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Catholic Thought on the Common Good: A Place for Establishment Clause Limits to Religious Exercise

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ARTICLE

CATHOLIC THOUGHT ON THE COMMON GOOD: A PLACE FOR ESTABLISHMENT CLAUSE LIMITS TO RELIGIOUS EXERCISE

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I. INTRODUCTION

Robust religious exercise, protected by the Religion Clauses of the First Amendment,[1] promotes the common good. Religious freedom benefits not only religious people and institutions but the entire society as well because it creates positive externalities. It fosters civic peace, pluralism, and stability and helps maintain the boundary between state and civil society. Religious freedom supports many fundamental social norms required for the functioning of a free society. It has also been the seedbed for other civil rights, contributing to free speech and to equal protection; indeed, the African-American church gave birth to the civil rights movement, which culminated in a national commitment to equality and nondiscrimination. In short, religious freedom contributes to the common good; that is, the sum total of social conditions that allow all people to flourish as human persons with all the dignity inherent in that identity.[2]

The free exercise and non-establishment norms of the Religion Clauses work together to protect freedom by creating a government that is religiously neutral as among religions and incompetent as to theological matters. These norms recognize that church-state separation limits the state and protects church autonomy from government interference with religious matters,

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1. U.S. CONST. amend. I. Other sources of protection include federal and state statutes and regulations, as well as interpretations of state constitutions.

2. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 164 (2004) [hereinafter COMPENDIUM]; *see generally* Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007).

gives churches and individuals generous accommodations to allow a vast array of religious practices and ministries, and creates the conditions for religious diversity, since religion is not relevant to citizenship. Over time, these norms have shaped, albeit imperfectly and often with great social upheaval, the legal and social incorporation of numerous religious groups—Catholics, Mormons, Jehovah's Witnesses, Jews, and more recently Muslims and Sikhs, to name a few—into what was once a predominantly Protestant nation. In short, religious freedom continues to be protected, not only by the Religion Clauses but increasingly by statutes and agency regulations, in large part because it promotes the common good.

Limits to religious exercise are also necessary for the common good. No right is absolute, and free exercise is no exception. Just as both Religion Clauses work together to protect free exercise, they also set its outer boundaries. As to the Free Exercise Clause and related statutes, courts sometimes place public order limits on religious exercise.[3] In addition, the Establishment Clause provides an independent structural constraint on certain types of religious exercise in favor of the common good.[4] First, it prohibits government actions that threaten the integrity and independence of political and legal institutions. This ensures that a church does not take over the reins of government or wield significant coercive legal power over citizens.[5] Second, the Establishment Clause prevents government actions that privilege religious groups and individuals in ways unconnected to removing a free exercise burden or that privilege them in ways disproportionate to any reasonable protection of religious exercise, thereby giving an unwarranted advantage.[6] For the most part, the system works remarkably well: church and state operate in their respective spheres, and thousands of religion-protective and religion-assistive programs, practices, exemptions, and provisions

3. An interpretive debate has raged for more than fifty years over the proper degree of scrutiny to give to laws that burden a person's religious exercise, as it is obvious that at times significant countervailing governmental and societal interests must take priority over religious freedom claims. In 1963, the Court announced a strict scrutiny standard of review of burdens to religious exercise in *Sherbert v. Verner*, 374 U.S. 398 (1963). In 1990, without overruling precedent, the Court announced a deferential standard for facially neutral, generally applicable laws in *Emp't Div. v. Smith*, 494 U.S. 872 (1990). Religion-protective statutes like the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2017), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2017), employ strict scrutiny, which allows a court to uphold government action where burdens on religious exercise are justified by compelling state interests that cannot be advanced by less restrictive means.

4. This Article builds upon but extends Professor Carl Esbeck's Establishment Clause analysis. *See* Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359 (2007). Professor Esbeck draws different conclusions regarding the implications of the analysis for exemptions. *See* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?* 106 KY. L.J. 603 (2018) (distinguishing preferences from exemptions).

5. *See* discussion *infra* Section II.B.1.

6. *See* discussion *infra* Section II.B.2.

are broadly accepted at the state and federal level.[7] Sometimes, however, an accommodation is an "unjustifiable award[ ] of assistance,"[8] resulting in religious privilege rather than protection of religious freedom. Of course, judgments about those necessary limits to religious exercise have varied over time, with the jurisprudence sometimes more restrictive and at other times more relaxed.

This independent structural constraint on religious exercise rectifies what Professor Carl Esbeck refers to as "religious" and "non-religious" harms.[9] To understand these terms, consider a society with a legally established church, where the government also imposes on non-members bans on worship and practice (religious harms) as well as civil disabilities (non-religious harms). When that church is disestablished, non-members are now free to worship and practice their own faiths; free exercise is promoted, thereby rectifying the religious harm. But non-members are also now free to exercise civic freedoms, which corrects the non-religious harm. Therefore, the structural limits the Establishment Clause places on certain forms of religious exercise—here, the religious exercise of a church backed by state power—promotes religious exercise *and* rectifies non-religious harms by redressing civil or economic harms unrelated to religious exercise.[10]

The Catholic Church's teaching on the proper relationship between church and state prioritizes free exercise norms and is largely silent regarding non-establishment.[11] The teaching accepts the independent jurisdictions of church and government, eschews church privilege in favor of broad religious freedom for all persons and religious bodies, claims institutional autonomy from state control, and views the government as a partner in advancing the common good on matters of education, social services, and health care as long as each institution retains its mutual autonomy.[12]

In the American constitutional context, the American bishops, through the United States Conference of Catholic Bishops (USCCB),[13] have taken

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7. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

8. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring).

9. Esbeck, *supra* note 4, at 364–65.

10. The arguments presented in this article are focused tightly on Establishment Clause concerns and are thus to be distinguished from the growing criticisms of religious exemptions that cause third-party harms; *see, e.g.*, Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

11. POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM (DIGNITATIS HUMANAE): ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN MATTERS RELIGIOUS (1965), https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html [hereinafter DECLARATION].

12. COMPENDIUM, *supra* note 2, ¶ 425.

13. For a description of the evolution of the organization of American bishops, currently known as the United States Conference of Catholic Bishops, see Winnifred Fallers Sullivan, *Indifferentism Redux: Reflections on Catholic Lobbying in the Supreme Court of the United States*, 76 NOTRE DAME L. REV. 993 (2001) [hereinafter *Indifferentism Redux*].

the position that Catholic teaching prioritizes the Free Exercise Clause and subordinates the Establishment Clause, viewing it as reinforcing—but not limiting—free exercise norms.[14] This produces a maximalist reading of religious freedom, which is constrained by public order considerations, but not by non-establishment norms.

The USCCB's narrow interpretation of the Establishment Clause is completely understandable, given the fact that the clause has been wielded repeatedly (and often successfully) as a weapon against the Church's efforts to obtain government aid or participate in aid programs for its schools and other public ministries.[15] Indeed, many religious groups are loath to ascribe to the clause a limiting role because it is often used aggressively and explicitly as a vehicle for secularizing society and privatizing religion.[16] Nevertheless, it is this article's contention that the rich intellectual tradition of Catholic political and social thought could be mined for non-establishment norms that limit free exercise in ways that promote the common good. In this way, the Church could make an important jurisprudential contribution to Establishment Clause interpretation that recognizes limits to religious exercise.

By accepting that Establishment Clause limits to religious exercise are critical to the common good of society, the Church can retrieve elements of its own teachings to craft an understanding of the clause's independent role in limiting certain types of religious exercise—not only for religious freedom but for other non-religious civic values as well. The Church's teaching on law and politics is concerned with much more than securing its own freedom; it recognizes clearly the secular nature of the state, the critical role of non-state institutions in civil society, the protection of a broad array of human rights, the public order constraints on free exercise, and the duty of every group and individual to promote the common good.[17] By making a contribution to developing non-establishment norms, the Church would offer an important counterweight to the very polarized discourse on religious exercise currently affecting American culture in which maximalist free exercise claims are met with hostile attempts to restrict religion. Both extremes are unsustainable. A prudential approach to limiting free exercise, rooted in the Church's intellectual tradition, could help reframe both the legal and civil discourse on the Religion Clauses and the common good.

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14. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 4–7 (2017) [hereinafter *Catholic Institutions*].

15. *Id.* at 11–23.

16. *See, e.g.*, *Highlighted Court Victories*, FREEDOM FROM RELIGION FOUND., https://ffrf.org/legal/challenges/highlighted-court-successes (last visited Jan. 4, 2019); *Legal Successes*, AM. ATHEISTS, https://www.athesits.org/legal/legal-successes (last visited Jan. 4, 2019); *Religious Liberty*, AM. C.L. UNION, https://www.aclu.org/issues/religious-liberty (last visited Jan. 4, 2019).

17. *See generally* Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) [hereinafter A CATHOLIC VIEW OF LAW AND JUSTICE].

This article is organized as follows: Section II describes the Religion Clauses, which work together to promote religious exercise, with the Establishment Clause functioning independently to limit some religious exercise that compromises the integrity of law and government. Section III turns to Catholic teaching on religious freedom and describes its American application as reflecting a nearly-exclusive focus on free exercise norms. Section IV provides some contemporary examples that illustrate the need for the Establishment Clause's independent limiting function. Section V locates the teachings on religious freedom in the larger intellectual context to theorize about Catholic non-establishment norms, while remaining in the framework of free exercise primacy.

II. Free Exercise and Its Limits: Integral to the Common Good

The Supreme Court's interpretation of the Free Exercise and Establishment Clauses has produced not simply two separate bodies of law, but areas of overlap, like the church autonomy doctrine and the ministerial exception, which are rooted in both clauses.[18] Indeed, free exercise themes pervade the non-establishment jurisprudence, which is unsurprising given the fact that the Establishment Clause is designed to be deeply protective of religious freedom.[19] The Establishment Clause ensures the independence of church and state, the secularity of the state, state neutrality on religious matters, the equality of religious persons and groups before the law, the irrelevance of religion to one's status as citizen, and the voluntariness of religious commitments.

But the Establishment Clause is *Janus*-faced: it both promotes and constrains religious exercise. The Court's interpretation has produced a discourse of relationship between the clauses, in which it decides whether a particular government action to aid or accommodate groups or individuals, when not mandated by the Free Exercise Clause, is permissible under or forbidden by the Establishment Clause. In this way, non-establishment constrains free exercise. In the clearest case, the church that believes its institutions must be privileged and its teachings enforced by the civil authorities cannot exercise that aspect of its faith. Of course, the United States has not seen an established church since 1833, so little, if any of the jurisprudence in this area addresses such clear-cut issues.[20]

Perhaps it is this dual identity of the Establishment Clause that is at the heart of so much confusion over the clause's meaning and proper applica-

18. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012), the Court's most recent autonomy decision, rests explicitly on both clauses. *Id.* at 188–89. Earlier autonomy precedents rested on the First Amendment; *see, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–09 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107, 119 (1952).

19. *See* discussion *infra* Section II.A.

20. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 255 n.20 (1963).

tion. Indeed, there are many sub-fields within the jurisprudence, where multiple tests and approaches abound and where unified theories have been offered and resisted.[21] Conservatives tend to emphasize its overlap with free exercise values, while liberals tend to emphasize its independent role in limiting religious exercise.[22] (Some liberals even consider it to function as the atheist's free exercise clause.) The Supreme Court interpretations tend to fall along these political lines; with increasing conservative victories over the last thirty years, the doctrinal arc has moved away from restriction and towards greater protection of religious exercise.[23] Yet the polarized discourse remains, with conservatives claiming maximal freedom and liberals attempting to use the Establishment Clause to curtail religious exercise.

A. The Religion Clauses Together Protect Religious Exercise

The Free Exercise and Establishment Clauses often work together to provide robust religious freedom. Even if both clauses are not explicitly invoked in the same decision, free exercise norms and non-establishment norms often reinforce each other.[24] The Court's first religion decision of the modern era, *Everson v. Board of Education of Ewing Township*,[25] declared, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[26] The *Everson* Court described many elements of the Establishment Clause that promote and protect the free exercise of religion: the requirement of governmental neutrality toward all religious choices; no preference, coercion, or punishment on religious matters; and no state interference in or usurpation of church functions.[27]

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21. For an attempt at a comprehensive understanding of the jurisprudence, see Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. 59 (2017).

22. Some scholars have emphasized that the Establishment Clause protects independent, judicially enforceable rights. *See, e.g.*, *id.* at 89–90.

23. *See Catholic Institutions*, *supra* note 14, at 23–29.

24. Only a person whose religious exercise is affected by coercive government action can bring an action under the Free Exercise Clause. Standing requirements are more lenient for the Establishment Clause because of its structural nature. Professor Esbeck notes:

> The Free Exercise Clause runs in favor of a particular rights holder . . . and so the remedy is focused on lifting the religious harm from that individual. . . . The Establishment Clause, however, is a clause that reduces the net power or jurisdiction of government. No-establishment brought about a carve-out of government jurisdiction for all time, not just with respect to the complaining party before the court, thereby reducing the otherwise plenary power of the government [to undertake its tasks].

Esbeck, *supra* note 4, at 364. For a sustained discussion of standing issues, see generally Fallon, *supra* note 21.

25. Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1 (1947) (upholding bus fare reimbursement program that benefitted parochial school parents).

26. *Id.* at 15–16.

27. The Court wrote:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for

The "wall of separation"—the classic non-establishment principle—provides formidable support for free exercise norms. Although the metaphor has often been criticized by religious groups as an engine of secularization because it justified the ban on school prayer, the basic notion of separate jurisdictions or spheres of church and state, in which religious and governmental functions are segregated, comes straight out of early Christian thought as a bulwark for free exercise protection of the church from state control.[28] Thousands of exemptions throughout state and federal laws, which promote the flourishing of religious exercise, are based on this notion of separation-as-freedom.[29] It is exemplified in Chief Justice Burger's majority opinion in *Walz v. Tax Commissioner*, in which a taxpayer unsuccessfully challenged a church's property tax exemption under the Establishment Clause.[30] In contrast to the challenger's claim, the Court noted that the exemption actually creates a more perfect separation, which prevents the state from getting entangled in church affairs. Within a decade of *Walz*, the Court (per Chief Justice Burger) interpreted federal law to exempt lay faculty at religious schools from the jurisdiction of the National Labor Relations Board in order to avoid church-state entanglement.[31] Non-entanglement later became the third prong of the *Lemon* test,[32] the dominant Establishment Clause approach for a time. Non-entanglement, as it promotes separation-as-freedom, goes far in strengthening the category of "permissible accommodations"—those free exercise protections that are neither required by the Free Exercise Clause nor forbidden by the Establishment Clause.

Church-state separation and non-entanglement are echoed in the church autonomy doctrine, which protects institutional free exercise by making clear that civil courts have no authority to determine religious-ecclesiastical questions or to take sides in religious disputes.[33] Since the state is secular and has no theological competence, such intervention in religious affairs would violate both free exercise and non-establishment norms. These notions of church autonomy are particularly well developed in the

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> entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id.

28. Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

29. *See* Ryan, *supra* note 7.

30. Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970).

31. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

32. Lemon v. Kurtzman, 403 U.S. 602 (1971) (requiring that state action have a secular purpose, have a primary effect that neither advanced nor inhibited religion, and not involve excessive church-state entanglement).

33. *See, e.g.*, Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

employment context. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court determined that both Religion Clauses require a "ministerial exception" from anti-discrimination laws to allow churches to select their ministers.[34] Chief Justice Roberts wrote,

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. *By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions*.[35]

Likewise, the Title VII exemption for religious employers is rooted in the separation-non-entanglement-autonomy triad. This exemption allows religious discrimination in favor of co-religionists regardless of the secular or religious nature of the job.[36] In *Corp. of Presiding Bishop v. Amos*, in which the Court upheld the exemption's constitutionality, Justice Brennan wrote that "[c]oncern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce."[37] As in *Walz*, the challenger claimed an Establishment Clause violation, but the Court viewed the exemption as critical to preserving the overlapping, freedom-promoting norms.

Neutrality affirms both non-establishment and free exercise norms. As noted in *Everson* and seen in the disestablishment experience, the state must not favor or disfavor religion in ways that can coerce, affect, or influence the religious decisions of citizens, who must be free to make voluntary choices. Neutrality is expressed in *Lemon*'s second prong,[38] which prohibits *both* the advancement *and* the inhibition of religion, and it is restated in Justice O'Connor's endorsement test, which prohibits government actions that intend or send a message to endorse *or* disapprove of religion.[39] The case law addressing religious discrimination or preference reveals both

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

35. *Id.* at 188–89 (emphasis added).

36. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 329–30 (1987).

37. *Id.* at 345 (Brennan, J., concurring).

38. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

39. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

norms at work, with some cases arising under one clause or the other.[40] Laws, on their face or as applied, that intentionally target, and thus burden, religious individuals and churches have been found a clear violation of the Free Exercise Clause in numerous instances. The State of Tennessee prohibited clergypersons from political office.[41] The city council of Hialeah passed ordinances to suppress a Santerian church.[42] The State of Michigan made playground safety grants available to all schools except religious ones.[43] The civil rights commission of Colorado evidenced bias toward religion when addressing a religious defense to a discrimination claim.[44] Such targeting was also found to violate the Establishment Clause where Minnesota drafted its charitable solicitation statute to, in effect, disfavor the Unification Church.[45] And most recently, in the litigation surrounding President Trump's Executive Order banning travel to the United States from Muslim-majority nations, the Supreme Court asked for briefing on the Establishment Clause issue,[46] yet some amici briefed it as a Free Exercise issue.[47] In sum, to single out religion or a religious group or individual for a particular disability violates free exercise norms and also fails to recognize the secularity and neutrality of the state in contravention of non-establishment norms.

Given the considerable normative overlap of the Religion Clauses in favor of free exercise, conservatives argue for a narrow interpretation of the Establishment Clause, one that gives it weight only to the extent it reinforces free exercise norms. This has been the consistent position of the Catholic Church as represented by the USCCB in numerous amicus briefs filed with the Supreme Court.[48] The Church's normative vision is that the Establishment Clause's values of separation, non-entanglement, autonomy, and neutrality should work together only to provide robust religious freedom. This includes generous categories of permissible accommodations and permissible aid, broad protections for church institutions, and no discrimination on religious grounds. It especially emphasizes the freedom for religious institutions to work together with government on matters of common concern, so long as each remains in its own proper sphere.[49] But conservatives generally, and the Church specifically, tend to reject an independent

40. Justice Brennan noted that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another . . . . This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." Larson v. Valente, 456 U.S. 228, 244–45 (1982).

41. McDaniel v. Paty, 435 U.S. 618 (1978).

42. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

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

44. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

45. Larson v. Valente, 456 U.S. 228, 245 (1982).

46. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

47. *See infra* notes 124–25 and accompanying text.

48. *See* discussion *infra* Section III.

49. *See* discussion *infra* Section III.

role for the Establishment Clause in limiting religious exercise. They accept in general the "public order" limits to religious freedom but see little need for setting "outer bounds" to religious freedom—at least not by way of non-establishment norms. Under this approach the non-establishment norms and free exercise norms appear redundant. Indeed, the redundancy claim is implied in Justice Thomas' call to un-incorporate the Establishment Clause.[50] Yet Supreme Court case law on the clause makes clear that it does in fact have an independent function that limits government in some of its interactions with religious individuals and institutions. We now turn to this topic.

B. The Establishment Clause Creates Independent Limits to Some Religious Exercise

Contrary to the approach of the Church and many conservatives, the Establishment Clause acts independently to limit some types of religious exercise. First, the clause provides the structural barrier that maintains the integrity and fair functioning of government institutions for all citizens by preserving independence from church control or intervention. This is the corollary to church autonomy—churches enjoy considerable freedom as to their identity, mission, and governance, but are powerless to wield state power or otherwise intrude directly in governmental functions. Second, the clause prohibits government actions that privilege religious groups and individuals in ways unconnected to removing a free exercise burden or that privilege them disproportionately, that is, without regard for the rights or circumstances of others. Both limiting roles can correct religious harms, but they often have the additional or even the sole effect of rectifying *non-religious* harms.[51] A restriction on religious exercise might give greater freedom for non-religious actions, or protection to non-religious people and entities. Those who do not want to pray benefit from a no-prayer rule.[52] Businesses benefit financially if they are not required to accommodate religious practice in a particular way.[53] Teachers gain more academic freedom if they do not have to conform curriculum to religious tenets.[54] Thus, citizens may reap civil benefits where the clause strikes laws that give state power to a church, aid a church but not its free exercise, or aid a church in ways that lack balance or proportion. We now explore in greater detail the clause's independent limiting function.

50. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring) (arguing that clause's original purpose is to limit Congress's interference with state establishments). Such action would render the clause inapplicable to the states, thereby allowing them to decide for themselves the proper relationship between church and state.

51. *See generally* Esbeck, *supra* note 4.

52. *Id.* at 364.

53. *Id.* at 392 n.159.

54. *Id.*

1. When Structural Church-State Separation Is Compromised

The Establishment Clause preserves the integrity of state institutions and prevents "a fusion of governmental and religious functions."[55] Here the wall of church-state separation is focused not on the freedom of the church (as previously described) but rather on limiting its freedom. As early as 1872, the Supreme Court noted that "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference."[56] That integrity involves several different considerations. First, because government is secular, its members cannot be required to profess any particular faith or religion. Just as religion is irrelevant to one's standing as a citizen,[57] so it is with one's more formal participation in government. Thus, the Constitution prohibits a religious test for federal office, a prohibition that was later extended to the states in *Torcaso v. Watkins*.[58] Relying heavily on *Everson* and other early Establishment Clause decisions, the *Torcaso* Court held that a non-theist's position as a public notary could not be conditioned on his declaring a belief in God.[59] While this could be viewed as protecting individual rights to participate in government, a nationwide prohibition on religious tests for office also ultimately protects government from capture by any particular church or religion.

Second, non-establishment involves the preservation of governmental institutions: public schools, public property, and the public treasury. While this principle is uncontroversial, the Supreme Court's application of it has been particularly troubling to conservatives, including evangelical Protestants and Catholics.[60] In the public school context, the Court has been remarkably strict in its elimination of religious influences, as these schools serve students of all religions and no religion. Religious instruction inside the school building, devotional prayers and Bible reading either in the classroom or any school-sponsored event (even a football game), and creation science or the Ten Commandments in the classroom have all been found to violate the Establishment Clause.[61] As to religious symbols on public property, decisions have been mixed, but the Court has twice prohibited symbols from the interiors of courthouses, which are especially sensitive spaces in which citizens of all religions and no religion gather for civic business of all

55. Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982).

56. Watson v. Jones, 80 U.S. 679, 730 (1871).

57. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

58. Torcaso v. Watkins, 367 U.S. 488 (1961).

59. *Id.* at 495.

60. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting).

61. Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (religious instruction); Engel v. Vitale, 370 U.S. 421 (1962) (classroom prayer); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Bible reading); Epperson v. Arkansas, 393 U.S. 97 (1968) (creation science); Stone v. Graham, 449 U.S. 39 (1980) (Ten Commandments classroom poster); Edwards v. Aguillard, 482 U.S. 578 (1987) (creation science); *Lee*, 505 U.S. 577 (graduation prayer); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (football game prayer).

sorts. In *McCreary County, Kentucky v. ACLU*, the Court found a complete lack of secular purpose when the Ten Commandments were displayed in a courthouse under circumstances emphasizing their religious significance.[62] In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court found that a crèche displayed prominently inside a county courthouse during the Christmas season sent an unequivocal message of religious endorsement.[63] Even though no particular church could be identified as the beneficiary in these school and public property cases, the Court instead found that benefits to Christianity in general were sufficient to violate the prohibition on "laws respecting an establishment of religion."[64]

As to the public treasury, the *Lemon* test quite aggressively prohibited many forms of aid to religious (predominantly Catholic) schools, finding that they had the primary effect of advancing religion and finding further that any attempt to monitor the aid to prevent this effect would create excessive church-state entanglements.[65] The emphasis on non-entanglement suggests that the Court was protecting the church's autonomy from intrusion, yet strict separationist "no-aid" dicta in *Everson* and many early Establishment Clause cases, echoing Blaine Amendment language of the late nineteenth century, suggest an even higher value for protecting the public treasury from Catholic claims.[66] Conservatives, including Catholic bishops in their amicus role, vigorously argued for moderating *Lemon.* Even though there has been considerable softening on the school aid issue, there remains a firm prohibition on the direct funding of church institutions for their religious activities.[67]

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62. McCreary County v. ACLU, 545 U.S. 844 (2005).

63. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

64. This position in the property context may be changing, *see* Town of Greece v. Galloway, 572 U.S. 565 (2014).

65. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Comm. for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Levitt v. Comm. for Public Educ. & Religious Liberty, 413 U.S. 472 (1973).

66. Throughout the nineteenth century, Catholic leaders sought public funding for their schools. They wanted to be treated like the public schools because, they argued, public schools were actually Protestant schools, given the ubiquity of Christian devotional practices. These claims for equity in funding were met with intense opposition. Senator James G. Blaine offered a constitutional amendment to forbid public monies from being controlled by any religious organization. While that amendment was never adopted, many states adopted their own constitutional provisions that prohibited the funding of "sectarian" institutions or activities. *Catholic Institutions*, *supra* note 14, at 13–16.

67. Mitchell, 530 U.S. at 801–03 (plurality opinion). For criticism claiming the breach of this prohibition, *see* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2030 (2017) (Sotomayor, J., dissenting).

The cases mentioned involve endorsement or aid to religious groups that can compromise the integrity and independence of government. But more direct and immediate concerns regarding the preservation of this independence arise whenever there is delegation of civic authority to religious bodies. Only two Supreme Court decisions describe such a scenario, which attests to the widespread reality of structural church-state independence. In *Larkin v. Grendel's Den*, Massachusetts had enacted a statute that gave churches and schools the discretion to veto applications for liquor licenses within the vicinity of five hundred feet.[68] After its application was rejected because of a nearby church's objection, a restaurant successfully challenged the law on Establishment Clause grounds. The Court held that the "'wall' is substantially breached by vesting discretionary governmental powers in religious bodies."[69] The state law "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications."[70] The law violated the non-entanglement requirement because it "enmeshes churches in the exercise of substantial governmental powers. . ."[71] and results in a "fusion of governmental and religious functions."[72]

In *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court also found a delegation of state authority—but this time not to a religious body.[73] A New York state law created a separate school district for a Village whose population was entirely Satmar Hasidic. The law granted the Village "all the powers and duties of a union free school district."[74] Handicapped Satmar children from the village and elsewhere who were unable to attend private yeshivas were sent to this public school. But the *Kiryas Joel* Court made clear that a school district could not be created along religious population lines. The Court noted that "[a]uthority over public schools belongs to the State, and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group."[75] The Court did not consider "constitutionally significant" the fact that the law empowered the village citizens rather than a religious

68. Larkin v. Grendel's Den, 459 U.S. 116 (1982). It was far more common for zoning ordinances simply to ban liquor licenses within a certain number of feet of these sensitive uses. *Id.* at 123–24.

69. *Id.* at 123.

70. *Id.* at 127.

71. *Id.*

72. *Id.* at 126.

73. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994); *see also* Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002) (holding part of the New York kosher fraud law unconstitutional); State *ex rel.* Heitkamp v. Family Life Servs., Inc., 616 N.W.2d 826 (N.D. 2000) (delegating civil authority and discretionary powers on the basis of religious criterion).

74. Bd. of Educ. of Kiryas Joel Village Sch. Dist., 512 U.S. at 693.

75. *Id.* at 698.

body: since the village lines were drawn entirely along "the lines of a religious community . . . we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority."[76] The state law defined "a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"[77]

The religious groups in *Larkin* and *Kiryas Joel* only wanted accommodations like freedom from neighbor nuisance and the ability to school their disabled children, but the way in which those accommodations were achieved violated non-establishment norms. Religious exercise cannot be protected when it is achieved by a fusion with government power. These goals were fully attainable through different means. The *Larkin* Court made clear that there were legitimate ways to protect churches by using liquor bans near schools and churches commonly found in zoning laws. And the *Kiryas Joel* Court noted other alternatives to the creation of the special school district. In fact, *Kiryas Joel* did get its public school district, ultimately by way of a broad and neutral law that allowed any municipality of 10,000–125,000 residents contained within a larger school district the right to petition for its own separate district.[78]

2. When Free Exercise Is Promoted Without Measure

The second category of limits to religious exercise focuses on government accommodations that either lack any relation to religious exercise or lack any consideration of any other non-religious interests. This involves government actions that privilege religious groups and individuals in ways unconnected to removing a free exercise burden, or privilege them in extreme ways, without any consideration of impacts on others' rights or circumstances, thereby giving an unwarranted advantage. The Court has noted the boundaries to permissible accommodations: "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.' At some point, accommodation may devolve into 'an unlawful fostering of religion.'"[79] Drawing the line between lawful protection of religious exercise and an unlawful fostering of religion admittedly is a challenge.

The Court has made clear that religion-only accommodations must promote religious exercise. In *Amos*, mentioned above, the Court found it essential that a religion-only accommodation lift burdens to religious exer-

76. *Id.* at 702.

77. *Id.*

78. LESLIE A. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 59 (4th ed. 2017).

79. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–35 (1987).

cise caused by a generally applicable regulation.[80] The Title VII exemption for religious employers, which allows churches to engage in religious discrimination (by preferring co-religionists in hiring) was upheld because this exemption did lift a significant burden to a church's ability to define itself and its mission.[81] Two years after *Amos*, *Texas Monthly v. Bullock* held that an exemption that is unrelated to the promotion of religious exercise will run afoul of the Establishment Clause.[82] In that case, a secular magazine challenged a sales tax exemption for religious periodicals. The plurality opinion authored by Justice Brennan noted the contrast with *Amos*. Because the exemption "*cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion*," it constituted an "unjustifiable award[ ] of assistance" to churches.[83]

The Establishment Clause thus demands a nexus between the religion-only accommodation and the promotion of religious exercise. But even with such a nexus, the accommodation must be crafted in a way that gives due consideration to other significant interests (or that creates a mechanism in which such consideration can be given). This lack of balance surely existed in both *Larkin* and *Kiryas Joel*, where the accommodations involved the compromise of government integrity. But even apart from the delegation issue, accommodations without boundaries may collide with the Establishment Clause wall. *Estate of Thornton v. Caldor* presented such an accommodation.[84]

Given the demise of Sunday closing laws, Connecticut enacted a state law that allowed any employee to declare a Sabbath day that employers had to respect. The *Thornton* Court found that a law providing Sabbath observers an "absolute and unqualified right not to work on whatever day they designate as their Sabbath"[85] had the primary effect of advancing religion in violation of the *Lemon* test.

> In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The

80. "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338.

81. *Id.* at 342–43 (Brennan, J., concurring).

82. 489 U.S. 1 (1989).

83. *Id.* at 15 (emphasis added).

84. Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

85. *Id.* at 709.

> employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.[86]

Justice O'Connor noted in her concurrence that, in contrast to the Connecticut law, federal law requires employers to accommodate the religious needs of employees only after taking into account the business owner's needs as well as obligations to other employees (seniority, collective bargaining agreements, and the like).[87] Under this approach, Sabbath observers receive scheduling protection unless that creates hardships for other affected groups. There are problems with this approach as well, as it may be underprotective, with many religious employees finding themselves without workplace accommodation. But the avenue taken by *Thornton*—total disregard of any other legitimate interest—is not an acceptable route.[88]

The notion of religious accommodations that fail to promote free exercise in a measured way is further elaborated in *Cutter v. Wilkinson.*[89] In this challenge to the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA), state prison officials argued that the creation of a specialized exemption process for prisoners' religious practices violated the Establishment Clause. RLUIPA was unanimously upheld on the ground that the statute provided for a balancing of competing interests. The statute is structured so that the prisoner must first prove that a prison rule substantially burdens his or her religious exercise; if successful, the government must show that its rule advances a compelling interest, with no less restrictive way to advance that interest.[90] As Justice Ginsburg wrote,

> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. In *Caldor,* the Court struck down a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." We held the law invalid under the Establishment Clause because it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests."
>
> We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "[c]ontext matters" in the application of

86. *Id.*

87. *Id.* at 711–12.

88. Professor Esbeck notes that the government in *Thornton* had moved off the neutral baseline, as if it was "actively taking sides in favor of religious observance." Esbeck, *supra* note 4, at 395. "Government may not regulate the private sector with the purpose of creating an unyielding preference for religious observance over competing secular interests." *Id.* at 392.

89. Cutter v. Wilkinson, 544 U.S. 709 (2005).

90. *Id.* at 712.

> that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions.[91]

The full meaning of what it means for an accommodation to be "measured" is open to debate. There are competing views on how an accommodation should be balanced against other significant interests.[92] Some tend toward a position that would save an accommodation nearly always, except perhaps for extreme exigencies.[93] Others tend toward a position that would consider most negative impacts or harms to third parties to render the exemption unconstitutional.[94] Both extremes are unsustainable—a process of balancing is necessary to make these determinations.

Some principles help in the consideration of competing interests. For instance, if the accommodation rests on church autonomy concerns, there is greater weight in favor of broad exemptions and less weight given to religious and non-religious harms. The religious employer exemption in *Amos* was autonomy-based, allowing religious entities (so long as they were nonprofit) the unfettered right to make employment decisions on religious criteria. The interests of employees were properly disregarded in favor of the overriding need for institutional autonomy on identity and mission.

3. The Result: Non-Religious Harms Are Rectified

Professor Esbeck has argued that the structural separation of church and state rectifies religious harms (that is, by promoting religious freedom) and non-religious harms.[95] The Establishment Clause protects not just religious groups and individuals but *all* citizens because government represents and acts on behalf of everyone. When the *Torcaso* Court ended religious tests for state office, it opened government service regardless of faith—or no professed faith.[96] When the *McCreary* and *Allegheny* Courts restricted religious displays in the interior of courthouses, they recognized that people who conduct their civic business in such locations are all members of the political community, regardless of faith—or no professed faith.[97] When the Court banned classroom prayer, it increased the freedom of religious minorities, but also of non-religious students; when it banned the teaching of cre-

91. *Id.* at 722–23 (citations omitted).

92. Justice Ginsburg added, "Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Id.* at 720 (citations omitted).

93. *See, e.g.*, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE (2015).

94. *See supra* note 10.

95. Esbeck, *supra* note 4, at 363–65.

96. *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

97. *See* McCreary County v. ACLU, 545 U.S. 844 (2005); Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

ation science, it promoted academic freedom.[98] When the Court limited some types of aid to religious schools, it acknowledged the taxpayers' interest in not funding religion. When the *Texas Monthly* Court struck the sales tax exemption for religious literature and the *Larkin* Court struck the discretionary veto power of a church over a liquor license, they rectified the economic harms flowing from those accommodations.[99] Likewise, businesses benefitted when the *Thornton* Court struck the Connecticut law allowing unfettered Sabbath-taker rights.[100]

This line of cases demonstrates that sometimes religious freedom is limited in order to ensure that all citizens have a secular, religiously-neutral, fair government, with full access to participation regardless of faith or no professed faith. Deciding whether a particular accommodation is an "unjustified award of help" may be a difficult task. But such a category is an inevitable warrant of our constitutionally limited government.

III. The Catholic Interpretation: The Primacy of Free Exercise

Catholic leaders have long considered the constraints imposed by the Establishment Clause unfair, even hostile, to the Church's free exercise. This sentiment has been directly related to the Catholic view of the Church's own schools. Bishops have always viewed the ability of parents to send their children to religious schools to be a fundamental right of religious exercise—and as early as the nineteenth century they sought public aid to support that right.[101] But state Blaine Amendments and early Establishment Clause interpretations constrained that parental free exercise in the interest of a strict "separation of church and state" and its no-aid policies.[102] In the 1970s and 1980s, the *Lemon* test barred many types of government aid to religious schools, with direct impacts on Catholic schools.[103] Further, Catholics and others have criticized separationist interpretations of the Establishment Clause as the engine for privatizing religion and secularizing American culture, as some litigants treated the Clause as granting an affirmative right to a religion-free society. Thus, it is understandable that Catholics, among others, have argued for the narrowest interpretation of non-establishment norms to push back the separationist tide and allow the broadest latitude for religious exercise. They have been quite successful at redirecting the law away from separation toward accommodation.

Free exercise and non-establishment norms now overlap in the education-funding context. Over time, the Court became more tolerant of pro-

98. *See* Epperson v. Arkansas, 393 U.S. 97 (1968); Engel v. Vitale, 370 U.S. 421 (1962).
99. *See* Texas Monthly v. Bullock, 489 U.S. 1 (1989); Larkin v. Grendel's Den, 459 U.S. 116 (1982).
100. *See* Estate of Thornton v. Caldor, 472 U.S. 703 (1985).
101. *Catholic Institutions*, *supra* note 14, at 11–29.
102. *Id.* at 15–21.
103. *Id.* at 21–23.

grams that did not directly fund schools or their teachers but instead allowed parents to choose a religious education for their children as one among many options. Using this religion-neutral private choice concept, conservatives on the Court began to erode *Lemon*'s dominance and the limits it placed on religious exercise—even religious exercise that involves a claim to public funds.[104] In 2002, the Court upheld a school voucher program that included religious schools.[105] Indeed the shift has been so dramatic that, in *Trinity Lutheran Church and School v. Comer*, the exclusion of church schools from a grant program was viewed as a violation of the Free Exercise Clause and not, as the separation-minded dissenters saw it, a mandate of the Establishment Clause.[106]

A. The Declaration on Religious Freedom and an Establishment Clause that Serves the Free Exercise Clause

Church leadership has long rejected an interpretation of the Establishment Clause that has an independent role of rectifying non-religious harms.[107] Conservatives, associating this role with anti-religious hostility, challenged the very notion of the independent constraining function of the Establishment Clause. Such challenges have served the Church and other religious groups well, as repeated argumentation has helped redirect the jurisprudence toward a greater latitude for free exercise accommodations.[108] But for Catholics this is not merely a self-serving litigation strategy. This position is driven by the Church's own teachings. The Church's *Declaration on Religious Freedom* (the *Declaration*), issued at the Second Vatican Council in 1965, sets forth the need for robust free exercise protection and is largely silent on non-establishment norms.[109] Unsurprisingly, the Church's American implementation of the *Declaration* has prioritized the Free Exercise Clause over the Establishment Clause.[110] Most significantly, USCCB amicus advocacy—which presents its normative vision of what the

104. *Id.*

105. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

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

107. *See infra* notes 119–45 and accompanying text.

108. *See generally Catholic Institutions*, *supra* note 14, for the success of the maximalist free exercise argument.

109. *See* DECLARATION, *supra* note 11. The *Declaration* is summarized in the COMPENDIUM, *supra* note 2, at 421–22.

110. *See* Kevin C. Walsh, *Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 STAN. L. & POL'Y REV. 411 (2015). Professor Walsh has written that:

> The Conference's briefs supply the closest thing one can find to *the* Catholic position on questions of constitutional law, but it is important to note at the outset that *there is no such thing*. To be clear: there is no "Catholic answer" to questions of federal constitutional law (or any questions of federal law, for that matter). There is . . . a Catholic teaching about the necessity for the Church to have the freedom to be a Church: to administer sacraments and to gather the People of God. But there is no Catholic teaching about the meaning of the Free Exercise Clause of the First Amendment. And so on. When bringing Catholic teaching to bear on questions of federal law before the Supreme

law ought to be—claims that the Establishment Clause is authentic only insofar as its reinforces free exercise.[111]

The *Declaration* claims for all individuals and institutions the broadest protection of free exercise, subject to public order limits (defined as the protection of rights, civic peace, and public morality).[112] It abandons the Church's former claim to legal privilege and its former teaching that religious error had no rights. It makes clear that government must not discriminate on religious grounds or "command or inhibit acts that are religious."[113] But because it is a document for a global church with a history of establishments, it envisions a positive governmental role in accommodating religious exercise[114] and even retaining establishments if those are historic in a given nation, as long as free exercise rights are protected for all.[115]

In the American context, John Courtney Murray, S.J., the *Declaration*'s main drafter, argued in the late 1940s for the primacy of the Free Exercise Clause and a reading of the Establishment Clause that was in service to free exercise norms.[116] Murray reacted sharply against early Establishment Clause decisions of the Supreme Court that were absolutist in their separationism.[117] This free exercise primacy is a powerful normative stance and has been the consistent position of the bishops ever since, as is evident in the USCCB[118] amicus briefs of the last fifty years filed with the Supreme Court in specific Free Exercise and Establishment Clause cases. The Conference briefs often provide an originalist narrative of the framers' intent for the Establishment Clause to show its narrow scope: to prohibit a national church and not to interfere with the state establishments.[119] The Clause "re-

> Court of the United States, the Bishops' Conference makes prudential, strategic, tactical, and legal judgments in deciding whether to file a brief and what to include in it.

Id. at 413–14. This is, of course, correct on one level. There must be room to make shifts in legal argumentation, and ossifying current argumentation by calling it official teaching would be a mistake. But legal arguments *are* made, consistently, publicly, and with authority. *See Amicus Briefs*, U.S. CONF. CATHOLIC BISHOPS, http://www.usccb.org/about/general-counsel/amicus-briefs/index.cfm (last visited Mar. 2, 2019); amicus briefs noted *infra* at notes 119–45. Over time, the Church has quite clearly marked positions on given controversies to bring moral judgment to bear. Thus, while there may be no "Catholic answers" to the questions posed, Catholic leaders have never shied away from offering tentative ones.

111. *See infra* notes 119–45.

112. DECLARATION, *supra* note 11, § 7.

113. *Id.* § 3.

114. *Id.* ("Government therefore ought indeed to take account of the religious life of the citizenry and show it favor. . ."); *id.* § 6 ("Government is also to help create conditions favorable to the fostering of religious life. . .").

115. *Id.* § 6.

116. John Courtney Murray, *Law or Prepossessions?*, 14 L. & CONTEMP. PROBS. 23 (1949), http://scholarship.law.duke.edu/lcp/vol14/iss1/2.

117. *See id.*

118. *See infra* notes 119–45 and accompanying text; *see also*, Sullivan, *Indifferentism Redux*, *supra* note 13; *Catholic Institutions*, *supra* note 14.

119. *See, e.g.*, Brief for United States Catholic Conference as Amicus Curiae in Support of Appellants, Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Nos. 86-179, 86-401), 1987 WL 864775.

flects the experience of its framers that officially preferred or established religion generates religious intolerance and infringes personal liberty."[120] Church-state separation is therefore warranted only to promote religious freedom and church autonomy (i.e., only to the extent that it ensures no preference of a religion and no interference in religious belief, practice, or governance).[121]

The USCCB accepts the notion, set forth in Section II.A., of overlapping Religion Clauses, arguing that the Free Exercise and Establishment Clauses should "be construed and applied harmoniously as complementary protection of religious liberty"[122]—in short, that the Establishment Clause buttresses the Free Exercise Clause. As to the Free Exercise Clause itself, the bishops' briefs give it a broad interpretation, contending that it is capable of addressing all conscience claims and all discrimination claims, and that the Establishment Clause is superfluous. In the recent litigation in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* concerning a baker who refused to create a cake for a same-sex wedding, the USCCB argued as amicus that all conscience claims, both religious and non-religious, arise under free exercise (noting that the state could not require even an atheist business owner to provide a message she found offensive).[123]

The USCCB locates claims of religious discrimination solely under the Free Exercise Clause as well. In the recent litigation over the travel ban that disproportionately involved Muslim-majority nations, the religious discrimination claim had been framed as an Establishment Clause violation.[124] The bishops' amicus brief argued that the ban was an obvious violation of the Free Exercise Clause, as the "text and context of the proclamation leaves no doubt that it targets Muslims for special disfavor, failing the basic requirement of religious neutrality" under that clause.[125]

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120. *See id.* at *14.

121. *See* Brief for United States Catholic Conference as Amicus Curiae in Support of Appellants, Aguilar v. Felton, 473 U.S. 402 (1985) (Nos. 84-237, 84-238, 84-239), 1984 WL 565475.

122. Brief for United States Catholic Conference as Amicus Curiae in Support of Petitioners, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (No. 84-773), 1985 WL 669821, at *9.

123. Brief for United States Conference of Catholic Bishops as Amici Curiae in Support of Reversal at 22, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4131333, at *22 ("The Free Exercise Clause protects individuals and organizations of every faith and those of no faith at all. Whether Muslim or Christian, Jewish or Hindu, the right to exercise one's conscience is as universal a value as any the Constitution recognizes. It makes no difference that Masterpiece Cakeshop is owned by a Christian. The same arguments would apply if the owner belonged to any religion, or none.").

124. Trump v. Hawaii, 138 S. Ct. 2392, 2415–18 (2018).

125. Brief for United States Conference of Catholic Bishops as Amici Curiae in Support of Respondents at 8, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1605661, at *8.

B. The Embrace of Neutral Programs of Private Choice: Overlapping Free Exercise and Non-establishment Norms

This notion of the primacy (and near-exclusivity) of the Free Exercise Clause works together with the narrow interpretation of non-establishment norms. During the *Lemon* era, the Conference argued that the Establishment Clause was being used to limit aid in situations that did not "pose a realistic threat of impairing religious freedom."[126] The bishops' briefs criticized the Court's broad and speculative concern of the "excessive entanglement" that might result from certain aid programs.[127] The briefs argued that church-state entanglement had to refer to actual and direct interference in *religious* matters of belief, practice, or governance. "[W]hen [Establishment Clause interpretation] is not so rooted, it can lead to the invalidation of government programs which do not threaten authentic constitutional values."[128] Indeed, the Conference repeatedly called for "A New Approach to the Interpretation of the Establishment Clause."[129]

Owing to the consistent arguments of conservatives (and a receptive Court), the jurisprudence has shifted toward allowing, sometimes requiring, neutral programs of private choice to permit participation by religious institutions,[130] where aid is allocated on "the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[131] Indeed, the Conference briefs have embraced this private choice model in both funding and accommodation contexts, as it captures the notions of parental free exercise to choose a religious education for children, as well as freedom of conscience, freedom from discrimination, and church autonomy.[132] On aid programs, the bishops consistently argue that if "funds originating with the

126. Brief for United States Catholic Conference as Amicus Curiae in Support of Petitioners, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (No. 83-990), 1983 WL 486389, at *16 (arguing further, "officially preferred or established religions generate religious intolerance and persecution. Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose no threat to religious freedom.").

127. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

128. Brief for United States Catholic Conference as Amicus Curiae in Support of Appellants, *supra* note 121, at *15.

129. Brief for United States Catholic Conference as Amicus Curiae in Support of Petitioners, Agostini v. Felton, 521 U.S. 203 (1997) (No. 96-552), 1997 WL 86237, at *14. For a detailed analysis of the brief, see *Indifferentism Redux*, *supra* note 13, at 1011–15.

130. *See supra* notes 101–106 and accompanying text.

131. Brief of United States Conference of Catholic Bishops as Amici Curiae in Support of Petitioner at 21, Trinity Lutheran Church, Inc. v. Comer, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 1639726, at *21; *see also* Brief for United States Conference of Catholic Bishops as Amici Curiae in Support of Respondent, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22087619.

132. *See infra* notes 133–37 and accompanying text.

government flow to religiously affiliated schools as a result of genuinely independent and private choices of individuals," there is no Establishment Clause violation.[133]

The notion of private choice has also had a powerful influence on the jurisprudential development of accommodations and exemptions. Of course, the older ideas of separation-as-freedom remain: as the Bishops' Conference brief in *Walz* noted, tax exemptions contribute "to the secularity of government" as well as to religious freedom.[134] Such exemptions "foster the great objects of the constitutional mandate of separation: religious and political peace, harmony and order, in our society."[135] But over time, the concept of private choice got added to the mix. The Conference's briefs argued that accommodations, like the religious employer exemption in *Amos*, create a space for private religious activity based on private choice. By definition, then, the voluntary religious choices made within this space cannot be ascribed to the government, even though the law itself has created the exemption.[136] Similarly, church autonomy protects the private choices of religious institutions.[137] The state does not advance religion—the individuals and entities are advancing religion by their voluntary acts, which is just another way of describing religious freedom.

C. The Invisibility of "Non-Religious Harms"

The USCCB's public position on Establishment Clause interpretation does not recognize the value of curtailing free exercise to prevent or rectify non-religious harms, as those are described in Section II.B. above. The clear refrain that emerges in amicus advocacy is that any valid interpretation of the Establishment Clause must support or promote free exercise. The Estab-

133. Brief for United States Conference of Catholic Bishops as Amicus Curiae in Support of Petitioners, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1480726, at *10; Brief for United States Conference of Catholic Bishops as Amici Curiae in Support of Petitioners, Arizona Christian School Tuition Org. v. Winn, 563 U.S. 125 (2011) (Nos. 09-987, 09-991), 2010 WL 3535061.

134. Brief for United States Catholic Conference, Amicus Curiae, Walz v. Tax Comm. of the City of New York, 397 U.S. 664 (1970) (No. 135), 1969 WL 119908, at *13.

135. *Id.* at *67.

136. Brief for United States Catholic Conference, *supra* note 119; *see also* Brief for United States Catholic Conference, *supra* note 122.

> The voluntary student activity in this case [an independent student prayer group in a public school] is protected under the Free Exercise Clause as religious activity. . . . Properly harmonized with the Free Exercise Clause, in accord with the authentic purposes of the Religion Clauses, the Establishment Clause may not be applied to subvert legitimate Free Exercise rights.

Id. at *21. The vision is further described: "Although the Religion Clauses enjoin the government to be neutral in relationships among sects, the two Religion Clauses require a benevolent neutrality which (a) accommodates the spiritual needs of the people (Free Exercise) but also (b) avoids official preference or support for particular religions (Establishment)." *Id.* at *15.

137. Brief for United States Conference of Catholic Bishops as Amici Curiae in Support of Petitioner, Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171 (2012) (No. 10-553), 2011 WL 2470845.

lishment Clause is designed only to "avoid relationships between church and state that [directly and demonstrably] impair religious liberty."[138] The clause is almost never used to describe a limitation on free exercise[139]—in fact, one brief, citing *Texas Monthly*, voiced frustration that "the line between a valid accommodation and an invalid preference is not clear, and every legislative exemption still has to be defended against Establishment Clause challenges."[140] The bottom line is this: if a court is going to curtail free exercise in one instance, it should be doing so in order to promote free exercise more generally. The Conference briefs have argued that the Establishment Clause should not even apply to situations of church-state cooperation on health, social services, and education as long as "each institution remains in its own proper sphere and the program only facilitates cooperation to advance the common good of society."[141]

Obviously, the USCCB's amicus posture offers a vision of the common good: the human person flourishes in social contexts in which there is robust religious freedom. The harmony of the Religion Clauses, as defined by the framers, demands the broadest protection of conscience and religious freedom for all. Thus, it makes sense to embrace private choice regimes for government benefits, and to permit religious accommodations to create "space" in which private choices are made. Even (and perhaps especially) on controversial matters, they argue, "the common good is best served if courts show deference to individuals and organizations choosing to exercise

138. *Indifferentism Redux*, *supra* note 13, at 1015. *See also* Brief for United States Catholic Conference, *supra* note 121 ("The Establishment Clause was intended to buttress the Free Exercise Clause. Applications which burden religious liberty are inconsistent with the intent of the framers and are necessarily erroneous."). Professor Winnifred Fallers Sullivan surveyed numerous amicus briefs from the 1980s and 1990s, and found a consistent claim for accommodation, citing to briefs filed in: Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (No. 91-948); Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014); Bowen v. Kendrick, 487 U.S. 589 (1988) (No. 87-253); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (No. 86-179); Sch. Dist. v. Ball, 473 U.S. 373 (1985) (No. 83-990); Mueller v. Allen, 463 U.S. 388 (1983) (No. 82-195); and Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689). *Indifferentism Redux, supra* note 13 at 1007 n.76.

139. The Conference's brief in *Hosanna-Tabor* does provide an example of reciprocal limitations: just as the state has no control over the selection of clergy, so a church has no control over whether a person is eligible to run for state office. Brief for United States Conference of Catholic Bishops, *supra* note 137.

140. Brief for United States Conference of Catholic Bishops as Amicus Curiae in Support of Respondents, Gonzales v. O Centro Espírita Beneficiente Uñiao Do Vegetal, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2211654, at *12.

141. Brief for United States Catholic Conference as Amici Curiae in Support of Petitioners, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648), 1999 WL 631664, at *19 [hereinafter Brief for United States Catholic Conference, Mitchell v. Helms]; Brief of United States Catholic Conference as Amicus Curiae in Support of Appellant, Bowen v. Kendrick, 487 U.S. 589 (1988) (Nos. 87-253, 87-431) 1988 WL 1031758 ("Benevolent neutrality, not separatism, must be at the heart of Establishment Clause analysis." "Where a statute doesn't directly sponsor, fund, or involve in religious activity," the Establishment Clause is not applicable. When activity is "purely a social welfare activity, there is no need for this Court to engage in a detailed process to determine whether the incidental involvement of religious organizations is legitimate.").

their consciences in challenging situations implicating their religious beliefs."[142] The Establishment Clause is "not a ban upon beneficial government action that strengthen[s] the common good, even if religiously motivated."[143] Nor should it "be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights."[144] To have an Establishment Clause violation, "[t]he State must be directly and substantially involved with religion as religion, rather than contact occasioned by cooperation with the public interest."[145]

So why should Catholics give greater regard to the independent constraining function of the Establishment Clause, especially when its arguments for a narrow reading of the clause have been so successful? For this reason: just as the clause protects religious freedom and autonomy, it also protects government from religious encroachment that can compromise its independence and neutrality. Just as robust religious freedom offers civic peace and promotes pluralism, so too with an Establishment Clause that sometimes must curtail disproportionate accommodation to preserve that peace and pluralism. These too are "authentic" Establishment Clause values. And good for the common good.

IV. The Need for Establishment Clause Limits: Contemporary Examples

A number of contemporary examples call for Establishment Clause restrictions on religious exercise—some clearly, others arguably. In this section, I offer the examples as ways to further consider the clause's independent function to preserve the integrity of government and ensure that accommodations promote free exercise in a measured way, and to show how non-religious harms often need to be rectified by these limits. My purpose is to point out that Catholic advocacy, which does not engage this area of law, could and should do so based on its own intellectual tradition. A uniquely Catholic approach to Establishment Clause restrictions on religious exercise, the subject of the next section, could make a significant contribution to the understanding of "responsible" religious freedom.

142. Brief for United States Conference of Catholic Bishops, *supra* note 123, at *28.

143. Brief for United States Catholic Conference, Mitchell v. Helms, *supra* note 141, at *7.

144. Brief for United States Conference of Catholic Bishops, *supra* note 140, at *21 (quoting Justice Kennedy's opinion in *Bd. Of Educ. of Kiryas Joel Village Sch. Dist.*, 512 U.S. 687, 730 (1994)).

145. Brief for United States Catholic Conference, Mitchell v. Helms, *supra* note 141, at *11.

A. When Structural Church-State Separation is Compromised

1. Church-State Fusion: Policing Policies

The doctrine of Establishment Clause limits is an essential part of the jurisprudence of the Religion Clauses and restrains abuses of governmental power by a religious group. The recent case of *U.S. v. Town of Colorado City* provides an example.[146] The Department of Justice sued the local governments of Colorado City and Hildale, two towns along the Utah-Arizona border. Those governments had been controlled by the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS, or the so-called fundamentalist Mormons) and its jailed leader Warren Jeffs. For decades, the towns not only ignored substantial law-breaking by the FLDS Church, but affirmatively did the Church's bidding by engaging in housing discrimination[147] and police misconduct toward residents who were not church members—including coercion, intimidation, false arrests, unreasonable property seizures, and denial of municipal services.[148] The Federal District Court found that the police department was deeply entangled with the Church; indeed, the FLDS Church controlled and directed the department's decisions, leaving a long trail of abuses, like training and equipping Church security forces and helping the Church harass non-members.[149] The judge acknowledged that "the constitutional right to the free exercise of religion, on the one hand, and the statutory right to housing and constitutional policing on the other hand are vitally important to a viable, peaceful community."[150] He found, *inter alia*, an Establishment Clause violation because the evidence showed the fusion of government and religion, with the purpose or effect of endorsing, promoting, and favoring the Church at the expense of non-members.[151]

This is an establishment marked by "the danger of political oppression" through church-state union.[152] And we know from our own history

146. United States v. Town of Colorado City, No. 3:12-cv-8125-HRH, 2017 WL 1384353 (D. Ariz. Apr. 18, 2017), *appeal filed*. For some older cases of church-state fusion, see State v. City of Rajneeshpuram, 598 F. Supp. 1217 (D. Ore. 1987); State v. Celmer, 404 A.2d 1 (N.J. 1979).

147. This discrimination included coercion, intimidation, and interference in seeking housing and discrimination in the provision of municipal services. *Town of Colorado City*, 2017 WL 1384353 at *5–8.

148. *Id.* at *8–9. *See generally* U.S. DEP'T. OF JUSTICE., NO.17-424, FEDERAL COURT ISSUES ORDER IN LAWSUIT AGAINST THE TWIN CITIES OF COLORADO CITY, ARIZONA AND HILDALE, UTAH, FINDING WIDESPREAD POLICE MISCONDUCT AND RELIGIOUS DISCRIMINATION (Apr. 19, 2017), https://www.justice.gov/opa/pr/federal-court-issues-order-lawsuit-against-twin-cities-colorado-city-arizona-and-hildale-utah.

149. *Town of Colorado City*, 2017 WL 1384353 at *9 (finding that certain police practices violate the Establishment Clause; other practices were found to violate the Equal Protection Clause, the Fourth Amendment, and the Fair Housing Act).

150. *Id.* at *1.

151. *Id.*

152. Esbeck, *supra* note 4, at 390.

that disestablishment brings with it great religious freedom.[153] But it also brings freedom and equality more generally and restores political and religious institutions to their proper scope.[154] When the local governments of Hildale and Colorado City were rid of church control, their citizens could be free: free to pursue their own religious exercise, but also to live more freely in every way, unhampered by intimidation and fear.[155] In this way, when the Establishment Clause limits religious exercise, religious harms *and non-religious harms* are rectified.

2. *Church-State Fusion: Funding of Religious Schools*

Other situations also suggest the compromise of church-state structural barriers. In *Montesa v. Schwartz*, public school students challenged numerous decisions of the Orthodox Jewish school board majority in East Ramapo, New York, claiming that those decisions benefitted private yeshivas at the expense of the public schools they were charged to serve.[156] The students alleged that, for a decade, the school board had

> promoted the Hasidic Jewish faith in violation of the First Amendment to the United States Constitution by (1) systematically funding Hasidic schools with public monies by manipulating the Individuals with Disabilities Education Act ("IDEA") settlement process, (2) providing preferential treatment to Hasidic Institutions when they attempted to sell and lease two school buildings, and (3) buying religious books with public money and loaning the books to Hasidic schools.[157]

The alleged effect had been to "siphon[ ] money out of the public school system into yeshivas and other religious organizations for the benefit of the Hasidic children's religious education. . . ."[158] Indeed, various state agencies had taken actions against the district in connection with these matters, to no avail.[159] The Court dismissed the case for lack of standing.[160] Had the

153. *Id.* at 368–69.

154. *Id.* at 389–91.

155. Remedies included injunctive relief against the police department for conduct in violation of the Establishment Clause and the development and implementation of constitutional policies in its place. United States v. Town of Colorado City, 2017 WL 1384353 at *12–15.

156. Montesa v. Schwartz, 836 F.3d 176 (2d Cir. 2016); *see also* Merryl H. Tisch & G. Sciarra, Op-Ed, *When a School Board Victimizes Kids*, N.Y. TIMES (June 3, 2015), https://www.nytimes.com/2015/06/03/opinion/when-a-school-board-victimizes-kids.html.

157. *Montesa*, 836 F.3d at 193–94.

158. *Id.* at 191.

159. *Id.* at 192–93.

160. The Court denied standing on the grounds that the students' injury "is too far removed, too attenuated, from the alleged unconstitutional component of the act of funneling-public-monies to support the advancement of Orthodox Hasidic Jewish schools to constitute the type of injury cognizable and compensable as the result of an Establishment Clause violation." *Id.* at 199. A vigorous dissent by Judge Reiss argued otherwise, *id.* at 201–05. For a discussion of the intricacies of standing doctrine in Establishment Clause jurisprudence, see Fallon, *supra* note 21, at 68–70.

Establishment Clause claim been allowed to go forward, and had the students succeeded on the claim, the non-religious harms[161] resulting from reduced public school budgets would have been acknowledged and addressed.

A related topic involves the public funding of religious charter schools. States typically require charter schools to be non-sectarian, yet many questions have arisen about whether certain schools are in fact non-sectarian, or about the misuse of taxpayer funds when there are close financial ties between a church and the charter school.[162]

3. Church-State Fusion: Legislator Prayers

In addition to the funding issue, another compromise of church-state independence has arisen in the symbolic area of legislative prayer. A circuit split now exists as to whether legislators themselves can offer prayers at the start of a public session.[163] Prior to these cases, court decisions had focused on prayers offered by clergy at legislative sessions. The Supreme Court has found the practice of using a paid chaplain valid under the Establishment Clause,[164] as well as a municipal process by which many different clergypersons are invited to offer prayers, even if they end up being predominantly of one faith.[165] These arrangements between legislatures and individual members of the clergy at least could be said to respect the separate governmental and religious functions.

But two recent cases involve local Christian legislators who themselves offer sectarian Christian prayers before a town council or zoning board meeting, running the risk of the fusion of functions. Citizens challenging this practice argue that it compromises the body's representation of all, regardless of faith or no professed faith. The Sixth Circuit has upheld the practice on the grounds that it is not coercive and falls within the tradition of legislative prayer.[166] The Fourth Circuit, noting that "the identity of the prayer-giver is relevant to the constitutional inquiry," has invalidated the practice on the grounds that it involves government-composed prayers

161. >For a detailed description of those harms, *see Montesa*, 836 F.3d at 198 (describing a decrease in curricular offerings, programs, teachers, and guidance counselors; and the elimination of assistant principals, specific extracurricular activities, including art and music, and programs to assist immigrant students).

162. *See, e.g.*, Doe v. Heritage Acad., Inc., No. CV-16-03001-PHX-SPL, 2017 WL 6001481 (D. Ariz. June 9, 2017); Wilson v. State Bd. of Educ., 89 Cal. Rptr. 2d (Cal. Ct. App. 1999); *In re* Approval of Hatikvah Int'l Acad. Charter Sch., 2012 WL 141495 (N.J. Super. Ct. App. Div. 2012); Pocono Mountain Charter Sch., Inc. v. Pocono Mountain Sch. Dist., 88 A.3d 275 (Pa. Commw. Ct. 2014); *see also* Benjamin Siracusa Hillman, *Is There A Place for Religious Charter Schools*, 118 YALE L.J. 554 (2008).

163. *Compare* Bormuth v. City of Jackson, 870 F.3d 494 (6th Cir. 2017) (rehearing en banc), *with* Lund v. Rowan City, 863 F.3d 268, 274 (4th Cir. 2017) (rehearing en banc).

164. Marsh v. Chambers, 463 U.S. 783 (1983).

165. Town of Greece v. Galloway, 572 U.S. 565 (2014).

166. *Bormuth*, 870 F.3d at 494.

and preference of one religion over all others.[167] Curtailing this practice would ensure that those who do not share the faith of the legislator (and do not join in the prayer) are not treated differently, particularly if they have applications or other civic business before the body.

4. Church-State Fusion: State Institutions and Religious Law

As the American Muslim population grows, questions have been raised regarding the extent to which Sharia law can be enforced by state institutions. The Establishment Clause provides the boundaries to issues of this nature. The Clause prohibits courts from interpreting and applying religious law.[168] So, for instance, a court would not be allowed to enforce a will that asks the court to divide the testator's property among his children according to Islamic law.[169] But courts can certainly enforce wills (and contracts) that are religiously motivated, and typically do so without any regard to the religious motivation.[170] So a court would have no problem enforcing a will that provided, by its terms, a division of a testator's property among his children that was in accord with Islamic law. The motivation would be irrelevant.

Courts would also be prohibited from substituting religious law for civil and criminal law or delegating to a religious authority any determinations concerning civil or criminal penalties.[171] So, for instance, a court properly rejected a criminal defense by a husband that he could rape his wife with impunity because religious law permitted it.[172] As to legislation, Muslim-majority areas, like any areas with large religious populations, may legislate based on religious ethics (banning alcohol, for instance), but laws that violate constitutional rights, such as free speech or equal protection, would not be permitted.[173]

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167. *Lund*, 863 F.3d at 274.

> For years on end, the elected members of the county's Board of Commissioners composed and delivered pointedly sectarian invocations. They rotated the prayer opportunity amongst themselves; no one else was permitted to offer an invocation. The prayers referenced one and only one faith and veered from time to time into overt proselytization. Before each invocation, attendees were requested to rise and often asked to pray with the commissioners. The prayers served to open meetings of our most basic unit of government and directly preceded the business session of the meeting.

Id. at 272.

168. Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 437 (2014). For a general discussion of this topic, see also Muhammad Elsayed, Comment, *Contracting Into Religious Law: Anti-Sharia Enactments and the Establishment and Free-Exercise Clauses*, 20 GEO. MASON L. REV. 937, 939 (2013); James A. Sonne, *Domestic Applications of Sharia and the Exercise of Ordered Liberty*, 45 SETON HALL L. REV. 717 (2015).

169. Volokh, *supra* note 168, at 437.

170. But not contracts that would constitute crimes, impair children's rights, or discriminate in certain circumstances. *Id.* at 435–37.

171. Religious law governs religious tribunals. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

172. S.D. v. M.J.R., 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010).

173. Volokh, *supra* note 168, at 453.

B. When Religious Interests are Promoted Without Regard to Other Considerations

1. Immunity for Religious Institutions in Sex Abuse Cases

In addition to church-state barrier issues, there are contemporary examples of accommodations that lack a connection to free exercise or pay no regard to the larger social context. Both are at issue in cases against church institutions for negligent supervision of clergy (and other torts) in the context of the sexual abuse of minors. Many religious denominations, including Catholic dioceses and orders, have argued vigorously for complete immunity under both the Free Exercise and Establishment Clauses, on the grounds that tort actions against the institutions would cause excessive entanglement in religious affairs and would violate their rightful autonomy on church-clergy decisions.[174] Most courts have rejected these arguments and have allowed tort actions to proceed.[175] A minority of courts continue to find that non-entanglement and church autonomy principles require immunity.[176]

Churches have a significant interest in autonomy to select clergy free from state interference. In *Hosanna-Tabor*, the Court disallowed clergy discrimination suits against churches because they would "depriv[e] the church of control over the selection of those who will personify its beliefs"[177] in violation of both Free Exercise and Establishment Clauses. In contrast, there is no comparable autonomy interest in avoiding tort suits against churches that allege negligent supervision of clergy who sexually abused children. The impact of *Hosanna-Tabor*, nationwide, is to give churches freedom to promote their self-identity, beliefs, and mission. Had courts uniformly adopted an autonomy stance on the tort actions in sex abuse cases, the impact nationwide would have had nothing to do with increased religious freedom. Instead, thousands of situations of clergy sex abuse would have gone unaddressed. With no legal accountability, churches would not have made efforts at reform. An entire class of individuals suffering great harm from clergy abuse in religious institutions would have been deprived of legal recourse, while those suffering harms from employee abuse in secular institutions would have claims that were legally cognizable and redressable.

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174. *Catholic Institutions*, *supra* note 14, at 47–51; Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1040–41 (2003) [hereinafter *Protection of Children*].

175. *Catholic Institutions*, *supra* note 14, at n.272 (collecting cases); *Protection of Children, supra* note 174, at 1040–41.

176. *Catholic Institutions*, *supra* note 14, at n.271 (collecting cases); *Protection of Children, supra* note 174, at 1040–41.

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

This sought-after immunity is not supported by a free exercise rationale and offends the Establishment Clause. It can be read as a breach of the structural barrier between church and state, in which the privilege afforded churches distorts the administration of civil justice. It can also be read as a *Texas Monthly*-like situation in which an accommodation is unconnected to the promotion of religious exercise, since decisions to ignore and conceal the abuse had no basis in religion. Additionally, it can be read as a *Thornton*-like situation in which "the accommodation favored the religious claimant in every instance"[178] with no regard to the impacts on those affected by a deprivation of legal rights. On any reading, an immunity from tort law for institutions that mishandled clergy sex abuse allegations is nothing more than an unjustified privilege for those churches. For states that continue to find immunity, I would argue that the Establishment Clause bars any special immunity from abuse-related tort claims against religious institutions.

2. Reduced Oversight of Secular Curriculum in Religious Schools

Other situations offer examples of disproportionate accommodations. A recently enacted exemption for private schools—granted to benefit yeshivas—reduces the state's role in curriculum oversight, thereby allowing yeshivas to focus more attention on religious subjects and less to secular subjects.[179] A lawsuit challenging the exemption claims that it "impermissibly aids religion and entangles the government with religion in violation of the Establishment Clause through the relaxation of educational standards for ultra-Orthodox Jewish non-public schools."[180] Putting the secular curriculum of religious schools out of a state's regulatory reach is a privileging of religion that disregards the educational needs of children—which are at the very heart of any state accreditation of religious schools.[181]

3. Child Marriage

A similar disregard for the needs of children occurs when exemptions allow child marriages, which are most often religiously-based (and usually arranged unions between a young girl and an older man).[182] New Jersey has

178. Esbeck, *supra* note 4, at 394.

179. Vivian Wang & Jesse McKinley, *The Curious Case of the Yeshiva Carve Out*, N.Y. TIMES, Apr. 3, 2018, https://www.nytimes.com/2018/04/03/nyregion/yeshivas-budget-new-york.html; *see also* Jimmy Vielkind, *With Budget Stalled, Felder Pushes Moratorium for Yeshivas*, POLITICO (Mar. 30, 2018, 5:32 AM), https://www.politico.com/states/new-york/albany/story/2018/03/29/with-budget-stalled-felder-pushes-moratorium-for-yeshivas-337723.

180. Complaint ¶ 96, Young Advocates for Fair Educ. v. Cuomo, No. 18-CV-4167, slip op. (E.D.N.Y. 2019), 2018 WL 3545354.

181. Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L. J. 363, 379–80 (2003) ("Courts have consistently affirmed the right of states to regulate nonpublic schools. States have a *substantial interest* in ensuring that all children receive an adequate education.") (emphasis added).

182. Sebastian Malo, *New Jersey Law Gives Momentum to U.S. Efforts to Ban Child Marriage*, THOMSON REUTERS FOUND., (June 22, 2018, 5:12 PM), https://www.reuters.com/article/us-

recently enacted a law repealing such exemptions, making it the first state in the nation to do so. It had been vetoed by the former governor in order to preserve, in part, the "religious customs" of groups for which this practice is common.[183] Marriage is within the province of the state (which is why polygamy is not permitted, and why *Obergefell* was necessary to allow same-sex couples the right to wed);[184] setting the ages for a variety of activities for children is also within the province of the state (age for employment, capacity for contracts, availability of contraception, and abortion). Allowing the age of marriage to vary by religious community is akin to a pluralistic legal system in which religious populations are empowered to govern themselves on a host of issues (family law, the law of wills and trusts, and the like).[185] That is not a permissible system in the United States. Again, here the Establishment Clause limits that freedom in order to rectify non-religious harms to underage girls who are not able to fully consent to a lifelong commitment.

4. Statutory Exemptions with Disproportionate Religious Benefits

Several statutes that attempt to protect religious conduct in the most comprehensive ways raise possible issues of proportionality.[186] Mississippi has a conscience law to protect health care personnel from having to participate in acts that would violate their religious or moral conscience.[187] Almost all the states and federal government have such laws, but they are typically crafted to address particular categories of conscientious objection, such as abortion, sterilization, physician-assisted suicide, and the like.[188] Mississippi's law, however, does not protect conscience claims based on particular categories.[189] Instead, it provides a right to object to any health care service, broadly defined, by any health care provider, whether individ-

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usa-marriage-children/new-jersey-law-gives-momentum-to-u-s-efforts-to-ban-child-marriage-id USKBN1JI2X9; Matt Friedman, *Ban on Child Marriages Conditionally Vetoed by Christie*, POLITICO (May 11, 2017, 1:13 PM), https://www.politico.com/states/new-jersey/story/2017/05/11/ban-on-child-marriages-conditionally-vetoed-by-christie-111987 [hereinafter *Ban on Child Marriage*].

183. Ban on Child Marriage, *supra* note 182.

184. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

185. *See, e.g.*, Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279 (2009).

186. *See* Mark Strasser, *Neutrality, Accommodation, and Conscience Clause Legislation*, 8 ALA. C.R. & C.L.L. REV. 197, 232 (2017).

187. Health Care Rights of Conscience Act, MISS. CODE ANN. §§ 41-107-1 to 13 (2019).

188. *See* Angela C. Carmella, *When Businesses Refuse to Serve for Religious Reasons: Drawing Lines Between "Participation" and "Endorsement" in Claims of Moral Complicity*, 69 RUTGERS U. L. REV. 1593, 1597–1605 (2017).

189. Health Care Rights of Conscience Act, MISS. CODE ANN. §§ 41-107-1 to 13 (2019) ("[A]ny individual who may be asked to participate in any way in a health care service," even if not a professional or paraprofessional, may refuse to participate in "any phase of medical care, treatment or procedure" that is a bona fide violation of conscience).

ual, institution, or payer.[190] "A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience."[191] The statute provides that to "'[p]articipate' in a health care service means to counsel, advise, provide, perform, assist in, refer for, admit for purposes of providing, or participate in providing, any health care service or any form of such service."[192] Anyone refusing to participate is immune from any legal liability and cannot be discriminated against.[193] The decision as to what service is objectionable is left entirely up to the health care provider, except that refusals may not be based upon patient's race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation.[194]

On the one hand, decisions under the Free Exercise Clause in *Thomas v. Review Board*[195] and *Hobby Lobby Stores, Inc. v. Burwell*[196] seems to invite such breadth. The Court in both cases deferred readily to the conscience claim of a person or entity refusing to become complicit in a particular act, noting that the claim need not be "acceptable, logical, consistent, or comprehensible to others" to receive legal protection.[197] And surely there are well-known moral scruples that go well beyond the usual examples of abortion and sterilization, particularly now with technological advances and the use of stem cells, genetic testing, and pharmaceutical interventions that easily raise ethical concerns. It may be the case that comprehensive legislation is necessary because those who make such conscience claims in the everyday world of health care may not be respected and the claims themselves may not lend themselves to easy categorization.

On the other hand, as a piece of legislation, this law appears to be flawed in the way that the Sabbath law in *Thornton* was, and well beyond it. Under the statute, the personal convictions of any individual in any counseling, diagnosis, or treatment situation overrides all else, in any health care setting. Thus, a receptionist would be entitled to refuse to admit a pregnant patient for genetic testing if he or she thought the patient might ultimately make a decision to have an abortion; another employee would have to admit the patient. Perhaps it could be workable if proper notice is given and employers are able to schedule and staff appropriately, but the completely

190. *Id.* §§ 41-107-3(a) (health care services defined), 41-107-5 (rights of providers), 41-107-7 (rights of institutions), 41-107-9 (rights of payers).

191. *Id.* §§ 41-107-3(a) to (b) (any individual who "may be asked to participate in any way in a health care service," even if not a professional or paraprofessional, may refuse to participate in "any phase of medical care, treatment or procedure" that is a bona fide violation of conscience); Mississippi courts have not yet interpreted this statute, see Britton v. Univ. of Miss. Med. Ctr., No. 3:11-CV-483-DPJ-FKB, 2012 WL 1969136, at *6 (S.D. Miss. May 31, 2012).

192. Health Care Rights of Conscience Act, MISS. CODE ANN. § 41-107-3(f) (2019).

193. *Id.* §§ 41-107-5(2) to (3); 41-107-7(2) to (3); 41-107-9(2) to (3).

194. *Id.* §§ 41-107-5; 41-107-7; 41-107-9.

195. Thomas v. Review Bd., 450 U.S. 707 (1981).

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

197. *Thomas*, 450 U.S. at 714.

open-ended nature of the protection, with the need for everyone else to bend to any conscience claim in any situation, without knowing the possible substance of the claim ahead of time, seems to lack proportionality. Even the *Hobby Lobby* Court noted that its broad deference to a conscience claim would have "precisely zero" impact on others.[198]

The proposed federal First Amendment Defense Act (FADA) is subject to the same criticism.[199] This piece of legislation addresses the post-*Obergefell* world,

> to ensure that the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person speaks, or acts, in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as a union of one man and one woman, or two individuals as recognized under Federal law, or that sexual relations outside marriage are improper.[200]

It intends to protect religious and moral views that favor traditional marriage in order to "contribute to a more respectful, diverse, and peaceful society."[201] This legislation has been proposed because, in the "culture wars," churches fear that their teaching will be considered nothing more than bigotry and that they will lose the rights of free exercise and free speech.[202]

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198. 134 U.S. at 2760.

199. First Amendment Defense Act, S. 2525, 115th Cong. § 3 (2018).

> Protection of the Free Exercise of Religious Beliefs and Moral Convictions: The Federal Government shall not take any discriminatory action against any person [who speaks or acts in accordance with belief or conviction of traditional views on marriage and sexual relations]. (b) Discriminatory actions are defined as any action taken by the Federal Government to: (1) alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a); (2) disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person; (3) withhold, reduce the amount or funding for, exclude, terminate, or otherwise make unavailable or deny, any Federal grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, license, certification, accreditation, employment, or other similar position or status from or to such person; (4) withhold, reduce, exclude, terminate, or otherwise make unavailable or deny, any entitlement or benefit under a Federal benefit program, including admission to, equal treatment in, or eligibility for a degree from an educational program, from or to such person; or (5) withhold, reduce, exclude, terminate, or otherwise make unavailable or deny, access or an entitlement to Federal property, facilities, educational institutions, speech fora (including traditional, limited, and nonpublic fora), or charitable fundraising campaigns from or to such person. (c) Accreditation; Licensure; Certification. The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person speaks, or acts, in accordance with a sincerely held religious belief or moral conviction described in subsection (a).

200. *Id.* § 3(a).

201. *Id.*

202. Jonathan Rauch, *Gay Rights, Religious Liberty, and Nondiscrimination: Can a Train Wreck be Avoided?*, 2017 U. ILL. L. REV. 1195, 1199 (2017).

FADA, in its current form, prohibits the federal government from penalizing individuals, non-profits, and closely held for-profits for actions taken on the basis of their opposition to same-sex marriage and pre-marital sex.[203] Thus, it prohibits the loss of tax exemptions and the withholding or termination of federal grants, scholarships, contracts, loans, benefits, entitlements, and access to facilities and fora. Traditional views on marriage alone cannot affect federal licensure, accreditation, or certification. The protections are indeed broad, but they are not unlimited, as in *Thornton.* The prohibition does not apply to publicly-traded for-profits, federal for-profit contractors, federal employees, and certain requirements of health care facilities to protect spousal visitation and decision-making.

Is FADA a proportional response to the very real concern that the government might take punitive action against religious institutions whose faith commitments involve traditional marriage?[204] Does it protect the important work done by churches in civil society while at the same time preserving the goals of *Obergefell*? To get a sense of whether the legislation is "measured" and has given consideration to competing claimants, consider *Newman v. Piggie Park Enterprises*, where a business raised a free exercise defense to the Civil Rights Act to claim a religious exemption from public accommodations laws.[205] While an exemption was never seriously entertained, imagine for a moment the implication of such an exemption: the Act's enforcement would have been subverted to a staggering degree, perhaps entirely in some parts of the nation. This would have been an unfettered exemption, available at anyone's discretion, without regard to the very people the law was intended to protect.

FADA's inclusion of for-profits expands the statute's reach significantly, with no identifiable boundaries to the kinds of refusals that a business can make. The statute would not affect state public accommodations laws and anti-discrimination laws, but it might have the effect of encouraging the refusal of services, as it suggests a moral equivalence of commercial and non-profit refusals. As federal law, it would allow objectors to refuse to provide same-sex couples with goods, services, and access that would be otherwise required by federal laws. Under FADA, then, a religiously affiliated college and a for-profit landlord could both refuse housing for same-sex couples without the loss of federal educational loans or federal low-income housing subsidies, respectively. Perhaps a comparison with the recent legislation in Utah, known as the "Utah Compromise," would be helpful: that law, the product of seven years of work between the Church of

203. *See supra* note 199.

204. *See infra* notes 224–34 and accompanying text.

205. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (referring to the separate opinion of Judge Winter: "Defendants had argued that the Civil Rights Act of 1964 was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's.'" Newman v. Piggie Park Enterprises, 377 F.2d 433, 437–38 (4th Cir. 1967)).

Jesus Christ of Latter-Day Saints and Utah Equality, provides exemptions to religiously-affiliated organizations and specified non-profits while at the same time requiring robust anti-discrimination measures in housing and employment.[206]

FADA might spur the passage of comparable state laws; indeed, it already has. Mississippi's mini-FADA (which also adds a provision on biological sex as determinative of gender and other explicitly religion-protective provisions as well)[207] was challenged on Establishment Clause grounds, but the Fifth Circuit found that plaintiffs had no standing.[208] This reversed the district court, which had granted a preliminary injunction on the grounds that the law prefers some religious beliefs to others and injures citizens, giving traditionalists on the marriage issue an "absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service."[209]

In sum, the outcome of these contemporary examples may be contested, but they all raise the question whether independent non-establishment norms should restrain religious exercise. While the accommodations promote free exercise, curtailing such exercise would produce, in specific areas, greater civil and economic freedoms and equality more generally, protect children more effectively, and preserve the integrity of political and judicial institutions.

V. Theorizing about Catholic Non-Establishment: The Integrity of the State and the Importance of Proportionality

In the American context, the Establishment Clause prevents non-religious harms like threats to political institutions and to citizens. The bishops could, consistent with Catholic teaching, employ non-establishment norms that limit free exercise in ways that promote the common good—indeed, the sources for these limits are already within the intellectual tradition.[210] Instead of arguing exclusively for maximalist free exercise, the USCCB could offer a prudential theory that recognizes and sets outer boundaries to exemptions based on proportionality. A tempered broadening of the Establishment Clause could result in an important jurisprudential contribution to

206. Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. Times, Mar. 12, 2015, https://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html.

207. Protecting Freedom of Conscience from Government Discrimination Act, Miss. Code Ann. § 11-62-1 to 19 (2016); *see* Strasser, *supra* note 186, at 235.

208. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017).

209. Barber v. Bryant, 193 F. Supp. 3d 677, 721 (S.D. Miss. 2016).

210. For a preliminary exploration of this topic, see Angela C. Carmella, *Brennan and Brewbaker's Christian Legal Thought: Providing the Foundations for Establishment Clause Understanding*, 56 J. Catholic Legal Stud. 39 (2017) [hereinafter *Establishment Clause Understanding*]; *see also infra* notes 213-37 and accompanying text.

issues involving church-state boundaries and disproportionate accommodations.

Catholic political and social thought suggests that it is beneficial to treat religious freedom and its limitations as two sides of the same coin. First, Catholic doctrine fully accepts the "separation" or jurisdictional independence of state and religious institutions. Indeed, the Church gave birth to the concept, as its ancient doctrine of the "freedom of the Church" recognized that church and state have proper spheres of authority.[211] Just as the state cannot intrude on the internal church affairs, churches cannot intrude on the government's proper sphere. The USCCB's amicus positions provide that even church-state cooperation on matters affecting the common good is legitimate only insofar as each remains in its proper sphere.[212]

Church teaching also accepts constitutional government and its secularity, as well as its instrumental nature.[213] The state lacks the power either to choose a religion for itself, or to favor or prefer a particular religion.[214] Laws have their basis in reason, not revelation.[215] And constitutional government guarantees rights and equality—not only with respect to religious freedom, but in connection with a broad range of human rights, civil and political, social and economic.[216] Government must also ensure stable societal conditions of civic peace and basic morality.[217] Given these emphases on rights and stability, there should be no quarrel with a structural constraint like the Establishment Clause that ensures government secularity and institutional integrity as well as the Church's freedom.[218]

Catholic teaching on independent spheres provides the framework for analyzing (and disapproving of) oppressive establishments and the misuse of public authority to divert public funds to religious schools, as well as the application of religious law by courts (when not part of contract enforcement). This same framework could also guide the inquiry for regimes of immunity that completely thwart the administration of justice for an entire class of claimants. Accommodations that deprive the state of curricular oversight of religious schools, that allow religious populations to promote child marriage, or that protect all manner of religious conduct, broadly de-

211. *See* COMPENDIUM, *supra* note 2, ¶ 426. *See also* Garnett, *supra* note 28.

212. *See supra* notes 119–45 and accompanying text; *see also* Brief for United States Catholic Conference as Amici Curiae Supporting Petitioners, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648), 1999 WL 631664, at *19 (urging the Court to evaluate programs based on whether they undermine institutional autonomy of religion *or government* and on whether personal liberty is *substantially infringed*) (emphasis added); COMPENDIUM, *supra* note 2, ¶ 425.

213. COMPENDIUM, *supra* note 2, ¶¶ 168–70, 393–95, 406, 408, 421–22.

214. *Id.* ¶ 424. The mention in paragraph 423 of historic or cultural arrangements that favor particular community is not relevant to the United States context.

215. *Id.* ¶ 398.

216. *Id.* ¶¶ 152, 388–89.

217. *Id.* ¶¶ 168, 422.

218. *See generally A Catholic View of Law and Justice*, *supra* note 17, at 265–72; *Establishment Clause Understanding*, *supra* note 210, at 50–56.

fined, are also capable of thwarting civic, political, or legal norms in ways that compromise the structural separation, or spheres, of church and state. Even with respect to legislative prayer, while the Church favors civic acknowledgement of the nation's Judeo-Christian heritage, the crossing of the jurisdictional line by legislators themselves offering prayers should make this practice suspect even for robust accommodationists.

Catholic teaching conceives of the church-state relationship within the broader common good of an immensely pluralistic society. In addition to the vigorous protection of human rights, the state must respect limits with respect to non-state groups within society, like families, churches, non-profits, and businesses as they promote the common good. Under this theory of "subsidiarity," government coordinates non-state groups to this end, usually by giving them freedom, but also support, so that together the state and non-state institutions work to create the conditions for the full flourishing of the human person.[219] Church teaching, through subsidiarity as well as the broad recognition of human rights, understands that part of the state's task involves the balancing of rights among various groups and the protection of all citizens.[220] Moreover, the *Declaration* clearly recognizes that the state protects *all* citizens, of different faiths and no faith, and that its public order role calls for restrictions on religious exercise when needed to preserve civic peace and public morality and to safeguard rights.[221] It is but a short step to argue that the Catholic intellectual tradition is open to the additional limits that flow directly from the secular and independent nature of the state, and its corollary, the restraints necessary to prevent a religious group from usurping or thwarting civic, political, or legal norms.[222] Thus, sometimes, religious claims will have to be limited to preserve the integrity of the state or to protect citizens from "non-religious" harm.

It is also significant to note that concern for families and for the vulnerable are at the center of Church teaching.[223] Given the depth of these concerns, it seems that restrictions on unfettered religious exercise that causes harm to children would be a clear implication of the teachings. One might say these are simply public order restraints—which Catholics already accept as part of free exercise interpretation. Yet the particular contexts in which these issues have arisen necessitate specific mechanisms to prevent religious groups from undermining critically important legal norms: by allowing tort actions to proceed against churches in connection with clergy

219. COMPENDIUM, *supra* note 2, ¶¶ 185–88.

220. *Id.* ¶¶ 168–69.

221. *See* DECLARATION, *supra* note 11, § 7.

222. Indeed, the *Declaration* provides that "society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection." *Id.* § 6.

223. COMPENDIUM, *supra* note 2, ¶¶ 182, 209–14, 449.

sex abuse, by prohibiting child marriage, and by ensuring the proper administration of public funds for education.

As to the question of whether an accommodation promotes free exercise in a measured way, the Catholic concept of "proportionality" might serve as a resource. Proportionality is familiar to Catholic moral thought in teachings on the principle of double effect.[224] The principle of double effect provides criteria for determining the ethical legitimacy of well-intentioned actions that also create unintended negative consequences.[225] As part of the analysis, one considers proportionality, which involves an assessment of whether "the extent of the harm is adequately offset by the magnitude of the proposed benefit."[226]

The Supreme Court's case law on the Establishment Clause seems to echo these concerns of double effect and proportionality. The Court recognizes that government actions (exemptions, programs, and the like) that produce religious freedom are intended to promote individual well-being and the common good, yet sometimes generate unintended harms. And it engages in a proportionality assessment to ensure that the good achieved outweighs the harms. Thus, the Court requires that an accommodation actually promote religious freedom,[227] and that any harm caused by that accommodation be balanced against that benefit.[228] *Thornton* makes sense when

224. Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 24, 2018), https://plato.stanford.edu/archives/win2014/entries/double-effect/.

> *The New Catholic Encyclopedia* provides four conditions for the application of the principle of double effect:
>
> 1. The act itself must be morally good or at least indifferent.
> 2. The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.
> 3. The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.
> 4. The good effect must be sufficiently desirable to compensate for the allowing of the bad effect. (p. 1021).
>
> The conditions provided by Joseph Mangan include the explicit requirement that the bad effect not be intended:
>
> A person may licitly perform an action that he foresees will produce a good effect and a bad effect provided that four conditions are verified at one and the same time:
>
> 1. that the action in itself from its very object be good or at least indifferent;
> 2. that the good effect and not the evil effect be intended;
> 3. that the good effect be not produced by means of the evil effect;
> 4. that there be a proportionately grave reason for permitting the evil effect (1949, p. 43).
>
> In both of these accounts, the fourth condition, the proportionality condition is usually understood to involve determining if the extent of the harm is adequately offset by the magnitude of the proposed benefit.

Id. § 1 (internal quotation marks omitted).

225. *Id.*

226. *Id.*

227. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

228. Cutter v. Wilkinson, 544 U.S. 709, 720, 722–23 (2005).

framed in this way, because the accommodation that protects Sabbatarians without regard to anyone else creates non-religious harms that are out of proportion to the benefit to Sabbatarians, who can be protected in other, more measured ways.[229] *Amos* also makes sense when framed in this way, because even though the religious employer exemption is broad and may harm employees who find themselves without work, the benefits to religious groups needing autonomy on employment issues are immense and cannot be achieved in other ways. The "harm is adequately offset by the magnitude of the benefit"[230] and the accommodation is thus proportional.

The Bishops' Conference accepts in principle that harms can result from accommodations and that the Establishment Clause is implicated.[231] Yet in application it has disclaimed disruptions or burdens to third parties on the grounds that the harms are not severe and that far greater consequences would result from the loss of religious freedom.[232] The proportionality assessment finds that the magnitude of the free exercise benefit to individuals and society sufficiently offsets any resulting harm.[233] Indeed, the experience of generous conscience protection after *Roe v. Wade* has led the Church to champion this model of accommodation for other bioethical issues and for matters involving sexual orientation.[234]

Surely, Catholic thought gives room for recognizing non-religious harms connected to non-establishment norms, to be addressed with considerations of proportionality. Church teaching accepts the reality of political

229. Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

230. McIntyre, *supra* note 224, § 1.

231. Brief for United States Catholic Conference as Amici Curiae Supporting Petitioners, *supra* note 212 (urging the Court to evaluate programs based on whether they undermine institutional autonomy of religion or government and on whether *personal liberty is substantially infringed*) (emphasis added).

232. Brief for United States Conference of Catholic Bishops as Amici Curiae Supporting Petitioners, *supra* note 123 (recognizing the non-religious harms of a wedding vendor exemption from public accommodations laws but comparing this to what it concluded were weightier religious harms:

> There are certainly some social costs to such an approach. It requires Craig and Mullins to seek their wedding cake from another baker, and it forces the Wiccan to do the same when seeking a cake to celebrate Halloween. *But that cost is far lower than that of: forcing proprietors to choose between providing services against their consciences and abandoning some or all of their livelihood; forbidding institutions of civil society from expressing a diversity of views on contested moral questions; and, in turn, skewing or stifling public moral debate on those questions, and reducing the number and range of voluntary associations dedicated to serving the common good.*)

Id. at *30 (emphasis added). That brief also noted that as an empirical matter, cases have been rare and that none have involved directly discriminatory refusals to serve gays. *Id.* at *17; *see also* Reply Brief for Appellant United States Conference of Catholic Bishops at *28, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (2013) (No. 12-1466), 2012 WL 6057504 (defending the Health and Human Services grant to administer programs for victims of human trafficking that accommodated bishops' restrictions).

233. Brief for United States Conference of Catholic Bishops as Amici Curiae Supporting Petitioners, *supra* note 123.

234. *See supra* notes 187–88, 199 and accompanying text.

compromise and adjustments in lawmaking.[235] Catholics could support broad free exercise protections while also accepting that there might be instances of excessive harms that justify a limit on those protections. Widely accepted statutes that seek to provide comprehensive protection, like RLUIPA and its sister statute, the Religious Freedom Restoration Act,[236] contain a built-in restraint, so that even very broad deference to religious claims remains limitable.[237] Employing non-establishment norms to reach exemptions that are more measured, Mississippi could revise its conscience law to provide an enumeration of categories of conscience claims, and FADA might be recast to protect only religious institutions from punitive government action, without the protections for business refusals that have no identifiable bounds under the statute. In these ways, the statutory schemes could be more tailored to particular issues and the harms (i.e., health care and social service disruptions) lessened.

VI. CONCLUSION

Many conservatives will say that this "extra" role for the Establishment Clause—curtailing rather than buttressing free exercise—has led to hostility toward religion. But this is a mistaken assumption. The independent limiting function of the Establishment Clause can and should be fully consistent with robust religious freedom. This article has argued that the Clause's independent limiting function is necessary for the proper functioning of government and the continued viability and vigor of religious accommodations. The prudent application of the Clause in this way, when accommodations compromise the integrity of government or promote free exercise in unbalanced ways, contributes to the common good by protecting responsible religious freedom within a pluralistic society.

The Catholic Church rightly gives primacy to the Free Exercise Clause but could accept and develop its own theory of Establishment Clause limitation. This theory could draw upon the Church's teachings on the care for the children, families, and the poor, the love of neighbor, subsidiarity's protection of the multiplicity and diversity of non-state actors in civil society, the state's role in enforcing and protecting human rights for all, and the need for proportionality in moral and political decision-making.

235. Gregory A. Kalscheur, S.J., *Conscience and Citizenship: The Primacy of Conscience for Catholics in Public Life*, *in* VOTING AND HOLINESS: CATHOLIC PERSPECTIVES ON POLITICAL PARTICIPATION 107 (Nicholas P. Cafardi ed., 2012).

236. *See supra* note 3.

237. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (interpreting RFRA); Cutter v. Wilkinson, 544 U.S. 709 (2005) (interpreting RLUIPA).