quoting James Madison's *Memorial and Remonstrance Against Religious Assessments*, *supra* note 160, at 301).

164. MADISON, *supra* note 160, at 301.

165. *Id*. at 302.

166. *Id*. at 303.

167. Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1872) (quoting Harmon v. Dreher, 2 Speer's Equity, 87 (Court of Appeals of South Carolina)).

168. For a discussion of one contemporary critique of liberal democracy, Catholic integralism, see Xavier Foccroulle Ménard & Anna Su, *Liberalism, Catholic Integralism, and the Question of Religious Freedom*, 47 BYU L. REV. 1171 (2022). For integralist articles that both describe and illustrate these backlashes, see Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism, [https://perma.cc/S5KD-9NVC]; Adrian Vermeule, *All Human Conflict is Ultimately Theological*, CHURCH LIFE J. (July 26, 2019), https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological/ [https://perma.cc/9BQ5-JE26].

169. *See* JEFFERSON, *supra* note 96, at 161; MADISON, *supra* note 160, at 302–03.

170. *See* JEFFERSON, *supra* note 96, at 159–61 (arguing that "free enquiry" is essential to identifying religious truth and that difference of opinion plays a beneficial role as "[t]he several sects perform the office of a Censor morum over each other"); *see also* Letter from James Madison to William Bradford, Jr. (Apr. 1, 1774), *in* 1 THE WRITINGS OF JAMES MADISON, *supra* note 99, at 22, 23 (religion benefits from "mutual emulation and mutual inspection" in conditions of freedom). For additional discussion, *see* BRADY, *supra* note 20, at 144–46.

The dynamic character of religious groups and traditions exacerbates these risks and increases their dangers, and history gives many examples. Where religious divisions exist, opposing factions and government actors have reached back and forth to assert influence and control outcomes. Political alignments during the Reformation era are just one illustration.[171] The same dynamics occurred during the medieval period.[172] Scholars have also identified these patterns in other religious traditions in other regions. In the eleventh century, battles over Islamic orthodoxy in the Muslim world became entangled in efforts of political leaders to consolidate and legitimize power with violent results, and over the next few centuries, persecutors became the persecuted as power shifted.[173] The same pattern repeated itself in the Ottoman Empire and its rival the Safavid Empire.[174] Far away in Tibet, beginning in the thirteenth century, the fortunes of Buddhist monasteries and their leaders were tied to the power of their royal aristocratic patrons.[175]

While the temptations of religious communities and governments to reach out to one another for support and control is natural, the results are harmful for each. Religious groups cannot secure lasting power through the use of political influence. Political patronage weakens faith communities, as James Madison and his Baptist allies repeatedly observed.[176] The secular hand that supports also seeks influence and control, and government assistance can lead to divided loyalties and complacency among religious leaders.[177] Moreover, the zeal of the saint and the reformer cannot be repressed even if the cost of their resistance is death. Religious support and control are also an insecure foundation for political power and legitimacy. Religious change and development are inevitable, and disaffected believers will turn against repressive and partisan regimes. Indeed, change and evolution are not only inevitable in

171. *See* STEVEN OZMENT, THE AGE OF REFORM, 1250–1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE 434 (2020).

172. For two illustrations of these dynamics during the medieval period, see TIERNEY, *supra* note 3, at 172–75, 180–85 (describing Pope Boniface VIII's struggle with France's King Philip the Fair); TIERNEY, *supra* note 152, at 528–31, 575–82 (describing the machinations and shifting alignments of secular rulers and competing popes during the Great Schism (1378–1417)).

173. *See* TIMUR KURAN, FREEDOMS DELAYED: POLITICAL LEGACIES OF ISLAMIC LAW IN THE MIDDLE EAST (forthcoming Oct. 2023) (citing Chapter 7); Ahmet T. Kuru, *Islam, Catholicism, and Religion-State Separation: An Essential or Historical Difference?* 1 INT'L J. RELIGION 91, 96–97 (2020).

174. *See* KURAN, *supra* note 173.

175. REBECCA REDWOOD FRENCH, *Buddhism and Law in Tibet*, *in* BUDDHISM AND LAW, *supra* note 143, at 305, 309–11.

176. *See* MADISON, *supra* note 160, at 301; LELAND, THE VIRGINIA CHRONICLE, *supra* note 124, at 118; DECLARATION OF THE VIRGINIA ASSOCIATION OF BAPTISTS, *supra* note 99, at 661.

177. *See* MADISON, *supra* note 160, at 301; LELAND, THE VIRGINIA CHRONICLE, *supra* note 124, at 118; DECLARATION OF THE VIRGINIA ASSOCIATION OF BAPTISTS, *supra* note 99, at 661.

religious traditions; they are also essential and beneficial. Development in light of new questions, circumstances, and needs renews and revitalizes faith traditions, and it enables them to realize their principles more truthfully and fully. Like all human knowledge, religious understanding develops over time, and freedom is essential to clearer views. The strongest defenders of religious liberty in the founding era recognized this.[178]

All of these lessons must inform an adequate framework for defining the scope of institutional religious freedom, and so should basic principles that the Court has drawn from them over time. "The law knows no heresy," the Court wrote in *Watson*, and individuals have the "right to organize religious voluntary associations to assist in the expression and dissemination of any religious doctrine" as well as to provide for their own forms of dispute resolution and ecclesiastical government.[179] *Watson* affirmed the fundamental voluntarism of religious groups and the requirement of religious equality, and it interpreted the American tradition of religious liberty to prohibit government interference in religious doctrine and church government. Ecclesiastical issues belong to the "jurisdiction" of ecclesiastical bodies.[180] *Watson* did not envision a complete separation between church and state. The case involved a property dispute between competing church factions, and the Court recognized that civil courts have the power to hear and decide such cases.[181] However, when they do so, courts must defer to religious bodies on religious questions.[182] Later cases involving disputes over church property have repeated these basic principles.[183]

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178. "Union of religious sentiments begets a surprising confidence, and ecclesiastical establishments tend to great ignorance and corruption," Madison argued. Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), *in* 1 THE WRITINGS OF JAMES MADISON, *supra* note 99, at 18, 19. Religion flourishes best "by mutual emulation and mutual inspection." Letter from James Madison to William Bradford, Jr. (Apr. 1, 1774), *supra* note 99, at 23. *See also* JEFFERSON, *supra* note 96, at 160 (diversity of opinion in conditions of freedom promotes better understanding of religious truth); LELAND, THE VIRGINIA CHRONICLE, *supra* note 124, at 121 (arguing that "if there is not a little difference among men, they sink into stupidity"). For all of these proponents of religious liberty, experience informed their arguments. For additional discussion, see BRADY, *supra* note 20, at 144–45.

179. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1872).

180. *Id*. at 733.

181. *Id*. at 713–14.

182. *Id*. at 727–34.

183. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696, 708–11, 724–25 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–47, 449 (1969); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 113–16, 120–21 (1952). In *Watson*, the Court held that courts deciding property disputes involving hierarchical

In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, the Court adopted *Watson*'s words and reasoning under the First Amendment and added a gloss with additional caution. *Watson*, the Court wrote, "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[184] *Kedroff* also involved a dispute over church property, but this time the state had stepped in to favor one side.[185] *Kedroff* struck down a Cold War-era statute transferring property from the control of the Patriarch of Moscow to an autonomous group of American churches.[186] *Kedroff*'s words, in context, make clear that governments may not act to influence religious doctrine and government, no matter how compelling the reasons may appear to be.[187]

Later Supreme Court decisions extended these principles beyond the context of intrachurch disputes to cases claiming exemptions from government regulation. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* the Court recognized a "ministerial exception" from employment discrimination laws.[188] The selection of clergy "affects the faith and mission of the church itself," the Court observed, and interference with this choice compromises the ability of religious institutions to "shape [their] own faith and mission."[189] In *Our*

churches must defer to the decisions of the highest decision-making authority on any religious questions. *Watson*, 80 U.S. at 727. The Court has reaffirmed this principle numerous times as a matter of First Amendment principle. However, in *Jones v. Wolf*, decided over a century later, the Court held that this deference does not mean that courts must automatically follow the decisions of these tribunals on the outcome of the property dispute itself. *Wolf*, 443 U.S. at 604–05. A state can also choose to follow a "neutral principles of law" approach under which courts make determinations based on neutral principles of property and trust law, but if deeds, charters or relevant church documents present religious questions, courts must defer to religious authorities on these questions. *Id*. at 603–04. The principal advantage of a neutral principles of law approach, the Court argued, is that churches can ensure that their wishes are followed by providing for them through "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id*. at 603.

184. *Kedroff*, 344 U.S. at 116.

185. *See id.* at 97–99 (evaluating constitutionality of New York law transferring control of Russian Orthodox churches from the Patriarch of Moscow to an autonomous North American district).

186. *See id*. at 97–106 (outlining the history of Article 5-C of the Religious Corporations Law of New York).

187. *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (stating that "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion").

188. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188 (2012).

189. *Id*. at 188, 190.

Lady of Guadalupe School v. Morrissey-Berru, [190] the Court went a step further. Construing the exception in *Hosanna-Tabor* expansively to cover lay teachers of religion in faith-based schools, the Court grounded it in a "broad" and "general principle of church autonomy."[191] The First Amendment protects the right of religious groups to define their own faith and doctrine, and this also requires "autonomy with respect to internal management decisions that are essential to the institution's central mission."[192] The holding in *Our Lady of Guadalupe* was limited to the scope of the ministerial exception, but its reasoning was far broader. The Court recognized that independence in matters of faith and doctrine requires protection for the decisions essential to their formation and preservation.

As our constitutional tradition makes clear, while the understanding of church and state as separate areas of authority and government had its earliest roots in Western history as a theological concept,[193] it did not stay simply a religious idea. What began as the Biblical teaching and earliest doctrine of a small minority faith in the Roman empire created a space between religion and government when Roman rulers embraced Christianity. While dualism remained a central feature of church-state relations in the West, the natural tendency of church and state to exert control over one another quickly led to entanglements that deepened over time.[194] It was the bitter fruit associated with close connections between religious and state institutions that helped not only to preserve this space,[195] but to greatly expand it in the wake of the persecutions and religious wars that followed the Protestant Reformation.[196] For founding-era Americans, church-state separation was at once a religious principle and a conclusion from reason and experience.[197] For many

190. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

191. *Id*. at 2061.

192. *Id*. at 2060.

193. *See* discussion *supra* notes 8–14 and accompanying text.

194. *See* NOONAN, *supra* note 14, at 47–48; WILKEN, *supra* note 6, at 33–37. *See generally* RAHNER, *supra* note 5, at chapters 2–5.

195. For example, the efforts of reforming popes to wrest control over ecclesiastical offices from lay rulers during the Investiture Controversy of the eleventh and early twelfth centuries were a response, in part, to the religious corruptions that had grown up with this practice. *See* TIERNEY, *supra* note 3, at 24–27, 33–36, 45–46; TIERNEY, *supra* note 152, at 214–20.

196. *See* NOONAN, *supra* note 14, at 49–50.

197. Madison made both types of arguments in his *Memorial and Remonstrance*. For example, he argued that the supposition that religion requires state support is "a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world," as well as a "contradiction to fact" and "a contradiction in terms." MADISON, *supra* note 160, at 301. Madison's arguments were echoed in the MEMORIAL OF THE PRESBYTERY OF HANOVER, VIRGINIA

Americans today, institutional religious freedom remains a religious demand, [198] but the lessons of experience also provide universal justifications that have shaped our constitutional tradition and the principles that the Court has developed to draw the boundaries. Indeed, as I have observed above, the lessons of Western history have repeated themselves in other regions of the world, at different periods of time, and in places with varying religious belief systems.[199]

B. The Inevitability of Overlap

The dangers of too close a connection between religion and government and related judicial principles must inform an adequate approach to institutional religious freedom, but so must another lesson of history, also recognized by the Court and tied to the nature of religious groups. Religious institutions, like faith itself, are not neatly separable from public life and civic concerns. Religious institutions share the same physical space as other institutions and the same social world. Additionally, religious belief systems have implications for all aspects of human life. The object of religious faith is the source or ground of all that is, so religious ethics goes beyond the merely personal or private. In the divine, believers understand who they are and what they should do, not just as individuals or members of religious institutions, but also as members of the larger community. Religious teaching often speaks to human relations broadly; for example, God's command to seek justice for the oppressed and to care for the orphan in the Hebrew Bible is spoken to kings.[200] Thus, while religious institutions and ecclesiastical concerns must be free from government manipulation and control, and government must be free from religious domination, religion and government can never be entirely separate. The interests of religious institutions and government will inevitably overlap.

As I have discussed above, much of this overlap is taken for granted and unproblematic with areas of conflict shifting over time as

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(1785), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE 304, 305–06 (Daniel L. Dreisbach & Mark David Hall eds., 2009), and later by the Baptist proponent of religious liberty John Leland, THE RIGHTS OF CONSCIENCE INALIENABLE (1791), *reprinted in* LELAND WRITINGS, *supra* note 124, at 177, 181–82.

198. *See, e.g.*, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, U.S. CONF. OF CATH. BISHOPS AD HOC COMM. FOR RELIGIOUS LIBERTY (2012), https://www.usccb.org/committees/religious-liberty/our-first-most-cherished-liberty [https://perma.cc/9RQX-FXDC] (affirming "that our faith requires us to defend the religious liberty granted us by God, and protected in our Constitution").

199. *See supra* notes 173–175 and accompanying text.

200. *See e.g.*, *Isaiah* 1:16–17; *Jeremiah* 22:13. For further discussion, see *supra* notes 1–2 and accompanying text.

circumstances change.[201] Today, for example, we barely notice the many ways that religious organizations make use of civil laws and, indeed, rely on their requirements to achieve their institutional purposes. This was not always the case. In antebellum America, the Catholic hierarchy fought against state incorporation laws that channeled religious organizations into democratic and lay-driven forms of governance by placing local church property under the control of lay trustees.[202] These state laws also could not accommodate Mormon polity, and after the move to Utah, the Mormon community further struggled to defend its church structures during the federal crusade against polygamy.[203]

In earlier periods of Western history, much more extensive forms of overlap between religious and secular law became problematic as circumstances changed, and the relationship between ecclesiastical and civil law during the Reformation is an example. When Catholic canonists in the twelfth century drew on classical Roman law to deepen and develop ecclesiastical law, the sophistication of the substance and process of canon law far outstripped that of secular law.[204] Popes claimed for the church both spiritual jurisdiction over religious matters as well as a temporal jurisdiction that extended in theory to all secular matters but in practice to appeals involving specific types of cases, such as cases of possible judicial bias, cases where there were disputed questions of law, and cases sounding in equity involving injustice to be corrected.[205] The religious and secular legal systems became intertwined during the Middle Ages. However, as secular legal systems advanced and tensions between secular and ecclesiastical powers grew, this relationship between secular and canon law became more problematic, and the fragmentation of the church during the Reformation upended it in Protestant regions.[206]

The areas of deepest conflict in American history have been different. Contests in the founding era over funding for churches assumed that religion was necessary for democratic government as the mediator of moral principles, but Americans disagreed over whether government

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201. *See* discussion *supra* notes 20–30 and accompanying text.

202. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 347–55 (2014).

203. For scholarship focusing on the Mormon experience, see Nathan B. Oman, *"Established Agreeable to the Laws of Our Country": Mormonism, Church Corporations, and the Long Legacy of America's First Disestablishment*, 36 J.L. & RELIGION 202 (2021).

204. TIERNEY, *supra* note 3, at 97–98.

205. *Id*. at 97–98, 128–31, 150–51.

206. John Witte discusses these developments in Germany in WITTE, LAW AND PROTESTANTISM, *supra* note 19, at 35–64. The Lutheran Reformation in Germany did not split religious and secular law. Rather, civil law was infused with religious content and principles, much of which came from the medieval canon law that Luther had initially condemned. *Id*. at 76–84, 294–95.

funding was needed to sustain religion and whether it threatened the essential independence of church and state.[207] In 1833, Massachusetts ended the last state system of tax support for churches, but other battles over government funding of religious institutions soon followed. Growing religious pluralism made funding for religious schools controversial in ways that it had not been before, [208] and the long-running controversy over aid to religious schools has generated a steady stream of Supreme Court cases for seventy-five years.[209] Growing religious pluralism has also made religious language and speech in civic settings problematic in new ways, and associated litigation in the Supreme Court has continued for almost as long.[210] Now government expansion into areas once dominated by religious groups and deepening moral pluralism regarding marriage, family, and sexuality have generated the conflicts over religious health care and other social services I focus on in this Article.[211]

Religious providers of social services understand their activities and outreach as essential expressions of faith. For many of America's most numerous religious communities, including Christianity, Judaism, and Islam, works of charity are both a divine command and also a manifestation of the divine character.[212] Specifically in Christian theology, God becomes present not only in the acts of charity that imitate his life-giving sacrifice for the world, but also in the dignity of those who are helped: those who help the hungry, the stranger, the poor, the sick, and the prisoner "do it to me," Jesus says.[213] Religious Americans practice charity at both an individual and collective level, and charitable works are directed both inwardly to other community members and outwardly to the larger public. When religious believers reach out to others, they often engage in joint pursuits with those outside their faiths.

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207. BRADY, *supra* note 20, at 122–27.

208. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020) (noting that "[i]n the founding era and the early nineteenth century, governments provided financial support to private schools, including denominational ones"); *see also* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 163–69 (2020) (detailing federal funding of religious schools in late eighteenth and early nineteenth centuries); Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677 (2020) (discussing federal funding for religious schools educating Native Americans from the Revolution through the antebellum period).

209. For recent cases, see *supra* note 25.

210. *See supra* note 26 and accompanying text.

211. *See supra* notes 27–30 and accompanying text.

212. *Deuteronomy* 15:7–11; *Psalms* 82:1–4; *Isaiah* 58:6–12; *Matthew* 25:34–46; *James* 1:27; *Qur'an* 2:177, 2:215, 17:26, 24:22, 93:1–11.

213. *Matthew* 25:45. For a detailed discussion of the theological significance of charitable activity in the Catholic context, see Helen M. Alvaré, *Church Autonomy after Our Lady of Guadalupe School: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL. 319, 333–53 (2021).

Indeed, government programs and policies to advance the common good are themselves, at least in part, manifestations of the religious commitments of American voters, and the participation of religious institutions in government social services programs is another form of this type of joint pursuit. When government rules require or pressure religious social services providers to act in ways that violate their religious beliefs, they impinge on a core area of individual and collective religious practice,[214] and this interference naturally provokes religious resistance. Where the government's rules have the greatest impact on minority groups, resistance is fueled by an additional sense of unfairness and favoritism. It is often said that if religious ministries serving the public want to operate in areas of government regulation or funding, they must comply with the same rules that apply to all other groups.[215] However, this assertion overlooks the essential character of religious social services work, and it disregards historical lessons. Social services are a shared space involving shared activity, not an area that belongs solely or ultimately to the government. Claiming dominance will not erase the overlap; it will only entrench conflict. Room must be made for the interests of both religious groups and the government in ways that preserve the independence of each.

Indeed, in three recent Supreme Court cases, the Court has recognized that the inclusion of religious institutions in areas of shared activity is an important free exercise value. In the first of these cases, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court struck down a state rule excluding religious entities from participating in a grant program designed to help recipients with the cost of improving their playgrounds with recycled rubber.[216] Three years later, in *Espinoza v. Montana Department of Revenue*, the Court found that Montana's constitutional prohibition on direct and indirect aid to religious schools was unconstitutional.[217] Most recently in *Carson v. Makin*, the Court invalidated a restriction that excluded "sectarian" schools from Maine's tuition assistance program for families living in school districts without public secondary schools.[218] In *Trinity Lutheran* and *Espinoza*, the Court held that the exclusion of religious institutions from participating in public programs solely because of their religious identity discriminates

214. Thomas Berg also makes this argument. *See* Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 298–99 (2013).

215. *See supra* notes 87–90 and accompanying text.

216. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017, 2024 (2017).

217. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254, 2261–64 (2020).

218. Carson v. Makin, 142 S. Ct. 1987, 1993, 2002 (2022).

against religion in violation of the Free Exercise Clause.[219] In *Carson*, the Court went further and held that the general exclusion of religious entities from an otherwise available benefit because of the religious use they may make of the benefit is also unconstitutional.[220] The Court used strong language: the exclusion of religious groups from government benefits for which they are otherwise qualified "is odious to our Constitution."[221] These cases were about government funding of religious institutions, and they left open many questions about when the government may, or must, restrict funding for the religious uses of religious groups. Funding questions are beyond the scope of this piece. The conflicts I address arise in settings where religious groups and governments are already cooperating for the public good, but they clash over government regulations that conflict with organizational commitments. However, *Carson*, *Trinity Lutheran*, and *Espinoza* have implications for the questions I address here. These decisions affirmed that the inclusion of religious organizations in areas of government activity where religion and government have shared interests is a free exercise value. Government rules that require religious social services providers to violate their faith as a condition for serving the public or participating in public programs are inconsistent with this principle. The full inclusion of religious groups in areas of shared activity requires religious accommodation that takes into account both religious and government needs.

IV. A NEW FRAMEWORK FOR UNDERSTANDING INSTITUTIONAL RELIGIOUS FREEDOM

If religious and government institutions inevitably interact, institutional religious freedom requires balancing the values of independence and inclusion as well as religious and government interests. An adequate framework for understanding institutional religious freedom must safeguard religious freedom at points of overlap in ways that preserve all of these values. It must also account for the specific dangers of church-state involvement that have informed our constitutional tradition and the principles that the Court has drawn from these lessons

219. *Espinoza*, 140 S. Ct. at 2256–57, 2260–61; *Trinity Lutheran*, 137 S. Ct. at 2021, 2024–25. Where such exclusion occurs, it "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny." *Id*. (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

220. *Carson*, 142 S. Ct. at 2002.

221. *Trinity Lutheran*, 137 S. Ct. at 2025; *see also Carson*, 142 S. Ct. at 1996 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025); *Espinoza*, 140 S. Ct. at 2263 (quoting *Trinity Lutheran*, 137 S. Ct. 2025).

over time.[222] While sufficiently comprehensive, it must be flexible. Specific doctrines must be defined and refined over time in light of more general principles as circumstances change and new questions arise.

Thus far, the Court's cases addressing institutional religious freedom have been limited in scope and reach. The Court has decided a number of cases involving intrachurch disputes over property, and in them the Court has held that courts and legislatures addressing these disputes must respect institutional independence in matters of faith, doctrine and ecclesiastical government.[223] The Court has also carved out a broadly defined ministerial exception to employment discrimination laws and gestured to a broader principle of autonomy that protects additional areas of internal decision-making affecting faith and doctrine.[224] In all of these cases, the Court has embraced principles of religious voluntarism, religious equality, and institutional independence, but it has done little to knit these values together into a broader framework within which additional questions can be addressed and resolved. In what follows, I offer such a framework and illustrate its application to some of our current disputes over the regulation of religious social services providers. What I offer can be thought of as an extension of the Court's jurisprudence in this area and, in some respects, as developing the principle of church autonomy sketched by the Court in *Our Lady of Guadalupe*.[225] It is also an integration of the principles of institutional independence in these cases with the value of inclusion in *Carson*, *Trinity Lutheran*, and *Espinoza*.[226] Like *Hosanna-Tabor* and *Our Lady of Guadalupe*, it rests on both clauses of the First Amendment.[227]

I envision what I propose as part of the "growing end" [228] of a constitutional tradition that includes the founding-era history that informed the adoption of the First Amendment, the earlier European history that shaped founding-era perspectives and helps to illuminate them, and the judicial doctrine that has drawn on past lessons to articulate and refine specific principles in light of current problems and developing

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222. *See supra* Part III (discussing these dangers and principles).

223. *See* discussion *supra* notes 179–187 and accompanying text.

224. *See* discussion *supra* notes 188–192 and accompanying text.

225. For a discussion of *Our Lady of Guadalupe*, see *supra* notes 190–192 and accompanying text.

226. For a discussion of these cases, see supra notes 216–221 and accompanying text.

227. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (drawing on both religion clauses); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 181 (2012) (same).

228. I have followed John T. Noonan, Jr. in his use of this term, and he, in turn, received it from John Courtney Murray. NOONAN, *supra* note 14, at 344 (quoting John Courtney Murray, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUDIES 509, 569 (1964)).

experiences. Indeed, this is what the Court has seen itself as doing in this area. In both *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Court drew on founding-era history,[229] the earlier European history that formed the "'background' against which 'the First Amendment was adopted,'"[230] earlier precedent[231] and its broad statements of principle,[232] and the constitutional text.[233] In other areas of law, the justices have sometimes described narrower forms of textualism or originalism, but these labels often obscure what is, in fact, principled decision-making shaped by tradition and informed by changing experiences and circumstances.[234] While I will not defend it here, in my view, the best way to understand First Amendment interpretation is as part of a constitutional tradition that is historically informed, principles-based, and open to development in light of new conditions and experiences. Such a view is often a better explanation of what is, in fact, happening, and it incorporates a broader range of values and concerns than narrower approaches. It is also better at capturing historical insights and purposes than narrower approaches. Constitutional interpretation understood as part of a tradition, however, is never completely fixed, and in what follows, I make proposals that are my best ideas—right now—about how to approach questions that will always require reevaluation.

A. Inward-facing Religious Activity

When approaching questions of institutional religious freedom, it is helpful to distinguish organizations and activities that are primarily inward-focused or involve only group actors from those that reach out to

229. *Hosanna-Tabor*, 565 U.S. at 183–85.

230. *Our Lady of Guadalupe*, 140 S. Ct. at 2061 (quoting *Hosanna-Tabor*, 565 U.S. at 183).

231. *Our Lady of Guadalupe*, 140 S. Ct. at 2061*; Hosanna-Tabor*, 565 U.S. at 185–87.

232. *Hosanna-Tabor*, 565 U.S. at 186 (repeating that "our opinion in *Watson* [*v. Jones*, 80 U.S. (13 Wall.) 679 (1872)] 'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'" (quoting *Kedroff*, 344 U.S. at 116)); *see also Our Lady of Guadalupe*, 140 S. Ct. at 2060 (also drawing on *Kedroff*, 344 U.S. at 116)).

233. *Hosanna-Tabor*, 565 U.S at 189.

234. For example, while Justice Alito's concurrence in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), focuses primarily on the text and history of the Free Exercise Clause, his analysis is also informed by experience. This experience includes the detrimental effects of the Court's narrow rule in *Emp. Div. v. Smith*, 494 U.S. 872 (1990), the confusion associated with the *Smith* rule, and the workability of more protective options. *See Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring in the judgment) (discussing the "dangers posed by *Smith*"); *id*. at 1888 (stating that *Smith* "has not aged well" and that "experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to 'anarchy'"); *id*. at 1917–22 (discussing the confusion associated with the *Smith* rule); *id*. at 1922 (discussing subsequent developments since *Smith* including evidence of the workability of the strict scrutiny standard in federal religious freedom legislation).

engage with the government or other public partners to solve shared problems and reach shared goals. For the former, the presumption should be that religious institutions are autonomous. Governments do not have a direct interest in the affairs of these groups, and interference in this context carries the greatest risks of distorting religious doctrine and practice and provoking animosity and resistance. However, autonomy in these contexts cannot be absolute. It must have narrow limits to preserve the right to exit and to protect vulnerable members, such as children, from physical harm and exploitation. Preserving the right to exit can also include steps to protect adult members from serious forms of physical harm or death, which would compromise or eliminate the ability of adherents to reevaluate or change their religious affiliation. Religious groups also cannot be autonomous when they deal with outsiders; contracts with third parties are enforceable in civil courts, and claims of negligence can be brought where the group has acted in ways that result in harm to those outside the group. Employees should generally be considered religious insiders except in rare cases where religious groups dominate a particular employment market to a degree that the voluntarism of religious employment is in doubt.

Religious institutions may also choose to give up some of their autonomy by drawing on civil laws to meet their needs and accomplish their goals. For example, religious organizations may take advantage of corporate law, contract law, and property law and afford employees benefits regulated by the state. This type of involvement is common today, and it reverses the pattern in the Middle Ages described above where the Church asserted a temporal as well as spiritual jurisdiction and, more relevantly, civil litigants often sought resolution of disputes in accordance with canon law in Church courts.[235] There are, however, limits on church-state involvement where religious institutions draw on civil law. As the Court has held in cases involving property disputes between competing church factions, secular courts cannot become entangled in religious questions or involved in oversight of church government.[236] Likewise, contract disputes between religious groups and their employees must not involve courts in religious questions.[237]

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235. *See* WITTE, LAW AND PROTESTANTISM, *supra* note 19, at 36–45.

236. *See generally supra* notes 179–184 and accompanying text.

237. This principle has been widely adopted in U.S. courts and has broad support among scholars. *But see* Helfand, *supra* note 116, at 1923 (grounding institutional religious freedom on member consent and arguing that civil courts can consider religious questions where the parties to a dispute opt out of institutional adjudication); *id*. at 1942–51 (arguing that civil courts should also be able to engage in "marginal review" where questions of institutional misconduct arise). Helfand discusses the "truism" that civil courts cannot become involved in religious questions in Michael

There are also limits on legislatures. For example, state corporation law cannot channel religious organizations into preferred forms of polity but must be flexible enough to allow groups to structure their internal relations according to their own ecclesiastical principles.[238]

Additionally, some areas of institutional autonomy cannot be relinquished if the dangers of church-state involvement are too great. For example, while the Court in *Hosanna-Tabor* declined to address whether the ministerial exception to employment discrimination laws should be broadened to prohibit contract claims brought by ministers against their churches,[239] the *Our Lady of Guadalupe* Court suggested that courts are "bound to stay out of employment disputes involving those holding certain important positions."[240] It would make sense to limit government involvement in this sensitive area of institutional life though simple contract claims that do not involve the choice of minister or the ministerial role should be permitted in civil courts. *Our Lady of Guadalupe* suggests that we might identify other areas of autonomy that cannot be relinquished by their relationship to the fundamental freedom of religious associations to develop their own faith and doctrine.[241]

There will also be areas where group leaders and members expect civil law to apply even where they do not draw on it expressly. These expectations reflect the fact that, in America, religious and other institutions share the same social world and many of the same basic values. Safety standards for worship spaces and other structures are an example as are many legal protections for employees including prohibitions on employment discrimination where religious doctrine and important religious roles are not involved. Likewise, many tort law principles reflect widely shared values and do not implicate religious

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A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013), and he argues there that the "religious question doctrine" should not apply to disputes where there is no institution involved to defer to. *Id*. at 494–501. Sometimes it will be unclear whether contracts are meant to be enforced in secular courts instead of confined to religious methods of dispute resolution. Evidence that religious concepts are integral to the agreement or that disputes are routinely handled internally strongly suggests that the parties do not envision civil enforcement.

238. For scholarship examining the ways in which early American incorporation law channeled religious organizations into democratic and lay-driven forms of governance, see generally Gordon, *supra* note 202. Minority faiths with hierarchical polities resisted the limitations of these incorporation statutes. *See id*. at 347–55 (discussing Catholic resistance); Oman, *supra* note 203 (discussing Mormon resistance).

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

240. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

241. *See id*. at 2060–61 (tying the principle of church autonomy to independence in matters of faith and doctrine).

doctrine and practice.[242] In areas like these, where there is overlap between religious and broader social values, civil law should apply unless the group makes clear to those involved that they intend to operate autonomously, there is overriding ecclesiastical law, or the group generally behaves as an insular community. The same limits on group autonomy and government involvement discussed above would also apply in these contexts.

Religious schools are a special category of inward-focused religious institution because governments have a legitimate and important interest in the quality of the secular education they provide. Religious schools are at once critical institutions for preserving and transmitting the faith in religious communities and also providers of a more general education preparing students for a life in the broader community. Along with parents, both schools and governments share responsibility for ensuring that children are prepared to become self-sufficient and productive adults capable of participating in democratic self-government. This shared interest in general education means that the autonomy of religious schools will be more circumscribed than that of other inward-focused institutions, and the Court has long held that governments may develop "reasonable" standards for secular education in religious and other private schools.[243]

How to balance the important religious and government interests in the context of religious schools is a complex topic beyond the scope of this Article. My focus in this Article is outward-facing religious organizations engaged in the provision of social services, and all that I have said about groups that are primarily inward-focused is just a sketch. However, certain general guidelines follow from the analysis I have developed above. First, governments must eschew direct involvement in the religious aspects of religious schools, including decision-making integral to their religious mission.[244] Second, government involvement in the educational activities of religious schools is only justified where it advances essential educational interests narrowly understood, and religious accommodations must be made whenever it is possible to do so without impairing these interests. Finally, the receipt of government aid does not justify greater involvement by the state. Government aid that flows to religious schools does so to enhance the secular education they

242. Recovery for a slip and fall or similar accident where negligence has occurred is an example.

243. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925); Meyer v. Neb., 262 U.S. 390, 402 (1923).

244. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060–61 (protecting religious institutional "autonomy with respect to internal management decisions that are essential to the institution's central mission").

provide,[245] and conditions that go beyond this purpose become, in effect, mechanisms to stifle unorthodox religious positions. Thus, while some government involvement in religious schools is necessary and unavoidable, the central role that these schools play within religious communities means that this involvement must be carefully defined and limited.

B. Outward-facing Religious Activity

In what follows I will focus on settings where religious groups are outward-focused and are engaged with the government and others to advance the common good, and in these contexts, the concept of partnership is a better starting point than that of autonomy. Partnerships involve two independent entities that work together for shared ends. My use of this term reflects the importance of both religious independence and inclusion in areas of joint concern. It also accounts for the fact that where religious groups and governments work together, both have interests that matter. It is helpful to distinguish three different contexts where disputes might arise: government funding, government licensing, and government tax exemption. The government's interests are at their most specific and compelling in the first context, while religious groups have especially compelling interests when licensure or tax exemption is threatened. However, government and religious institutions have important interests in all of these contexts, and the values of independence and inclusion apply to each as well.

1. Government Funding

When governments fund religious social services providers, they have important interests in ensuring that their private partners advance their programs' priorities. However, where religious accommodations can be made without significantly undermining the central purposes of these programs, they should be constitutionally required. Where governments can accommodate religious commitments without compromising their goals, the failure to do so evidences a lack of concern with religious inclusion, and where only peripheral policies are at stake, the government is, in effect, using its religious partners as engines of civil policy.[246] Where the impact falls on religious groups with unconventional or

245. While the Court has relaxed constitutional restrictions on government aid to religious schools over the course of several decades, it has made clear that government aid must be for public purposes, not to advance religious education or practices. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002); Mitchell v. Helms, 530 U.S. 793, 807–08 (2000).

246. The metaphor is James Madison's. MADISON, *supra* note 160, at 301. *See* discussion *supra* notes 163–164.

unpopular theologies, the failure to accommodate is also inconsistent with the value of religious equality. The result will be strong religious resistance that undermines trust in the government and destabilizes civic bonds, and we have seen both in today's disputes.

Moreover, pressure on religious groups to act in ways that violate their religious beliefs has the effect of undermining these beliefs and interfering with the free development of religious doctrine. Regulations that are incompatible with an institution's religious commitments put the group to a choice, and either choice has this effect. For example, if the group chooses to violate their commitments and remain part of the government's program, it will be difficult to preserve these beliefs over time; betrayal of principle will be difficult to sustain so principle will change to reflect the government's views. Alternatively, if the group chooses to withdraw, there will still be pressure on religious doctrine because the religious desire to serve continues. To the extent that there are divisions within the group over the beliefs at stake, regulatory pressure will also empower some factions in the group over others.[247] In *Our Lady of Guadalupe*, the Court affirmed the freedom of religious organizations over faith and doctrine, and it held that this freedom requires autonomy over closely linked matters of organizational government and administration.[248] Where religious groups are cooperating with the government to provide social services, their activities cannot be autonomous even with respect to matters impacting religious doctrine. The government has its own priorities, and both religious institutions and governments understand that. However, where the government can make accommodations that do not significantly hamper the central purposes of the government's program, the pressure on religious groups and their missions is not justified. Given the importance of religious inclusion and independence, both of which are at stake, the government should also bear the burden of demonstrating that religious accommodation is not possible without significantly impairing its basic goals, and it must identify these goals with specificity and defend their centrality convincingly. Where the government's regulations directly interfere with religious matters by, for example, prescribing rules that extend to the choice of a hospital chaplain, accommodations must always be made.

Rules that pressure religious groups to violate their religious beliefs or withdraw from government partnerships also harm those outside the

247. In *Smith*, the Court cited its intrachurch dispute cases for the proposition that the government may not "lend its power to one or the other side in controversies over religious authority or dogma." Emp. Div. v. Smith, 494 U.S. 872, 877 (1990).

248. *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61.

group. As other scholars have pointed out, religious providers of social services make unique contributions including through the vitality of their commitments, the distinctive content of their programs, and the magnitude of their efforts.[249] Moreover, including a diversity of providers within the government's programs where all meet the government's basic objectives has the broader benefits of institutional pluralism. A wide range of participants in public-private partnerships can reach more beneficiaries, including those who may themselves share the tradition that would be excluded without religious accommodation. A wide range of participants will also bring multiple approaches to solving shared problems. I have argued that diversity is beneficial when it comes to the development of religious understanding.[250] The same is true of all fields of knowledge and activity. Even unpopular viewpoints can deepen understanding by enriching and challenging conventional wisdom. Viewing religious social services providers as equivalents to government actors not only erases the religious significance of their work, but it also misses the ways in which public-private partnerships benefit the community by enriching the government's work with the distinctive perspectives of outside groups.

Some scholars have advocated using funding rules as a tool to promote congruence between the government's normative commitments and the values of its private partners.[251] More subtle pressure would replace direct coercion.[252] This position undervalues the benefits of institutional pluralism, and it is inconsistent with longstanding constitutional principles. Where religious accommodations can be made without significantly undermining the central purposes of the government's programs, pressuring institutions to conform to disputed values is a form of manipulation that seeks to bend religious groups to government orthodoxy. "The law knows no heresy," the Court wrote in *Watson* and

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249. *See, e.g.*, Berg, *supra* note 76, at 1352–55; Berg, *supra* note 214, at 301–13, 316; STEPHEN V. MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY 15–43 (2012); STEPHEN V. MONSMA & STANLEY W. CARLSON-THIES, FREE TO SERVE: PROTECTING THE RELIGIOUS FREEDOM OF FAITH-BASED ORGANIZATIONS 8–9 (2015).

250. *See* discussion *supra* p.713, 717–18.

251. *See* Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Values*, 75 CHI.-KENT L. REV. 417, 418 (2000); *see also* Brady, *supra* note 51, at 194–95 (discussing this view).; Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1412–13 (2003) (same). For further discussion of the argument that governments should adopt policies that promote congruence between basic public norms and the values of civil society institutions, see NANCY ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 36–41 (1998); Yael Tamir, *Revisiting the Civic Sphere*, *in* FREEDOM OF ASSOCIATION 214, 220–26 (Amy Gutmann ed., 1998); *see also* Brady, *supra* note 42, at 1701–02; Brady, *supra* note 47, at 150–51.

252. Macedo, *supra* note 251, at 421–22, 424, 441–42, 448.

has repeated in later cases,[253] and it cannot meddle in religious beliefs even when the reasons seem compelling.[254] Using funding rules to place pressure on religious doctrine violates these principles.

In many of today's disputes, religious entities and government officials disagree about whether accommodations can be made without impairing important government interests. For example, critics of accommodation argue that allowing religious foster care agencies to refuse to certify same-sex couples would undermine the equal access of these couples to fostering opportunities.[255] They also argue that accommodations would result in humiliation to couples who are turned away and, more broadly, compromise the equal citizenship of those in same-sex relationships while denigrating and demeaning them.[256] On the other hand, religious foster care agencies argue that they are willing to refer same-sex couples to other providers, and there have been many other available providers where disputes have arisen.[257] Moreover, they argue that their objection is not to working with LGBTQ persons, but to having to approve relationships that are inconsistent with longstanding religious beliefs regarding the nature of marriage,[258] beliefs that the Court has recognized as "based on decent and honorable . . . premises."[259]

Governments certainly have strong interests in ensuring that beneficiaries and other participants in their programs are treated fairly

253. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872); *see also* Serbian E. Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevich, 426 U.S. 696, 710 (1976) (quoting *Watson*, 80 U.S. at 728); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (same); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 114 (1952) (same).

254. State interference in religious beliefs endangers the "free development of religious doctrine and … implicat[es] secular interests in matters of purely ecclesiastical concern." *Mary Elizabeth Blue Hull*, 393 U.S. at 449. As discussed above, in *Kedroff* the Court affirmed the freedom of religious institutions from government interference even when the particular interference at issue was designed to protect churches from Soviet domination. *See supra* notes 185-87 and accompanying text.

255. *See, e.g.*, Pizer, *supra* note 90, at 394; Tebbe, *supra* note 90, at 39.

256. *See* Pizer, *supra* note 90, at 390–91, 394; Tebbe, *supra* note 90, at 39; *see also* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 189–91 (2015) (describing the effects of exemptions from antidiscrimination laws protecting LGBTQ persons).

257. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021); Buck v. Gordon, 429 F.Supp.3d 447, 453 (W.D. Mich. 2019).

258. *See Fulton*, 141 S. Ct. at 1875; *Buck*, 429 F.Supp.3d at 453.

259. Obergefell v. Hodges, 576 U.S. 644, 672 (2015); *cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (stating that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths") (referring to these longstanding beliefs and quoting additional language from *Obergefell*, 135 S. Ct. at 2607). Religious foster care agencies have naturally drawn on these statements from the Court. *See, e.g.*, Brief for Petitioner at 32, 35, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

and have access to the full range of services and opportunities that the government supports. These are central purposes for any social services program. The full inclusion of same-sex couples in the government's foster care system also increases the number of foster families available to needy youth. However, religious accommodations need not impair these goals. There are usually many providers willing to work with same-sex couples where conflicts have arisen,[260] and governments can structure the application process for prospective parents in ways that ensure that same-sex couples never experience the humiliation of being turned away. Where necessary, governments can also take steps to open additional avenues for fostering by incentivizing private providers or creating their own certification processes. Religious accommodations do recognize the existence of competing understandings of marriage and sexuality, and the existence of these competing viewpoints can be an uncomfortable fact for those on both sides of today's culture wars. However, this alone is not a harm that can justify infringements on religious liberty. Competing views about sensitive subjects including marriage and family are inevitable in a free society, and the religious views at issue in today's debates have a long history rooted in religious text, theology, and moral philosophy.[261] Religious social services providers holding these views should not be able to block equal access of same-sex couples to the foster care system, but religious agencies should also not be forced to violate their beliefs as a condition for providing services if the government's basic objectives can be met in other ways.

The same analysis should apply in other settings where religious providers seek exemptions from government rules that conflict with religious doctrine. For example, if there are ways to ensure that transgender individuals have ready access to gender transition services, hospitals with religious objections should not be required to provide these services. Religious hospitals are usually willing to make referrals to willing providers,[262] but in the case of abortion, health care providers and grant recipients often object to making referrals for what they view as the

260. *See, e.g.*, *Fulton*, 141 S. Ct. at 1875; *Buck*, 429 F.Supp.3d at 453, 465.

261. For a summary of the Catholic Church's interpretation of these sources, *see* Committee on Marriage and Family Life of the United States Conference of Catholic Bishops, *Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions* (2003), https://www.usccb.org/topics/promotion-defense-marriage/between-man-and-woman-questions-and-answers-about-marriage-and [https://perma.cc/2PVP-LNF9]. For an argument that these sources can and should be interpreted to support a newer concept of "transformational marriage" that includes same-sex couples, *see* Robin Bradley Kar, *Transformational Marriage: How to End the Culture Wars over Same-Sex Marriage*, *in* THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 375 (Robin Fretwell Wilson ed., 2018).

262. *See, e.g.*, Minton v. Dignity Health, 39 Cal.App.5th 1155, 1159–60 (Cal. Ct. App. 2019), *cert. denied*, 142 S. Ct. 455 (2021).

destruction of innocent human life.[263] In these cases, governments can use other mechanisms to provide interested women with information about providers, and they can also incentivize providers where they are scarce. Pressuring religious groups to facilitate what these groups view as the destruction of human life is a deep and deeply destabilizing impingement on religious liberty.

Some have worried that requiring accommodations for foster care agencies that object to working with same-sex couples will open the door to demands for exemption from other antidiscrimination rules, such as prohibitions on religious discrimination.[264] This has not been an idle thought. Miracle Hill Ministries, which operates a foster care ministry in South Carolina, has defended a policy limiting those it works with to professing Protestant Christians.[265] South Carolina and the Trump administration exempted Miracle Hill from state and federal nondiscrimination rules, including federal funding rules, and these decisions were followed by legal challenges by prospective foster parents.[266] The Biden administration has rescinded the federal waiver,[267] but litigation continues.[268] Another worry is that allowing religious hospitals to refuse to offer gender transition services will open the door

263. See, for example, the objection of a Catholic organization to a grant condition requiring a willingness to refer victims of human trafficking for contraception or abortion, discussed in *supra* note 76 and accompanying text.

264. *See, e.g.*, Rabbi Jill Maderer, *People of Minority Faiths Could Be Turned Away From Taxpayer-Funded Programs*, ACLU (Apr. 27, 2021), https://www.aclu.org/news/lgbtq-rights/people-of-minority-faiths-could-be-turned-away-from-taxpayer-funded-programs [https://perma.cc/BK6Y-YXM7].

265. Laura Meckler, *Trump Administration Grants Waiver to Agency that Works Only with Christian Families*, WASH. POST (Jan. 23, 2019), https://www.washingtonpost.com/local/education/trump-administration-grants-waiver-to-agency-that-works-only-with-christian-families/2019/01/23/5beafed0-1f30-11e9-8b59-0a28f2191131_story.html. [https://perma.cc/6FCF-A5M6].

266. Rogers v. U.S. Dep't of Health & Hum. Servs., 466 F. Supp. 3d 625 (D.S.C. 2020) (asserting Establishment Clause and Equal Protection claims); Maddonna v. U.S. Dep't of Health and Hum. Serv., 567 F. Supp. 3d 688 (D.S.C. 2020) (asserting Establishment Clause and Equal Protection claims as well as claims under the Administrative Procedure Act).

267. Press Release, U.S. Dep't of Health & Hum. Servs., HHS Takes Action to Prevent Discrimination and Strengthen Civil Rights (Nov. 18, 2021), https://www.hhs.gov/about/news/2021/11/18/hhs-takes-action-to-prevent-discrimination-and-strengthen-civil-rights.html [https://perma.cc/5YBR-6GBH].

268. Rogers v. U.S. Dep't of Health & Hum. Serv., No. 6:19-cv-01567-JD (D.S.C. Dec. 2, 2021) (rejecting South Carolina's motion for judgment on the pleadings based on the Supreme Court's decision in *Fulton*). Miracle Hill no longer receives state or federal funds. *See* Defendants Henry McMaster's and Michael Leach's Motion for Summary Judgment and Memorandum in Support at 23-24, Rogers v. U.S. Dep't of Health & Human Serv., Civil Action No. No. 6:19-cv-01567-JD (motion submitted Nov. 17, 2022). Prospective foster care parents continue to challenge South Carolina's accommodation allowing Miracle Hill to participate in South Carolina's foster care system. *Id*. at 1–3.

to broader discrimination against LGBTQ individuals in health care.[269]

Governments certainly have compelling interests in prohibiting bare discrimination in all of their programs. Hospitals cannot turn away sick patients regardless of their faith and sexuality. Miracle Hill cannot refuse to work with non-Christians just because they adhere to a different faith. However, our current conflicts do not involve this type of discrimination. Religious hospitals object to health care procedures that violate religious views about human life and sexuality. Religious foster care agencies do not want to certify same-sex couples because of longstanding religious views that marriage is between a man and a woman. And it appears that Miracle Hill wants to limit its foster care ministry to Protestant foster parents because it views its foster parents as ministry partners who, like its employees, must profess evangelical faith.[270] Federal rules protect the right of federally-funded social services providers to hire on the basis of religion,[271] and while controversial, this protection allows religious providers to preserve their religious character and motivation.[272] The critical question in Miracle Hill's case should be whether non-Protestant foster parents have ready access to other agencies to work with. If they do not, the state must incentivize other private providers to provide foster services or develop its own program to ensure equal access. If it does not, non-Christian individuals and couples will not only be without fostering opportunities, but they will experience pressure to identify with a particular religious community. This pressure would violate the fundamental principle of religious voluntarism.

If religious exemptions from the requirements of government-funded programs are at least sometimes constitutionally required, the question of

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269. *Cf.* HUMAN RIGHTS WATCH, "YOU DON'T WANT SECOND BEST": ANTI-LGBT DISCRIMINATION IN US HEALTH CARE 1–2 (2018), https://www.hrw.org/sites/default/files/report_pdf/us_lgbt0718_web.pdf [https://perma.cc/6BSK-WDET] (arguing that religious exemptions exacerbate barriers to health care among LGBT people).

270. Meckler, *supra* note 265; *see also Maddonna*, 567 F. Supp. 3d at 701–02 (recounting Miracle Hill's view that foster parents have a spiritual role).

271. "Charitable choice" rules in several federal statutes have these protections, and they track the religious exemption in Title VII of the Civil Rights Act of 1964. For a discussion of these charitable choice rules, see *supra* note 104 and accompanying text. Section 204(c) of Executive Order 11246, as amended, exempts faith-based government contractors from the order's prohibition on religious discrimination in employment. Federal agencies overseeing social services grants not subject to charitable choice rules generally follow the protections in these rules, and where statutes expressly prohibit grantees from discriminating on the basis of religion in employment, many agencies make exceptions on a case-by-case basis pursuant to the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2018). *See* U.S. GENERAL ACCOUNTABILITY OFFICE, FAITH-BASED GRANTEES: FEW HAVE SOUGHT EXEMPTIONS FROM NONDISCRIMINATION LAWS RELATED TO RELIGIOUS-BASED HIRING 1–2 & n.4 (October 2017) (reporting to congressional requesters).

272. For a defense along these lines, see Berg, *supra* note 42, at 168, 180–82.

what threshold of religious harm is necessary for relief arises. Numerous religious exemptions could make a government program unwieldly and costly, but second-guessing an organization's understanding of its beliefs would involve governments in religious questions and risk bias or misunderstanding in cases involving unfamiliar or unpopular faiths. The pressure exerted on Catholic Social Services by Philadelphia's Commissioner of the Department of Human Services, who "remarked that 'things have changed since 100 years ago,' and 'it would be great if we followed the teachings of Pope Francis,'" is an extreme example.[273] Who but the religious organization can say whether the government's rules violate its beliefs, but can't this autonomy also be abused? The Court has made clear that courts evaluating claims for religious exemptions can evaluate the sincerity of religious claims but must defer to religious entities about their own beliefs, and it repeated this limitation in *Fulton*.[274] In its pre-*Smith* case law and under federal and state religious freedom legislation modeled on it, the burden on an entity's religious beliefs must be substantial,[275] and the Court has repeatedly recognized that it can be either direct or indirect.[276] The loss of government funding, a license to operate, or tax exemption would clearly be a substantial burden, and indeed, in some cases it would be an extreme burden.[277] In *Fulton*, foster care agencies had to have contracts with the city to operate foster programs.[278] The danger that religious social services providers will raise numerous unmanageable objections to government rules is speculative, and the Court has held repeatedly that speculative dangers cannot justify burdens on religious exercise under a strict scrutiny standard.[279] Speculative dangers should also not defeat claims to institutional religious freedom. Moreover, in this case, the speculation that religious accommodations will spur more demands likely

273. Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021).

274. *Id*. at 1876.

275. *See* Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2018); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2018). Currently twenty-three states have laws modeled on RFRA. For information about states that adopted RFRAs prior to 2021, see *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/6CE9-MBWS]. In 2021, two additional states, Montana and South Dakota, adopted RFRA legislation. *See* MONT. CODE ANN. §§ 27-33-101 to 27-33-105 (2021); S.D. CODIFIED LAWS § 1-1A-4 (2022).

276. *See* Carson v. Makin, 142 S. Ct. 1987, 1996 (2022); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017); Sherbert v. Verner, 374 U.S. 398, 403–07 (1963).

277. In *Carson*, the Court recognized that the "exclu[sion] [of] religious observers from otherwise available public benefits" places an indirect burden on religious exercise cognizable under the Free Exercise Clause. *Carson*, 142 S. Ct. at 1996.

278. *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring in the judgment).

279. *Fulton*, 141 S. Ct. at 1882 (majority opinion); *Sherbert*, 374 U.S. at 407.

has things backwards. Accommodating burdens on institutional religious exercise will probably reduce the likelihood of multiple unmanageable claims. Religious social services providers and governments have long histories of amicable cooperation, and religious organizations expect regulation in partnerships to advance the common good. Indeed, regulation is beneficial to both governments and religious institutions. Today's fights endanger this beneficial cooperation, and addressing religious needs in ways that take account of government interests will reduce conflict and preserve valuable relationships.

Indeed, requiring governments to accommodate religious organizations whenever it is possible to do so without significantly impairing central program purposes will also encourage cooperation by giving both institutional and government actors incentives to work together to seek mutually acceptable solutions when conflicts arise. In *Fulton*, almost as soon as Philadelphia learned that Catholic Social Services would not certify same-sex couples as foster parents, it threatened Catholic Social Services with the termination of their partnership and pressured it to adopt the city's understanding of Catholic doctrine.[280] It did not consider less drastic solutions.[281] For its part, Catholic Social Services had never been approached by a same-sex couple interested in fostering, and it was willing to direct interested same-sex couples to other agencies.[282] However, Catholic Social Services did not consider or propose additional mechanisms to ensure that same-sex couples would not experience the humiliation of being turned away.[283] Once their disagreement arose, the stance between the city and Catholic Social Services quickly became adversarial.[284] A constitutional requirement that governments accommodate their religious partners when it is possible to do so without impairing their basic goals will encourage dialogue and negotiation. Placing the burden on governments to demonstrate that accommodation is not possible will strengthen these incentives. In almost all cases, meeting this burden will require evidence of good faith engagement and consideration of alternatives, including those proposed by religious groups. When governments reach out, religious groups will have their own incentives to reach back with realistic proposals that meet the government's needs because the failure to do so risks losing the chance for relief. Dialogue and good faith

280. *See* Fulton v. City of Phila., 922 F.3d 140, 148–51 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021) (recounting the history of their dispute).
281. *Id.*; *see also Fulton*, 141 S. Ct. at 1876.
282. *Fulton,* 141 S. Ct. at 1875.
283. *Fulton*, 922 F.3d at 150.
284. *Id*. at 150–51.

negotiation provide opportunities for solutions to surface that neither party may have thought of on their own. In many cases, if not most, there will be mutually acceptable solutions to conflicts. Sometimes there will not be, but even if mutually acceptable compromises are not possible, a good faith process of dialogue and negotiation can help to prevent bitter fights that undermine valuable cooperation for the common good.

2. Government Licensing

Much the same analysis should apply to disputes over government licensing as government funding, but in this context, space must also be made for religious groups to operate outside licensing regimes where their independence is clear to those they serve. Licensing frameworks that apply to social services providers are important mechanisms to protect the health and safety of those they serve, guarantee minimum levels of quality, and ensure that professional standards are met where applicable. For example, state regulations governing licensed foster care and adoption agencies are designed to ensure that decisions are made in the best interests of the child and that birthparents, adoptive parents, and adoptees have necessary support services during and after the adoption process.[285] Licensing rules governing outward-facing social services programs are also typically drawn to safeguard access to public goods by all members of the community. Thus, various types of antidiscrimination rules have long applied to licensed health care facilities and adoption and foster care agencies.[286]

Most religious providers of social services have few objections to licensing rules. Religious providers frequently operate in areas heavily

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285. For example, the Pennsylvania rules that govern Catholic Social Services require foster care agencies to train and support foster parents, inspect foster homes, and consider a variety of factors to ensure the suitability of applicants for foster parenting. 23 PA. CONS. STAT. § 6344(d)(2) (2022); 55 PA. CODE §§ 3700.1–3700.73 (2022). Rules for adoption agencies in Pennsylvania also require agencies to consider of a variety of factors related to the fitness of applicants for adoption when completing home studies and additional factors when matching children to suitable adoptive parents. 23 PA. CONS. STAT. § 2530; 55 PA. CODE §§ 3350.12, 3350.13. Adoption agencies must also ensure the availability of counseling and other services for birth parents, adoptive parents and children. 55 PA. CODE §§ 3350.5(e), 3350.13(j).

286. For example, Pennsylvania regulations provide that "[n]o child may be denied consideration for adoption because of his age, sex, religion, race or nationality, place of residence, settlement, economic or social status, a handicap that does not prevent him from living in a family, or the lack of an available adoptive family." 55 PA. CODE § 3350.5(g). Pennsylvania statutory law also provides that "the age, sex, health, social and economic status or racial, ethnic or religious background of the child or adopting parents shall not preclude an adoption but the court shall decide its desirability on the basis of the physical, mental and emotional needs and welfare of the child." 23 PA. CONS. STAT. § 2724(b). Pennsylvania also prohibits licensed health care facilities from discriminating on the basis of "race, color, national origin, ancestry, age, sex, religion, handicap or disability." 28 PA. CODE § 51.12.

regulated by the government, and government regulation is usually mutually beneficial. Licensing is one way that governments regulate specific forms of activity. Medical licensing rules benefit religious health care providers. The licensing of religious adoption agencies enhances the services they provide to children, birth parents, and adoptive families. When disputes arise, they are generally narrow, as is illustrated by conflicts over licensing rules for child placement agencies. While the *Fulton* case has spotlighted fights over rules prohibiting discrimination on the basis of sexual orientation in government-funded foster care services, religious adoption agencies have also fought similar prohibitions in general state licensing rules. In jurisdictions that condition licensing on such prohibitions, even privately-funded religious adoption agencies are faced with closure if they do not work with same-sex couples.[287] The religious adoption agencies involved in these fights share most of the government's values including a commitment to serving all children and broadening access to adoption. Like foster care agencies challenging rules for government funding and contracts, they do not object to working with single LGBTQ individuals.[288] They have a narrow objection to working with same-sex couples grounded in a traditional view of marriage, and they have been willing to refer these couples to other providers.[289]

Licensing rules, like conditions on government funding, place pressure on religious organizations to violate or abandon nonconforming religious practices, but the burden in the licensing context is often much greater because social services providers may not be able to operate at all without

287. *See* New Hope Family Services, Inc. v. Poole, 966 F.3d 145, 182 (2d Cir. 2020) (reversing lower court dismissal of challenge brought by privately-funded religious adoption agency to New York rules for approval of adoption agencies). The New York regulations challenged in *New Hope* forced the closure of other adoption programs in the state including the adoption and foster care services provided by Catholic Charities in Buffalo. *After 95 Years, NY Rules End Catholic Adoption and Foster Services in Buffalo*, CATH. NEWS AGENCY, https://www.catholicnewsagency.com/news/39219/after-95-years-ny-rules-end-catholic-adoption-and-foster-services-in-buffalo [https://perma.cc/BA44-CMZD]. Other Catholic institutions have also shut down adoption programs because of requirements that they place children with same-sex couples. *See* U.S. Conf. of Cath. Bishops, *Discrimination Against Catholic Adoption Services Fact Sheet* (2018), https://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf [https://perma.cc/Z4RD-FBVW].

288. *New Hope*, 966 F.3d at 157. Likewise, the religious doctrine that governs both Catholic adoption and foster care programs does not prohibit placing children with single individuals who identify as gay or lesbian. *See Facing Lawsuit, Catholic Bishops Allow Lesbian to Foster Child*, Wash. Post, July 14, 2022, https://www.washingtonpost.com/religion/2022/07/14/lesbian-foster-parent-catholic-bishops/ [https://perma.cc/R4DQ-5GWC] (stating that the United States Conference of Catholic Bishops instructed Bethany Christian Services, a sub-grantee, that its teaching does not prohibit a foster care application by an unmarried lesbian and that Bethany had misunderstood Catholic doctrine when denying her application).

289. *New Hope*, 966 F.3d at 157–58.

a license. Where this is the case, licensing rules not only promote but also enforce the government's understanding of the public good. Where governments can accommodate religious needs without significantly undermining the basic functions of licensing regimes, they must do so. Where licensing is a requirement for operation, these basic functions should be limited to the protection of the health, safety, and welfare of program beneficiaries and those interacting with licensed institutions as well as access to public goods by the public. The government must bear the burden of showing that it has no other way to protect its interests without impinging on religious exercise. In most cases, the narrow nature of conflicts between religious institutions and governments will mean that solutions can be found that meet both religious and government needs. For example, while prohibitions against discrimination on the basis of sexual orientation clearly serve the basic purpose of expanding access to adoption, religious accommodations do not undermine this purpose where other adoption agencies are readily available to work with same-sex couples. Where necessary, states can develop mechanisms to ensure that same-sex couples can easily identify these providers, and they can also take steps to open additional avenues for adoption by incentivizing private providers or expanding their own programs.

While religious accommodations can often be made in ways that allow for religious diversity in the context of government oversight, not all disputes are narrow, and sometimes religious entities have more distinctive visions that may not be compatible with secular licensing frameworks. In these cases, room must be made for religious programs to operate outside of licensing regimes as long as the nature of their services is clear to those they serve and they follow essential rules for protecting vulnerable individuals from exploitation. Thus, for example, religious counseling programs and groups practicing faith healing can operate outside of secular licensing regimes, but they can be required to make clear that they do not follow ordinary standards of care if the distinctive nature of their programs might be unclear. States can also place limits on these activities to protect the health of children and adults with cognitive impairments where there is a risk of substantial physical harm. In some areas, governments have special responsibilities for groups of people that justifies the application of licensing rules. For example, the responsibility of governments for foster children justifies a requirement that all foster care agencies be licensed.

Allowing religious groups to operate outside of licensing regimes where their independence is clear to those they serve, and essential protections for children and vulnerable adults are in place, balances the government's interest in the oversight of public services and the ability

of religious groups to follow their own distinctive understandings of human goods. Some of these religious visions may be troubling to others, but the basic values of religious independence, religious voluntarism, and equality require their protection. Indeed, the best way to moderate unorthodox visions is not to try to suppress them but to make space for them within mainstream licensing frameworks whenever possible. Accommodating distinctive religious viewpoints within licensing regimes allows for the interaction of different ideas and perspectives, including for blending and renewing majority and minority views and religious and secular insights about the public good. Sometimes accommodation will not be possible without undermining the basic functions of these regimes, but seeking compromise is itself a way of preserving the many valuable partnerships that are.

3. Tax Exemption

So far threats to remove tax exemptions from religious groups that adhere to traditional religious views on culture war issues have been largely theoretical, but these threats have added to the bitterness of our current disputes.[290] Tax exemption is one of the oldest ways that American governments have cooperated with religious groups to advance the common good.[291] Tax exemptions for religious and charitable institutions remove financial burdens from entities that benefit the public, and they facilitate their provision of public services.[292] Today, the loss of tax exemption for religious providers of social services could have a devastating economic impact and would exert strong pressure on them to change their beliefs. None of the beliefs and practices at issue in our current disputes, by themselves, justifies these impacts. Federal and state

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290. *See* William N. Eskridge, Jr., *Marriage Equality, Traditionalist Churches, and Tax Exemptions*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND, *supra* note 90, at 281, 286–88 (arguing that the IRS is unlikely to deny tax exemption to churches and core religious institutions because of discrimination on the basis of sexual orientation or gender identity). When then Democratic presidential candidate Beto O'Rourke made such a threat in October 2019, he ignited a firestorm of criticism, and he back-peddled from his position as other presidential hopefuls distanced themselves from his statements. Quinn Gawronski, *Warren, Buttigieg Reject O'Rourke's Threat to Tax Anti-LGBTQ Churches*, NBC NEWS (Oct. 14, 2019), https://www.nbcnews.com/feature/nbc-out/warren-buttigieg-reject-o-rourke-threat-tax-anti-lgbtq-churches-n1066036 [https://perma.cc/ZR98-D46J].

291. *See generally* Witte, *supra* note 100 (discussing the history of tax exemption of church property).

292. Chief Justice Burger drew on these traditional rationales in the Court's decisions in *Walz v. Tax Commission*, 397 U.S. 664, 672–73 (1970) and *Bob Jones University v. United States*, 461 U.S. 574, 586–91 (1983). For discussion of the history of this rationale in federal and state law, see Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, *in* 4 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2031–35 (1977); Witte, *supra* note 100, at 386–95.

governments extend tax exemptions to a wide range of nonprofit groups that benefit the public and enhance human flourishing, such as groups organized for educational, scientific, and literary purposes as well as religious and other charitable purposes,[293] and tax exemptions enable these groups to flourish by removing government burdens on them.[294] Religious foster care agencies that follow longstanding beliefs about the nature of marriage provide valuable services to children in need. Hospitals that refuse to perform abortions or provide gender transition services provide valuable medical care to the community. The purposes of tax exemption would be undermined, not served, by denying tax-exempt status to these groups.

In *Bob Jones University v. United States*, the Supreme Court upheld the decision of the Internal Revenue Service to deny tax-exempt status to religious schools with racially discriminatory practices, [295] but the beliefs and practices involved in our current disputes are not comparable. Goldsboro Christian Schools's whites-only admissions policy[296] and Bob Jones University's prohibition on interracial dating and marriage reflected and perpetuated historical patterns of discrimination that subordinated Black Americans and undermined their access to economic and social goods. The Court held that the IRS correctly construed the charitable tax exemption in the federal tax code to exclude these schools because their discriminatory practices undermined any public benefit justifying the exemption.[297] The Court's broadest language in *Bob Jones* is troubling. It describes a malleable and expandable balancing approach in which "fundamental public policy" rooted in "firm" national law and "the common community conscience" can negate any public benefit from programs that violate this policy.[298] This interpretation of the federal code can easily supply justifications for denying tax-exempt status to unpopular groups out of step with national norms. When religious groups are affected, it can threaten the free development of doctrine, undermine the value of religious equality, and use the concept of public benefit to pressure conformity with government orthodoxy.

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293. JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 19–20 (1995) (discussing the breadth of federal and state tax exemptions). At the federal level, 26 U.S.C. § 501(c)(3) (2018) exempts qualifying entities from income taxes, and 26 U.S.C. § 170(c)(2) (2018) permits federal taxpayers to take a deduction for charitable contributions to these entities.

294. See sources in *supra* note 293.

295. Bob Jones Univ. v. U.S., 461 U.S. 574, 577, 605 (1983).

296. Occasionally, Goldsboro Christian Schools accepted students from racially mixed marriages. *Id*. at 583.

297. *Id*. at 595–96. The IRS denied these schools tax-exempt status under 26 U.S.C. § 501(c)(3) and found them ineligible for deductible charitable contributions under 26 U.S.C. § 170(c)(2).

298. *Bob Jones Univ.*, 461 U.S. at 592–93.

However, there is more specific language in *Bob Jones* that describes a narrower problem with the racially discriminatory practices involved in that case. Racial discrimination in education "exerts a pervasive influence on the entire educational process,"[299] and it also has a pernicious and destabilizing effect on the larger community experiencing "the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*."[300] This was not a case, the Court clarified, of organizations providing a public benefit but engaging in "certain . . . activities [that] violated law or public policy."[301] Rather, this was a case where racially discriminatory practices altered the substance of educational programs and had far-reaching and injurious effects on the access of Black Americans to equal education and other social goods. Discriminatory private schools thwarted efforts to integrate public schools, sometimes with the approval of Southern state governments.[302] The schools in this case were not, in fact, providing a public benefit at all, the Court concluded.[303]

A narrower interpretation of *Bob Jones* can be consistent with the principles and reasoning developed above. Tax exemptions for religious and other charitable organizations in federal and state law are not only designed to lift financial burdens from groups that benefit the public interest. Their breadth is also designed to support a robust and diverse nonprofit sector that supplements and enhances the public functions of government and supplies goods that are beyond the power of government to furnish.[304] The diversity of this sector propels a constant process of evolution in our understanding of how to advance the public good. Policy-based limits on tax exemption risk endangering these purposes and, in the case of religious groups, other First Amendment principles as well. However, denial of tax exemption is not inconsistent with these values in the rare cases where an organization's activities are clearly injurious to the public welfare. The Court in *Bob Jones* gave an obvious

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299. *Id*. at 595 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

300. *Id*. at 595.

301. *Id*. at 596 n.21.

302. Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What is Caesar's, What is God's: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL'Y 145, 162 (2021) (observing this phenomenon but reading *Bob Jones* more broadly).

303. *Bob Jones Univ.*, 461 U.S. at 595–96 & n.21.

304. Justice Powell discusses this traditional understanding of tax exemption as a way to "encourag[e] diverse, indeed often sharply conflicting, activities and viewpoints" in his concurrence in *Bob Jones*. *Id*. at 609–10 (Powell, J., concurring in part and concurring in the judgment). For further discussion of this rationale for tax exemption and its history, see Belknap, *supra* note 292, at 2036–39.

example of "Fagin's school for educating English Boys in the art of picking pockets."[305] In that example, the program was not actually designed to promote the public welfare at all.[306] Limits on tax exemption would also be appropriate and consistent with the First Amendment where an organization's principal activities entail serious concrete and foreseeable harms to others. The IRS has rarely drawn on *Bob Jones* to deny tax-exempt status, but where it has done so, its decisions generally fit into these categories. It has denied tax exemption to religious groups engaging in criminal activity and in noneducational settings where racial discrimination can also "easily be expected to aggravate the disparity in the educational, economic, or social levels of the [racial] group when compared with society as a whole."[307] Institutions whose principal activities inflict serious and foreseeable concrete harms on the public are not the type of group that federal and state tax exemptions are designed to benefit. While religious groups that are denied tax-exempt status for these reasons will experience pressure to change their doctrines, the government has important interests in maintaining the integrity of its exemptions framework and avoiding steps that lend support to activities that produce grave harms. Governments may—probably wisely—choose to refrain from denying exemptions to religious groups in all but the most egregious circumstances to avoid any appearance of religious favoritism, but what they cannot do is deny tax exemption because of religious practices that do not undercut the purposes of tax exemption in this serious way.

None of the religious groups involved in our current culture war disputes present this type of scenario. Religious hospitals provide valuable health care to all members of the public even if there are religious limits on the types of services that they will provide. Religious adoption and foster care agencies provide beneficial services to needy children even if they only work with prospective parents who are married under traditional religious understandings of marriage. These organizations do not block the government or other agencies from providing the services they decline to offer, and their policies do not thwart the government's own efforts to ensure LGBTQ individuals and

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305. *Bob Jones Univ.*, 461 U.S. at 591 n.18 (majority opinion).

306. *Id.*

307. Mayer & Pohlman, *supra* note 304, at 155. This quote is from IRS Tech. Adv. Mem. 89-10-0001 (Mar. 10, 1989) ruling that a trust established to benefit poor needy white members of a certain city does not qualify for tax exemption under 26 U.S.C. § 501(c)(3). As some scholars have pointed out, however, using illegality as "a bright-line disqualification" can penalize groups engaged in laudable civil disobedience. Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to* Bob Jones*: Religious Tax Exemptions After* Obergefell, 92 IND. L.J. 1175, 1193–95 (2017). An illegality doctrine would need to be more nuanced than that.

others have ready access to health care, public services, and other social goods. Indeed, outside the context of abortion, religious organizations have usually been willing to refer same-sex couples and transgender individuals to other willing providers.[308] The type of racially discriminatory policies at issue in *Bob Jones* were different. They thwarted government efforts to desegregate public schools by draining white students and perpetuating patterns of subordination that deprived Black Americans of basic economic and social goods.[309] Today's religious refusals to offer abortion and gender transition services or to work with same-sex couples as adoptive or foster parents do not, in themselves, deprive affected individuals of opportunities to access services from others or impair the quality of the services they receive from them.[310]

Today, analogies are frequently drawn between religious justifications for racial discrimination and the longstanding religious beliefs about the nature of marriage, the family, and human sexuality at the heart of today's culture wars.[311] However, these comparisons are too facile. The theological pedigree of segregation was tied to the religious defense of slavery. Both drew on Biblical proof texts and natural theologies to divide humanity along racial lines and subordinate Black Americans. Defenders of slavery viewed Black citizens as the cursed descendants of Ham or Canaan.[312] Defenders of Jim Crow shifted somewhat to speak of the dispersion of Noah's sons, including the African race they associated

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308. *See supra* notes 257, 262, 282, 289 and accompanying text.

309. *See supra* notes 300–03 and accompanying text.

310. In some cases, depending on the particular context, a religious exemption might have the effect of impairing access to services, and as I have argued above, this fact will be relevant to whether the government must make the accommodation. *See supra* pp. 731–32, 734–37, 742. However, much more pervasive harm would be required to justify the loss of tax exemption.

311. These analogies have been made by government officials, political figures, and others, and they also appear in academic scholarship. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–30 (2018) (holding that statement by commissioner of state civil rights commission comparing baker's religious opposition to same-sex marriage to religious defenses of slavery expressed "hostility" to religion in violation of the First Amendment's "guarantee that . . . laws be applied in a manner that is neutral toward religion"); U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016) (statement of Chairman Martin R. Castro); Melling, *supra* note 256, at 180–85. For explorations and evaluations of these analogies, see LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (2020); Andrew Koppelman, *Gay Rights, Religious Liberty, and the Misleading Racism Analogy*, 2020 BYU L. REV. 1 (2020); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020).

312. FAY BOTHAM, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW 94–97 (2013); E. BROOKS HOLIFIELD, THEOLOGY IN AMERICA: CHRISTIAN THOUGHT FROM THE AGE OF THE PURITANS TO THE CIVIL WAR 495–96 (2003).

with Ham's descendants.[313] Both constructed theological arguments on assumptions and observations of separation and inequality in nature and the human world.[314] Religious social services providers in today's conflicts do not deny the fundamental worth and equality of all human persons, though they do deny that LGBTQ persons should live fully in accord with gender identities and sexual orientations that they view as essential to who they are. This is a moral disagreement reflecting a tectonic shift in American understandings of the meaning of marriage and the function of human sexuality, not a disagreement about the dignity, worth, and fundamental equality of all human beings.[315] The analogies that are drawn to religious justifications for racial discrimination in today's fights are not only too facile; they can also be dangerous, nowhere more so than in the context of tax exemption. Denying traditional religious groups tax exemptions would not only favor liberal religious faiths over conservative ones, exert pressure on conservative groups to change their doctrine, and favor progressive voices in intrachurch debates over doctrine. By excluding them from the definition of charitable organizations, the government would also be sending a message that traditionalist religious faiths are not beneficial to society like other religious and charitable groups are. There are, undoubtedly, Americans who would agree with this message. However, for the government to send this message in this way not only violates important constitutional principles but is also certain to deepen the social divisions that are destabilizing American society and government. Indeed, contracting the charitable tax exemption in such a deeply destabilizing way would, ironically, produce the very conditions that the exemption is designed to address and alleviate.

313. BOTHAM, *supra* note 312, at 99–111. They also argued that segregation reflects the division of peoples after the Tower of Babel, the mark of Cain for killing Abel, "the bounds of . . . habitation" Paul observed among the nations in *Acts* 17:26, and the separateness of Jews from other peoples in the Old Testament. *Id*. at 93–111; J. RUSSELL HAWKINS, THE BIBLE TOLD THEM SO: HOW SOUTHERN EVANGELICALS FOUGHT TO PRESERVE WHITE SUPREMACY 49–53 (2021).

314. HAWKINS, *supra* note 313, at 46–48; HOLIFIELD, *supra* note 312, at 503.

315. For example, the Catholic Church, whose hospitals and social services agencies are involved in many of the disputes discussed in this Article, has consistently affirmed the equal dignity and worth of all persons regardless of sexual orientation, POPE FRANCIS, AMORIS LAETITIA ¶ 250 (2016), even as it has refused to bless unions that are not ordered according to its understanding of God's design for marriage, *Responsum of the Congregation for the Doctrine of the Faith to A Dubium Regarding the Blessing of the Unions of Persons of the Same Sex, 15.03.2021*, HOLY SEE PRESS OFFICE (Feb. 22, 2021), https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/03/15/210315b.html [https://perma.cc/98FZ-PPPJ].

V. INSTITUTIONAL RELIGIOUS FREEDOM POST-*FULTON*

When the Court granted certiorari in *Fulton* in February of 2020, one of the questions presented was whether it should revisit its holding in *Smith* curtailing most protections under the Free Exercise Clause to instances of religious discrimination.[316] Many of the Court's conservative justices had already suggested doubts about *Smith*,[317] and with the addition of Justice Barrett to the conservative majority the following October, the Court seemed poised to overturn *Smith* and restore greater protection for religious exercise. However, while the Court ruled in favor of Catholic Social Services, it did not revisit *Smith*.[318] The Court held that Philadelphia's requirement that foster care agencies certify same-sex couples contained a system for individualized exemptions and, thus, was not generally applicable,[319] and Philadelphia failed to give a compelling reason for refusing Catholic Social Services an exception made available to others.[320]

The result in *Fulton* was unanimous, but a majority of the Court's members expressed dissatisfaction with the precedent the Court left intact. Justices Alito, Gorsuch, and Thomas would have over overturned *Smith* and returned to something like the strongly protective rule in the Court's pre-*Smith* case law.[321] This rule applied strict scrutiny whenever a law substantially burdened religious practice, not just when a law was not neutral or generally applicable.[322] Justice Barrett, joined by Justice Kavanaugh and in part by Justice Breyer, expressed discomfort with *Smith*, but these justices were uncertain about what should replace it.[323] They seemed to favor a "more nuanced" approach sensitive to the type of claimant and the nature of the religious burden and, perhaps, a framework

316. Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (2021).

317. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., with Thomas, Gorsuch & Kavanaugh, JJ., statement respecting denial of certiorari) (describing *Smith* as "drastically cut[ting] back on the protection provided by the Free Exercise Clause" and indicating a willingness to revisit *Smith*); *see also* Danville Christian Academy, Inc. v. Beshear, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., with Alito, J., dissenting from the denial of application to vacate stay) (stating that "[i]t is far from clear . . . why the First Amendment's right to free exercise should be treated less favorably than other rights, or ought to depend on the presence of another right before strict scrutiny applies"). Justice Breyer had also opposed *Smith* in the past. *See* City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (O'Connor, J., with Breyer, J., dissenting).

318. *Fulton*, 141 S. Ct. at 1881.

319. *Id.* at 1878–79.

320. *Id*. at 1881–82.

321. *Id*. at 1924 (Alito, J., concurring in the judgment). Justice Gorsuch also wrote an opinion criticizing the majority for failing to overturn *Smith*. *Id*. at 1931 (Gorsuch, J., concurring in the judgment).

322. *See* discussion *supra* note 36 and accompanying text (discussing the Court's pre-*Smith* doctrine).

323. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

with varying levels of scrutiny.[324] Chief Justice Roberts, who wrote the opinion in *Fulton*, almost certainly shared their discomfort with *Smith*, and he probably also shared their uncertainty about what should follow.[325]

Within the next several weeks the Court denied certiorari in additional cases inviting reconsideration of *Smith*,[326] and it has become clear that the Court is unlikely to move beyond *Smith* by overturning the case in total and at once, at least not initially. It is more likely that *Smith* will be dismantled over time as the Court carves out more protective approaches for specific categories of cases. Indeed, Justice Barrett and those who joined her concurrence seemed to be inviting litigants and scholars to envision what these new rules might look like, and they seemed to be looking for rules that are more finely tailored to the different kinds of cases that come before courts than the Court's pre-*Smith* jurisprudence was. They also were probably looking for rules that seemed more workable than a single highly protective standard across the board. In his concurrence in the judgment in *Fulton*, Justice Alito attacked *Smith* on numerous grounds, devoting the most space to a critique based on the text and history of the First Amendment.[327] However, the primary concern of the majority in *Smith* was a pragmatic one; they feared that a rule requiring heightened scrutiny any time a law placed a substantial burden

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324. *Id*. at 1883.

325. Chief Justice Roberts's cautious approach to free exercise questions can be seen in his concurrences and dissents in recent cases addressing COVID-19 restrictions on religious worship. In general, Chief Justice Roberts has been hesitant to override the responses of the political branches of government in a public health emergency "fraught with medical and scientific uncertainties." S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)). However, he has recognized some limits on this "broad" deference. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716–17 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief) (stating that while "significant deference" is due to the political branches, California's "determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake"); *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 75 (2020) (Roberts, C.J., dissenting) (observing that "[n]umerical capacity limits of 10 and 25 people . . . do seem unduly restrictive" and "may well" violate the Free Exercise Clause but concluding that "[i]t is not necessary . . . to rule on that serious and difficult question at this time").

326. *See* Ricks v. State Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *cert. denied*, 141 S. Ct. 2825 (2021) (challenging the application of Idaho rule requiring provision of social security number for individual contractor registration); State v. Arlene's Flowers Inc., 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021), *reh'g denied*, 142 S. Ct. 521 (2021) (challenging application of state antidiscrimination rules to flower shop owner for refusing to sell wedding flowers to same-sex couple).

327. *Fulton*, 141 S. Ct. at 1894–1912 (Alito, J., concurring in the judgment) (making criticisms based on text and history).

on religious practice would "court[] anarchy," especially in a country that is increasingly religiously diverse.[328] Justice Barrett did not say it when she wrote her concurrence in *Fulton*, but it is likely that the workability of a broad-based strict scrutiny standard was a concern for her and those who joined her. Indeed, to the increasing religious diversity that worried the Court in *Smith*, we can now add growing polarization and civic distrust,[329] both threatening more intransigent demands and feeding a diminished willingness on all sides to try to resolve conflicts through compromise. Robust religious freedom is essential to tamp down on polarization and restore civic trust, but developing manageable rules may also seem more challenging in these circumstances.

The framework that I have proposed in this Article can be viewed as part of the process of charting a new direction for free exercise jurisprudence post-*Fulton*. It offers an understanding of institutional religious freedom that is at once comprehensive and nuanced as well as workable and balanced. In the years ahead, institutional claimants will be drawing more on the Court's cases addressing the freedom of religious groups. As I noted above, *Smith* itself preserved the Court's precedents limiting government involvement in religious institutions,[330] and in *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Court carved out a robust "ministerial exception" to neutral, generally applicable employment discrimination laws.[331] The framework that I develop here draws on all of these precedents, and it can be understood as picking up where the Court left off in *Our Lady of Guadalupe*. My proposals recognize that strict scrutiny is not a fair or workable standard for all government impingements on institutional religious freedom. Strict scrutiny, at least in theory, is a very demanding standard, and under it only the most compelling government interests justify impingements on religious liberty.[332] In contexts where governments and religious groups

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328. Emp. Div. v. Smith. 494 U.S. 872, 888 (1990).

329. *See, e.g.*, Geoffrey Skelley & Holly Fuong, *3 in 10 Americans Named Political Polarization As A Top Issue Facing the Country*, FIVETHIRTYEIGHT (June 14, 2022), https://fivethirtyeight.com/features/3-in-10-americans-named-political-polarization-as-a-top-issue-facing-the-country/ [https://perma.cc/8J8C-FMV7] (discussing evidence of rising polarization and political division); Michael Dimock & Richard Wike, *America is Exceptional in Its Political Divide*, PEW TRUST MAG. (Mar. 29, 2021), https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide [https://perma.cc/XD27-AZ3P] (discussing studies conducted by the Pew Research Center illustrating America's deepening political divisions).

330. *See* discussion *supra* note 41 and accompanying text.

331. *See* discussion *supra* notes 188–192 and accompanying text.

332. In *Sherbert v. Verner*, the Court stated that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible

are working together to advance shared goals, such as where the government funds religious social services programs, both religious institutions and governments have important interests at stake. These interests must be balanced in a way that preserves both religious independence and inclusion while also accounting for the central purposes of the government's programs. At the same time, however, in contexts involving inward-facing religious institutions and activities, more protection is needed than would be available from the Court's pre-*Smith* jurisprudence.[333] In these contexts, the internal affairs of the group should be presumptively autonomous with narrow limits to preserve the right to exit and to protect vulnerable members from physical harm and exploitation.

The proposals that I make build on the reasoning of the Court's recent decisions in *Our Lady of Guadalupe* and *Hosanna-Tabor*, but they add nuance that at once expands and tightens the Court's emerging church autonomy doctrine. In *Our Lady of Guadalupe*, the Court grounded the ministerial exception that it recognized in *Hosanna-Tabor* on a "broad" and "general principle of church autonomy" that protects "autonomy with respect to internal management decisions that are essential to the institution's central mission."[334] *Our Lady of Guadalupe*'s principle is at once both over and under protective. Take, for example, religious hospitals. Health care is integral to the religious mission of religious hospitals, but religious hospitals neither want nor expect autonomy over medical practices. *Our Lady of Guadalupe* does not distinguish between outward-facing religious groups like religious hospitals and inward-facing groups like churches and schools, but such a distinction is essential for an adequate framework for defining institutional religious freedom. Nor does *Our Lady of Guadalupe* wrestle with the fact that even inward-facing groups draw on civil law and regulation to accomplish their religious goals. *Our Lady of Guadalupe* envisions church autonomy in

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limitation.'" 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"). In its pre-*Smith* jurisprudence, the Court often seemed to be applying something less than strict scrutiny. BRADY, *supra* note 20, at 190–91. However, in more recent cases, the Court has emphasized again the demanding nature of the compelling state interest test. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (explaining that the strict scrutiny "standard 'is not watered down'; it 'really means what it says'") (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728–30 (2014) (discussing the strict scrutiny standard in the Religious Freedom Restoration Act, which was modeled on the Court's pre-*Smith* jurisprudence).

333. For discussion of inward-facing religious activity, see *supra* Part IV.A.

334. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020).

terms of areas of immunity from government involvement,[335] but the scope of autonomy for inward-facing groups should be construed both more broadly and as a presumption that religious groups can give up within limits.

The framework I develop in this Article also links questions of institutional religious freedom with insights from the Court's recent funding cases. As I noted above, this Article is not about government funding of religious groups. It addresses claims for religious accommodation in contexts where religious groups and governments are already working together to advance shared goals. However, as the Court expands the contexts in which religious entities not only may, but must, be permitted to participate in government programs, conflicts like the one that arose in *Fulton* will become more common. In *Carson*, *Trinity Lutheran*, and *Espinoza*, the Court held that the Free Exercise Clause prohibits governments from excluding religious organizations from public programs solely because of their religious character or exercise.[336] In *Fulton*, the Court held that when religious groups participate in government programs, discriminatory regulation must be subject to strict scrutiny.[337] However, *Fulton* dodged the harder question of what protection the Free Exercise Clause affords when regulations burdening a religious group's mission are neutral and generally applicable. The Court's decisions in *Carson*, *Trinity Lutheran*, and *Espinoza* shed light on what the answer should be. These cases rested on the recognition that religious inclusion in areas of shared activity is a free exercise principle, and religious inclusion in public programs would be a mirage without protections where the government's rules require religious groups to violate their beliefs.[338] Without accommodation, such rules would either push religious entities out or threaten their independence by pressuring them to conform to the state's norms regardless of whether such conformity is truly necessary to achieve the government's central goals.

CONCLUSION

Throughout this Article, I have observed that there are many interfaces between religion and the state and that areas of conflict shift over time as circumstances change and new issues become salient. My focus in this Article has been on conflicts over the regulation of religious social services sparked by deepening moral divisions over family and human

335. For discussion of *Our Lady of Guadalupe*, see supra notes 190–1192 and accompanying text.
336. *See* discussion *supra* notes 216–221219 and accompanying text (discussing these cases).
337. Fulton v. City of Phila., 141 S. Ct. 1868, 1878, 1881 (2021).
338. For further discussion, see *supra* pp. 724–25.

sexuality. I have argued that the resolution of these disputes must preserve religious inclusion and independence while also accounting for the central purposes of government programs.

The importance of resolving these conflicts in a balanced way follows from the lessons and principles that I have identified in Part III, but my argument would, perhaps, be incomplete without touching on another area of overlap that has also become problematic because of the same moral divisions. As I noted in the introduction, founding-era Americans agreed that religion plays an important role in cultivating the public virtues essential to democratic government.[339] "[A]ll [religions are] good enough," Thomas Jefferson argued,[340] in large part because he believed that America's religions agreed on the same basic morality.[341] He also believed that "if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it."[342] Now, however, Americans are increasingly divided over moral issues, and many of these divisions fall along religious lines.[343] As this has happened, the involvement of religious reasoning in public debates and decision-making has become problematic. Indeed, for some, conservative religious positions with respect to the treatment of LGBTQ Americans are little more than justifications for discrimination.[344]

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339. *See* discussion *supra* note 20 and accompanying text.

340. JEFFERSON, *supra* note 96, at 161.

341. *See* discussion *supra* notes 96–98 and accompanying text. They are "all sufficient to preserve peace and order," Jefferson continued. JEFFERSON, *supra* note 96, at 161.

342. JEFFERSON, *supra* note 96, at 161.

343. *See* discussion *supra* note 28 and accompanying text.

344. Official expressions of this view have appeared in a number of disputes over religious claims for exemption from prohibitions against sexual orientation discrimination. *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021) (recounting Philadelphia City Council's statement that the city has "laws in place to protect its people from discrimination that occurs under the guise of religious freedom"); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018) (quoting a statement by a commissioner of the Colorado Civil Rights Commission, who compared religious opposition to same-sex marriage to the many other occasions where "[f]reedom of religion and religion has been used to justify . . . discrimination throughout history"); Buck v. Gordon, 429 F. Supp. 3d 447, 457–58 (W.D. Mich. 2019) (quoting Michigan Attorney General's statement that Michigan's law protecting adoption and foster care agencies with traditional religious views of marriage has no purpose besides "discriminatory animus"). Legal academics have also been among those who have described these religious positions as reflecting ill will or excuses for discrimination. *See, e.g.*, Erwin Chemerinsky, *Giving People a License to Discriminate Because of their Religious Beliefs*, L.A. TIMES (June 17, 2021), https://www.latimes.com/opinion/story/2021-06-17/discrimination-religion-free-exercise-supreme-court-gay-rights [https://perma.cc/NBK5-AAE3] (describing exemption claims like the one asserted in *Fulton* as involving the use of religious beliefs as "an excuse for discrimination"); Lawrence G. Sager, *In the Name of God: Structural Injustice and Religious Faith*, 60 ST. LOUIS U.

Those who view religious involvement in public reasoning and decision-making with suspicion and distrust tend to downplay the benefits of religious inclusion, but perhaps even more importantly, they often overlook the inevitable interaction between religious and public values. In the centuries following the Investiture Controversy, Roman Catholic popes claimed an ultimate authority over temporal matters that reflected the primacy of the spiritual in a divinely created world,[345] and they sought to imbue all aspects of human life with higher moral values.[346] For example, as I have observed above, they asserted temporal jurisdiction over many civil cases including those sounding in equity,[347] and they also interfered directly in political matters by seeking to legitimize and delegitimize secular rulers.[348] We have learned to disentangle religious offices from state institutions, but religious leaders and citizens still speak religious judgments in the public realm, calling for moral reform.[349] We hardly notice these judgments when we agree with their moral positions, such as when religious leaders call for greater private and public resources to care for the poor and vulnerable and to open opportunities for the disadvantaged.[350] Other times we have learned to see the value in judgments that were once deeply controversial, such as those spoken by abolitionists and civil rights leaders. Today, many Americans may be much more unsure about the value of the voices of America's conservative faiths. However, religious values and the voices that bear them will always influence the larger culture and inform public decision-making. Religious believers understand human purposes in

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L.J. 585, 598, 600 (2016) (referring to these positions as "religiously grounded distaste" and "impulses of exclusion"); Sepper, *supra* note 90, at 662 (referring to these positions as reflecting "religious ire").

345. *See* TIERNEY, *supra* note 3, at 128–31, 142–43, 151–53, 172 (discussing the views of Popes Innocent III, Innocent IV and Boniface VIII).

346. Brian Tierney, a preeminent historian of church-state relations in medieval Europe, writes that "Innocent [III] believed [that] a great ruler set 'below God but above men' could shape mundane human affairs in such a fashion that the ordered peace of a universal society would reflect the immanent harmony and justice of God's universe." TIERNEY, *supra* note 3, at 131.

347. *See* discussion *supra* note 204–205 and accompanying text.

348. Innocent IV's attempt to depose Frederick II in 1245 is an example. *See* TIERNEY, *supra* note 3, at 140–41.

349. For an excellent discussion of some of America's quintessential religious-moral "crusades," *see* NOONAN, *supra* note 14, at 249–60.

350. For example, a substantial majority of Americans have a favorable view of Pope Francis, whose exhortations to assist the poor and needy, help the migrant and the outcast, and care for the environment all draw on a long tradition of Catholic Social Teaching. Claire Gecewicz, *Americans, Including Catholics, Continue to Have Favorable Views of Pope Francis*, PEW RSCH. CTR. (June 25, 2021), https://www.pewresearch.org/fact-tank/2021/06/25/americans-including-catholics-continue-to-have-favorable-views-of-pope-francis/ [https://perma.cc/H2RK-TWWL]. For Pope Francis's social teaching, see generally POPE FRANCIS, FRATELLI TUTTI (2020); POPE FRANCIS, LAUDATO SI' (2015); POPE FRANCIS, EVANGELII GAUDIUM (2013).

light of the divine ground of all that is, and religions speak to all aspects of human life. They also speak with an urgency commensurate with their object. A free society cannot quash religious voices in public debate and decision-making, nor should it try. Religious consciences will always be part of our conscience as a political community, often for the good, sometimes for the bad, and frequently in ways whose value is not yet fully determinable.

However, as the recent unraveling of our civic relationships and trust has demonstrated, consciences can be clouded by bitterness, resentment, and fear. Those on all sides of today's culture wars have been guilty of these responses to the fights that have helped to breed them. For religious conservatives, in particular, this bitterness has too often replaced the commandment to love with impulses to attack.[351] It is not the existence of diverse moral perspectives in the public sphere that is dangerous. Diversity is inevitable. We may not be confident like Thomas Jefferson that error will be "laugh[ed] . . . out of doors,"[352] but our history has proved that we can live with great diversity and thrive. What is more dangerous is anger and animosity that dissolves the humanity of others, blocks the ability to hear what they have to say, and dismisses their concerns. Reaching balanced solutions to conflicts over religious freedom is essential to tamping down this anger and recovering civic trust, and it is also essential to taking into account the different interests and values at stake in shared spaces.

While rarely mentioned in Supreme Court opinions and constitutional scholarship, there is one more value in our tradition of religious freedom that is especially relevant today. The Virginia Declaration of Rights, which James Madison helped draft, calls for the practice of "forbearance, love, and charity towards each other,"[353] and Madison recalled these principles in his famous Memorial and Remonstrance.[354] They also appear as the first argument for religious tolerance in John Locke's *Letter Concerning Toleration*.[355] In *The Bloudy Tenent of Persecution* and *The Bloody Tenent Yet More Bloudy*, Roger Williams calls for the exercise of "humanity each to other"[356] and for the exercise of charity that imitates

351. For a discussion of this development from someone inside the evangelical community, see Michael Gerson, *The Last Temptation*, THE ATLANTIC (Apr. 2018), https://www.theatlantic.com/magazine/archive/2018/04/the-last-temptation/554066/ [https://perma.cc/TY3C-CJFB].

352. JEFFERSON, *supra* note 96, at 161.

353. VA. CONST. art. I, § 16.

354. MADISON, *supra* note 160, at 303.

355. LOCKE, *supra* note 140, at 13–14.

356. ROGER WILLIAMS, THE BLOUDY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE,

"he who is love itself,"[357] rather than "hostility and cruelty."[358] Love is a value with religious roots; it also is an aspiration of human nature; and its worth is learned through experience. Perhaps in this shared value, we can find part of the answer to conflicts arising from the inevitable overlap of religion and government. But even if we cannot, perhaps we can at least see that balanced approaches bring peace that benefits us all.

DISCUSSED, IN A CONFERENCE BETWEEN TRUTH AND PEACE (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS, *supra* note 129, at 1, 424.

357. WILLIAMS, THE BLOODY TENENT YET MORE BLOODY, *supra* note 129, at 176.

358. WILLIAMS, THE BLOUDY TENENT, OF PERSECUTION, FOR CAUSE OF CONSCIENCE, *supra* note 356, at 81.