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DEFINING RELIGION DOWN: *HOSANNA-TABOR, MARTINEZ, AND THE U.S.* SUPREME COURT

CARL H. ESBECK*

Big River, the musical adaptation of Mark Twain's *THE ADVENTURES OF HUCKLEBERRY FINN*, begins the second act with the duet "Worlds Apart," involving Huck and the runaway slave, Jim, wondering how two could cohabit the antebellum South whose lives are "worlds apart, worlds apart."¹ So it is with the United States Supreme Court's recent duet on the First Amendment and religious freedom: *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*² and *Christian Legal Society Chapter, Hastings College of the Law v. Martinez*.³ *Hosanna-Tabor* was unanimous. *Martinez* split along the familiar 4-4, liberal-conservative divide, with Justice Anthony Kennedy casting the deciding vote. The decision in *Hosanna-Tabor* went in favor of the claimant, confirming that there are restraints on the government when it imposes employment nondiscrimination regulations on a religious organization. *Martinez* went against the claimant, upholding the power of a state university to require a student religious organization to conform to a nondiscrimination policy regulating the group's membership and choice of leaders. *Hosanna-Tabor* prohibited government interference in the selection of religious leaders. *Martinez* allowed it.

Scholars were initially struck by how different the results. They were worlds apart. Two hasty explanations were advanced. First, Justice Elena Kagan had replaced Justice John Paul Stevens. That had a

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1. ROGER MILLER, *Worlds Apart*, in *BIG RIVER: THE ADVENTURES OF HUCKLEBERRY FINN* 58 (1986).

2. 565 U.S. ___, 132 S. Ct. 694 (2012).

3. 561 U.S. ___, 130 S. Ct. 2971 (2010).

modicum of explanatory power, as Justice Stevens only rarely favored religious claimants. But a one-Justice change did not explain the sharp contrast in outcomes nor unravel the surprising unanimity of *Hosanna-Tabor*. Second, perhaps the answer lays with the anti-textual position taken by the Office of Solicitor General (OSG), U.S. Department of Justice in *Hosanna-Tabor*. All that is required by the Religion Clauses of the First Amendment, argued the OSG, is that government be formally neutral with respect to religion and religious organizations.⁴ That duty was satisfied when Congress enacted a nondiscrimination statute, which by its terms treated religious organizations just like other employers when it came to prohibiting discrimination. The legislation was thus facially neutral. The OSG conceded that religious employers such as the church-related school in *Hosanna-Tabor* had freedom of association, but so did labor unions, service clubs, and the like, and they were all subject to the same nondiscrimination legislation.⁵ Freedom of association, argued the OSG, only called for *ad hoc* balancing of the interests of the group in question in promoting its ideas against the interests of the government in nondiscrimination.⁶ The OSG's position meant that, so far as the religion clauses were concerned, the government could blind itself to the fact that the affected employer happened to be religious; no rule grounded in the text of the religion clauses was necessary.⁷ The Court's reaction to the OSG's religion-blind government was to deride the position as "remarkable," "untenable," and hard to square with the text of the First Amendment which plainly singles out religion for special protection.⁸ So the anti-textual position pushed forward by the OSG may have struck the Bench as so extreme as to have undercut those Justices otherwise inclined to be sympathetic, namely those in the *Martinez*

4. *Hosanna-Tabor*, 132 S. Ct. at 706.

5. *Id.*

6. Transcript of Oral Argument at 27–43, *Hosanna-Tabor*, 132 S. Ct. 694 (2011) (No. 10-533), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf. During oral argument, the Bench sank the OSG's case-by-case balancing approach by posing hypotheticals that would force the civil courts to take sides on religious questions in violation of the Establishment Clause.

7. *Hosanna-Tabor*, 132 S. Ct. at 706.

8. *Id.* ("That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.").

majority, thereby giving an opening for Chief Justice John Roberts to write a unanimous opinion in *Hosanna-Tabor*.

But are these cases worlds apart? Or, upon a closer look, are the rationales similar in one material respect: the cases share a narrow definition of religion, namely, that in its most important aspects religion is a matter of belief but not also deeds, and that the core of religion takes place largely out of the public eye in those buildings on the street corner with the steeple on top. If this is indeed a common thread, then the two cases harmonize around an understanding that religion is fully protected only when exercised in private.

I.

Martinez involved Hastings College of the Law, which is part of the state university system in California. Like most institutions of higher education, Hastings had formalized its rules for recognizing a diverse array of student-initiated organizations. Official recognition made these special interest groups eligible to schedule meetings in classrooms during noncurricular hours, to access various channels of communication, such as the College's webpage and bulletin boards, and to use Hastings' name to identify themselves.⁹ As is common, recognition was conditioned on compliance with Hastings' nondiscrimination policy, which in its written form barred discrimination on various bases such as race, national origin, and gender, including religion and sexual orientation.

The Supreme Court has several times vindicated the rights of student groups at state universities when excluded from recognition on the basis of an organization's speech or viewpoint.¹⁰ The issue at the college at Hastings was unusual, however. Hastings claimed to apply its written policy in a manner requiring that these interest groups allow any law student to become a member and to attain positions of leadership.

9. Hastings' policy said that it "neither sponsor[ed] nor endorse[d]" the views of recognized groups, and it insisted that student groups inform others that the organization was not an official arm of the law school. Brief for Petitioner at 4, *Martinez*, 2010 WL 71183 (No. 08-1371) (January 28, 2010).

10. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995) (involving a religious student newspaper); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (regarding a religious student organization); *Healy v. James*, 408 U.S. 169, 185–88, 194 (1972) (concerning a leftist student political organization).

Although this “all-comers” application of the written policy was contested, the majority opinion, authored by Justice Ruth Bader Ginsburg, decided *Martinez* on such an understanding.¹¹ The student chapter of the Christian Legal Society (CLS) required that its voting members and leaders be professing Christians, thus the organization was selective on the basis of religion. CLS also believed that sexual intimacy should be confined to marriage, which in some instances would have the effect of excluding sexually active students on various bases including same-sex orientation.

CLS sought to argue the case based on the written nondiscrimination policy which, by its terms, targeted groups such as CLS on the bases of the organization’s views on religion and gay sexual conduct.¹² As noted above, however, the Court majority accepted Hastings’ gloss on its policy, namely, that all comers must be admitted by all groups. *Martinez* thus presented for plenary review a policy formally neutral as to religion. And, as the Court triumphantly pointed out to frustrated CLS lawyers, “[i]t is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”¹³ It was also true that the all-comers policy had a disparate impact on CLS. So the next step was to determine whether the all-comers interpretation was adopted by Hastings with the hidden purpose of suppressing CLS’s expression. The Court concluded, over a sharp dissent, that there was no evidence of a hidden purpose on the record before it.¹⁴ In the eyes of the majority, Hastings claimed a plausible

11. *Martinez*, 130 S. Ct. at 2982–84.

12. CLS distinguished between same-sex orientation as a person’s status and gay sexual conduct. This is much like the distinction between a person who thinks about committing adultery but does not and a person who does commit adultery. The Court, however, refused to acknowledge such a distinction in the context of homosexuality. *Id.* at 2990.

13. *Id.* at 2993 (emphasis in original). CLS observed that if Hastings sought to have a diversity of viewpoints among its recognized student organizations, then the all-comers policy was silly because it undercut the goal of such diversity. Perhaps, acknowledged the Court, but Hastings was not bound to having as its purpose ever increasing group diversity. *Id.* at 2992. Hastings could have other viewpoint-neutral purposes, such as full extracurricular access by all students.

14. *Id.* at 2995; *cf. id.* at 3016–19 (Alito, J., dissenting).

purpose, namely, ensuring access by all law students to extracurricular groups that have Hastings' recognition.¹⁵

The all-comers policy, however, has a discriminatory effect on the expression of all student organizations that have exclusionary membership policies (such as CLS, but also the Law Student Democratic Caucus, Vietnamese American Law Society, La Raza, etc.).¹⁶ The Court conceded that was true, but the Free Speech Clause protects speech, not acts. So the Court brushed aside CLS's hardship noting that "*acts* are not shielded from regulation merely because they express a discriminatory *idea* or *philosophy*."¹⁷ Further explaining, the Court said: "The Law School's policy aims at the *act* of rejecting would-be group members without reference to the *reasons* motivating that behavior"¹⁸ More to this belief-acts distinction, the Court said, "CLS's *conduct*—not its Christian *perspective*—is, from Hastings' vantage point, what stands between the group and [recognition by Hastings]."¹⁹ Thus, crucial to the holding was that CLS was not being excluded because of its religious beliefs, but because of its actions. CLS pointed out that its noncompliant actions were speech acts, for the actions affirmed CLS's Statement of

15. *Id.* at 2989 (majority opinion). It should not go unnoticed that Hastings' all-comers requirement subtly shifts the character of university recognition policies. The normative purpose of such policies is to encourage students with common interests to pursue them collectively while expanding associational diversity beyond the strict confines of the curriculum. No university seal of approval is needed, or—for that matter—to be implied. Indeed, university authorities have come to enjoy deniability concerning actions by student organizations. *See supra* note 9 and accompanying text. The all-comers policy, however, elevates all-student inclusion over student-initiated diversity, *see supra* note 13, which acts as a drag on associational pluralism and diminishes the clarity of group messaging. The same criticism could be leveled at, for example, prohibiting racial or gender discrimination. But these are suspect classes, unlike the "class"—if one can call it that—of all students.

16. *Martinez*, 130 S. Ct. at 2994; *see id.* at 3004 (Alito, J., dissenting) (stating that the record reflects several instances where Hastings registered student groups with bylaws limiting membership to those with similar viewpoints including the Hastings Democratic Caucus and the Vietnamese American Law Society).

17. *Id.* at 2994 (majority opinion) (emphasis added) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)).

18. *Id.* (emphasis added).

19. *Id.* (emphasis added).

Faith.²⁰ But the Court thought that no concern of the Free Speech Clause. Hastings is permitted to exclude CLS because of its acts, explained the majority, so long as Hastings does so for a purpose other than the suppression of CLS's beliefs.²¹

This distinction works only if the definition of "religion" permits the *Martinez* Court's hermetic separation between beliefs that are religious and actions that profess a religion. But the nature of religion, at least for many religions such as Christianity and Islam, to name the world's two largest, is to have an integrated view of belief and action or doctrine and practice.²² The Court's protection of beliefs but not actions means that CLS can privately believe anything it wants, but it cannot manifest those beliefs in the act of admitting to membership or leadership only those who will sign its Statement of Faith. Likewise, the Court's protection of beliefs but not actions means that CLS can believe anything it wants about God's intentions concerning sexual fidelity, but CLS had best not take note of whether its members and leaders openly fail to practice what they preach. If "religion" as used in the First Amendment is confined to passive belief, this is indeed a privatized notion of religion. No word of advice was forthcoming from the *Martinez* majority as to how a religious organization—indeed, any organization serious about ideas—can maintain its institutional integrity and clarity of message when it cannot choose its members or even its leaders.

Having rejected CLS's free speech claim of viewpoint discrimination, its free exercise claim was brushed aside by the Court in a footnote²³ citing *Employment Division of Oregon v. Smith*.²⁴ The Court in *Smith* held that a neutral law's discriminatory effect on a religious practice is not, without more, unconstitutional. *Smith* stated its rule this way: There is no violation of the Free Exercise Clause where a law is

20. CLS required voting members and leaders to sign a Statement of Faith. *Id.* at 2980. Signing was an act, albeit an act affirming a set of beliefs.

21. *Id.* at 2994–95.

22. See RICHARD B. HAYS, *THE MORAL VISION OF THE NEW TESTAMENT: A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS* 313–16 (1996) (proposing a way to analyze the New Testament and a method for applying it to the task of resolving current moral disputes).

23. *Martinez*, 130 S. Ct. at 2995 n.27.

24. 494 U.S. 872 (1990).

generally applicable and neutral as to religion.²⁵ The *Martinez* majority deemed Hastings' all-comers policy to be neutral and generally applicable, so CLS's religious exercise was not protected by the Free Exercise Clause.²⁶

II.

In January 2012, the Supreme Court handed down *Hosanna-Tabor*. The case involved a fourth-grade teacher, Cheryl Perich, suing her employer, a church-based school, alleging retaliation for having asserted a claim under the Americans with Disability Act (ADA).²⁷ The Equal Employment Opportunity Commission filed the original suit, and Perich intervened as a party. In the lower federal courts the church school raised the "ministerial exception," which recognizes that under the First Amendment, religious organizations have the authority to select their own ministers. Over the last forty years the ministerial exception has been recognized by every federal circuit to have considered it.²⁸ Indeed, the exception overrides not just the ADA, but also a number of venerable employment nondiscrimination civil rights statutes.²⁹ Just who

25. *Id.* at 878–82.

26. *Martinez* did not discuss the actual text of the Free Exercise Clause which enjoins government from "prohibiting the free exercise" of religion. However, the plain meaning of the word "exercise" connotes more than just passively holding to a set of beliefs, but includes the active practice of those beliefs. It is true that in a modern and complex nation, a society with many people of differing faiths and none, religiously motivated actions will inevitably be subject to greater regulation than the passive holding of beliefs. But, as *Smith* and now *Martinez* would have it, absent intentional discrimination, religiously motivated exercise is outside the protection of the Free Exercise Clause. Congress was so displeased with *Smith* that in 1993 it passed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-04 (2006). *See id.* § 2000bb(a)(4) (congressional finding critical of *Smith*).

27. 42 U.S.C. §§ 12101–12213 (2006).

28. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

29. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006) (prohibiting discrimination on the bases of race, color, national origin, sex, and religion); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006) (prohibiting sex discrimination in pay); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006) (prohibiting discrimination in employment based on age).

is a “minister,” however, had varied somewhat from circuit to circuit³⁰— and in any event the Supreme Court had never taken a case involving the ministerial exception.

The *Hosanna-Tabor* Court wrote that:

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.³¹

The Court went on to say that although “[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”³² Accordingly, in a lawsuit that strikes at the ability of a church to internally make decisions concerning its faith or mission, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck by the First Amendment in favor of the church.³³

In addition to math, social studies, and language arts, Perich taught classes in religion, led students in prayer, and occasionally conducted chapel. The Court found that Perich was a minister. However, for purposes of this essay, *Hosanna-Tabor* is of interest for a different reason. The Court drew a sphere of autonomy around church governance, a term that includes more than the hiring and firing of ministers. It did so in the course of the need to distinguish the leading case of *Employment Division of Oregon v. Smith*, mentioned above.

Oregon had listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith*

30. Lund, *supra* note 28, at 65–66 (collecting cases).

31. *Hosanna-Tabor*, 132 S. Ct. at 706.

32. *Id.* at 710.

33. *Id.* (“When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.”).

were members of the Native American Church, and held jobs as counselors at a private drug rehabilitation center.³⁴ They were fired for illegal drug use (peyote), and later denied unemployment compensation by Oregon because they had lost their jobs for cause. Members of the Native American Church ingest peyote in the course of a sacrament.³⁵ The *Smith* Court held that the Free Exercise Clause was not violated when Oregon enacted a drug law of general applicability that was neutral as to religion, even though the law happened to have an adverse impact on a religious practice (sacramental peyote use). In *Hosanna-Tabor*, Chief Justice Roberts admitted that the ADA was likewise a general law of neutral applicability that happened to have an adverse impact on the church-based school's ability to fire a classroom teacher.³⁶ But he then drew a crucial distinction between *Hosanna-Tabor* and *Smith*:

[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its lending its power to one or the other side in controversies over religious authority or dogma).³⁷

Hosanna-Tabor thus ruled that there is a class of cases, to which the rule in *Smith* does not apply, described as "an internal church decision that affects . . . faith and mission . . .".³⁸ The firing of Perich, deemed a minister, was characterized as "internal," meaning a decision of the church affecting faith or mission. In contrast, criminalizing peyote use was characterized as "outward," meaning that the denial of unemployment compensation because of illegal drug use did not regulate an internal decision of the Native American Church. Further, the

34. *Smith*, 494 U.S. at 874.

35. *Id.*

36. *Hosanna-Tabor*, 132 S. Ct. at 707.

37. *Id.* (some quotation marks and brackets removed).

38. *Id.*

ingestion of peyote in *Smith* was characterized as regulating a “physical act,” whereas the firing of Perich regulated by the ADA was said to be not a “physical act” but a “church decision.”³⁹

In having to distinguish *Smith*, the decision in *Hosanna-Tabor* became about more than just the ministerial exception. It is now a leading case for church autonomy, meaning *internal church decisions affecting faith or mission*. Obviously a sacrament is an important religious practice and obviously the members of the Native American Church suffered a burden on religious conscience that went unremedied in *Smith*. But the point of *Hosanna-Tabor* was not to remedy burdens on religious conscience. If it were, then *Hosanna-Tabor* would have overruled *Smith*. That did not happen. Rather, *Hosanna-Tabor* carved out an exception to *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on religious conscience,⁴⁰ but government interference with the internal autonomy of the religious school’s mission.⁴¹

The future task is to delimit the scope of *Hosanna-Tabor*. That means determining those subject matters (in addition to firing a minister) that come within the Court’s description of “internal church decision[s].”

39. This passage in *Hosanna-Tabor* references *Smith* where it also says that the exercise of religion often involves “the performance of (or abstention from) *physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.” *Smith*, 494 U.S. at 877 (emphasis added). Presumably the neutral regulation of such “physical acts” falls under the rule of *Smith* rather than *Hosanna-Tabor*.

40. *Hosanna-Tabor*, 132 S. Ct. at 709 (“The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason.”).

41. The Court’s distinction between *Smith* and *Hosanna-Tabor* will surely be contested as new cases arise. It is true that a governance decision by a church was not directly countermanded in *Smith* like it was by the ADA in *Hosanna-Tabor*. In *Smith*, the plaintiffs were fired from their jobs at a drug counseling center because of peyote use and then later denied unemployment compensation because of the criminal activity. *Smith*, 494 U.S. at 874. Neither the loss of their jobs nor the denial of compensation directly countermanded the claimants when observing a sacrament of their Native American Church. For all practical purposes, however, the actual practice of peyote ingestion during the sacrament was discouraged or driven underground. But—as I state in the text—Oregon’s drug laws imposed a burden on religious conscience, whereas *Hosanna-Tabor* is not about lifting burdens on religious conscience. Rather, *Hosanna-Tabor* is about church autonomy.

There is help from another quarter: Justice Samuel Alito's concurring opinion, joined by Justice Kagan, said that this subject-matter class of cases recognizes a "religious autonomy" found in the no-establishment and free-exercise phrases that together protect "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."⁴² While "an internal church decision" clearly includes more subjects than firing ministers, the scope of this class of cases is not broad and *Smith* remains the general rule. The "internal" matters of *Hosanna-Tabor* are a discrete set of decisions made in the relative privacy of a virtual building with a steeple on top, by individuals holding authority to govern "the church itself" in its "faith and mission."

III.

To receive the most rigorous First Amendment protection for religion from the Supreme Court, it appears that the definition of religion (*Martinez*) and the scope of church autonomy (*Hosanna-Tabor*) are first cabined. This suggests a resurgence of the privatization of religious observance because religion harbors illiberal ideas.

The paring back on fully protected religion is also evident on a front that is administrative rather than judicial. The ongoing dispute over the federal healthcare contraception mandate arises because employer-required health insurance plans must cover the full range of contraception approved by the Food and Drug Administration, including certain drugs and devices that also work as abortifacients.⁴³ This

42. *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring). See also Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (quoting Douglas Laycock, *Towards a General Theory of Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

43. The federal healthcare act requires employers to provide healthcare plans that include preventive care, but the act does not define the contours of preventive care. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (2006). That task was delegated to the Health Resources and Services Administration (HRSA). On August 1, 2011, HRSA adopted "Required Health Plan Coverage Guidelines" that defined the scope of women's preventive services for

requirement has the effect of imposing a burden on conscience for some religious employers, most prominently Catholic employers, as to all contraception, as well as anti-abortion Protestant employers and other religions opposed to abortifacients.⁴⁴ The Executive Branch decided that in order to be exempt for reasons of conscience, a “religious employer” must meet all of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986.⁴⁵

satisfying the employer mandate. *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RESOURCES & SERV. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited July 31, 2012). These guidelines adopted all of the contraceptive methods approved by the Food and Drug Administration as the standard for the minimum services required in a healthcare plan.

According to the Office of Women’s Health, Food and Drug Administration, the Affordable Care Act required contraception drugs and devices that may also work to prevent implantation of a fertilized egg in the uterus are Plan B, Plan B One-Step, Next Choice, Ella, and the copper inter-uterine device. *Birth Control Guide*, FDA OFFICE OF WOMEN’S HEALTH, 16–18 (Aug. 2012), <http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf>.

44. Two Protestant institutions of higher education, Grace College and Seminary and Biola University, have sued the federal government alleging that the mandate’s requirement pertaining to abortion inducing drugs is violative of religious conscience. See *Christian opposition to abortion pill mandate grow, two more colleges sue*, ALLIANCE DEFENDING FREEDOM (Aug. 23, 2012), <http://www.adfmedia.org/News/PRDetail/7602>. Similarly, the evangelical Wheaton College has sued the federal government on the basis that the government’s forced provision of drugs that cause an abortion is violative of the free exercise of religion. See *Wheaton College v. Sebelius* (2012-current), THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/wheaton/> (last updated Oct. 5, 2012).

45. 45 C.F.R. § 147.130(a)(1)(iv)(B) (2006). Most religious charitable organizations fall under § 6033(a)(3)(A)(ii), and thus for that reason alone do not satisfy the definition of “religious employer.”

This exemption covers little more than houses of worship. That means that religion-based social service and healthcare agencies are not exempt from the mandate, nor are religious schools, colleges, and universities.

The nature of protected religion in the Executive Branch's definition is that its essence is about teaching doctrine and providing services to those already members of the church. This meaning excludes serving the poor and needy when "outside" the church, and does not perceive religion at its core as about educating youth within a world and life view that includes God. That crabbed meaning pretty much guts the answer to "Who is my neighbor?" in the parable of the Good Samaritan.⁴⁶

This election-year clash was entirely avoidable. The options before the Executive Branch were not a Sophie's Choice. On the one hand, there is the important goal of reproductive health, including preventive care, for women working at religious hospitals, charities, schools, and universities. And it is understood the Executive Branch insists that no co-pays be incurred by women with respect to contraception. On the other hand, public-serving organizations should not be deemed to have forfeited their First Amendment rights when they reach out to help the poor, the needy, the sick, and students, thereby punishing these ministries of hope that are major contributors to society's safety net and educational system. Hobbling such important groups within civil society is reckless play with a diverse nonprofit sector that Americans widely support with their money and volunteer hours.

Contraception is cheap and readily available. If the federal government were to put its goodwill and vast resources behind the effort, there are multiple means of delivering these services to the women in question that are convenient and free. The method need only be unconnected to the objecting religious employer, thereby not implicating religious conscience by an act or omission of the employer. For example, the states could be ultimately responsible for payment, with the means of tender being online state-issued coupons easy for women to redeem at their pharmacy or medical clinic. The additional taxpayer expense, if any, is the price Americans collectively pay for an open society that honors the cause of conscience.

46. *Luke* 10:25–37.

There are also entanglement problems with the Executive Branch's shrunk-down definition of "religious employer." For example, how is the administrative apparatus to make determinations concerning religious teachings, values, and events including: (i) whether an organization's "purpose" is "the inculcation of religious values," (ii) whether an organization "primarily" employs those who share its religious tenets, (iii) whether an organization "primarily" serves those who share its religious tenets, and (iv) who does and does not "share" the organization's religious tenets?⁴⁷ All this administrative probing and classifying raises constitutional concerns given that church-state separation prohibits government officials from making what are essentially religious determinations when interpreting the words and practices of a religious organization.⁴⁸

The percentage of Americans who place a high priority on protecting religious freedom is thought by some to be in decline.⁴⁹ That can be tested and perhaps reversed by a crisis of conscience such as the healthcare contraceptives and abortifacients mandate. But a crisis response is often too late when the decision-maker is the unelected judiciary. The judiciary is designed to be immune to politics and majority rule. There is more immediate help to be found in the Religious

47. Apparently the Executive Branch is unaware of the degree to which America's pews are filled with people who regularly attend a church but have not joined as members, as well as members of a church who dissent in material part from the tenets taught by the magisterium. See *Study shows widespread confusion and ignorance on the subject of official membership in a place of worship*, GREY MATTER RESEARCH & CONSULTING (Aug. 29, 2012), http://greymatterresearch.com/index_files/Membership.htm.

48. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269–70 n.6 (1981) (“[T]he university—and ultimately the courts” have no constitutional authority “to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith.”). For example, which activities are considered “inculcation” of the faith and who is a co-religionist are religious questions that will be answered differently by different religious groups under varying circumstances. *Id.* (singing and scripture reading by one student religious group are regarded as “worship” in some circumstances, but by another sect is not considered a part of a “worship service”); see also *id.* at 272 n.11 (definitional distinctions in university’s policy invite excessive entanglement).

49. See Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 *CARDOZO L. REV.* 1755, 1773–80 (2011).

Freedom Restoration Act of 1993 (RFRA).⁵⁰ The Act is applicable where the federal government is the agent imposing a burden on religion.⁵¹ RFRA has a definition of “religious exercise” that suggests breadth, instructing the courts and administrators that protected religion is neither confined to religious practices that are compelled by a faith nor to religious practices that are central to a faith.⁵² Moreover, an important but until now under-appreciated feature of RFRA is that religious acts are protected, not just passive beliefs,⁵³ and that “religious exercise” covers more than disputes affecting internal church autonomy.⁵⁴

50. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

51. *Id.* at § 2000bb-3(a).

52. *Id.* § 2000bb-2(4), cross-referencing the definition at 42 U.S.C. § 2000cc-5(7)(A) (2006). Both inquiries are to be avoided because they raise Establishment Clause problems for civil courts having to take sides over religious differences.

53. In RFRA, religious exercise includes more than religious belief. *Compare* 42 U.S.C. at § 2000bb-1(a) (all substantial burdens on religious exercise are covered by the act) *with* § 2000bb-3(c) (burdens on religious belief are not authorized by the act, even in the face of compelling governmental interests).

54. 42 U.S.C. § 2000cc-5(7)(A) (“The term ‘religious exercise’ includes any exercise of religion.”).