

Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate

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I. INTRODUCTION: THE HHS MANDATE AND RELIGIOUS FREEDOM

Unexpectedly, questions about religious liberty—its foundations, importance, and scope—made a main-stage appearance in American political and cultural debate in 2012. The Republican Party’s election platform stated that religious freedom “has never been more needed than it is today” and pledged “to respect the religious beliefs and rights of conscience of all Americans and to safeguard the independence of their institutions from government.”¹ Mitt Romney received cheers at the GOP convention when he pledged to “guarantee America’s first liberty: the freedom of religion.”² The American Catholic bishops, in a widely publicized statement, “address[ed] an urgent summons to . . . Americans to be on guard, for religious liberty is under attack,” and declared a “fortnight for freedom” in summer 2012 to call attention to the problem.³

The prime matter triggering the warnings about religious liberty was the U.S. Department of Health and Human Services (HHS) mandate that employers cover contraception in employees’ insurance policies as a “preventive service” under the Affordable Care Act.⁴ Catholic organizations and individuals object to covering contraception; evangelicals and Catholics object to covering “emergency contraception” that they fear can act to abort new embryos by preventing their implantation in the uterus.⁵ As of November 2013, the objections had generated 75 cases nationwide filed by dioceses, social services, colleges, and secondary schools, and by commercial businesses owned by traditionalist objectors and producing either religious products (Tyndale House, a Christian book publisher) or secular products (for example, closely-held mining and

1. See *2012 Republican Party Platform*, WHITEHOUSE2012.COM, <http://whitehouse.gov/2012/08/30/2012-republican-party-platform/#Item8> [hereinafter “GOP Platform”].

2. *Mitt Romney Republican Convention Speech*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/08/30/mitt-romney-speech-text_n_1826619.html.

3. A Statement on Religious Liberty, United States Conference of Catholic Bishops (Mar. 20, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm/> [hereinafter “Bishops’ Statement”].

4. Interim Final Rules, 76 Fed. Reg. 46,623 (Aug. 3, 2011).

5. THE BECKET FUND, <http://www.becketfund.org/faq/>.

manufacturing companies).⁶ The Republican platform called the mandate “[t]he most offensive instance” of an alleged “war on religion” by the Obama administration.⁷ The Catholic bishops’ statement listed the mandate as the first example of threats to religious freedom, calling its imposition “unprecedented.”⁸ The mandate’s supporters responded, equally vehemently, that the religious-liberty concerns were non-existent, that the bishops and Republicans were together waging a “war against women.”⁹

At its first announcement in August 2011, the HHS mandate included an exemption for a “religious employer,” defined as an organization satisfying all of the following criteria: “(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under Internal Revenue Code section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii).”¹⁰ Although some reproductive-rights advocates questioned HHS’s authority to adopt any exemption, the far more vigorous objections were to the exemption’s narrowness: it essentially covered no more than houses of worship, leaving unprotected Catholic and evangelical social services, health-care institutions, and colleges and schools.¹¹ This aspect troubled critics the most because it suggested “that if a religious entity is not insular, but engaged with broader society, it loses its ‘religious’ character and liberties,” when in fact “[m]any faiths firmly believe in being open to and engaged with broader society and fellow citizens of other faiths.”¹²

6. See BECKET FUND, HHS MANDATE INFORMATION CENTRAL, <http://www.becketfund.org/hhsinformationcentral/> (last visited Nov. 3, 2013) [hereinafter “Becket Information”] (summarizing 36 cases brought by non-profits and 39 by for-profits); see also Gregory S. Baylor, *HHS Mandate Cases: A Scorecard*, ALLIANCE DEFENDING FREEDOM, http://blog.alliancedefendingfreedom.org/2013/01/14/hhs-mandate-cases-a-scorecard/?utm_source=Jan+21%2C+2013+eNews&utm_campaign=Jan+23%2C+2013+eNews&utm_medium=archive.

7. GOP Platform, *supra* note 1.

8. Bishops’ Statement, *supra* note 3.

9. Such charges predated the mandate controversy but multiplied during it. See, e.g., *U.S. Catholic Bishops Major Force Behind War on Women* COMMON DREAMS, <https://www.commondreams.org/newswire/2011/02/23-8> (statement of Terry O’Neill, president, National Organization for Women) (“The collusion of House Speaker John Boehner (R-Ohio) and the U.S. Conference of Catholic Bishops has led to an open declaration of war on the women of this country.”).

10. 45 C.F.R. § 147.130(a)(1)(iv)(B) (2010).

11. *Id.* (stating that the original exemption “respects the unique relationship between a house of worship and its employees in ministerial positions”).

12. Bishops’ Statement, *supra* note 3 (quoting Union of Orthodox Jewish Congregations, Statement, Jan. 24, 2012).

In response to such criticisms, HHS in February 2012 proposed a further “accommodation” under which, for religious non-profit organizations outside the narrow religious-employer exemption, the organization’s insurer would cover contraception without (HHS vowed) imposing any costs on the organization or including the coverage in the organization’s plan or contracts.¹³ With this proposal, the 2012 Democratic platform asserted, the administration had “respected the principle of religious liberty.”¹⁴ The proposal satisfied a few critics but not the most prominent ones, including the bishops.¹⁵

After several months’ delay during the election season, HHS proposed in February 2013, and confirmed in July 2013, new rules that addressed some of the remaining criticisms while still adhering to the insurer-pays accommodation for non-exempt religious organizations.¹⁶ With respect to the accommodation, HHS reemphasized that the insurer must keep the coverage separate from the organization’s group plan and must provide it “without the imposition of any cost-sharing requirement (such as a copayment, coinsurance, or a deductible), premium, fee, or other charge on plan participants or beneficiaries *or on the [religious] organization or its plan.*”¹⁷

13. HHS Cite (Feb. 10, 2012).

14. Moving America Forward: 2012 Democratic National Platform, at 18, <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf>.

15. The critics remained unconvinced partly because the accommodation was unclear in details and partly because they believed that, even if clarified, it would still connect the employer with the coverage of objectionable procedures. See, e.g., Comment Letter from Sr. Carol Keehan, CHA, et al., to Marilyn Tavenner, HHS (June 15, 2012), at 4, available at <http://www.chausa.org/Pages/Advocacy/Issues/Overview/> (“[T]he more we learn, the more it appears that [the compromise] would be unduly cumbersome and would be unlikely to adequately meet the religious liberty concerns of all of our members and other Church ministries.”).

Lawsuits proceeded in the meantime, although only those brought by for-profit businesses and owners reached the merits. For a summary, see, e.g., Becket Information, *supra* note 6. Suits by non-profits were held in abeyance or dismissed as non-justiciable because HHS was still working on its accommodation and had put off enforcement against non-profits for a year in the meantime. See cases collected at *id.*; but see Roman Catholic Archdiocese of New York v. Sebelius, 907 F. Supp. 310, 325–33, 2012 WL 6042864 (E.D.N.Y. 2012) (finding that organizations were suffering injuries because of changes they had to make in anticipation of mandate’s enforcement, and that “[t]here is no ‘Trust us, changes are coming’ clause in the Constitution”).

16. Proposed Rules, Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, (proposed Feb. 6, 2013), available at www.ofr.gov/OFRUpload/OFRData/2013-02420_PI.pdf [hereinafter “2013 Proposed Rules”]; Final Rules, Coverage of Certain Preventive Services Under the Affordable Care Act, 78 FR 39,870-01 (July 2, 2013), available at http://www.ofr.gov/OFRUpload/OFRData/2013-15866_PI.pdf [hereinafter “2013 Final Rules”]. For detailed discussion, see *infra* Part V.

17. 2013 Final Rules, *supra* note 16, 78 FR at 39,875 (emphasis added).

HHS also expanded the core exemption by eliminating its first three criteria, requiring only that the organization be a church or its “integrated auxiliary” under the IRS code—thereby extending protection to “[activities] of houses of worship that provide educational, charitable, or social services to their communities,” such as the congregation-run soup kitchen or the parish-operated school.¹⁸ This satisfied some remaining critics by deleting the especially controversial language that had denied exemption solely because an entity served others (rather than preach) or reached out beyond its own adherents. But non-profits not integrated organizationally into a church—agencies organizationally separate from their denominational body, or independent of any denomination—were left with only the insurer-pays accommodation, and for-profit businesses with no accommodation at all. For this and other reasons, the bishops and many others continued their opposition.¹⁹

The controversy over the HHS mandate is rich both in legal issues and, because it broke through to popular consciousness, in lessons about the dynamics and rhetoric of religious freedom. It also marks the latest in a series of disputes between traditionalist religious tenets and laws that promote what are commonly labeled “progressive” views on issues of sexual morality such as abortion, gay rights, and women’s roles in society. Pharmacists who refuse to dispense emergency contraception, small landlords who refuse to rent to unmarried couples, Catholic adoption agencies that refuse to place children with same-sex couples, and other objectors have clashed with anti-discrimination laws or government-funding conditions. The clashes have become so frequent, and sustained such a high level of continuing hostility between the two sides, that the

18. *Id.* at 39,874 (quoting 26 U.S.C. § 6033(a)(1), 6033(a)(3)(A)(i), (ii) (2012)). HHS thus confirmed its February conclusion that the accommodation “should not exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school.” Proposed Rules, *supra* note 16, at 19.

19. USCCB News Release, *HHS Final Rule Still Requires Action in Congress, Courts, Says Cardinal Dolan*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (July 3, 2013), available at <http://www.usccb.org/news/2013/13-137.cfm> (repeating the criticism that the mandate did not exempt for-profit or individual objectors); Becket Fund Statement, *Final HHS Rule Fails to Protect Constitutional Rights of Millions of Americans*, THE BECKET FUND (June 28, 2013), available at <http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate/> (same).

pattern of progressive laws versus traditionalist objectors is now a central feature of American free-exercise disputes.

Douglas Laycock suggests that the battles have become so polarized that they may now differ in kind from the ordinary range of conflicts between groups supporting legislation and religious groups objecting to it. He documents instances in which “important forces in American society” have not simply opposed a particular religious-liberty claim but have “question[ed] the free exercise of religion in principle—suggesting that [it] may be a bad idea, or at least, a right to be minimized.”²⁰ He gives examples, some from conservatives, but more from the left: from gay-rights groups, reproductive-rights groups, liberal activists and bloggers.²¹

I believe it is vital at this juncture to bolster the commitment among political progressives to religious liberty, even for traditionalists with whom they disagree. Religious liberty has been a central and invaluable part of our constitutional tradition, but that will not continue if it becomes another partisan issue—if one side of our fundamental political/cultural divide becomes skeptical of its value and seeks to minimize it. This article emphasizes, in particular, meaningful freedom for faith-based service organizations, including schools, social services, and healthcare services. As the HHS mandate dramatizes, there is an increasingly strong impulse, especially on the left, to limit the free exercise of religious institutions to the narrow confines of the house of worship.

I do not want to overstate my claims. The large majority of political progressives affirm religious liberty in principle, and a secular civil-liberties group like the ACLU still defends religious practice as a distinctive right in certain cases—even some cases involving religiously grounded conduct that might be considered non-progressive, and even in the face of generally applicable rules in public settings like state schools.²²

20. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 407 (2011).

21. *Id.* at 411–19. For further examples, see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. Rev. (forthcoming 2014), ms. at 33–38, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304427. Here is just one quote, from the Democratic sponsor of Colorado’s civil-union bill, which contained no significant exemption for objecting religious organizations:

So, what to say to those whose religion requires them to discriminate? I’ll tell you what I’d say. Get thee to a nunnery and live there then. Go live a monastic life away from modern society, away from people you can’t see as equal to yourself, away from the stream of commerce where you may have to serve them.

Id. at 33 (quoting Sen. Pat Steadman as quoted in Vincent Carroll, *Civil Unions or a Cloister? Please*, DENVER POST 25A (Feb. 13, 2013)).

22. See, e.g., ACLU, ACLU DEFENSE OF RELIGIOUS PRACTICE AND EXPRESSION IN PUBLIC SCHOOLS, <http://www.aclu.org/aclu-defense-religious-practice-and-expression-public-schools> (describing ACLU defense of rights of female Muslim students to wear headscarves).

In the HHS context, the Obama administration's tortured, drawn-out efforts to accommodate showed it ultimately gave weight to religious-freedom arguments, even if one might question the adequacy of some of the accommodations.

Moreover, since this article calls on progressives to respect liberty for those with whom they disagree, I acknowledge at the outset that traditionalist religions have their own multiple failings in respecting others' liberties. The examples run from gay rights to the religious liberty of Muslims and atheists. These hamper traditionalists' ability to claim protection themselves from government imposition as a matter of reciprocity, which otherwise would be a strong argument.²³ Traditionalists' opposition to other liberties also helps fuel opponents' suspicions that traditionalist religious-liberty claims are raised only as a pretext, to limit others' freedom by whatever means possible. I argue here that the suspicion is misplaced; traditionalists' religious-liberty claims are strong. But the claims would have more credibility if traditionalists would recognize, or at least spend less time opposing, others' rights. That proposition requires more explanation; later in this Article I will have comments on what traditionalist groups should do.²⁴

With all that said, I believe that there is a worrying trend of more and more progressives questioning meaningful protection for religious liberty in significant instances. Conservatives and libertarians say this conflict shows that religious liberty and progressivism are irreconcilable at their foundations, since (as I explore in Part II) religious liberty protects private arrangements while progressivism is suspicious of them.²⁵ But what if one accepts progressive premises in many cases—what if one thinks, for example, that government regulation of the private sector often promotes freedom—but also believes in strong religious organizational freedom? As it happens, I hold such a combination of views: I have published arguments in defense of the Affordable Care Act and same-sex marriage while defending conscience accommodations in both contexts.²⁶ I expect

in schools, and Catholic students to wear rosary beads, including in the face of generally applicable school rules).

23. See *infra* Part IV.A.1.

24. See *infra* Parts IV.A.1, VI.A.

25. See, e.g., Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990); see *infra* Part II.C.

26. See, e.g., Thomas C. Berg, *Abortion and the Key Provisions of the Patient Protection and Affordable Care Act (PPACA)*, available at <http://www.wholelifeheroes.org/berg/> (defending ACA against objections by anti-abortion groups); Douglas Laycock

that there are many other Americans who, like me, hold certain progressive political views but also highly value the freedom of religious organizations to pursue their mission and identity. Accordingly, I want to ask whether progressivism and religious organizational freedom must necessarily conflict. They might simply be opposing values that one balances, much like order and liberty, or security and privacy. But I propose that there are actually progressive arguments for strong religious organizational freedom.

Therefore, the centerpiece of this Article, in Part IV, is a set of arguments why progressives should support strong protections for faith-based service organizations such as social services, health-care institutions, and schools. I focus on the HHS mandate because its exemption originally excluded such organizations entirely. I argue that there are sharp ironies when progressives exclude faith-based service organizations from religious-freedom protection. Service to others lies at the core of religious exercise; progressives more than anyone should affirm this; and accommodating such organizations vigorously both preserves civil liberty and recognizes the overall contributions they make to progressive social goals, even if they conflict with progressive positions on some deeply-felt issues.²⁷

Before making a progressive case for religious organizational freedom, I sketch, in Part II, three features of progressivism and discuss how they may support or conflict with religious-liberty claims. I then consider, in Part III, the relevance of the topic of this symposium: the concept of “freedom of the church” and the arguments for it set out by Fr. John Courtney Murray and others. The classic arguments for the freedom of the church overlap significantly with mine. But the concept of the freedom of the church is not sufficient for a context like the HHS mandate, because that concept asserts a categorical bar to government’s jurisdiction. It is unconvincing to assert that government entirely lacks jurisdiction over insurance coverage for all employees. Arguments for religious organizational freedom in such matters, like the arguments that appear in Part IV, must rely on a balancing of interests rather than a categorical bar. But that balancing, even for progressives, should give the religious organization’s freedom significant weight.

& Thomas C. Berg, *Protecting Religious Liberty and Same-Sex Marriage*, 99 VA. L. REV. IN BRIEF (2013), available at http://www.virginialawreview.org/inbrief.php?s=in_brief&p=2013/04/17/protecting_samesex_marriage_an, and at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254131.

27. For purposes of this Article, I do not distinguish between constitutional exemptions declared by courts and statutory exemptions adopted by legislators or regulators.

II. PROGRESSIVISM AND ITS CONFLICTS WITH RELIGIOUS FREEDOM

How and why might progressivism conflict, incidentally or inherently, with the freedom of religious organizations? This requires first defining “progressivism,” a term that has no precise or agreed-on meaning, other than perhaps the cluster of policy positions currently held by the left wing of the Democratic Party. But a definition is necessary, one appropriate to this context. I offer three features that define progressivism relatively sympathetically, consistently with its historical development, and also identify its conflicts with religious liberty.

A. *Equal Freedom*

First, progressivism emphasizes a commitment to expanded, equal freedom for all, especially for individuals and groups that have been unfairly disadvantaged or that are particularly vulnerable on important matters. I share Alex Gourevitch’s judgment that if one overarching standard can pull together various progressive positions, “[t]he standard is whether particular measures advance the cause of equal freedom.”²⁸ Progressives certainly understand themselves to be advancing the rights and flourishing of the poor and working class, as well as racial, ethnic, religious, sexual, and other minorities. The general concept of equal freedom for those who are in need or vulnerable does not necessarily conflict with religious freedom; indeed, I will argue, it supports it.

B. *Against Traditionalist Sexual Morality*

Second, however, progressivism in America today has come to include a set of policy views on sexual-morality issues such as abortion, contraception, gay rights, and others. Laws based on such views generate most of the progressive clashes with religious liberty, including the HHS dispute.²⁹ Deciding whether these “progressive” policy views in fact advance equal freedom for the disadvantaged is well beyond this paper’s scope.³⁰ But the asserted connection is a familiar one. To take just one

28. Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L.J. 1159, 1164 (2007).

29. See Laycock, *supra* note 20, at 407 (summarizing the disputes).

30. For what it’s worth, I think that a number of those positions—anti-discrimination protection for gays and lesbians (including recognition of same-sex marriage) and positive

example, Linda McClain and James Fleming argue that goals of “progressive change” should focus generally on the “distribution of private and social power, not just economic redistribution”—for example, on “the unequal distribution of power and resources on the basis of gender and efforts to alter patterns of gender inequality in institutions of civil society, such as the family.”³¹

Professor Laycock recognizes that the conflict between progressive groups and traditionalist religions may be just one more example of a group pursuing legislation and running up against a conflicting religious-liberty claim. But he adds: “[M]y sense is that the deep disagreements over sexual morality are different from disagreements with other interest groups that resist exceptions for religious liberty. These disagreements have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences.”³² It can lead to the following syllogism, as Laycock puts it:

If traditional religion is the enemy, then it might follow that religious liberty is a bad thing, because it empowers that enemy. No one says this straight out, at least in public. But it is a reasonable inference from things that are said, both in public and in private. . . . The gay rights movement sees traditional religious teachings about same-sex relationships as simple bigotry. And it sees religion as the principal force that legitimates bigotry—and by legitimating it—helps sustain it. In this view, religion dresses hate and bigotry in quasi-respectable disguise. And in terms of support for laws that restrict how gays can live their lives, there is no difference between raw unthinking bigotry and the most sophisticated theological discourse.”³³

For the most intense proponents of the HHS mandate, opponents may not have been engaged in “bigotry,” but they were pursuing a “war on women.” To those proponents, a male celibate hierarchy seeks to deny rights to women based on a medieval theology rejected by most Catholics. The proponents found it “incredible that this is an issue in 2012.”³⁴

government support for women and families—do advance equal freedom, but (as reflected in my membership on the board of Democrats for Life of America) I think abortion does not.

31. Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 433, 449 (2005) (reviewing RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004)).

32. Laycock, *supra* note 20, at 414.

33. *Id.* at 415.

34. Janet Dalven, director, ACLU Reproductive Freedom Project, quoted in Stephanie Mencimer, *The Catholic Legal Assault on the Contraception Mandate*, MOTHER JONES, May 22, 2012, <http://www.motherjones.com/mojo/2012/05/catholic-holy-war-hhs-contraception-mandate> (“The fight they are waging isn’t about religious liberty at all, but about whether a woman should have insurance coverage for birth control. When you stop and think about it, it’s incredible that this is an issue in 2012.”).

C. Government Regulation of Private Power

Finally, however, the conflict over sexual roles and morality would not raise fundamental religious-liberty issues were it not coupled to a third feature of progressivism: its belief that private organizations' power can restrict freedom and that government regulation overturning their decisions can increase freedom. As Eric Foner writes in his history of American conceptions of freedom, the early-20th-century Progressive movement itself held that

[o]nly energetic government could create the social conditions for freedom, [as] an alternative to control of Americans' lives by narrow interests that manipulated politics or by the all-powerful corporations. . . . "Progressivism," said the social scientist William F. Willoughby, "looks to state action as the . . . only practicable means now in sight, of giving to the individual, all individuals, not merely a small economically strong class, real freedom." . . . "Effective freedom," wrote John Dewey, . . . was far different from the "highly formal and limited concept of liberty" as a preexisting possession of autonomous individuals that needed to be protected from outside restraint. It meant "effective power to do specific things," and as such was a function of "the *distribution* of powers at a given time."³⁵

New Dealers picked up the theme: "Americans, declared a writer in the journal *Christian Century*, had been 'so busy defending a traditional . . . concept of freedom from government control' that they had forgotten that liberty can be protected 'by the state' rather than needing protection from it."³⁶

Modern welfare laws follow this tradition of "envisioning liberty not just in its 'negative' dimension—i.e., protection against interference with an individual's pursuit of particular goods—but also in its 'positive' dimension—i.e., a right to affirmative assistance in securing particular goods."³⁷ President Obama reiterated a similar argument in his second inaugural address when he stated that safety-net guarantees in "programs like Medicare and Medicaid and Social Security . . . do not sap our initiative; they strengthen us. They do not make us a nation of takers;

35. ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 152–53 (Norton 1998) (quotations omitted; emphasis in original).

36. *Id.* at 198.

37. Robert K. Vischer, *The Progressive Case for Conscience*, *THE PUBLIC DISCOURSE* (Mar. 9, 2011), available at <http://www.thepublicdiscourse.com/2011/03/2915>.

they free us to take the risks that make this country great.”³⁸ The healthcare law and the HHS mandate likewise reflect this vision. HHS Secretary Kathleen Sebelius, for example, has consistently argued that the mandate promotes women’s freedom by “put[ting] women and their doctors, not insurance companies or the government, in charge of health care decisions.”³⁹

Although this positive-freedom theory first focused on economic freedom, it is not a huge step to assert that government can promote other freedoms by regulating private power. In an influential article, Robin West named such an approach “progressive constitutionalism,” and she claimed for it equal or preferred status to the view that the Constitution guarantees negative freedoms against government:

[C]onservative constitutionalists view private or social normative authority as the legitimate and best source of guidance for state action; accordingly, they view both the Constitution and constitutional adjudication as means of preserving and protecting that authority and the power that undergirds it against either legislative or judicial encroachment. Progressive constitutionalists, in sharp contrast, view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy, and regard the Constitution as one important mechanism for challenging those entrenched private orders.⁴⁰

Applied to the HHS mandate, this approach would claim that Catholic organizations deny religious freedom to their employees who wish to use birth control and that requiring the organizations to provide coverage would promote religious freedom. The mandate’s defenders argued just that, as in this representative example from the director of the ACLU’s Reproductive Freedom Project: “Real religious freedom gives everyone the right to make personal decisions, including whether and when to use birth control, based on our beliefs. It doesn’t give one group the right to impose its beliefs on others, or to use religion as an excuse to discriminate by denying employees access to vital services.”⁴¹

38. *Barack Obama Inaugural Address*, TELEGRAPH (Jan. 20, 2012), <http://www.telegraph.co.uk/news/worldnews/barackobama/9816372/Barack-Obama-Inaugural-Address-2013-full-text.html>.

39. News Release, U.S. Department of Health and Human Services: Health care law gives women control over their care, offers free preventive services to 47 million women (July 31, 2012), <http://www.hhs.gov/news/press/2012pres/07/20120731a.html>.

40. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 643 (1990).

41. Dalven, *quoted in* Mencimer, *supra* note 34. Google searches produce hundreds of similar statements by groups, activists, and ordinary individuals. See, e.g., Commenter at, Bryan Cones, *The HHS mandate and Catholic Health Association: Do Catholics want special treatment?*, U.S. CATHOLIC (June 19, 2012), <http://www.uscatholic.org/blog/2012/06/hhs-mandate-and-catholic-health-association-do-catholic-want-special-treatment> (“The Church’s position actually violates religious freedom. . . . By [accommodating Catholic organizations], you deny equal protection under the law to people simply by dint of the

On this score, the HHS mandate is again the latest example of a recurring controversy. As my colleague Rob Vischer has summarized, remarking on the dispute over whether pharmacists must provide emergency contraception:

[I]n the reproductive rights arena, [t]he focus has shifted from decriminalizing abortion and contraception to insisting that the individual must have unfettered access to [them]. . . . The fact that the state cannot forbid the provision of a particular good or service is taken to mean that every good or service must be provided by all licensed providers. In the process, the moral convictions of providers are rendered irrelevant.⁴²

Vischer “do[es] not mean [to suggest] that access to morally controversial goods and services is never of legitimate public value”; but he observes that “the enshrinement of universal access as a precondition for participating in the marketplace imposes significant costs on . . . the liberty of conscience [of providers].”⁴³ The logic of mandated access would allow the state to require Catholic organizations to cover not just contraception and Plan B but also second-term abortions. And the controversies over Catholic Charities branches refusing to place children with same-sex couples raise fundamentally similar questions, this time under anti-discrimination laws. “The pro-choice and gay rights groups want conservative believers not just to leave them alone, but to affirmatively assist with abortions and same-sex relationships—or else leave any occupation that might ever be relevant.”⁴⁴

A simple rejoinder to the progressive claims is that the First Amendment limits only state action, not private decisions. But that is too simple. Almost no one argues that the First or Fourteenth Amendments directly require government to ensure that providers and employers give access to morally controversial services. Instead, the argument is about the scope of the provider’s or employer’s religious liberty rights, since such rights are not absolute. The progressive constitutionalist merely reframes his argument to say that the Constitution permit the state, within a broad range, to shift power from employers to employees so as to empower the latter’s exercise of conscience.

fact that they are employed by a hospital or college with some affiliation to the Roman Rite Church; whether or not the person is Catholic in their faith or believes the Church’s teaching on contraception. This is the real attack on religious freedom.”).

42. Vischer, *supra* note 37.

43. *Id.*

44. Laycock, *supra* note 20, at 418.

As I mentioned above, conservatives and libertarians say this conflict shows that religious liberty and progressivism are irreconcilable at their foundations, since one protects private ordering and the other is suspicious of it.⁴⁵ But both progressivism and religious organizational freedom have wide support: most Americans likely affirm both to some degree. I argue that they are not simply conflicting values that one should balance—although that is one aspect of the situation—but that there are actually progressive arguments for strong religious organizational freedom. Before exploring those arguments in detail, I discuss how they relate to this symposium’s subject, the concept of “freedom of the church.”

III. HOW DOES FREEDOM OF THE CHURCH APPLY?

The distinctive concept of the “freedom of the church” supports religious organizational freedom in a context like the HHS mandate—but only to a point. The dispute over the mandate shows the possibilities, but also the limits, of “the freedom of the church.”

Those who speak of the freedom of the church generally hold that a central feature of the Western tradition of religious freedom is the power of churches to act in a meaningful sphere without government interference. Greg Kalscheur refers to it as “institutional religious freedom—the freedom of the church to be the church,” or “the freedom of religious institutions to carry out their institutional religious missions”—and posits that it “lies at the heart of the religious freedom protected by the First Amendment.”⁴⁶ Kalscheur follows in the vein of John Courtney Murray, who argued in *We Hold These Truths* that Catholics could affirm the American principles of government because, among other things, “in contrast to the Jacobin syste[m], the American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends.”⁴⁷ This “American limitation of governmental powers,” if it is adhered to, “guarantee[s] the Church . . . a stable condition of freedom” to pursue her mission, “to define herself and to exercise to the full her spiritual jurisdiction.”⁴⁸

The freedom of the church has two important corollary themes. First, religious organizations serve as counterweights to government power. “[A]t crucial points in Western history,” Carl Esbeck emphasizes, religious

45. See *supra* note 25 and accompanying text.

46. Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL OF RTS. J. 43, 45 (2008).

47. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 70* (Sheed & Ward 1960) [hereinafter “MURRAY, WHTT”].

48. *Id.*

organizations have “had a pivotal role in guarding against political absolutism,” from the medieval conflicts between pope and emperor over the power of appointing bishops to the twentieth century’s religiously inspired resistance movements against Communism.⁴⁹ John Courtney Murray warned of the monistic tendency of the modern state to seek to serve as guarantor of all values, including not just order but also human freedom and human fulfillment. The democratic secular state, he said, may not be totalitarian—it may not “pretend to be the Universe or to speak infallibly”—but “it does assert itself to be the embodiment of whatever fallible human wisdom may be available to man, because it is the highest school of human experience.”⁵⁰ Freedom of the church counters this by “empower[ing] the church . . . in the face of state efforts to assert ‘omnipotent omnicompetence’ over all areas of human life and human activity.”⁵¹

Second, “freedom of the church” typically asserts a jurisdictional barrier: it defines a sphere into which the state simply may not intrude. The metaphor is that “[t]he freedom of the church within the religious realm is . . . a ‘sovereign authority.’ Government and religion might be seen as ‘co-sovereigns’ in this sense: there is a territory beyond civil affairs that is ‘reserved to the churches,’” on matters where they are “‘doing their own thing.’”⁵² Steve Smith likewise analogizes the church to “a foreign embassy” located in civil territory, immune from the civil sovereign’s jurisdiction.⁵³ Accordingly, “some matters lie within an exclusive sphere that is off limits to government regulation.”⁵⁴ Indeed, the jurisdictional nature of the barrier, it is argued, constitutes its very strength: no justification offered by the government can overcome it.⁵⁵

49. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 67 (1998).

50. MURRAY, WHTT, *supra* note 47, at 209.

51. Kalscheur, *supra* note 46, at 57–58 (quoting MURRAY, WHTT, *supra* note 47).

52. Kalscheur, *supra* note 46, at 65 (quoting Esbeck, *supra* note 49, at 55); MAX L. STACKHOUSE, RELIGION, RIGHTS, AND THE CONSTITUTION, IN AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990).

53. Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, ms. 26–27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412 (emphasis in original).

54. *Id.*

55. Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007), ms. 23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916336 (“Hildebrand’s contention was not that a state-imposed burden on the Church’s [freedom] must be justified by balancing [its] freedom . . . against compelling state interests.”).

The first of these themes, limited government, certainly challenges the HHS mandate, insofar as the mandate rests on the broad principle that government regulation of private organizations promotes individual freedom. The conflict with progressivism is obvious if the latter gives government a broad constitutional warrant, in Professor West's words, to "challeng[e] entrenched private orders." Progressives who follow that logic would have struck John Courtney Murray as intellectual heirs of those "'French enthusiasts' for whom 'no autonomous social forms intermediate between the individual and the state' and who aimed to 'destroy[] . . . all self-governing intermediate social forms with particular ends.'"⁵⁶

But the freedom of the church approach has only partial relevance for the HHS dispute. From the beginning HHS exempted houses of worship; in the literal sense it protected the freedom of the church.⁵⁷ For objectors the original exemption was infuriatingly narrow: a social-service organization with deep religious identity lost eligibility for exemption not only by employing non-adherents, but simply by serving them, indeed by serving anyone instead of preaching to them ("inculcat[ing] religious values"). This narrowness indeed made the original exemption seriously flawed, I will argue, even from a progressive perspective. But it is noteworthy that in his discussion of the freedom of the church, Steve Smith proposes a similar result. If one followed the analogy of church to "foreign embassy," he wrote, "the jurisdictional protection would apply to *churches*; it would not necessarily extend to other sorts of institutions or employers (like schools, possibly) that, although 'religious,' are not themselves churches."⁵⁸ An exemption for churches only is the original HHS exemption.

The second theme in "the freedom of the church"—jurisdictional sovereignty—is what limits its domain (while bolstering protection within that domain). Arguably the exclusive jurisdiction of the church can only apply to distinctively religious bodies like congregations, dioceses, religious orders, or seminaries and yeshivas. Religious schools, social

56. MURRAY, WHTT, *supra* note 47, at 307, 308 (quoted in Garnett, *supra* note 55, ms. at 23).

57. Interim Final Rules, 76 Fed. Reg. 46623 (Aug. 3, 2011) ("Specifically, the Departments [HHS, Labor, Treasury] seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions."); *see also* Proposed Rules, *supra* note 16, at 20 ("when the Departments first defined religious employer, the primary goal was to exempt the group health plans of houses of worship").

58. Smith, *supra* note 53, at 42 (emphasis in original) ("Delicate questions would no doubt be presented as to whether particular affiliated agencies or outreach institutions are sufficiently connected to a church as to be themselves part of 'the church.'").

services, and healthcare institutions, however pervasive their religious principles or practices, engage in activities that cannot be wholly free from state jurisdiction.⁵⁹ Perhaps when religious groups provide these services, they are not merely “doing their own thing.”⁶⁰

Yet that conception is surely too narrow: non-church religious institutions, as well as churches, must have a sphere of exclusive authority over “internal decision[s] that affect[their] faith and mission.”⁶¹ The Court so held, unanimously, in *EEOC v. Hosanna-Tabor Evangelical Lutheran School*,⁶² which not only affirmed the “ministerial exception” to anti-discrimination suits against religious employers, but also applied it to a teacher at a religious school whose duties made her effectively a “minister.” The Court held that “the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”⁶³ The plaintiff in *Hosanna-Tabor* taught religion classes, led prayers, and was formally “called” by the sponsoring congregation; before the case, lower courts had also repeatedly extended the exception to cover ministers in non-church religious entities.⁶⁴ The extension fits perfectly with the freedom of the church approach, which emphasizes that religion is exercised in concrete institutions that must have freedom to operate.⁶⁵ Since the Catholic Church and other faiths pursue their

59. See, e.g., THOMAS C. BERG, *Religiously Affiliated Education*, in RELIGIOUS ORGANIZATIONS AND THE LAW 675, 688, 692 (James A. Serritella et al. eds., 2006) (noting that legislatures and courts have refused to regard matters of curriculum, or employment of ordinary teachers, at religiously affiliated schools “as a purely internal matter”) (citing cases).

60. Kalscheur, *supra* note 46, at 64–65.

61. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 132 S. Ct. 694, 707 (2012).

62. *Id.*

63. *Id.* at 709 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)). This amounts to a substantive holding of exclusive jurisdiction, even though the Court ruled that procedurally the exception constitutes an affirmative defense rather than a bar to subject-matter jurisdiction. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

64. See, e.g., *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (canon law professor); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (social-services chaplain); *Scharon v. St. Luke’s Episcopal Presbyterian Hospital*, 929 F.2d 360 (8th Cir. 1991) (hospital chaplain).

65. Richard W. Garnett, *Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); see also PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* ch. 6 (Harvard Univ. Press 2012); Second Vatican Council, Declaration on Religious Freedom, paras. 3–4 (“The social nature of man . . . requires that he should give external expression to his internal acts of religion: that he should

missions through schools, social services, and health-care providers, freedom of the church must extend to those entities too. As Vatican II's *Declaration on Religious Freedom* puts it:

It comes within the definition of religious freedom that religious communities should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity. . . . [T]he social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable and social organizations, under the impulse of their own religious sense."⁶⁶

Thus, we should draw jurisdictional lines not at churches only, but also at religious functions within other institutions. The church's side of the line should include the distinctively religious features of religious schools, social services, and hospitals: what Carl Esbeck calls "inherently religious features," such as how the organization "identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts."⁶⁷

But even thus extended, the jurisdictional approach does not give an absolute shield to every religiously significant operation of faith-based institutions. Although the ministerial exception would surely protect Catholic non-profits from having to cover contraception for "ministerial" positions—those who give religious leadership or have significant religious training and functions⁶⁸— it seems unlikely to cover the whole range of employees on a matter such as insurance coverage. It is implausible to assert that non-church religious organizations have exclusive authority in all their relations with employees. A categorical, jurisdictional bar to government regulation will inevitably be limited to certain employees and certain questions.⁶⁹

To be persuasive in contexts beyond jurisdictional bars—contexts like the HHS mandate—religious freedom arguments must have two features. First, they must accept tests that consider state interests on the other side of the ledger. The balance should be weighted toward the organization's freedom, I will argue, but arguments for freedom must acknowledge the balance. This actually fits with some statements in the key modern

share with others in matters religious; that he should profess his religion in community. . . . Religious communities are a requirement of the social nature both of man and of religion itself."), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

66. *Id.* para. 4.

67. Esbeck, *supra* note 49, at 110.

68. Hosanna-Tabor, 132 S. Ct. at 708.

69. Kalscheur, *supra* note 46, at 65 ("How to define the sovereign arena in which religion "is doing its own thing" may present us with significant challenges[.]").

writings asserting the freedom of the church. Vatican II's Declaration on Religious Freedom recognizes "due limits" on the exercise of religious freedom, including the need to promote a "just public order" and preserve "equality of the citizens before the law."⁷⁰ Fr. Murray likewise recognized that religious freedom could be limited in various cases.⁷¹ He also emphasized that the limits themselves needed to be confined: his criteria were "that the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; that the rule of jurisprudence of the free society be strictly observed, scil., as much freedom as possible, as much coercion as necessary."⁷² Murray's criteria resemble the compelling-interest test of the Religious Freedom Restoration Act, the main ground for the legal challenges to the HHS mandate.⁷³

Second, religious-freedom arguments in this context must include pragmatic arguments that will appeal even to people inclined to be skeptical of broad rights for religious organizations with which they disagree. The arguments should include, for example, the value that religious organizations, including those with traditionalist beliefs, bring to society. Pragmatic reasons are especially important when one seeks accommodation from the political branches, as organizations objecting to the HHS mandate did. Even the "freedom of the church" approach itself, notwithstanding its assertion of jurisdictional shield for certain core church decisions, also rests on pragmatic arguments. Murray, for example, argued that freedom of the church and institutional pluralism were crucial not just to limit government but to accomplish social goals effectively.⁷⁴

70. See Cathleen Kaveny, in *The Bishops & Religious Liberty*, COMMONWEAL (June 15, 2012), available at <http://commonwealmagazine.org/bishops-religious-liberty>.

71. John Courtney Murray, *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 519, 530 (1964) (religious activity may be limited when it "seriously violate[s] either the public peace or commonly accepted standards of public morality, or the rights of other citizens").

72. *Id.*

73. 42 U.S.C. § 2000bb-1-7 (incorporating the free exercise test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). See Kalschauer, *supra* note 46, at 60–61 (citation omitted) (noting the similarity between Murray's and *Sherbert's* criteria).

74. MURRAY, WHTT, *supra* note 47, at 212 ("the modern state has, as a matter of empirical fact, proven impotent to do all the things it has undertaken to do"); *id.* ("the state depends for its motivation on a vitality which it cannot by itself command") (quoting William Hocking).

The Catholic bishops' 2012 statement on religious liberty includes such a pragmatic argument: "[w]ithout religious liberty properly understood, all Americans suffer, deprived of the essential contribution in education, health care, feeding the hungry, civil rights, and social services that religious Americans make every day, both here at home and overseas."⁷⁵ In the next part, I expand on this and other arguments to answer the question: why should progressives support significant freedom for religious organizations even when they find some of their beliefs and practices deeply wrong?

IV. PROGRESSIVE ARGUMENTS FOR RELIGIOUS ORGANIZATIONAL FREEDOM

My thesis is that it is ironic and mistaken for progressives to deny or minimize religious-freedom protection for faith-based service organizations, as the original HHS exemption did. Works of justice, mercy, and service lie at the core of many religious faiths, but especially those that describe themselves as "progressive." These works also rank among the features that progressives, religious or not, value most in religious organizations.⁷⁶ As an illustrative text, I take the comments of President Obama himself, from a widely reported speech during his first presidential campaign. He recounted how

I came to see my faith as being both a personal commitment to Christ and a commitment to my community; that while I could sit in church and pray all I want, I wouldn't be fulfilling God's will unless I went out and did the Lord's work.

There are millions of Americans who share [this] view of their faith, who feel they have an obligation to help others. . . . [W]hile these groups are often made up of folks who've come together around a common faith, they're usually working to help people of all faiths or of no faith at all.⁷⁷

75. Bishops' Statement, *supra* note 3 ("[Protecting religious liberty] is about whether we can make our contribution to the common good of all Americans. Can we do the good works our faith calls us to do, without having to compromise that very same faith?"). On the other hand, the bishops' statement lost effectiveness, in my view, because it failed to acknowledge limits to religious liberty or explain why recent government actions could not be justified by those limits. See Kaveny, *supra* note 70.

76. See *infra* Part IV.B; ROBERT WUTHNOW & JOHN HYDE EVANS, THE QUIET HAND OF GOD: FAITH-BASED ACTIVISM AND THE PUBLIC ROLE OF MAINLINE PROTESTANTISM 224 (2002) ("The [mainline] church's concern for the hungry and powerless . . . was beyond reproach. . . . [Mainline leaders] emphasized the credibility that stemmed from the church's tradition of concern for the poor and its extensive experience at the grassroots of caring for the needy through service programs.").

77. *Obama Delivers Speech on Faith in America*, N.Y. TIMES, July 1, 2008, <http://www.nytimes.com/2008/07/01/us/politics/01obama-text.html?pagewanted=all>.

Ironically, however, these features—“a commitment to [the] community,” beyond just praying or preaching, by groups “who’ve come together around a common faith” but who “work[] to help people of all faiths or of no faith at all”—are precisely the ones that HHS originally proposed should disqualify an organization from the exemption.

Obama’s description of the nature, motivation, and value of faith-based service organizations suggests two broad reasons for accommodating them. The first is civil libertarian: their service activity is a core exercise of religion, one that presumptively merits accommodation through the First Amendment or legislative measures. The second reason sounds in considerations of civic virtue: such organizations make important contributions to civic goals and social capital that progressives should, and that our religious-freedom tradition does, value.⁷⁸ Finally, there are also pragmatic reasons for accommodation: above all, that by answering religious-liberty concerns it makes the underlying legislation (often, progressive legislation) easier to pass.

*A. Religious Exercise/Conscience and State Power: Civil
Libertarian Arguments*

Forming in groups to serve others is central to religion and therefore to the free exercise of religion: it lies at the core, not the periphery. Progressives in particular should acknowledge this. If a progressive-oriented society values free exercise as a civil liberty, as it should, then its accommodation for faith-based service organizations in cases of conflicts of conscience should be generous and meaningful. Accommodation for such organizations cannot be unlimited, of course, but neither should it be narrow or, like the original HHS exemption, non-existent.

78. For a similar summary of civil-libertarian and civic-virtue arguments for accommodation—in this case, moderate accommodation—see Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Law?*, 43 B.C. L. REV. 781, 827 (2007) (“Never granting [exemptions] disparages religious beliefs and coerces religious believers, which is a loss not only to them but also to a nation committed to pluralism and benefited by the contributions religious groups bring to their members and to the larger society.”). See generally STEVEN SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* (2009); Kent Greenawalt, *Progressive Constitutionalism: Concepts of Interpretation and the Religion Clauses*, 4 WIDENER L. SYMP. J. 41, 46–48 (1999).

I. Progressives and Religious Freedom

Progressives have generally valued the protection of religious freedom, including the exemption of religious objectors from generally applicable laws. The New Deal Court, led by liberals like William Douglas and Frank Murphy, pioneered constitutional protection for religious freedom in the Jehovah's Witnesses cases, at least some of which declared exemptions from general laws.⁷⁹ Justice Brennan wrote *Sherbert v. Verner*,⁸⁰ the seminal decision requiring exemptions under the Free Exercise Clause, and he and other liberal justices continued to defend exemptions both before and after the majority rejected them in *Employment Division v. Smith*.⁸¹ The ACLU, People for the American Way, and other progressive civil-liberties groups played a crucial role in the coalition that passed the Religious Freedom Restoration Act to restore exemptions after *Smith*.⁸²

Such a commitment is appropriate for progressives, for religious conscience itself falls squarely within the commitment to equal freedom. We can see this by comparing religious freedom to other rights that progressives affirm. For example, among the most powerful arguments for gay rights, especially for same-sex marriage, is that intimate relationships, aimed at permanence and often involving the raising of children, are central to a person's identity, and that individuals should be able to live out that identity in public, not just insular private, settings. The most powerful arguments for women's rights and empowerment are that one's sex, and how society treats it, can shape one's life in pervasive ways. The same features surely apply to religious conscience and identity.⁸³ Religious believers and groups have a powerful drive to live consistently with their faith in all aspects of life, including participation in the "public" activities and relationships of civil society. As Alan Brownstein puts it:

79. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

80. 374 U.S. 398 (1963).

81. 494 U.S. 872 (1990). See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (dissenting opinions of Brennan and Blackmun, JJ.); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988) (Brennan, J., dissenting); *Smith*, 494 U.S. 872 (Blackmun, J., dissenting); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Souter, J., concurring in the judgment) (calling for reconsidering *Smith's* rule); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Souter, J., dissenting) (same, noting "very substantial issues about the soundness of the *Smith* rule").

82. Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994).

83. See, e.g., Thomas C. Berg, *What Same-Sex-Marriage and Religious Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 207–08, 212–26 (2010) [hereinafter "Berg, Common"] (describing the parallels).

For serious believers, religion is one of the most self-defining and transformative decisions of human existence. Religious beliefs affect virtually all of the defining decisions of personhood. They influence whom we will marry and what that union represents, the birth of our children, our interactions with family members, the way we deal with death, the ethics of our professional conduct, and many other aspects of our lives. Almost any other individual decision pales in comparison to the serious commitment to religious faith.⁸⁴

Likewise, Chris Eisgruber and Larry Sager recognize that religious belief and affiliation “are important components of individual and group identity,” because “[r]eligious affiliation typically implicates an expansive web of belief and conduct”—a “comprehensive” web rather than a set of “discrete propositions or theories”—and “[i]n a variety of ways the perceived and actual stakes of being within or without these webs of belief and membership can be very high,” such as “leading a life of virtue or a life of sin,” or “fulfilling or squandering one’s highest destiny.”⁸⁵ Eisgruber and Sager make this point to show why discrimination against a religious practice or identity is especially harmful, but it shows just as much why a substantial state restriction of a religious practice or identity is harmful even if it is non-discriminatory.⁸⁶ Religion is distinctive, if not unique, in its importance and comprehensiveness, even granting that other moral views deserve respect from the law as well. Thus, as Professor Brownstein has put it, “both religious liberty and the right of same-sex couples to marry share a common constitutional and normative foundation: a commitment to personal autonomy, authenticity in conduct, and relational responsibilities.”⁸⁷

84. Alan Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)).

85. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 61, 125–26 (2007).

86. Thomas C. Berg, *Can Religious Freedom Be Protected as Equality?*, 85 TEX. L. REV. 1185, 1199 (2007) (reviewing EISGRUBER AND SAGER, *supra* note 85).

87. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U. SAN FRAN. L. REV. 389, 400 (2010) [hereinafter Brownstein, *Reciprocal Accommodation*]. I have characterized the parallels as follows (Berg, *Common*, *supra* note 83, at 207–08):

[B]oth same-sex couples and religious believers claim that their conduct stems from commitments central to their identity—love and fidelity to a life partner, faithfulness to the moral norms of God—and that they should be able to live these commitments in a public way, touching all aspects of their lives. If gay couples claim a right beyond private behavior—participation in the social institution of civil marriage—so too do religious believers who seek to follow

Same-sex couples and religious dissenters share another feature: both need protection of their civil liberties because “what they experience as among the highest virtues is condemned by others as a grave evil”:

Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate. Because gays and lesbians and religious conservatives are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.⁸⁸

To quote Professor Brownstein again, the danger in such situations is that government will “focus on one characteristic of a person—their race, religion, national ancestry or sexual orientation—and act as if that one attribute determines the value of the person.”⁸⁹ Civil liberties protections are meant for people who are vulnerable to such reductionist dismissals of their interests. Both same-sex couples and religious traditionalists are vulnerable in this way.

For all of these reasons, when progressive arguments call for protecting important, pervasive aspects of personal identity like commitment to a life partner, reciprocity calls for giving strong protection to religious beliefs and practices as well.

Reciprocity works the other way too.⁹⁰ Traditionalist religious believers have the right to organize politically to block recognition of same-sex civil marriage. But doing so undercuts their arguments for reciprocity of rights; it also helps fuel opponents’ suspicions that religious-liberty claims are just a pretext for limiting others’ freedom. In the coming years, vigorous opposition to same-sex marriage will increasingly alienate not just gay-rights activists but also moderates. I am not suggesting that traditional believers must affirmatively support same-sex civil marriage. But even lowering the level of opposition would help. Traditionalists must turn their focus from resisting same-sex marriage in the law to protecting their ability to follow the traditional definition of marriage in their own organizations.

their faith not just in houses of worship, but in charitable efforts and in their daily work lives.

Although Brownstein and I both call for reciprocity in rights, we take somewhat different approaches on how and where to draw the lines between the conflicting interests. *Id.* at 415–33.

88. Laycock & Berg, *supra* note 26, at 4.

89. Brownstein, *supra* note 87, at 405 n.47.

90. With apologies to Yogi Berra.

2. *Religious Freedom for Faith-Based Service Organizations*

Progressives today often affirm religious freedom for individuals but, as in the original HHS mandate, reject or seriously constrict it for organizations.⁹¹ This seems to fit the progressive tenet that private organizations often wield illegitimate social and economic power and that by regulating them, government can promote individual freedom. The initial HHS rule exemplified a common strategy for shrinking organizational protection: confining it to the house of worship or to clergy and their worship-related activities. In the same vein, proponents of same-sex marriage frequently argue that religious exemptions from anti-discrimination liability should only protect houses of worship and clergy with objections to hosting or performing a marriage.⁹²

If, however, service to others lies at the core of religious exercise, then it is improper to disqualify organizations from free exercise protection when they provide such services. And no one should affirm more strongly than progressives that service lies at the core of religion. From the Social Gospel through the civil-rights movement through current ecumenical social-justice efforts, service to those in need has been among the defining emphases of the liberal/progressive wing of American religion.⁹³ For example, “[l]eft-leaning Catholics,” John Allen wrote, “have always rejected the idea that one has to proselytize in order to be genuinely religious”; the mandate “hits them where they live [because their] natural

91. See, e.g., Catholics for Choice, *The Truth About Religious Freedom*, <http://www.catholicsforchoice.org/topics/politics/TheTruthAboutReligiousFreedom.asp> (“Institutions do not have consciences, individuals do. . . . We recognize the right of individual medical professionals to decline to provide services they consider immoral. However, it goes too far to grant such rights to an entire institution.”); Laura Underkuffler, *Thoughts on Smith and Religious-Group Autonomy*, 2004 B.Y.U. L. REV. 1773 (arguing that institutional autonomy can be more dangerous than individual exemptions). For general arguments against organizational protections, see Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

92. See, e.g., Robin Fretwell Wilson, *Charting the Success of Same-Sex Marriage Legislation*, available at http://law.wlu.edu/faculty/faculty_documents/wilsonr/ChartingTheSuccessAppendix.pdf.

93. See, e.g., KENNETH WALD & ALISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* 202 (6th ed. 2007) (reporting surveys showing that religious liberals “[give] the greatest priority to what have been called ‘social justice’ questions such as poverty and peace”).

habitat . . . is formed by the church's schools, hospitals and charities."⁹⁴ President Obama's remark about "d[oin]g the Lord's work" and meeting "the obligation to help others"⁹⁵ likewise invokes this tradition. The President later answered claims that his administration was hostile to religion, noting that his job as a community organizer, "my first real job out of college, was working with churches in low-income communities, trying to make sure that the social gospel was made real, that people were getting help."⁹⁶

Nevertheless, as I've already noted, the original mandate disqualified organizations from protection based on the very features of broad community service that the President commended. Moreover, some of the mandate's proponents cavalierly dismissed the religious nature of social and health-care services and schools. The fund-raising group Emily's List referred to them as "so-called 'religious'" organizations; the *New York Times* called them "nonreligious arms" of the Church.⁹⁷ Such language ought to disturb other progressives, especially the large number whose progressive commitments arise from religious faith. Ironically, progressives who call faith-based social services "nonreligious" sound much like old-line Protestant fundamentalists who claimed that the only purpose of the Christian church was to save souls.⁹⁸ HHS tried to distance itself from such statements, saying that the narrow definition in the original exemption was "not intended as a judgment about the mission, sincerity, or commitment of the [non-church, service-providing] employer."⁹⁹ That mattered little, however, when HHS continued to propose to legitimate the language by

94. John L. Allen, Jr., 'Surprising support' and the future of center-left, NATIONAL CATHOLIC REPORTER (Aug. 10, 2012), <http://ncronline.org/blogs/all-things-catholic/surprising-support-and-future-center-left>.

95. See *supra* note 77 and accompanying text.

96. *Obama: My "Social Gospel" Work Dispels "War on Religion,"* WASH. POST, UNDER GOD (Mar. 16, 2012, 11:15 AM), http://www.washingtonpost.com/blogs/under-god/post/obama-my-social-gospel-work-dispels-war-on-religion/2012/03/16/gIQAb08TGS_blog.html.

97. Emily's List, Stop the Attacks on Birth Control, <http://www.thepetitionsite.com/takeaction/124/733/626/>; Editorial, *The Freedom to Choose Birth Control*, N.Y. TIMES, Feb. 10, 2012, available at http://www.nytimes.com/2012/02/11/opinion/the-freedom-to-choose-birth-control.html?_r=1.

98. In the 1960s, for example, the Rev. Jerry Falwell criticized ministers in the civil rights movement for attempting to "reform the externals" instead of "preaching the pure saving gospel of Jesus Christ." Jerry Falwell, Sermon, Ministers and Marchers (Mar. 21, 1965) (quoted in FRANCES FITZGERALD, CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY AMERICAN CULTURES 129 (1986)).

99. Advance Notice of Proposed Rulemaking, Certain Preventive Services under the Affordable Care Act (Mar. 21, 2012), available at <https://www.federalregister.gov/articles/2012/03/21/2012-6689/certain-preventive-services-under-the-affordable-care-act> [hereinafter "March 2012 ANPRM"].

writing it into federal law. Shortly before the mandate controversy arose, the president of Catholic Charities USA had urged, in another context, that a religious nonprofit entity should not be “penalize[d] for being—[for] working as a community organization.”¹⁰⁰ The original, minimalist HHS exemption did exactly that.

By February 2013 the administration proposed changes that not only purported to shift the burdens of coverage from the faith-based employer to its insurer, but also removed the language excluding organizations’ service activities from eligibility for mandate’s core exemption. Part V discusses these changes, which may significantly ameliorate the effects on faith-based service organizations. But even if they do, similar issues are sure to recur in many future disputes, such as those over antidiscrimination laws and same-sex marriage. America remains locked in a struggle over whether the freedom of organizations to act on their religious grounding and identity should be confined to the most insular settings or should extend to the provision of services in the broader society.

Following religious belief and maintaining religious identity is crucial for religious organizations, not just for individuals. The same features of identity-definition and comprehensiveness that mark religion in serious individual believers—the same web of belief and conduct—applies for organizations founded on religious principles. Organizations, like individuals, can suffer serious and pervasive harm when their participation in some important aspect of life requires that they violate tenets that inspire and ground that participation in the first place. The Catholic Health Care Association spoke of this interconnectedness of beliefs and practices when it complained about the HHS mandate’s “false dichotomy between the Catholic Church and the ministries through which the Church lives out the teachings of Jesus Christ”:

Catholic health care providers are participants in the healing ministry of Jesus Christ. Our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church and its teachings about the dignity of the human person and the sanctity of human life from conception to natural death.¹⁰¹

100. THE BROOKINGS INSTITUTION, FAITH-BASED & NEIGHBORHOOD PARTNERSHIPS IN THE OBAMA ERA: ASSESSING THE FIRST YEAR AND LOOKING AHEAD 172 (Feb. 18, 2010) (remarks of Rev. Larry Snyder), *available at* <http://www.brookings.edu/events/2010/02/18-community-partnerships>.

101. CHA June 2012 Comment, *supra* note 15.

Likewise, in a comment concerning another dispute preceding the HHS mandate, the general counsel of the large evangelical Protestant relief agency World Vision emphasized, ““We are not just another humanitarian organization, but a branch of the body of Christ. . . . The key to our effectiveness is our faith, not our size. If we would lose our birthright, if we ever would not be able to determine our team, we’d lose our vision.””¹⁰²

So far, I have spoken of organizations sharing features with individuals—for example, religious identity as a web of belief and conduct—so that effects on organization can be analogized to those on individuals. But effects on organizations also affect individuals themselves. Organizations serve as the means for aggregating and representing individual interests. An organization’s identity, its overall mission, motivates many people to give to it, others to work or volunteer for it, and still others to choose to receive services from it. If organizations are forced to contradict their identity and change their character, many of these individuals will see their own religious freedom constricted.

Progressives may generally value government more than conservatives do, but progressive religious organizations have their own conflicts with government. They too may find themselves in the position of saying “We must obey God rather than men.”¹⁰³ Recently the Catholic, Episcopal, and Methodist bishops of Alabama sued state officials to enjoin operation of the state’s draconian law against assisting illegal immigrants, arguing that the law blocked religious organizations from “freely exercis[ing] their requisite duty to practice the Gospel [and] extend hospitality to all people without reservation.”¹⁰⁴ In Minnesota, peace-oriented churches brought a successful state free-exercise challenge to the state’s conceal-carry law that prevented them from barring guns from their property.¹⁰⁵ Progressives do not, and should not, always treat government as a good. Indeed, it’s easy to conceive of a parallel to the HHS mandate involving a progressive organization. Suppose a legislative body in a red state concluded that people would be safer if more carried guns—indeed, that women might gain the greatest safety benefits—and therefore required employers to defray the costs of employees’ gun purchases as part of a package of benefits. Could a Mennonite relief organization be required to cover the cost of guns for employees who choose to buy them?

102. STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* 25 (2012) (quoting Steven T. McFarland).

103. Acts 5:29 (Revised Standard Version).

104. See Iulia Filip, *Bishops Say Alabama’s Harsh Immigration Law Would Criminalize Religious Sacraments*, COURTHOUSE NEWS (Aug. 4, 2011), <http://www.courthousenews.com/2011/08/04/38714.htm>.

105. *Edina Community Lutheran Church v. State*, 745 N.W.2d 194 (Minn. App. 2008).

Progressives rightly emphasize that state regulation of private entities can promote people's equal freedom by promoting material security and access to important goods. But this calculus is frequently complex, since regulation too involves costs on freedom, and the balance is quite different when a value as important as religious freedom stands on the other side. Accommodating a religious organization may lessen employees' access to contraception, but government may also have alternative ways of increasing that access without conflicting with the organization's tenets.¹⁰⁶ A presumptive posture of accommodation requires the government to explore such alternatives. If the government refuses to accommodate, the organization typically faces a deeply painful choice: it must either violate the tenets of the faith that grounds its work in the first place, exit the work that it views as a core exercise of the faith, or pay heavy fines. That coerced choice creates suffering, resentment, and social division, the kinds of harms that the founding generation sought to avoid.¹⁰⁷ Of course, when organizations act in society their free exercise of religion cannot be absolute; but it should be presumptively strong. Part V explores the boundaries on free exercise in the context of the HHS mandate and other disputes.

*B. Religious Organizations' Contributions: Civic
Republican Arguments*

So far my arguments have been civil libertarian in nature, focused on protecting the conscience and identity of religious organizations and the people that form them. But these organizational rights also rest on arguments that invoke "civic republicanism" or "civic virtue": that is, the contributions such organizations make to the common good. Arguments about religion's role in developing civic capacities have always played a role in justifying religious freedom in America.¹⁰⁸ Faith-based service organizations, including those with traditionalist beliefs that progressives

106. For examples of such analysis, see *infra* Part V.

107. James Madison, Memorial and Remonstrance Against Religious Assessments, ¶ 11 (1785), available at http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html; see Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEG. ISSUES 313, 317 (1996) (expanding on the argument).

108. See, e.g., Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87 (1992); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385–85 (1996).

oppose, play vital roles in serving the needy and vulnerable—services that progressives should support as ensuring equal freedom for all.¹⁰⁹ These organizations view their identity as sufficiently important that coercion to violate it may lead them to exit their work. In pursuing progressive values of the common good and service to the needy, we act at our peril if we threaten institutions that are particularly effective at mobilizing people for those values.

Progressives do highly value the service work of religious organizations, a recent Pew survey shows. Among respondents reporting no religious affiliation, a group that identifies 2 to 1 as liberal and Democratic, 77 percent said that religious organizations “play an important role in helping the poor and needy,”¹¹⁰ and 78 percent said that religious organizations “bring people together and help strengthen community bonds.”¹¹¹ When President Obama commended religious groups “working to help people of all faiths or of no faith at all,”¹¹² he of course commended not just their sense of conscience but their actual contributions to society. In 2012, as the controversy over his administration’s contraception mandate dragged on, the Democratic campaign platform emphasized how religious non-profits promoted progressive goals of social justice:

Faith. Faith has always been a central part of the American story, and it has been a driving force of progress and justice throughout our history. We know that our nation, our communities, and our lives are made vastly stronger and richer by faith and the countless acts of justice and mercy it inspires. Faith-based organizations will always be critical allies in meeting the challenges that face our nation and our world—from domestic and global poverty, to climate change and human trafficking. People of faith and religious organizations do amazing work in communities across this country and the world, and we believe in lifting up and valuing that good work, and finding ways to support it where possible.¹¹³

The paragraph was intended to affirm the Obama administration’s continuation of the initiatives the Bush administration began for expanding the funding of faith-based social-service organizations.¹¹⁴ And even-

109. See *supra* Part II.A (describing progressive emphasis on equal freedom for the vulnerable).

110. Pew Research Center, “Nones” on the Rise: One in Five Adults Have No Religious Affiliation 11–12 (Oct. 9, 2012), available at http://www.pewforum.org/uploaded/Files/Topics/Religious_Affiliation/Unaffiliated/NonesOnTheRise-full.pdf.

111. *Id.* at 23.

112. See *supra* note 77 and accompanying text.

113. Moving America Forward: 2012 Democratic National Platform, at 15, <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf>.

114. See *id.* (“We believe in constitutionally sound, evidence-based partnerships with faith-based and other non-profit organizations to serve those in need and advance our shared interests. There is no conflict between supporting faith-based institutions and

handed funding may be a legitimate way to acknowledge faith-based good works. But the most basic way to acknowledge them is to avoid unnecessarily coercing such organizations to violate their tenets and identity. Without entering the controversy over subsidizing faith-based service organizations, government can simply leave them alone, within reasonable limits, to provide their services. Freedom for religious organizations serves not just to limit government, but to encourage the contributions of these organizations to the common good.

First, the evidence suggests that assistance to the poor and vulnerable would be imperiled if faith-based service organizations exited such work because of conflicts of conscience. Political scientist Stephen Monsma, a leading empirical researcher on faith-based non-profits, says pointedly: “If [faith-based service organizations] would disappear overnight, a crisis of the first magnitude would exist in the nation’s social safety net.”¹¹⁵ The full case for that proposition is beyond my purview here, but a few pieces of evidence indicate the magnitude and distinctiveness of religious organizations’ contributions.

Take the magnitude first. Catholic Charities USA provides more persons in the U.S. with social services than any entity except the federal government:¹¹⁶ more than 10.2 million persons in 2010, through 171 regional affiliates and 3,300 local offices providing food, housing, and family-related services, “responding to disasters and meeting basic human needs.”¹¹⁷ Catholic hospitals and health-care facilities form the largest private nonprofit health-care system in the nation; each year Catholic hospitals care for one in six American hospital patients and typically provide a disproportionate share of public-health and specialty services.¹¹⁸ Evangelical Protestant social services also are crucial. They include,

respecting our Constitution, and a full commitment to both principles is essential for the continued flourishing of both faith and country.”).

115. MONSMA, *supra* note 102, at 18–19.

116. See Laury Oaks, *Catholic Church*, in 1 POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, AND POLICY 131, 131 (Gwendolyn Mink & Alice O’Connor eds., 2004).

117. CATHOLIC CHARITIES AT A GLANCE, <http://www.catholiccharitiesusa.org/document.doc?id=2853> (Catholic Charities and affiliates “provided client services 15,448,529 times” to 10,270,292 unduplicated clients”).

118. CATHOLIC HEALTH ASSOCIATION, CATHOLIC HEALTH CARE IN THE UNITED STATES 1–2 (Jan. 2013), available at <http://www.chausa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=7830>. See also *Obama Risks \$100 Billion if Catholic Hospitals Close*, THE FISCAL TIMES (Mar. 1, 2012), [http://www.thefiscaltimes.com/Columns/2012/03/01/Obama-Risks-\\$100-Billion-if-Catholic-Hospitals-Close.aspx#page2](http://www.thefiscaltimes.com/Columns/2012/03/01/Obama-Risks-$100-Billion-if-Catholic-Hospitals-Close.aspx#page2).

among thousands of providers, two of the 10 largest in the nation: the Salvation Army and World Vision, both of which opposed the HHS mandate in its earlier forms.¹¹⁹

Stephen Monsma collects an array of evidence about the magnitude of faith-based services. Here are a few examples: One study estimates that one-fifth of nonprofit organizations providing human services are faith-based in nature; the study's authors call this "most likely an underestimate."¹²⁰ "A survey of nonprofit relief efforts following the 2005 hurricanes Katrina and Rita in the New Orleans and Gulf Coast areas found that a majority (59 percent) of the nonprofit organizations providing relief were congregations or other faith-based agencies"; the religious agencies also tend to serve more persons than secular agencies.¹²¹ Among America's private overseas-relief agencies, 33 percent were faith-based in 2005, "deliver[ing] almost half of the nongovernmental international assistance"; World Vision, as Nicholas Kristof of the *New York Times* has observed, operates in 100 countries and has "more staff members than CARE, Save the Children, and the worldwide operations of [USAID]—combined."¹²² Faith-based foster-care and adoption agencies place thousands of children a year; the CEO of the National Council for Adoption has said that "[i]f [faith-based agencies] would disappear overnight the whole system would collapse on itself."¹²³

These contributions come from social ministries integrated into congregations or dioceses, as well as from separately incorporated nonprofits. The original HHS exemption arguably disqualified both categories by requiring that even a church-integrated entity must primarily reach adherents and primarily inculcate values rather than serve people. By removing the latter two restrictions in early 2013, HHS properly recognized

119. See *The 200 Largest U.S. Charities*, FORBES (Nov. 2011), available at http://www.forbes.com/lists/2011/14/200-largest-us-charities-11_rank.html (ranking the Salvation Army second, and World Vision ninth, in total donations). Both joined a June 2012 protest letter to HHS from almost 150 agencies and colleges, mostly but solely evangelical Protestant, organized by the Institutional Religious Freedom Alliance. INTERNATIONAL RELIGIOUS FREEDOM ALLIANCE, PROTEST LETTER SENT TO HHS SECRETARY ABOUT TWO CLASS RELIGIOUS SCHEME, <http://irfalliance.org/index.php?view=article&catid=21:in-the-news&id=60:protest-letter-sent-to-hhs-secretary-about-two-class-religious-scheme&format=pdf>.

120. MONSMA, *supra* note 102, at 18 (quoting Kirsten A. Gronbjerg & Steven Rathgeb Smith, *Nonprofit Organizations and Public Policies in the Delivery of Human Services*, in *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* 164 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999)).

121. *Id.* at 18 (citing CAROL J. DE VITA & FREDRICA D. KAMER, *THE ROLE OF FAITH-BASED AND COMMUNITY ORGANIZATIONS IN POST-HURRICANE HUMAN SERVICE RELIEF EFFORTS* 19 (2008)).

122. *Id.* at 21 (quoting Nicholas D. Kristof, *Learning from the Sins of Sodom*, N.Y. TIMES, Feb. 28, 2010, at Wk11).

123. *Id.* at 30; *id.* at 31 (quoting interview with Chuck Johnson).

the important role of social services integrated into congregations and dioceses. A leading study of 251 congregations nationwide finds that “[w]hile congregations function primarily as gathering places for collective worship, they also function as social safety nets, . . . providing assistance and support for those in greatest need.”¹²⁴ The average congregation in the study contributed about \$184,000 yearly in the value of social services, based on clergy/staff/volunteer hours, cash and in-kind support, and the value of space—and the nation has an estimated 250,000 to 350,000 congregations.¹²⁵ In a recent study the same researcher, Ram Cnaan, revises his estimated value of social services per urban congregation to more than \$476,000 yearly.¹²⁶

If faith-based service organizations with conscientious objections exit, or severely curtail their services, can we count on other organizations to fill their place? It is doubtful, not just because of the amount of work the organizations do, but because of its distinctive features. In Monsma’s words, “faith-based organizations often fill a niche that either government or large, secular social service agencies would have a hard time filling.”¹²⁷ For one thing, “they have faith-rooted beliefs into which they can tap to motivate and encourage” beneficiaries.¹²⁸ Among the prime examples are prisoner reentry programs, where—in the words of a report on one successful initiative—“faith-based institutions may be able to affect returning prisoners in ways that other programs do not,” because they “can help create the conditions for personal transformation, provide inspiration, and motivate individuals to achieve individual goals.”¹²⁹

Another distinctive feature lies in faith-based organizations’ capacity to mobilize grass-roots networks, volunteers, donations, and other resources. For example, Catholics, blacks, and white evangelicals (Hispanic and Anglo)—the three groups most likely to clash with progressive laws on sexual issues—are also, in the words of sociologist John DiIulio,

124. RAM A. CNAAN ET AL., *THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE* 100 (2002).

125. *Id.* at 99–100; *id.* at 9 (estimate of number of congregations).

126. *Spotlight: What’s A Congregation Worth?*, CHRISTIANITY TODAY (Mar. 31, 2011), available at <http://www.christianitytoday.com/ct/2011/april/spotlight-apr11.html>.

127. MONSMA, *supra* note 102, at 42.

128. *Id.*

129. *Id.* at 39 (quoting report of the Michigan Prisoner ReEntry Initiative, *Issues of Faith, Justice, and Forgiveness: Working with Faith-Based Organizations to Foster Diversity of Mission 2* (Sept. 2008)).

the three religious communities that figure most prominently in serving members and nonmembers alike. Each [group] showers volunteer hours and money on nonmembers who tend to be unlike members in terms of race, socioeconomic status, or religion.¹³⁰

Foreign missions and Catholic non-profits “bridge” across all three of these gaps, black-church FBOs across religion and socioeconomic status, and white evangelicals’ FBOs across race and socioeconomic status.¹³¹ For DiIulio, bridging these gaps brings people together and thus “show[er] bucketsful of social capital.”¹³² In their own work on “social capital,” Robert Putnam and David Campbell document how religious identity is more effective than non-religious identity in mobilizing people to volunteer and donate, not just for “religious” causes (by which Putnam and Campbell seem to mean uniquely religious activities such as worship or proselytizing), but for “secular” causes too (i.e. service to the needy even when done in a religious setting).¹³³ “In round numbers, regular churchgoers are more than twice as likely to volunteer to help the needy, compared to demographically matched Americans who rarely, if ever, attend church.”¹³⁴ Work on the congregational social services likewise emphasizes their ability to mobilize people through dense community networks.¹³⁵

In his Farewell Address as President, George Washington counseled that “religion and morality are indispensable supports” for political prosperity and warned that Americans should exercise “caution” in

130. JOHN J. DI IULIO, JR., *GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA’S FAITH-BASED FUTURE* 158 (2007). Although he served as the first head of George W. Bush’s Office of Faith-Based and Community Initiatives, DiIulio is no conservative cheerleader, but rather a Democrat who, after resigning his position, publicly criticized the Bush administration for committing inadequate funds to the faith-based/community initiative. *Id.* at 8–9, 120.

131. *Id.* at 158.

132. *Id.* (“[such organizations] function as volunteer-mobilizing civic powerhouses that daily supply vital social services to millions of people in need”).

133. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMAZING GRACE: HOW RELIGION DIVIDES AND UNITES US* 445 (2010) (“[R]eligion boosts total volunteering so substantially that in addition to their higher rate of religious volunteering, regular churchgoers are also much more likely to volunteer for secular causes.”).

134. *Id.* at 446. A *Chronicle of Philanthropy* study may seem to contradict this by showing lower rates of giving to “secular charities” in regions of the nation with higher rates of religious affiliation. *Faith and Giving*, PHILANTHROPY (Aug. 19, 2012), <http://philanthropy.com/article/FaithGiving/133611/>. The apparent explanation is that this study defines religiously-affiliated charities doing service work as “religious” rather than “secular,” whereas Putnam and Campbell gave respondents room to classify them as “secular.” If the question is what religious people contribute to causes, such as poverty relief, that progressives value, Putnam and Campbell’s characterization is more appropriate.

135. See, e.g., CNAAN, *supra* note 124, at 176 (“Many urban social networks are built around congregations, and it is much easier to develop a successful group or coalition when people know and trust one another because of shared experiences.”).

“indulg[ing] the supposition that morality can be maintained without religion.”¹³⁶ Today we should certainly reject Washington’s implications—if he meant them—that non-believers are less moral overall than believers, or that government should try to promote religion as a means to social progress and unity. But the facts indicate that religious organizations are crucial in America for motivating widespread works of justice and mercy. John Courtney Murray wrote that such institutions are important because “the state depends for its motivation on a vitality which it cannot by itself command.”¹³⁷ It is dangerous to suppose that we can replace the vitality these organizations offer if they decide they must exit their work to avoid compromising their identity, or that they must curtail their services to reduce catastrophic liability.

Religious organizations may well exit. Catholic Charities branches in Massachusetts, Illinois, and the District of Columbia have stopped performing adoptions because of rules requiring them to place children with same-sex couples.¹³⁸ The states lost the benefit of the organizations’ experience and contacts, especially concerning hard-to-place children with special needs. “In this all-or-nothing gambit,” Robin Wilson writes, “Catholic Charities lost, prospective adoptive parents lost, and so did many children in Massachusetts. Driving providers from the market who may have been able to continue in their roles with a legislative exemption impoverishes the whole enterprise.”¹³⁹ The HHS mandate likewise has triggered warnings that objecting organizations will cease providing services, depriving the community of assistance, or transfer them to non-religious operators, depriving the community of the distinctive social capital that religious organizations tend to generate. Such warnings have come from, among others, Cardinal Francis George of Chicago and the president of Belmont Abbey College, the first institution to sue HHS

136. George Washington, Farewell Address (Sept. 19, 1796) (“[R]eason & experience both forbid us to expect that National morality can prevail in exclusion of religious principle.”).

137. MURRAY, WHTT, *supra* note 47, at 212.

138. Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. TIMES, Dec. 29, 2011, at A16; Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1. Although some of the adoption disputes involved state-funded contracts, in Massachusetts at least the organization faced losing its license to perform adoptions altogether, funding or not.

139. Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 B.Y.U. J. PUB. L. 475, 493 (2008).

over the mandate.¹⁴⁰ It is not certain, of course, that organizations will follow through on the threats. But the government that triggers them engages in “a high-stakes game of chicken”¹⁴¹—one that it would be sensible to avoid, given the contributions that religious organizations make, unless regulation is supported by a strong societal need.

One could dismiss religious leaders’ warnings about possible exit as a kind of extortion, a tactic for negotiating concessions from the government to make circumstances more convenient for their organizations. But that would be unfair. It would miss the point that faith-based service organizations do their work as a religious endeavor. If we take that perspective seriously, we can appreciate how the organization would see a law conflicting with its tenets and identity as a fundamental frustration of its service work, not merely as an inconvenience it wishes to avoid.

Two further objections to the civic-contribution rationale for religious freedom merit discussion. First, it might be argued that the very prominence of faith-based service organizations shows that they significantly affect others when they contravene laws or regulations. Although this is sometimes true, sensible accommodation is possible in many cases because religious organizations are important but ample alternatives also exist. Consider, for example, the application to faith-based service organizations of laws against sexual-orientation discrimination. At least for personal services, such as marriage counseling, same-sex couples likely have no desire to patronize a traditionalist organization, while the organization’s distinctive contribution—which comes in serving people who want its services¹⁴²—will be lost if the conflict provokes the organization to exit. Although this analysis does not exhaust the potential harms from unjustified discrimination, it does show how religious organizations can be prominent in providing services but not so dominant that exempting them would cause serious hardship.

Second, it might be argued that a civic-virtue approach cannot support exemption of a practice that conflicts with a general law, since the law itself shows that the majority has decided the practice is inconsistent

140. The college’s president stated that “[w]e want to serve our community but we feel cornered . . . I believe we would go there [and close the college]” rather than comply with the coverage mandate. Amanda Memrick, *Belmont Abbey Officials Explain Health Care Lawsuit*, GASTON GAZETTE, Nov. 20, 2011, at 1B; see Robin Fretwell Wilson, *Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1448–49 (2012) (quoting this statement and Cardinal George’s).

141. Wilson, *supra* note 140, at 1449.

142. These are not necessarily adherents of the same faith, as is shown, for example, by the large number of non-Catholics attending urban Catholic schools. See, e.g., ANTHONY BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 297–304 (1993).

with civic virtue. But the answer to this lies in an important strain of America's religious-freedom tradition. President Washington reflected it long ago in a letter to a group of Quakers:

Your principles and conduct are well known to me; and it is doing the people called Quakers no more than justice to say, that (except their declining to share with others the burden of the common defense) there is no denomination among us, who are more exemplary and useful citizens.

I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.¹⁴³

As already indicated, Washington was a vigorous proponent of civic republican theory, which emphasized fostering socially valuable virtues like "honesty, diligence, devotion, public spiritedness, patriotism, [and] obedience" among the people.¹⁴⁴ He thought that religion's value consisted in its social utility: the moral habits it inculcated were necessary in a free society.¹⁴⁵ How then could he support "extensiv[e] accommodat[ion]" of Quakers and others who violated social norms? He did so because Quakers were generally "exemplary and useful citizens," largely because of the same belief system that led them to dissent from the norm of providing military service.

In other words, a specific act may deserve protection because even though others disapprove of it, it belongs to an overall pattern of living that has virtue they can recognize. This argument is central to the Supreme Court's leading religious-exemption decision, *Wisconsin v. Yoder*.¹⁴⁶ There the Justices protected the Amish practice of removing their teenagers from school, even though it violated compulsory-schooling laws, because it belonged to the overall Amish pattern of raising children with "habits of industry and self-reliance."¹⁴⁷

143. Letter from George Washington to the Annual Meeting of Quakers (Sept. 1789), available at <http://teachinamericanhistory.org/library/index.asp?document=393>.

144. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 385–86 (1996) (describing civic republicanism and Washington as one of its principal spokesmen).

145. Washington, Farewell Address, *supra* note 136.

146. 406 U.S. 205 (1972).

147. *Id.* at 224.

This argument is not merely pragmatic in nature: it an essential principle for marrying the values of pluralism and civic virtue. Protection of conscience and dissent can itself promote the common good by keeping the dissenter not just free, but free to continue to serve others.¹⁴⁸ Organizations contribute to societal goals from a variety of foundational perspectives and with a variety of other features. Thus “their best contribution to the common good may be an uncommon contribution,” as Stanley Carlson-Thies has put it.¹⁴⁹ Forcing an organization to change or minimize a feature of its distinctive identity risks undercutting the organization’s distinctive contributions inspired by that identity. These reasons justify some sort of presumption that organizations should be free to maintain their institutional identity and conscience as they provide services.

To regulate organizations that reach out to serve the broader community, on the ground that a particular practice conflicts with the common good, produces (again) ironic results. As Nancy Rosenblum and Robert Post describe, the case for heavy regulation of non-profits rests on a “logic of congruence” that emphasizes assimilation and fears balkanization:

Advocates of congruence fear that the multiplication of intermediate institutions does not mediate but balkanizes public life. They are apprehensive that plural associations and groups amplify self-interest, encourage arrant interest-group politics, exaggerate cultural egocentrism, and defy government. What is needed, in their view, is a strong assertion of public values and policies designed to loosen the hold of particular affiliations, so that members will be empowered to

148. In the context of same-sex marriage and religious traditionalism, I’ve argued for reciprocal protection of both side’s liberty (*see supra* Part IV.A.1); I’d also argue for reciprocal recognition of their civic virtues:

[People] may disapprove of [homosexuality] but still find in gay families the social virtues of commitment, sacrifice, and responsible child-rearing that make marriage an indispensable institution. . . . [But] if there is an argument that failing to recognize gay marriage may deprive marriage of the testimony that gay couples could give to its virtues, then there must be as strong an argument that failing to accommodate religious freedom may deprive society of multiple social virtues offered by religious organizations that have conscientious objections to gay marriage.

Berg, *Common, supra* note 83, at 224. As I’ve already mentioned, Alan Brownstein has helpfully showed how this argument can also be “recast . . . in traditional civil-rights terms.” *See* Brownstein, *supra* note 87, at 405 n.47 (quotation omitted) (arguing that civil-rights laws reflect the judgment that it is wrong to “focus on one characteristic of a person—their race, religion, national ancestry or sexual orientation—and act as if that one attribute determines the value of the person”).

149. Stanley Carlson-Thies, *Making an Uncommon Contribution to the Common Good*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, E-NEWS FOR FAITH-BASED ORGANIZATIONS (Oct. 6, 2011), available at <http://archive.constantcontact.com/fs020/1102433538532/archive/1107935942134.html>.

look beyond their groups and to identify themselves as members of the larger political community.¹⁵⁰

But the HHS mandate, especially its original form, affected precisely those religious organizations that, relatively speaking, work against balkanization. Religious organizations that employ non-adherents—even organizations that simply serve non-adherents—have already significantly rejected cultural egocentrism and “looked beyond” their “particular affiliations.” But the narrow HHS exemption left them unprotected, while protecting the most insular religious entities. I think that insular entities should be protected too: service organizations should be free to devote their energy to helping needy fellow adherents as well as non-adherents. But if one wishes to discourage insularity, it hardly makes sense to trigger regulation of an organization precisely when it decides to reach out to others. And suppose the exemption had been broadened so that the mandate only covered organizations that employ many people of other faiths (which proponents claim, reasonably, is the category where regulation is most justified¹⁵¹). This too would produce ironies, because surely some, perhaps many, organizations would then narrow their hiring to fellow members only. They would confine themselves precisely to their “particular affiliations.”

The ironies result from a logic that treats “balkanization” versus “public values” as an all or nothing choice. When an organization has reached out to serve and employ non-adherents in providing widely recognized social goods like shelter or health care, it is highly doubtful that it must be subject to each and every regulatory norm to prevent balkanization or promote political community. Recall that traditionalist religious organizations often have particular success in bridging certain social gaps, reaching “nonmembers who tend to be unlike members in terms of race, socioeconomic status, or religion.”¹⁵² In a society with an ongoing tradition

150. Nancy Rosenblum & Robert Post, *Introduction to CIVIL SOCIETY AND GOVERNMENT* (Nancy Rosenblum & Robert Post eds., 2002).

151. See, e.g., Joan Walsh, *Catholics Need to Preach What We Practice*, SALON.COM (Feb. 2, 2012), available at http://www.salon.com/2012/02/02/catholics_need_to_preach_what_we_practice/ (“[T]he administration is OK with church-run institutions that only employ Catholics prohibiting contraception coverage. It simply won’t let the church impose its teachings on non-Catholics.”). This statement was erroneous, of course, in that even organizations employing only Catholics were regulated if they gave people food, shelter, or health care rather than taught or preached, or if whatever services they provided were extended significantly to non-Catholics.

152. DI IULIO, *supra* note 130, at 158.

of private energy and voluntarism, including in religion, we ought to give room to organizations that choose varying ways to maintain their particular affiliations while serving public values.

Exemptions from anti-discrimination laws may present a more difficult case for progressives, because unjustified discrimination may indeed be more balkanizing. But organizations that discriminate on one unjustified ground can also still contribute by bridging other divisive social gaps. And George Washington would remind us to be “cautio[us]” before assuming that if they exit, others will fill the void.

C. Pragmatic Arguments: Enabling Underlying Legislation

A final argument for accommodation of religious organizations is simply pragmatic: “If there were no accommodations, the underlying legislation would become much more controversial and difficult to enact.”¹⁵³ This should matter to progressives, because they are more likely than their opponents to want to pass legislation: conservatives and libertarians are more often satisfied if nothing happens. Without meaningful accommodations, the only way to mitigate the effect of a proposed regulation on religious-freedom interests is to reject it altogether. Accommodations make it possible to enact the legislation and answer religious-liberty objections.

Recently, for example, legislation to recognize same-sex marriage has sometimes received the crucial votes because exemptions were added that meaningfully protect faith-based service organizations, not just clergy or churches that refuse to solemnize a marriage. As Robin Wilson has summarized it, in three of the seven states that enacted marriage equality by 2012, “proposed legislation offering protection only to the clergy failed to garner enough support to become law,” “only months before revised bills passed” with “more expensive protections.”¹⁵⁴ In New York, the *New York Times* concluded, religious exemptions were “the most pivotal” feature of the successful bill: “[L]anguage that Republican senators inserted . . . provided more expansive protections for religious organizations and helped pull the legislation over the finish line.”¹⁵⁵ A similar dynamic operated in Maryland, where several legislators indicated that religious exemptions played a role in switching or solidifying their vote.¹⁵⁶

153. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 694 (1992).

154. Wilson, *supra* note 140, at 1434–35.

155. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.

156. See Wilson, *supra* note 140, at 1435–36 (quoting and citing legislators).

Had the HHS mandate originally contained a meaningful religious-organizations exemption, it would have been shielded from some of the force of efforts to overturn it. The most effective critics of the original minimal exemption in early 2012 were Catholic liberals like Chris Matthews and E.J. Dionne, who supported the Affordable Care Act and dissented from the Church on contraception but wanted the Act and its implementation to strike a defensible balance with religious freedom.¹⁵⁷ The administration's insurer-pays accommodation, whether or not it disposed of the religious-liberty issues, certainly reduced the size and range of the opposition to the mandate.

To put the point in broad terms, the refusal to accommodate gives ammunition to those who object that regulation, however well-meant, inevitably tramples on freedom. Throughout American history, proponents of active government have defused that objection by vigorously protecting specified rights, including religious freedom. The Federalists' promise to adopt the Bill of Rights secured the votes to ratify the Constitution with its expanded central government. When the progressive Supreme Court of 1937 and afterward retreated from placing general limitations on economic regulation, it preserved the balance between regulation and liberty by vigorously enforcing "preferred" freedoms, including free exercise of religion. Progressives today can reap benefits from the same strategy.

The pragmatic balancing of competing interests to make government action possible is itself one kind of progressive virtue. The classic Progressive movement of the early 1900s, Elizabeth Sanders has observed, showed an "optimism, idealism, pragmatic experimentation, and willingness to work across party lines" that has much to offer methodologically "in the polarized and deadlocked era we inhabit one hundred years later."¹⁵⁸

157. Helene Cooper & Laurie Goldstein, *Rule Shift on Birth Control is Concession to Obama Allies*, N.Y. TIMES (Feb. 10, 2012), http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html?pagewanted=all&_r=0 (quoting Matthews calling the mandate "frightening," and Dionne saying the administration had "utterly botched the issue"); *id.* ("What had not been anticipated enough [by the administration], despite warnings . . . , was that allies would be furious [at the minimal exemption] too."). See E.J. Dionne Jr., *Obama's Breach of Faith Over Contraceptive Ruling*, WASH. POST, Jan. 29, 2012 ("Speaking as a Catholic, I wish the Church would be more open on the contraception question. But speaking as an American liberal who believes that religious pluralism imposes certain obligations on government, I think the Church's leaders had a right to ask for broader relief from a contraception mandate that would require it to act against its own teachings.").

158. Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1282 (2007); see also Kenneth I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI.

By protecting religious liberty strongly while ensuring general contraceptive coverage or recognizing marriage equality, decision makers can cut across culture-war lines and respect both sides' interests.

V. RESOLVING DISPUTES

The arguments above give progressive reasons to accommodate religious organizations significantly. But except for categorical bars like the ministerial exception to Title VII, even strong exemptions are presumptive only; they can be denied on the basis of strong state interests. Progressivism sees the interests underlying anti-discrimination and contraception-coverage laws as very important. Where should the line be drawn?

To answer that question in full is well beyond the scope of this Article. But in cases of conflict between anti-discrimination law and a religious organization's refusal to provide services, a crucial question should be whether there are alternatives to the religious service provider so that clients do not suffer hardship in obtaining the service. In most cases, religious organizations lack the market power to cause such hardship. Being refused service may cause psychological harm, and I do not deny the reality of that harm. But if the client can easily secure another provider, while the organization would be forced to choose among violating its identity, paying significant penalties, or exiting its work, the latter harm is greater. Accommodation would allow both sides to live out their identities in meaningful ways. I do not claim here that the availability of alternatives should be the only consideration in such cases, but it should be an important one.

With respect to the HHS mandate, I think the objecting religious organizations had a strong legal case against its original version. HHS's insurer-pays accommodation, bolstered and made more concrete in February 2013, has weakened the objectors' claims, although it has not done away with them.

The objectors' claims have rested primarily on the Religious Freedom Restoration Act (RFRA), which states that government must justify a substantial burden on religious exercise as the least restrictive means of serving a compelling governmental interest.¹⁵⁹ The original mandate seriously burdened religious organizations, by requiring them not just to pay the cost of objectionable procedures—contraception or (possibly)

L. REV. 759, 768 n.26, 768 (2006) (describing pragmatism as “a major influence on early twentieth century progressives” and connecting it to a purposive account of law as instituted to solve problems by availing itself of [p]ractical knowledge”) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

159. 42 U.S.C. § 2000bb-1 (2011).

abortion—but to enter into an insurance contract fixing that obligation. The element of contractual specificity, among other things, distinguishes insurance-coverage requirements from a citizen paying taxes a small portion of which may be used for a program he morally opposes, or an employer paying a salary part of which the employee may use for an objectionable purpose.¹⁶⁰ At the very least, an organization may plausibly believe that such an arrangement is close enough to the objectionable procedure to constitute impermissible facilitation—the sort of question of moral casuistry that has always been a matter of degree. If a court rules that such a connection is too remote, it does not simply make an ordinary judgment about the proximity of two acts. Rather, in effect it improperly rejects the organization’s religious belief as insufficient “to merit First Amendment” protection—for the organization’s conclusion that some act impermissibly cooperates with evil is itself a religious belief.¹⁶¹ For such reasons, the Supreme Court has deferred to objectors’

160. *Cf., e.g., O’Brien v. U.S. Dept. of Health and Human Services*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (finding, based on such analogies, that “RFRA does not protect against the slight burden on religious exercise that arises when one’s money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one’s own”); *with Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1140–43 (10th Cir. 2013) (en banc) (holding that business-corporation objectors were substantially burdened by facing a “Hobson’s choice” between violating their conscientious belief against covering “emergency contraceptives” and paying large fines). For the reasons that follow in the text, I believe that *Hobby Lobby*’s holding concerning “substantial burden” is correct and *O’Brien*’s holding wrong. Both decisions did involve commercial businesses owned by objecting individuals, a situation in which there are arguments against accommodation that do not apply to non-profit religious service organizations. But most of those arguments go to the extent and manageability of exemptions for businesses run by people of multiple faiths in a complex commercial marketplace—questions better assessed under the compelling-interest element of RFRA’s test. *Cf. United States v. Lee*, 455 U.S. 252 (1982) (finding that requiring Amish sole proprietors to pay social security taxes burdened their beliefs but was justified by government interests).

161. *See Thomas v. Review Board*, 450 U.S. 707, 714 (1981) (reversing a similar holding against a claimant, reasoning that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”). *See, e.g., Hobby Lobby*, 723 F.3d at 1141 (ruling for objecting corporations on the ground that “[i]t is not the employees’ health care decisions that burden the corporations’ religious beliefs, but the government’s demand that Hobby Lobby and Mardel enable access to contraceptives that Hobby Lobby and Mardel deem morally problematic”); *Tyndale House Publishers v. Sebelius*, 904 F. Supp. 2d 106, 123 (D.D.C. 2012) (Because it is the coverage, not just the use, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties.”).

judgments that the government's mandate is impermissible involving them in sinful acts. Thus the Court unhesitatingly accepted that forcing Amish employers to pay Social Security contributions for their employees substantially burdened the employers' religious exercise.¹⁶² And it accepted that withholding unemployment benefits from a Jehovah's Witness who refused to work in a factory producing munitions parts burdened his religious exercise, even though other Witnesses disagreed with his judgment: the plaintiff "drew a line, and it is not for us to say the line he drew was an unreasonable one."¹⁶³ The same holds for an organization's determination that to provide insurance coverage for contraception violates its tenets and identity.¹⁶⁴

I agree with Professor Brownstein that, when we balance burdens and government interests, accommodation may be unwarranted if the objector has a reasonable means of avoiding or reducing the burden.¹⁶⁵ But the original mandate allowed no reasonable means. Previous state-level mandates of contraceptive coverage had permitted employers to avoid them by self-insuring, adopting an ERISA plan to trigger federal preemption of state law, or withdrawing coverage only for prescriptions.¹⁶⁶ The HHS mandate originally required faith-based service organizations to cover contraception, period.¹⁶⁷ The potential penalties for maintaining a group plan that failed to include contraception were and are ruinous: \$100 a day for each "individual to whom such failure relates,"¹⁶⁸ meaning that a

162. *Lee*, 455 U.S. at 255–57 & n.3 (finding a burden on the Amish belief that "it [is] sinful [for them] not to provide for their own elderly and needy") (parentheticals supplied).

163. *Thomas*, 450 U.S. at 717–18.

164. *See, e.g., Hobby Lobby*, 723 F.3d at 1141 (holding that as in *Thomas*, "Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable").

165. Brownstein, *supra* note 87, at 416–17.

166. FAQs: Question 12, The Becket Fund, <http://www.becketfund.org/faq/>. *See Catholic Charities of Sacramento v. Superior Court*, 32 Cal.4th 527, 85 P.3d 67, 91–92 (C.A. 2004) (holding that employer was not burdened because statute only required that contraceptives be treated equally to other drugs and thus employer could avoid it "simply by not offering coverage for prescription drugs"); *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) (describing similar scope of New York law).

167. And still, of course, requires for-profit businesses run by religious individuals to do so.

168. 26 U.S.C. § 4980D; *see* Congressional Research Service Memo, Enforcement of the Preventive Health Care Services Requirements of the Patient Protection and Affordable Care Act, at 7–8 (Feb. 24, 2012), *available at* <http://www.scribd.com/doc/83822546/CRS-Enforcement-of-Preventive-Requirements> (explaining how these penalties might apply to failure to include mandatory services in group plan); CYNTHIA BROUGHNER, CONG. RESEARCH SERV. (REPORT FOR CONGRESS), PREVENTIVE HEALTH SERVICES

service organization with 500 employees would face a yearly penalty of more than \$18 million. The only conceivable course for an objecting employer would be to drop health coverage altogether and pay an excise tax of \$2,000 for virtually every one of its employees.¹⁶⁹ Even these charges would become onerous, because they rise continuously with the number of employees; the yearly charge for evangelical Wheaton College would be \$1.4 million, and for Notre Dame \$9 million.¹⁷⁰ On top of that, organizations that dropped insurance would likely have to pay increased salaries to attract employees—offsetting or even negating the saving of insurance costs—and many would be violating a religious belief that they should provide general health insurance as a matter of justice to their employees.¹⁷¹

Had the mandate simply continued to impose these burdens on non-church religious organizations, with no further accommodation, it is highly doubtful that the imposition would have satisfied RFRA's standard of serving a compelling interest test by the least restrictive means. There are certainly strong general arguments for encouraging contraceptive access, and it is true that many employees of Catholic social services, schools, and hospitals do not share the Church's moral stance on contraception. But "[i]t is well established that . . . 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited";¹⁷²

REGULATIONS: RELIGIOUS INSTITUTIONS' OBJECTIONS TO CONTRACEPTIVE COVERAGE (Feb. 24, 2012 (same)).

169. The formula for the excise tax is: (total number of full-time employees – 30) x \$2,000. See 26 U.S.C. § 4980H; JANMARIE MULVEY, CONG. RESEARCH SERV., POTENTIAL EMPLOYER PENALTIES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA), at 3–5 (July 3, 2013), available at www.fas.org/sgp/crs/misc/R41159.pdf.

170. See FAQ: Becket Fund's Lawsuits Against HHS, #11, available at <http://www.becketfund.org/faq/>; Nancy Frazier O'Brien, *Courts urged not to dismiss Catholic lawsuits against HHS mandate*, CATH. NEWS SERV. (Aug. 29, 2012), available at <http://www.catholicnews.com/data/stories/cns/1203636.htm> (Notre Dame calculation in deposition testimony of university's executive vice president).

See *Hobby Lobby*, 723 F.3d at 1140–41 (summarizing these alternatives and concluding they leave objecting organizations with a "Hobson's choice").

171. See, e.g., *Catholic Charities of Sacramento*, 32 Cal.4th at 540, 85 P.3d at 76 (noting that "Catholic Charities feels obliged to offer prescription drug insurance to its employees under what it describes as the 'Roman Catholic religious teaching' that 'an employer has a moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family'").

172. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

and the health-care law is full of such gaps. It exempts employers with fewer than 50 employees, leaving 96 percent of businesses and more than 30 million employers without a coverage guarantee;¹⁷³ it grandfathers many existing plans, for at least a few years; and HHS has exercised its statutory authority to grant waivers to thousands of employers based on hardship.¹⁷⁴ Second, rather than require coverage by objectors, the government could have seriously explored less restrictive options for ensuring contraception access for religious organizations' employees: community health centers, the state exchanges created under the ACA, insurers participating on those exchanges, or Title X funds freed up because Title X services are now covered by the ACA.¹⁷⁵ I agree with Professor Brownstein that when religious exercise is accommodated, government should, when possible, "tak[e] steps to spread the costs of the accommodation more broadly so that they do not fall quite so disproportionately on the members of the protected class."¹⁷⁶ There appeared to be several such options concerning the mandate.

Eventually, however—it is crucial to emphasize—HHS did accommodate faith-based service organizations, through the insurer-pays mechanism proposed in February 2013 and finalized in July. The accommodation has removed several of the burdens on religious organizations while providing a different means to increase employees' access to contraception. First, HHS ultimately expanded the definition of "religious employer[s]" fully exempt from the mandate, by removing the clauses that had excluded organizations because they reached non-adherents or because they provided services to people rather than preaching or proselytizing.¹⁷⁷ Under the expansion, the exemption applies, for example, if "a church runs a soup kitchen that provides free meals to low-income individuals irrespective of their religious faiths," or "if a church runs a parochial school that

173. According to Small Business Administration figures from 2007, there were more than 5,814,000 such businesses, 96 percent of the total, employing more than 33,915,000 million persons, 28.1 percent of the total. U.S. Small Business Administration, http://archive.sba.gov/advo/research/us_07ss.pdf.

174. See, e.g., *Hobby Lobby*, 723 F.3d at 1123–24, 1143–45 (relying on such facts to find no compelling interest even with respect to for-profit businesses); Edward Whelan, *The HHS Contraception Mandate Versus the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2187–88 (2012).

175. See, e.g., Comments of Kristen Day et al., Democrats for Life of America, on Advance Notice of Proposed Rulemaking on Preventive Services, at 7–8 (June 19, 2012), http://democratsforlife.org/index.php?option=com_content&view=article&id=794:comments-submitted-on-contraception-mandate&catid=53:contraception-mandate&Itemid=235; see also HHS Release, Jan. 2012 (suggesting community health centers as option).

176. Brownstein, *supra* note 87, at 435.

177. 2013 Final Rules, *supra* note 16, 78 FR at 39,874; see text accompanying note 18.

employs people of different religious faiths.”¹⁷⁸ Since the exemption still required that a school or social service be owned by, or an “integrated auxiliary” of, a church or association of churches, the change only modestly increased the number of exempted entities. But it eliminated the element that had caused the greatest offense: denying an organization protection simply because it served others or reached outside its faith. Thus the Catholic Health Association, which had previously found HHS’s proposals inadequate, commented that “remov[ing] the three objectionable conditions required to be considered a ‘religious employer’ . . . is a great relief to our members and many others.”¹⁷⁹

Second, the 2013 Final Rules solidify the insurer-pays accommodation for non-church religious organizations. By requiring insurers to pay directly for contraceptive services, HHS committed itself to “ensuring that [objecting] organizations and their plans do not contract, arrange, pay, or refer for such coverage, and that contraceptive coverage is expressly excluded from the group health insurance coverage.”¹⁸⁰ The rules set forth a flexible standard and self-certification process for religious non-profits to claim the accommodation,¹⁸¹ and it delineated a method by which employees of self-insuring non-profits would receive coverage from insurance companies.¹⁸² Assuming these mechanisms work, they would validate reading the HHS dispute with a measured optimism: Even an administration drawing much of its support from the secular left recognizes that meaningful religious-liberty protection must extend to faith-based service organizations, not just to houses of worship.

The final rules leave some objections unaddressed (most obviously the objections of people of faith running for-profit businesses), and some matters unresolved even for religious organizations. It extended full

178. 2013 Proposed Rules, *supra* note 16, 78 Fed. Reg. at 8461.

179. Survey, Catholic Health Association: Catholic Health Association Seeks Members’ Input on HHS Proposed Rule for Contraceptive Services (Feb. 13, 2013), http://www.chausa.org/CHA_Seeks_Members_Input_On_HHS_Proposed_Rule_for_Contraceptive_Services.aspx; *see also* Catholic Health Association, Women’s Preventive Health Service Final Rule (June 28, 2013), *available at* <http://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule>. For the CHA’s earlier opposition, *see supra* note 15.

180. 2013 Final Rules, *supra* note 16, at 39,876.

181. *Id.* at 39,874 (requiring an organization to certify only that it is “organized and operates as a nonprofit entity,” that it “holds itself out as a religious organization,” and that it objects to providing contraceptive coverage); *id.* at 39,875 (rejecting other proposed documentation requirements for eligibility so as to respect “eligible organizations’ interest in avoiding undue inquiry into their character, mission, or practices”).

182. *Id.* at 39,879–81.

exemption only to faith-based service programs legally integrated with a church or diocese. This discriminates against independent and para-church organizations. A strongly evangelical elementary school that believes certain emergency contraceptives cause abortions should have no less freedom to object to covering such medicines, just because it is free-standing, than does a Catholic school legally integrated into a parish. Provisions concerning church and state should not discriminate among faith groups according to their polities, or organizational structures, many of which stem from their fundamental theological premises.¹⁸³ Distinctions based on organizational structure generally make a poor proxy for the strength of the organization's religious interest; they therefore violate the "clearest command" of the Religion Clauses, that "one religious denomination cannot be officially preferred over another."¹⁸⁴ On the other hand, the difference in treatment between church-affiliated and independent religious organizations may not matter in practice if the insurer-pays accommodation works well—a matter that remains to be seen. Questions also remain concerning the payment mechanism for employees of self-insured organizations.

A common objection to accommodation is that it should not extend to faith-based service organizations that receive government funding. The HHS mandate regulates all organizations, whether they receive funds or not. But funding plays a role in other cases, for example where faith-based adoption agencies perform their services under government contracts.

The receipt of funding certainly complicates a religious organization's constitutional argument for accommodation of its practice, at least when the practice occurs in the very program receiving funds. The Supreme Court frequently says that a condition on funding does not burden or penalize religion but merely reflects government's choice about how it will spend its money.¹⁸⁵

This does not mean, however, that it is a good idea to deny accommodation whenever the organization or activity in question receives funds. Refusing accommodations for government-funded activities may make sense if the sole purpose of accommodation is to insulate religious

183. See, e.g., Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 404 (1984) ("Statutory exemptions based on the distinction of whether a religious organization is church-affiliated or an independent, nondenominational ministry discriminate in a manner contrary to the Establishment Clause.").

184. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (striking down law regulating fundraising activities of only those religious groups that solicited more than half of their revenue from nonmembers).

185. See, e.g., *Locke v. Davey*, 540 U.S. 712, 720 (2004); see generally *Rust v. Sullivan*, 500 U.S. 173, 196–202 (1991).

activities and organizations from government. Under that premise, once an organization provides services to the general society in cooperation with government, it must follow governmental rules without exceptions. But funding-related accommodations are appropriate to grant if accommodation serves a different purpose: to permit organizations to contribute to the common good in their own distinctive way, preserving the identity that motivates and inspires that distinctive contribution. If accommodation aims to protect “uncommon contributions to the common good,”¹⁸⁶ then government may quite legitimately cooperate with an organization by providing funds for its services while still making accommodation so the organization can preserve the identity that motivates those services.¹⁸⁷

Two features merit mention that strengthen the case for accommodation in at least some contexts of government funding. First, funding is sometimes so pervasive in a sector that it constitutes part of the baseline by which organizations offer their services to society. If an adoption agency loses access to government contracts for placing special-needs children, it probably has the same effect as losing its license altogether to provide such services. Second, even when faith-based service organizations receive government funds, they often contribute their own resources as well. As the president of Catholic Charities USA said, in a forum the year before the HHS mandate dispute broke out:

[F]aith-based organizations are not just in it for the money. . . . [F]olks think that the government pays the full fare. [But] I can say from my time in Minneapolis, [that in government contracts with Catholic Charities] the government would pay somewhere between two-thirds and three-fourths of what we needed and we had to make up the rest. So we were subsidizing the government, if you will, by hundreds of thousands of dollars every year. We were happy to do that because it furthered our mission and the mission of the common good.¹⁸⁸

186. Carlson-Thies, *supra* note 149.

187. As I have elsewhere put the point, America’s church-state tradition rests on “the vision of a religious sector that is independent but not marginalized”; and in a world where government funding is pervasive, this “calls for funding religious providers alongside their secular counterparts—but without requiring the religious providers to alter their [fundamental] character as the price of funding, except for strong reasons.” Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J. L. & PUB. POL’Y 165, 188 (2009).

188. Statement of Rev. Larry Snyder, at Brookings Institution, Faith-Based & Neighborhood Partnerships in the Obama Era: Assessing the First Year and Looking

Of course, a refusal to make accommodation is sensible in some funding contexts. When the practices of a recipient organization hamper the basic goals of the funding, no accommodation is warranted. But not every departure from the government's norms defeats those basic goals, and government ought not to define them rigidly. Accommodation should also be denied when it gives the faith-based organization a secular advantage in competing for funds. Simply cutting red tape only for religious organizations is not fair. But many accommodations provide no advantage; they merely preserve the religious organization's ability to participate in funding on equal terms without compromising its identity. Catholic Charities would receive no financial favoritism from being allowed to confine its placements to opposite-sex couples; it would simply be able to continue doing its work, in the vast majority of placements, on the same terms as other agencies. Finally, accommodation is inappropriate when the funded organization occupies a position that acts as a monopoly or "choke point" over funded services. For example, it made sense for a court to rule that the Catholic bishops' relief service could not receive the "single, nationwide contract" that government provided to combat human trafficking, since that role allowed it to deny contraception in all HHS funding on the matter.¹⁸⁹ What does not follow from this, however, is the next step that HHS took: refusing to renew the Catholic agency's participation in the program even as a recipient of merely one of "multiple grant awards."¹⁹⁰ Because of that step, a Catholic organization now cannot participate even as one of many agencies in a pluralistic approach to attacking this social problem. Such a rigid approach hurts the organization's liberty to exercise the service aspect of its faith and, in all likelihood, reduces the effectiveness of the program in reaching a wide range of beneficiaries.

VI. HOW CAN RELIGIOUS ORGANIZATIONAL FREEDOM APPEAL TO PROGRESSIVES?

What factors might make broad freedom for religious organizations more attractive to people with progressive policy inclinations? I am no

Ahead 168 (Feb. 18, 2010), http://www.brookings.edu/~media/events/2010/2/18-community-partnerships/20100218_faith_based.pdf.

189. *ACLU of Massachusetts v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012) (quotation omitted) (noting that HHS had "assisted human trafficking victims through a single, nationwide contract," instead of "multiple grant awards"), *vacated as moot*, *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013) (*vacated when HHS later declined to award Catholic agencies a contract*).

190. *ACLU v. Sebelius*, 821 F. Supp. 2d at 488 (quotation omitted); *see* Emily Cadel, *Culture Wars Claim Trafficking Law*, *CQ WEEKLY-IN FOCUS* (Apr. 28, 2012), <http://public.cq.com/docs/weeklyreport/weeklyreport-000004072374.html>.

expert on political strategy or rhetoric. But a few suggestions arise from reflections on the HHS mandate and other disputes.

A. *What Traditionalists Should Do*

First, although I've said a great deal about what progressives ought to do, let me reaffirm that traditionalist religions should make changes as well. I agree with Professor Laycock that for such organizations to defend their own liberty, "it would help to spend a lot less energy attacking the liberty of others."¹⁹¹ I have argued, for example, that many of the reasons for recognizing same-sex marriage also make a strong case for protecting religious objectors.¹⁹² But again, it is hard for traditionalists to claim this reciprocity when they seek to block recognition of same-sex marriage. They certainly have the right to argue against gay marriage; but doing so hampers their ability to argue for a "live and let live" approach that supports religious-liberty exemptions. Moreover, after the Supreme Court's invalidation of the Defense of Marriage Act in *United States v. Windsor*,¹⁹³ it seems ever more anachronistic for traditionalists to focus on preventing same-sex marriage, which will continue to spread through states. Arguing for reciprocity in protecting gay couples' rights and traditionalists' religious-liberty rights not only is more convincing normatively; it is becoming, practically speaking, the only game in town.

In the case of the HHS mandate, the Catholic bishops likewise muddled their strong arguments for religious liberty by arguing not just for exemptions, but for the mandate's repeal. The 2012 religious-liberty statement summarized the religious-liberty case: the mandate forces "religious people and institutions" to fund procedures they conscientiously oppose and defines service-oriented organizations as "[not] 'religious enough'" to merit protection.¹⁹⁴ But the statement then concluded that "[t]hese features [make the mandate] an unjust law," which the bishops distinguished from the situation of "conscientious objection": while the latter "permits some relief to those who object to a just law for reasons of conscience," such as draft objectors, an "unjust law . . . 'is 'no law at all,'" "cannot be obeyed," and must be repealed rather than merely

191. Laycock, *supra* note 20, at 429.

192. *See supra* Part IV.A.1.

193. 133 S. Ct. 2675 (2013).

194. Bishops' Statement, *supra* note 3.

qualified with an exemption.¹⁹⁵ As Professor Laycock observes, “The argument for a religious exemption is strong; the claim that the law is so unjust that the only solution is to repeal it will persuade no one. It is not unjust to require Microsoft to cover contraception.”¹⁹⁶ More precisely, it is not unjust except on distinctive Catholic principles of morality; thus, to seek repeal is to seek to enact a Catholic teaching (one with limited appeal) for the whole nation.¹⁹⁷ Even if objections to contraception should extend beyond religious organizations to commercial businesses owned by Catholics, there are still not enough of these to justify repeal as the solution to religious-liberty problems. The bishops certainly have a right to argue for repeal, but it blurs their argument that the case is fundamentally about religious liberty rather than women’s access to contraception.

Abortion is a different matter. If one believes that a law condones or promotes the killing of innocent human beings, then one has an understandable imperative to oppose it as unjust and not be satisfied solely with an exemption from it. The HHS mandate touches on this sensitive line as well because of the assertion that some forms of emergency contraception—most plausibly among them, the “five day after” pill—may terminate early embryos by preventing them from implanting.¹⁹⁸ It might be consistent, therefore, for Catholic opponents to stop arguing for repeal of the overall mandate but still argue that some forms of emergency contraception should be removed from it. This position on emergency contraception still may not persuade Americans, of course, but it at least ties arguments for repeal to the distinctive situation of abortion.

B. Which Progressives Will Be Receptive?

Realistically, given the depth of the conflict between religious liberty and some progressive views, arguments for broad liberty of religious organizations are likely to leave many progressives unconvinced. So

195. *Id.*

196. Douglas Laycock, in *The Bishops & Religious Liberty*, COMMONWEAL (June 15, 2012), <http://commonwealmagazine.org/bishops-religious-liberty>.

197. *Id.* (“The difference between exemption and repeal is the difference between seeking religious liberty for Catholic institutions and seeking to impose Catholic moral teaching on the nation.”). Repeal of the mandate does not “impose” the teaching in the sense of prohibiting contraception, but it does effectively try to “enact” Catholic teaching for the whole nation, not just for objecting Catholic organizations.

198. See Comments of Day et al., *supra* note 175 (summarizing evidence that although “morning after” pill (Plan B) may not prevent implantation, FDA labeling information still says it may, and there is greater ground for concern with respect to the “five-day after” pill (Ella)).

what strains of progressivism are mostly to be receptive to religious organizational freedom?

1. Religious Progressives

First, religious-freedom arguments seem likely to be more attractive to religious than to secular progressives. Although both groups can appreciate how service to others is a core exercise of faith, the former experience it directly. As I've already noted, harsh criticism of the original HHS mandate from prominent liberal Catholics like Chris Matthews and E.J. Dionne probably played a significant role in convincing the Obama administration to offer further accommodations.¹⁹⁹ Quite a few liberal Catholics, it appears, care about the religious-liberty issues. The Pew Center in 2012 found that 56 percent of Catholics agreed with the bishops' concerns about religious liberty—on which the mandate was the key issue—versus 41 percent of Americans overall.²⁰⁰ The 56 percent must include many Catholics who dissent from the bishops on contraception itself, since we know that large majorities so dissent, and since in the Pew poll 51 percent of Catholics “sa[id] Barack Obama best reflects their views on [other] social issues such as abortion and gay rights.”²⁰¹ Religious progressives thus constitute an important audience for religious-freedom arguments; religious-freedom proponents must focus attention on how to reach them.²⁰²

Of course, by no means will all religious progressives endorse broad liberty for the traditionalist objector. Some of them may be even more irritated than secularists are at views they believe not only are wrong but tarnish their own faith, or religion in general, by association. A brief tour through the comments sections of blogs at the *National Catholic Reporter* or *Commonweal* reveals countless such sentiments, like the

199. See *supra* note 157 and accompanying text (quoting Matthews and Dionne).

200. Catholics Share Bishops' Concerns About Religious Liberty (Aug. 1, 2012), <http://www.pewforum.org/Politics-and-Elections/Catholics-Share-Bishops-Concerns-about-Religious-Liberty.aspx>. A June 2012 poll showed that 57 percent of Americans, and a higher percentage of Catholics, favored exempting religious organizations. See *New Poll: HHS Mandate Hurts Obama with Women, Catholics*, LIFE NEWS (June 19, 2012), <http://www.lifenews.com/2012/06/19/new-poll-hhs-mandate-hurts-obama-with-women-catholics/>.

201. *Id.*

202. For a short version of such arguments, see Thomas C. Berg, *Other People's Freedom*, THE CHRISTIAN CENTURY (Dec. 19, 2011), <http://christiancentury.org/blogs/archive/2011-12/other-peoples-freedom>.

comment in response to John Allen’s call for “center left” Catholics to join the bishops in resisting the mandate: “As someone who probably falls into your categorization of the center-left, I’m not sure where you are coming from other than calling for us to capitulate to the bishops’ political agenda in America.”²⁰³

2. *Pragmatic Progressives*

In addition, the progressives most likely to support freedom of the church are those who are pragmatic in orientation. I use “pragmatic” in two related senses. Most concretely, pragmatic progressives are simply those who look for allies wherever they can find them. They may respect religious groups who, although traditionalist on some issues, can serve as members of progressive alliances on problems such as poverty reduction, immigration, or environmental degradation. Pragmatists are temperamentally receptive to the argument that religious groups have always constituted a major part of America’s safety net and that it is dangerous to take steps that may drive them from providing such services.²⁰⁴

In a more philosophical sense, progressives are pragmatic if their confidence in government is qualified—if they see the need to limit government as well as private entities, because power must always be balanced against power. That is the fundamental emphasis of Reinhold Niebuhr, the mid-20th-century Protestant theologian who President Obama said is “one of my favorite philosophers.”²⁰⁵ E.J. Dionne, another writer influenced by Niebuhr, explains the necessary balance between the power of government and the power of private organizations:

[A] commitment to balance has been essential: Americans mistrusted excesses of power, in both government and the private sphere. Over time, we constructed a system of countervailing power that used government to check private abuses of authority even as we limited government’s capacity to dominate the nation’s life. We also nurtured vigorous collective forces outside the state in what we commonly called the “third sector” “or “civil society.” These independent groups are another expression of the American commitment to community. They impressed Tocqueville and continue to strike outsiders as an essential characteristic of our country. At times these forces work with the government and the market. At other times they check the power of one, the other, or both.²⁰⁶

203. See Allen, *supra* note 94 (commenter on Aug. 10, 2012).

204. See *supra* Part IV.B.

205. David Brooks, *Obama, Gospel and Verse*, N.Y. TIMES (Apr. 26, 2007), http://select.nytimes.com/2007/04/26/opinion/26brooks.html?_r=0.

206. E.J. DIONNE, JR., OUR DIVIDED POLITICAL HEART: THE BATTLE FOR THE AMERICAN IDEA IN AN AGE OF DISCONTENT 6 (2012).

When he reasserted the “freedom of the church,” John Courtney Murray wrote against the background of the Communist challenge. In those years, he like many others thought it crucial to establish the principle that the state is limited. Today we face no threat from a totalitarian government, despite the fevered accusations about the Obama administration (which one Catholic bishop, sad to say, has endorsed).²⁰⁷ Nevertheless, recognizing strong religious organizational freedom in contexts like the HHS mandate would embody the pragmatic progressivism that Dionne commends: one that “mistrust[s] excesses of power, in both government and the private sphere,”²⁰⁸ but is willing to leave significant parts of the development of communal values to a “vigorous” third sector.

207. Bishop Daniel Jenky of Peoria said in a homily that Hitler and Stalin “would not tolerate any competition with the state in education, social services and health care” and that Obama “now seems intent on following a similar path.” *Peoria Bishop Compares Obama’s Actions to Stalin, Hitler*, NBCCHICAGO.COM, <http://usnews.nbcnews.com/news/2012/04/19/11288862-peoria-bishop-compares-obamas-actions-to-stalin-hitler?lite>.

208. DIONNE, *supra* note 206, at 6.

