TRACING BLURRED LINES: CATHOLIC HOSPITAL FUNDING AND FIRST AMENDMENT CONFLICTS

*EMILY E. FOUNTAIN**

INTRODUCTION

In his detached memoranda, Founding Father James Madison wrote, "the establishment of the chaplainship in Congress is a palpable violation of equal rights as well as of Constitutional principles. The danger of silent accumulations and encroachments by ecclesiastical bodies has not sufficiently engaged attention in the U.S."[1] As religion's role continues to expand beyond the context of didactic instruction and into the broader realm of social services, sometimes with the aid of federal funding, this statement is now both true and false.[2] Over time, courts and scholars alike have

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1. Leonard W. Levy, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 121 (1994).

2. Religious organizations started receiving federal funds in the 1930s, altering the relationship between church and state and further raising constitutional issues. *See* Thomas Pickrell & Mitchell Horwich, *"Religion as Engine of Civil Policy": A*

agreed that some aid to religious organizations is permissible; however, questions of magnitude and form remain in tension with the Free Exercise and Establishment Clauses of the First Amendment.

The Court has held that, at their historic core, the Religion Clauses were designed to prevent states and the federal government from supporting church leaders through funding.[3] However, the debate has evolved far beyond funding clergy, as more and more funds are directed towards social services. The Court refers to the tension as a "play in the joints" between the two clauses in which they believe there to be space for "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[4] In so doing, the Court has made note that "in the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement in religious activity."[5]

The parameters of acceptable aid under the Establishment Clause can be viewed through the lenses of direct and indirect aid, with the latter being more permissible and the former being allowed under certain conditions.[6] Whereas direct aid allows the government to provide monetary support to religious institutions and organizations themselves provided that the aid is used for a secular purpose, indirect aid is given first to individuals who then select where to direct the funds.[7] Over the years, the Court has addressed both forms of aid in various contexts, with particular focus on the education sector.

Religious hospitals have, however, been largely left out of the evolving precedent.[8] While one could compare them to parochial

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Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field, 44 LAW AND CONTEMP. PROBLEMS 111, 113 (Spring 1981).

3. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017).

4. Walz v. Tax Comm''n of N.Y., 397 U.S. 664, 669 (1970).

5. Lemon v. Kurtzmann, 403 U.S. 602, 612 (1971) (quoting *Walz*, 397 U.S. at 668 (1968)).

6. PEW RESEARCH FORUM, *Shifting Boundaries: The Establishment Clause & Government Funding of Religious Schools & Other Faith-Based Organizations*, in RELIGION & THE COURTS: THE PILLARS OF CHURCH-STATE LAW [hereinafter *Shifting Boundaries*] (2009), http://www.pewresearch.org/wp-content/uploads/sites/7/2009/05/funding.pdf [https://perma.cc/XF85-TRNG].

7. *Id.*

8. *See generally* Bradfield v. Roberts, 175 U.S. 291 (1899) (discussing the sole Supreme Court case on federal aid to denominational hospitals); *see also* Pickrell & Horwich, *supra* note 2, at 125.

schools, hospitals, in particular Catholic hospitals, raise unique establishment and free exercise problems.

In this Note, I explore the development of Establishment Clause doctrine and the imprecise comparison of religious hospitals to religious schools, focusing in particular on the problems posed by the growing number of Catholic hospitals and the tensions they create in First Amendment jurisprudence. I propose that, to mitigate these tensions, Congress should implement a bifurcated funding structure—similar to the structure currently used to fund legal aid services—in geographic areas where Catholic hospitals serve as the Sole Community Hospital. In so doing, Congress could divert federal and state funds to conduits and avoid the excessive entanglement problems that arise when funds flow directly to religious institutions.

Part I of this paper will discuss the evolution of the Establishment Clause, with a specific focus on its treatment in the context of schools. It will also provide an overview of the precedent relating to direct and indirect aid to religious institutions. Part II will set out the existing structure of federal funding for religious hospitals. Part III will discuss the differences between Catholic hospitals and other religious hospitals and healthcare facilities. Part IV will raise the issue that Catholic hospitals in particular face regarding the Free Exercise Clause. Part V will discuss the conflicts that Catholic hospitals raise in the context of direct and indirect aid. Finally, Part VI will propose a bifurcated funding structure as a means of avoiding the legal issues raised in Parts I-V.

I.
THE EVOLUTION OF THE ESTABLISHMENT CLAUSE

One cannot appreciate the full impact of the tension between aid to religious organizations and religious establishment without an understanding of how Establishment Clause doctrine developed and where the law is now. This section traces that development.

A. Maturation of Establishment Clause Jurisprudence

The Supreme Court first ruled on governmental aid to religious organizations in *Bradfield v. Roberts,* when federal aid to a hospital operated by a Roman Catholic Order was challenged. In *Bradfield,* the Court found that the aid did not violate the Establishment Clause because the hospital was created by an act of Congress with the primary benefit being not one of a sectarian nature, but

rather one of providing secular services to the sick and poor.[9] This ruling, however, was isolated in nature. It was not until 1947 in *Everson v. Board of Education* that a broader rule emerged.

In *Everson,* applying the First Amendment to the states via the Fourteenth Amendment, the Court upheld a generalized state transportation program that allowed parents who sent their children to parochial schools to be reimbursed for the cost of transportation.[10] Finding this program to be neutral and supporting a secular end, the Court took its first step towards acceptance of indirect aid to religious organizations.[11] The Court, however, did caution that the New Jersey Statute approached the boundaries of a state's constitutional power, but ultimately reasoned that the Free Exercise Clause of the First Amendment would not allow for other religious groups to be excluded from such public welfare legislation.[12] This thought articulates the blurring of lines between Religious Establishment and Free Exercise and the push and pull of one against the other. In the cases that followed *Everson* and in the issues still evolving with the growth of social welfare legislation, this tension is paramount.[13]

Twenty-one years passed between *Everson* and the next Supreme Court case regarding public funding to religious institutions in 1968. In the decades that followed, however, the doctrine constantly evolved, chiefly in the context of religious education. With *Everson* as a backdrop, the Court began to rely heavily on the tests of primary effect and secular purpose in justifying aid to religious institutions.[14] For example, in *Board of Education v. Allen*, the Court held that a program allowing local school boards to freely loan textbooks to both public and private schools did not violate the Establishment Clause, despite the majority of the private schools being

9. *Bradfield*, 175 U.S. at 299-300 (1899) ("The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation.").

10. *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

11. *See Shifting Boundaries, supra* note 6, at 11.

12. *Id.* at 7.

13. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 720–21 (1981) ("Although the relationship of the two Clauses has been the subject of much commentary, the 'tension' is of fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment . . . the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses . . . .").

14. *See Shifting Boundaries, supra* note 6, at 7.

Catholic.[15] The Court reasoned that the program advanced the secular purpose of promoting education while having the primary effect of furnishing books for all students, not just those at private Catholic schools.[16]

This *Allen* rationale became the foundation for what would come to be known as the *Lemon* Test— the tripartite test used to determine when a law violates the Establishment Clause.[17] To pass review, the law in question must (1) have a secular purpose, (2) have a predominantly secular effect, and (3) not foster excessive entanglement between government and religion.[18] Four years after *Allen* was decided in 1968, the Supreme Court set forth this standard in 1973 in a case called *Lemon v. Kurtzman*. *Lemon* struck down programs in Rhode Island and Pennsylvania that subsidized secular subject instruction in private schools due to excessive entanglement.[19] The early implementation of the *Lemon* Test in the 1970s and 1980s proved to be highly restrictive with the majority of the Court adhering to strict separationism.[20]

As early as the mid 1980s, however, the Court began to shift away from the idea of a wall between government and religion and embrace the idea of aid to religious entities.[21] The critical movement away from strict separationism came in 1985 with *Aguilar v. Felton*. *Aguilar* involved a federal program that provided students living in low-income neighborhoods with remedial instruction.[22] The program paid New York City public school teachers to provide services in both public and private schools, with a number of the schools being religiously affiliated.[23] The Court in *Aguilar* found that, because the program required the government to monitor the

15. *See generally* Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

16. *Id.* at 243.

17. *See Shifting Boundaries, supra* note 6, at 9.

18. *See generally* Lemon v. Kurtzmann, 403 U.S. 602, 612-13 (1971).

19. *Id.* at 625.

20. Lemon v. Kurtzman, 411 U.S. 192, 193 (1973) (holding that Pennsylvania's statutory program, enacted in 1968, for reimbursing nonpublic sectarian schools for certain secular educational services violated the establishment clause of the First Amendment because of the excessive entanglement of church and state fostered by the program's requirements as to continuing state scrutiny of the schools' educational programs and state auditing of school accounts).

21. *Shifting Boundaries, supra* note 6, at 11. One such example is the overruling of *Aguilar v. Felton* in 1997 through the Court's decision in *Agostini v. Felton*, 473 U.S. 402 (1985), holding that the government may provide direct aid to religious institutions and signaling the end of the era of strict separationism that had pervaded throughout the 1970s and 1980s. *Id.* at 14-15.

22. *See* Aguilar v. Felton, 473 U.S. 402 (1985).

23. *Id.* at 427.

teachers to ensure that they were not bringing religion into the secular instruction, *Lemon's* second prong—secular effect—was met.[24] However, the government monitoring that proved that the program had a predominantly secular effect caused it to fail *Lemon's* third prong— excessive entanglement. Thus, because of the monitoring, the Court invalidated the program under *Lemon*.[25] In an attempt to get around *Lemon's* third prong, Justice O'Connor's dissenting opinion proposed that the Court should rely on a presumption that because public school teachers are public servants they would obey the regulations prohibiting them from teaching religious content thus absolving the need for such close government monitoring.[26]

Although only a dissent in *Aguilar*, Justice O'Connor's reasoning paved the way to strict separationism's end.[27] Twelve years later, Justice O'Connor would use the same logic in *Agostini v. Felton* to uphold a federal program that offered secular remedial services inside New York City religious schools.[28] This presumption of public servants following government regulations, however, has only been applied in the context of direct aid. Understanding the distinctions between direct and indirect aid requires a more nuanced look at how the law has evolved with respect to each category.

B. Direct Aid to Religious Institutions

Although seemingly incompatible with the idea of a government free from religious establishment, the Supreme Court has found direct aid to religious organizations permissible in two forms: (1) when the aid is secular and the institution is not "pervasively sectarian" or (2) when sectarian institutions otherwise have safe-

24. *Id.* at 416.

25. *Id.* at 414.

26. *Id.* at 427 (O'Connor, J., dissenting) ("It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading 'remains a teacher,' but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom.").

27. *Shifting Boundaries, supra* note 6, at 11.

28. *See* Agostini v. Felton, 521 U.S. 203, 224 (1997) ("[W]e assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.") (referencing Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 125 (1993)).

guards to assure that the aid will not be used for religious purposes.[29]

In 1971, the Court upheld the Higher Education Facilities Act ("HEFA") in *Tilton v. Richardson*, finding that construction grants awarded to religious organizations by HEFA did not violate the Establishment Clause because, as a precondition to receive a HEFA grant, the recipient was not allowed to use the funding for religious purposes.[30] In *Bowen v. Kendrick*, the Court applied its *Tilton* rationale to the federal government's funding of faith-based groups providing sex education under the 1981 Adolescent Family Life Act.[31] In a 5-4 vote, the Court upheld the statute on its face as long as the groups implemented safeguards, such as disallowing the incorporation of religious references and requiring meeting locations to be free from religious symbols.[32]

The Court also found that, even in the absence of safeguards, direct aid to religious institutions was permissible if the aid was secular in nature.[33] In *Agostini v. Felton*, the Court allowed direct government aid in the form of secular textbooks to religious schools because the aid itself was not sectarian. In order to circumvent the final hump and the third prong of the *Lemon* Test— excessive entanglement[34]—Justice O'Connor, now writing for the majority, established the presumption that public servants would teach only

29. *Shifting Boundaries*, *supra* note 6, at 13.

30. Tilton v. Richardson, 403 U.S. 672, 679-80 (1971) ("The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.").

31. *See generally* Bowen v. Kendrick, 487 U.S. 589 (1988).

32. *Id.* at 611 ("Instead, this litigation more closely resembles *Tilton* and *Roemer*, where it was foreseeable that some proportion of the recipients of government aid would be religiously affiliated, but that only a small portion of these, if any, could be considered 'pervasively sectarian.' In those cases, we upheld the challenged statutes on their face and as applied to the institutions named in the complaints, but left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian.").

33. *See generally Agostini*, 521 U.S.

34. *Agostini*, 521 U.S. at 221 ("Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek*, that the level of monitoring necessary to be 'certain' that the program had an exclusively secular effect would 'inevitably result in the excessive entanglement of church and state,' thereby running afoul of *Lemon*'s third prong.").

secular content.[35] With the government now absolved from excessively monitoring its teachers, the inherent conflict between *Lemon's* second and third prong would be avoided.

In *Mitchell v. Helms,* the Court held that direct aid to a religious institution is constitutional only if the recipients use that aid for secular activities and found that a government program giving funds to religious schools specifically to purchase instructional materials was constitutional.[36] In a narrow ruling, Justice O'Connor found that the governmental program in *Mitchell* was permissible because the schools (1) could not use the funds for religious purposes, (2) could only use the aid to purchase supplemental materials, and (3) did not retain ownership of the materials.[37] O'Connor's *Mitchell* ruling now serves as the primary test for when the government may directly support religious institutions.[38]

In *Locke v. Davey,* the Court extended the *Mitchell* logic, holding that a Washington State program did not violate the Free Exercise Clause for prohibiting students from using state-sponsored scholarship funds to pursue theology degrees.[39] The program allowed students to use scholarship funds to attend religious institutions, so long as students did not use the aid specifically to obtain a religious degree. Finding that nothing in the program suggested "animus towards religion," Chief Justice Rehnquist, writing for the majority, upheld the state scholarship program.[40]

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35. *Id.* at 224 ("We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by 'adding to [or] subtracting from' the lectures translated. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.") (internal citation removed).

36. Mitchell v. Helms, 530 U.S. 793, 808 (2000).

37. *Id.* at 801 ("The specific criteria used to determine an impermissible effect have changed in recent cases which disclose three primary criteria to guide the determination: (1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. Finally, the same criteria can be reviewed to determine whether a program constitutes endorsement of religion.") (internal citations removed).

38. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 420 (8th Cir. 2007) (holding that, although *Mitchell* permits direct government funding of religious organizations, the ruling still prohibited direct public funding of religious activities through tax appropriations).

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

40. *Id.* at 725.

Locke clarified the steps that *Mitchell* had already taken. *Mitchell* departed from precedent by indicating that not all aid to religious institutions violates the Establishment Clause on its face and instead insisting on a principle of neutrality as the metric for permissibility.[41] *Locke* elucidated just how secular a program needed to be. By allowing scholarships funded by taxpayers to flow to religious institutions, the Court signified that there was even more "play in the joints"[42] between the Free Exercise and Establishment Clauses than previously thought.[43]

Most recently, this "play in the joints" played itself out not in a classroom, but on a playground. In *Trinity Lutheran Church of Colombia, Inc. v. Comer*, the Court faced the issue of a state-sponsored program that offered reimbursements to public and private schools if they purchased rubber playground surfaces made from recycled tires.[44] Trinity Lutheran Church Child Learning Center ("the Center") was a preschool and daycare that operated on the church property but admitted students of any religion. In 2012, it applied for the reimbursement grant.[45] Although the Center ranked fifth among the 44 applicants, 14 of which ultimately received a grant,[46] the Missouri Department of Natural Resources dismissed its application because the Center was owned or, at the very least, controlled by the church.

The Court ultimately struck down the MO program holding that "the express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."[47] Distinguishing *Locke,* the Court stated, "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here, there is no question that

41. *See* Michael W. McConnell, *Trinity Lutheran: A Welcome Reminder that Church-State Separation is a Principle of Neutrality,* SLS BLOGS: LEGAL AGGREGATE (July 2, 2017), https://law.stanford.edu/2017/07/02/trinity-lutheran-a-welcome-reminder-that-church-state-separation-is-a-principle-of-neutrality [https://perma.cc/5QWL-AMCT].

42. *Locke*, 540 U.S. at 728 (explaining that the principle of "play in the joints" is really just a refusal to apply any principle "when faced with competing constitutional directives").

43. *Id.*

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

45. *Id.*

46. *Id.* at 2018.

47. *Id.* at 2015.

Trinity Lutheran was denied a grant simply because of what it is—a church."[48] What *Trinity Lutheran* signaled is a movement toward neutrality in direct aid cases that began in *Mitchell*.

What precisely neutrality means, however, is yet to be determined. A dissent in *Trinity Lutheran* joined by Justices Sotomayor and Ginsberg stated, "True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution."[49] What constitutes an adequate assurance of neutrality is the question that remains open. While *Trinity Lutheran* purports to tell us that the bar for this assurance is not high, the majority limited its holding to the facts at hand, leaving the debate very much alive and at play.[50]

C. Indirect Aid to Religious Institutions

Historically, the Court struck down programs that did not have safeguards in place to prevent the aid from being used to advance religion. In 1973, the Court struck down programs in New York and Pennsylvania that gave tuition reimbursements to parents who sent their children to religious schools in *Committee for Public Education & Religious Liberty v. Nyquist*.[51] These reimbursements were funded through general tax revenues, and although the reimbursements could not exceed over fifty percent in the New York Program or exceed the cost of tuition in the Pennsylvania program, the Court found that these programs amounted to public financial assistance in support of religion.[52] The Court said that the assistance here was causative to support religion, in contrast to *Everson* where "any assistance to religion was purely incidental."[53]

Eventually, the Court's view began to shift. The first signal in the changing approach of the Court towards indirect aid came in the form of approved tax breaks to parents for educational expenses—regardless of whether that education was private or pub-

48. *Id.* at 2023.

49. *Id.* at 2029 (Sotomayor, J., dissenting).

50. *See generally id.* at 2024 n.3 (stating that "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination").

51. *See generally* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–98 (1973); *See generally* Sloan v. Lemon, 413 U.S. 825 (1973).

52. *Id.*

53. *Nyquist*, 413 U.S. at 781–82.

lic.[54] In *Mueller v. Allen*, the Court embraced these tax breaks as a form of indirect aid by holding that the government may provide this aid if the primary purpose and effect is to benefit children;[55] also known as the child-benefit theory.[56] The Court distinguished this from *Nyquist* by emphasizing that the tax breaks were available to students attending both public and private schools and analogized this case to *Everson* where the benefit ran to all children.[57]

This idea expanded into the realm of higher education in *Witters v. Washington Department of Services for the Blind*, when the Court upheld Washington's state program providing tuition assistance to the blind for higher education or vocational training.[58] In *Witters,* the Court found that "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."[59] This line of reasoning was reaffirmed in *Zobrest v. Cataline Foothills School District*, when the Individuals with

54. *Shifting Boundaries, supra* note 6, at 11–12.

55. Mueller v. Allen, 463 U.S. 388, 397 (1983) ("[The] provision of benefits to so broad a spectrum of groups is an important index of secular effect.") (internal quotation marks omitted).

56. The underpinning of the child benefit theory dates back to the Court's ruling in *Everson*.

57. In *Mueller*, it was important that a substantial number of schools eligible for the exemption were public as well as private. Two years after *Mueller*, in *Grand Rapids School Dist. v. Ball,* 473 U.S. 373 (1985), the Court struck down a similar program because 40 of the 41 schools eligible were nonpublic institutions.

58. Witters v. Washington Dept. of Social Services for the Blind, 474 U.S. 481, 489 (1986).

59. Justice Marshall listed eight other factors to explain why this aid did not violate the Establishment Clause: here (1) payment is made directly to each student, who transmits it to the educational institution of his or her choice; (2) any aid which ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients; (3) the aid program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited, is in no way skewed towards religion, is not an ingenious plan for channeling state aid to sectarian schools, creates no financial incentive for students to undertake sectarian education, and does not tend to provide greater or broader benefits for recipients who apply their aid to religious education; (4) the full benefits of the program are not limited, in large part or in whole, to students at sectarian institutions; (5) aid recipients have full opportunity to expend vocational rehabilitation aid on wholly sectarian education, and, as a practical matter, have greater prospects to do so; (6) aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian; (7) the decision to support religious education is made by the individual, not by the state; (8) there is no indication that any significant portion of the aid expended under the rehabilitation program as a whole will end up flowing to religious education; and (9) the program is not well suited to serve as a vehicle for subsidizing sectarian institutions. *Id.* at 488.

Disabilities Act (IDEA) allowed for a sign language interpreter to be provided to a deaf student at a Catholic high school.[60] The Court stated "that the service at issue in this case is part of a general governance program" and that the interpreter's placement in the Catholic school was not a choice of the state, but one made by the parents when the child was sent to that school in the first place.[61]

Witters, in conjunction with *Mueller* and *Zobrest*, paved the way for the principle of "true private choice" articulated in *Zelman v. Simmons-Harris*. In *Zelman v. Simmons-Harris,* the Court upheld an Ohio program that gave vouchers to low income parents who sent their children to eligible private schools.[62] Under the voucher program, students could use the vouchers at both public and private schools, including religious schools.[63] Although 46 of the 56 private schools participating in the program were religious, the Court found that the program did not violate the Establishment Clause. The Court reasoned that the voucher did not amount to coercion because parents could choose where to send their children and, of all the options available to Ohio schoolchildren, only one was to attend a religious school.[64] Thus, despite the fact that 82 percent of the eligible private schools were religiously affiliated, the Court upheld the program.[65] Chief Justice Rehnquist, writing for the majority in *Zelman*, noted that if the funding goes to individuals who have a true private choice in deciding to use governmental funds for religious purposes, then this form of indirect aid is constitutional.[66]

This private choice analysis has been utilized in circuits following the Court's decision in 2002, including the Ninth Circuit in 2013, and still holds much force in determining Establishment Clause violations.[67] Specifically, private choice has been an underpinning of the indirect aid analysis within the framework of govern-

60. *See generally* Zobrest v. Cataline Foothills School District, 509 U.S. 1 (1993).

61. *Id.* at 3, 12 ("And, as we noted above, any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to the private choices of individual parents.") (internal quotation marks omitted).

62. Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002).

63. *Id.* at 647.

64. *Id.* at 652 ("If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.").

65. *Id.* at 647.

66. *Id.* at 653.

67. Rubin v. City of Lancaster, 710 F.3d 1087, 1089–90 (9th Cir. 2013). Here, the court considered whether a city council's practice of opening its meetings with privately led prayers effected an unconstitutional establishment of religion.

ment funding to religious hospitals through popular programs, such as Medicare and Medicaid. To circumvent religious establishment in the context of medical services, the Court has often relied on the same doctrinal analysis it applied in the context of governmental aid to religious schools. However, to understand how the context of hospitals and medical services affects the precedent of government funding to religious organizations, it is necessary to unpack how the government has funded and continues to fund religious hospitals.[68]

II.
PROCESS OF FEDERAL FUNDING FOR RELIGIOUS HOSPITALS

Historically, denominational or religious hospitals received government assistance via construction grants and reimbursement services.[69] Within these categories, religious hospitals qualified for aid under three different federal schemes: (1) the Hill-Burton Act for facility expansion or modernization,[70] (2) Medicare or Medicaid, and (3) tax exemption for charitable institutions.[71] This section discusses each in turn before turning to the problems posed by these funding structures when applied to Sole Community Hospitals.

Under the Hill-Burton Act, also known as the Public Health Service Act, public and nonprofit facilities received construction grants under Titles VI and XVI.[72] The federal government tied Hill-Burton funding to Certificate of Need programs. Meaning that, before a facility could receive funds, the state government had to determine if there was a need for any new hospital construction. Nearly one-third of hospitals built in 1975 were attributed to Hill-Burton.[73] In the 1980s, all states except for Louisiana had enacted a Certificate of Need law, but in 1987 this federal mandate was re-

68. Although funding is provided to medical service providers outside of a hospital setting, this paper will largely focus on hospitals as the institutions that receive the majority of federal and state funding.

69. Pickrell & Horwich, *supra* note 2, at 124.

70. *See* 42 U.S.C. §291a (1946).

71. Pickrell & Horwich, *supra* note 2.

72. *Medical Treatment in Hill Burton Funded Healthcare Facilities,* U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Nov. 27, 2015), https://www.hhs.gov/civil-rights/for-individuals/hill-burton/index.html [https://perma.cc/RR8R-8FB8].

73. John H. Schumann, *A Bygone Era: When Bipartisanship Led to Health Care Transformation*, NAT'L PUB. RADIO, (Oct. 2, 2016), https://www.npr.org/sections/health-shots/2016/10/02/495775518/a-bygone-era-when-bipartisanship-led-to-health-care-transformation [https://perma.cc/Y5VH-BKWE].

pealed and, in 1997, the direct aid that Hill-Burton provided came to an end.[74]

Today, the government no longer provides construction grants, leaving only reimbursement grants in the form of Medicare or Medicaid or tax exemption for charitable institutions,[75] but Hill-Burton's federal-state matching idea still remains in the form of Medicaid financing.[76] Medicare and Medicaid programs now make up the bulk of direct assistance. Medicare, a federal reimbursement program, is funded through two trusts held by the U.S. Treasury.[77] The Hospital Insurance Trust Fund is funded primarily through payroll taxes, income taxes, and Medicare Part A premiums.[78] The Supplementary Medical Insurance Trust Fund is financed mainly through congressionally authorized funds, Medicare Part D premiums, and drug coverages under Part D.[79] Medicaid, on the other hand, operates on a federal-state matching program, which varies by state as well as on criteria like per capita income.[80] It is implemented through a state plan that is approved by the federal Department of Health and Human Services.[81]

The final source of aid for religious hospitals still applicable today comes through tax exemption for charitable institutions.[82] The government remains in a neutral position when conferring this economic benefit and believes that this status designation does not encumber the Establishment Clause. The government reasons that, because the choice to contribute to the religious institution falls on the taxpayer, rather than the government itself, no violation occurs.[83]

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74. *See* Richard Cauchi & Ashley Noble, *CON-Certificate of Need State Laws,* NAT'L CONF. OF STATE LEGISLATURES (Aug. 18, 2018), http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx [https://perma.cc/Z5GR-S9RK].

75. Pickrell & Horwich, *supra* note 2, at 124.

76. Schumann, *supra* note 73.

77. HOW IS MEDICARE FUNDED?, U.S. CTRS. FOR MEDICARE & MEDICAID SERVICES, https://www.medicare.gov/about-us/how-medicare-is-funded/medicare-funding.html [https://perma.cc/5D4R-N454] (last visited Dec. 6, 2018).

78. *Id.*

79. *Id.*

80. ALISON MITCHELL, CONG. RESEARCH SERV., R42640, MEDICAID FINANCING AND EXPENDITURES (2015).

81. *Id.* at 1.

82. Eric Santos, *Property Tax Exemptions for Hospitals: A Blunt Instrument Where a Scalpel is Needed*, COLUM. J. TAX L. 113, 115 (2016).

83. *Shifting Boundaries*, *supra* note 6, at 13.

This "freedom of choice" theory underlies the concept of reimbursement services through Medicare Medicaid[84] and tax exempt status.[85] In terms of Medicare and Medicaid, both programs have explicit freedom of choice provisions that include all denominational hospitals as medical service providers and leaves it up to the recipient to choose between these providers.[86] By leaving the choice to the individual, the government remains neutral and, thus, provides no aid directly to the religious institution itself, but rather to the recipient who then allocates those funds based on private choice. The logic of private choice is precisely the same analysis the Court used in the *Witters* and *Zelman* line of cases dealing with federal funding to sectarian schools. In those cases, the Court found indirect aid permissible because the choice to financially support a religious institution was up to the parent or guardian rather than the government itself.[87]

This freedom of choice theory, however, poses significant problems in many areas of the country where recipients' options are limited. Unlike schools, for which there is always a public option, hospitals are not always present in both public and private forms, which becomes especially problematic when these singular institutions are religious rather than secular. In many areas of the country, Catholic hospitals operate as the Sole Community Hospital (SCH) within a specified geographic radius. Because these SCHs are the only institutions providing care within a rural or isolated area, they are eligible to receive even more federal funding from the Center for Medicare and Medicaid Funding.[88] For example, in Zanesville, Ohio, a rural area of Appalachia, Catholic-affiliated Genesis Hospital has 290 beds and an estimated number of 70,392 ER visits per year. By obtaining SCH status, Genesis Hospital has re-

84. *See* 42 U.S.C. § 1395a (1976); 42 U.S.C. § 1396a(a)(23) (1976).

85. Pickrell & Horwich, *supra* note 2, at 128 n.111 ("Both Medicare and Medicaid have explicit freedom of choice provisions.").

86. *See* 42 C.F.R. § 431.51 ("(1) Section 1902(a)(23) of the Act provides that beneficiaries may obtain services from any qualified Medicaid provider that undertakes to provide the services to them.").

87. Zobrest v. Cataline Foothills Sch. Dist., 509 U.S. 1 (1993); Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

88. Medicare Payment Advisory Comm'n, Summary of Medicare's Special Payment Provisions for Rural Providers and Criteria for Qualification 143 [hereinafter "Medicare Payment Advisory"] (June 2001), http://67.59.137.244/publications/congressional_reports/Jun01%20AppB.pdf.

ceived an additional six million dollars per year as a result of increased Medicare reimbursement.[89]

Specifically, SCHs benefit from four provisions. According to Congressional Reports, those provisions provide that SCHs are:

> . . . first paid the highest of four amounts for Medicare impatient services: the current prospective payment system rate (PPS), or base year costs per discharge from 1982 up to the current year. Secondly, an SCH that receives the PPS rate and qualifies for a disproportionate share hospital (DSH) payment receives up to a 10 percent adjustment, rather than the maximum of 5.25 percent received by other rural hospitals. Third, 'SCHs don't have to meet the proximity requirement of geographic reclassification, which could facilitate approval for reclassification to a region with a higher wage index, base payment rate, or both. Lastly, if an SCH experiences a decrease of more than 5 percent in the number of impatient cases due to circumstances beyond its control, it is eligible to receive full compensation for fixed costs.[90]

Collectively, these provisions allow SCHs to recoup greater amounts of federal funds to subsidize the cost of operating in a rural area. For nonreligious hospitals, this extra funding poses few problems and, in terms of policy, is a good incentive for hospitals in rural areas to maintain adequate standards of care. The issue, however, is that many of these SCHs are Catholic-owned-and-operated or Catholic-affiliated, meaning that a religious entity is not only receiving federal funds, but receiving them at even greater amounts than their nonreligious counterparts.[91]

Consider, for example, Iowa where Catholic hospitals serve as the SCH in three areas—Carroll, Clinton and Mason City.[92] On a practical level, this means that the individuals living within these areas, seeking hospital or emergency care, only have one option: a Catholic hospital. Specifically, patients in these areas that receive

89. *See id.*; *see also Sen. Brown Helps Secure New Federal Designation for Genesis Hospital*, Sherrod Brown Sen. for Ohio (Mar. 1, 2011), https://www.brown.senate.gov/newsroom/press/release/sen-brown-helps-secure-new-federal-designation-for-genesis-hospital [https://perma.cc/PHK9-DTV8].

90. *Id.*

91. Louis Uttley & Christine Khaikin, Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report 6-7 (MergerWatch 2016), http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=GAWG5aAnZjwfavGdGq0FdUfGTTw%3D [https://perma.cc/7TUC-2CJG].

92. Similarly, Texas and South Dakota have Catholic SCHs in four areas. *Id.* at 8.

Medicare or Medicaid can effectively only direct those federal funds to a religious institution or must otherwise travel far distances to receive care. This calls into question how much freedom of choice patients really have when geographic isolation severely limits their options.

The majority of courts reject this freedom of choice theory and instead look to justify federal funding programs like Medicare and Medicaid through the *Lemon* Test. Courts have found that the programs satisfy the first two prongs of the *Lemon* Test, regarding a secular purpose and effect, because the payments are self-regulating and fall under general welfare services.[93] The third prong of the *Lemon* Test—excessive entanglement between government and religion—is presumed to be satisfied based on the assumption that denominational hospitals are not pervasively religious or, in the language of *Tilton,* are not "pervasively sectarian."[94] One can find justification for extending this logic to hospitals through Justice O'Connor's language in *Agostini* and the idea that doctors and hospitals alike play a public service function.

This analysis likely holds true for some denominational hospitals. But, because the degree to which denominational hospitals are not "pervasively sectarian" varies, it is not enough to say that the public servant assumption can be applied broadly and uniformly. Catholic hospitals, a subset of denominational hospitals, pose particular challenges when reconciling this assumption with their practices. Moreover, because of the large number of Catholic hospitals that operate as SCHs, their status as recipients of higher amounts of federal funding further complicates the picture.

III.
A DIFFERENCE OF DEGREE: CATHOLIC HOSPITALS VERSUS OTHER DENOMINATIONAL HOSPITALS

It should be noted that Catholic hospitals do not make up the totality of religious hospitals. Denominational or religious hospitals encompass a variety of different types of hospitals, and within those types exist a variety of differences in terms of strength of affilia-

93. Center for Medicare and Medicate Services, U.S. Dep't of Health and Human Services, Medicare Program; Reporting and Returning of Overpayments (Feb. 12, 2016), https://www.federalregister.gov/documents/2016/02/12/2016-02789/medicare-program-reporting-and-returning-of-overpayments [https://perma.cc/RB85-F5M9].

94. Tilton v. Richardson, 403 U.S. 672, 681 (1971).

tions.[95] Jewish-affiliated hospitals, for example, are not owned by Jewish organizations, but are run by boards of directors comprised of Jewish community members.[96] Christian hospitals, on the other hand, have a less formal mechanism for identification and operate under a Christian-based network with varying degrees of faith integrated throughout their mission statement and values.[97] In 2016, four percent of hospitals identified as "other religious non-profit" with 153 hospital locations and 9.4 percent of hospitals identified as "Catholic non-profit" with 355 hospital locations.[98] These numbers indicate that the vast majority of religious hospitals in the United States are Catholic owned and/or operated and warrant greater attention. Although the numbers alone provide cause for scrutiny, it is the structural differences between Catholic hospitals and their religious counterparts that produce the most significant issues.

Unlike Jewish or Christian hospitals, whose ties to their respective religions are categorized as more managerial, Catholic hospitals' affiliation with the Catholic Church is embedded not only within the management, but also within the practice of medicine and the care of patients itself. Issued by the United States Conference of Catholic Bishops (USCCB), the Ethical and Religious Directives for Catholic Health Care Services ("the Directives") prohibit a wide range of reproductive health services including "contraception, sterilization, many infertility treatments, and abortion, even when a woman's health or life is jeopardized by pregnancy."[99]

For example, directives §45,[100] §47,[101] §53,[102] §28[103] prohibit each of the services formerly listed. Hospitals that are owned by a

95. Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 SETON HALL L. REV. 1549, 1599 (2012).

96. *Id.*

97. *Id.*

98. UTTLEY & KHAIKIN, *supra* note 91, at 2.

99. JULIA KAYE ET AL., AM. CIVIL LIBERTIES UNION, HEALTH CARE DENIED, PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN'S HEALTH AND LIVES 7 (May 2016), https://www.aclumontana.org/sites/default/files/field_documents/healthcaredenied.pdf [https://perma.cc/YRB2-ER2N].

100. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, §45 (5th ed. 2009) [hereinafter *Directives*] ("Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of

Catholic health system or diocese, affiliated with a Catholic hospital or system through a business partnership, and even some formally owned by a Catholic health care system follow these directives.[104] Deviation from these directives can result in penalties, including loss of Catholic status for the hospital. The Directives, seventy-two in total, are divided up into six parts: (1) The Social Responsibility of Catholic Health Care Services; (2) The Pastoral and Spiritual Responsibility of Catholic Health Care; (3) The Professional-Patient Relationship; (4) Issues in Care for the Beginning of Life; (5) Issues in Care for the Seriously Ill and Dying; and (6) Forming New Partnerships with Health Care Organizations and Providers.[105]

For First Amendment purposes, the most concerning portions of the Directives are in parts (3) and (4), which involve the doctor-patient relationship and care for the beginning of life. Together, they severely restrict the range of procedures that Catholic-owned or affiliated hospitals are able to perform. At a minimum, these restrictions likely include abortion (in all circumstances including rape), euthanasia, sterilization and the provision of contraception to unwed couples. While these abstract prohibitions alone are deeply worrisome, the stories they generate are more concerning.

In a report published by the ACLU in March 2016, many women shared stories where Catholic-owned or affiliated hospitals denied them necessary healthcare services. Among others, this report shared the story of a woman named Maria (pseudonym) in Washington State who miscarried and was experiencing internal bleed-

material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.").

101. *Id.* at § 47 ("Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.").

102. *Id.* at § 53 ("Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available.").

103. *Id.* at § 28 ("Each person or the person's surrogate should have access to medical and moral information and counseling so as to be able to form his or her conscience. The free and informed health care decision of the person or the person's surrogate is to be followed so long as it does not contradict Catholic principles.").

104. KAYE ET AL., *supra* note 99.

105. *See generally Directives, supra* note 100.

ing.[106] Because of the Directives, the hospital did not abort the fetus. Maria's insurance coverage extended to only that hospital, so she was forced to wait and see if her body would complete the miscarriage naturally per the doctor's instructions.[107] The hospital delayed performing the abortion until her iron levels were so low that she needed a blood transfusion, which would put her next pregnancy at risk.[108]

The ACLU report is filled with dozens of stories like Maria's, and the proverbial Marias in the United States today are countless. An important point in Maria's story is her status as a resident of Washington State. Washington is among five states where more than 40 percent of the acute care beds are located in hospitals with Catholic restrictions.[109] Moreover, in Bellingham and Centralia, WA, Catholic hospitals are the sole community providers within a 45-mile radius.[110]

It is worth noting that, although Catholic-owned or affiliated hospitals must follow the Directives to retain Catholic status, the Directives are viewed as guidelines, rather than rules, and interpretations can vary based on local Catholic bishops.[111] Even still, these differences are one of degree. Although 52 percent of OB/GYNs affiliated with Catholic providers reported having conflicts over religious policies dictating care, these conflicts rarely result in a difference in practice due to the threat of job loss or punishment.[112] So, it is and will be people like Maria, who do not have any choice, let alone "true private choice,"[113] that will bear the cost.

Embedded in Maria's story is the true dilemma: reconciling the right of an individual or organization to freely practice their religion with the infringement this creates on private citizens' freedom to choose a healthcare provider or hospital. At the heart of this conflict is the push and pull of the two religion clauses and the balance to be struck between free exercise and religious establishment. Historically, and specifically within the classroom context,

106. KAYE ET AL., *supra* note 99, at 10.

107. *Id.* at 10–11.

108. *Id.*

109. UTTLEY & KHAIKIN, *supra* note 91, at 5 (the other four states are Wisconsin, Iowa, Alaska, and South Dakota).

110. *Id.* at 7.

111. KAYE ET AL., *supra* note 99, at 7.

112. Nina Martin, *Catholic Hospitals Grow, and With Them Questions of Care*, PROPUBLICA (Oct. 7, 2013), https://www.propublica.org/article/catholic-hospitals-grow-and-with-them-questions-of-care [https://perma.cc/7JZF-BVMX].

113. See generally *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002) for a discussion on true private choice.

free exercise has taken precedence over establishment. But, perhaps it is the field of health care and hospital funding that will alter this balance where the dominance of the Free Exercise Clause could have, and has in fact had, literal life or death consequences.

IV.
CATHOLIC-AFFILIATED HOSPITALS AND FREE EXERCISE

The Court has agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses."[114] The protection of free exercise interests of both individuals and entities alike has taken many forms over the course of the doctrine's evolution. Protections for free exercise rights exist in the form of both precedential balancing tests and statutes.

Beginning in the early 1970s, the Court confronted various cases that asked them to weigh potential violations of the establishment clause against free exercise rights. In *Wisconsin v. Yoder,* the Court employed a balancing test to determine if a Wisconsin compulsory school-attendance law requiring children to attend school until age sixteen unduly burdened the Free Exercise Clause.[115] The parents, practitioners of the Amish and Mennonite religions who were convicted of violating the compulsory attendance law, argued that continuing to send their children to school after eighth grade threatened their way of life and interfered with their religion.[116] The Court held that Wisconsin's law did unduly burden the Free Exercise Clause by forcing Amish parents to send their children to

114. Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973).

115. Wis. v. Yoder, 406 U.S. 205, 240–41 (1972) ("But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective.").

116. "The state court decision recognizing an exemption for the Amish from the state's system of compulsory education does not constitute an impermissible establishment of religion, where (1) accommodating the religious beliefs of the Amish cannot be characterized as sponsorship or active involvement, and (2) the purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, which existed in the state long before the advent of any compulsory education, to survive free from the heavy impediment which compliance with the state compulsory-education law would impose; such an accommodation reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the establishment of religion clause to forestall." *Id.* at 207-09.

public school despite a core religious Amish belief of remaining "aloof from the world[.]"[117]

A three-part test emerged from *Yoder*. First, the Court examined whether the religious beliefs in question were sincerely held.[118] Second, the Court examined whether state law did in fact seriously burden those beliefs.[119] Third, and after answering in the affirmative to the first two parts, the Court considered the balance of the state's interests against the free exercise interests of the religious group. The Court determined that, in order to rule for the state, the state's interests had to override religious interests and that there must be no other way to meet state interests other than to impinge upon religious freedom.[120]

While this balancing test skews largely in favor of free exercise rights, the claiming of a violation of free exercise rights in the first place generates significant concerns. In their 1981 article, Thomas Pickrell and Mitchell Horwich articulate this problem:

> . . . the religious institution receiving assistance may disable itself as an eligible participant in a social welfare program by claiming a cognizable free exercise right to be free of regulation accompanying the government assistance. The Establishment Clause permits the government to assist organizations to undertake only secular tasks. By asserting its free exercise right, the organization perforce implies that the task it undertakes is no longer predominantly secular, but predominantly religious. The assertion of a free exercise right magnifies the concern for entanglement under both the Free Exercise and Establishment Clauses.[121]

The confluence of state assistance to religious institutions and issues under both the Free Exercise and Establishment Clauses have left only two real choices in terms of this balancing test: (1) assistance with regulation or (2) no regulation at the cost of such assistance.

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117. *Id.* at 210 ("This concept of life aloof from the world and its values is central to their faith.").

118. *Id.* at 205.

119. *Id.* at 220.

120. Wisconsin v. Yoder – *Significance,* Law Library American Law and Legal Information, https://law.jrank.org/pages/22905/Wisconsin-v-Yoder-Significance.html [https://perma.cc/8U8D-2QDZ].

121. Pickrell & Horwich, *supra* note 2.

As this tension became a larger problem in the early 1970s, particularly in the shadow of the 1973 decision of *Roe v. Wade,*[122] Congress passed a series of laws known collectively as "the Church Amendments."[123] These amendments aimed to protect the conscience beliefs of individuals and entities who object to performing or assisting with abortion or sterilization procedures if doing so would be in opposition to the provider's religious or moral convictions. The Court has held that moral convictions include those beliefs "an individual deeply and sincerely holds . . . that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience."[124]

By enacting this legislation, Congress erected a shield for denominational hospitals receiving federal assistance and allowed them to opt out of performing procedures that go against certain religious beliefs.[125] The Church Amendments also prevent hospitals that receive federal funds from being forced to use their facilities for abortion procedures or to provide personnel for such procedures.[126] This protection is enforced even if such enforcement would impose a hardship on the mother.

If the Church Amendments put a thumb on the scale in favor of free exercise, the Hyde Amendment added yet more weight to the free exercise side of the balance. Originally passed in 1976, the Hyde Amendment prohibits federal funding of abortions and must be passed as a rider to the Human and Health Services Appropriations bill each year.[127] Medicaid funds are only allowed to be used for the exceptions of rape, incest or health of the mother.[128] The Court upheld the constitutionality of the Hyde Amendment against Establishment Clause concerns in 1980 in *Harris v. McRae.*[129]

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122. Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that the right to privacy includes a woman's right to obtain a pre-viability abortion).

123. *See* 42 U.S.C. § 300a-7 (1973).

124. Welsh v. U.S., 398 U.S. 333, 340 (1970).

125. *See* 42 U.S.C. § 238n (1996).

126. Nathaniel James, *The Church Amendment: In Search of Enforcement,* 68 WASH. & LEE L. REV. 717, 723 (2011).

127. *Id.*

128. Palmer Williams, *Four Things You Need to Know About the Hyde Amendment & Federally Funded Abortion*, AM. CTR. FOR L. AND JUST. (Aug. 2016), https://aclj.org/pro-life/four-things-you-need-to-know-about-the-hyde-amendment-federally-funded-abortion [https://perma.cc/TFZ7-2VCE].

129. Harris v. McRae, 448 U.S. 297, 326 (1980) ("We hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restric-

Embedded in both of these cases was the underlying point that, although *Roe* made abortion legal, taxpayer funding of abortion is neither a jump the government is required to take[130] nor one necessitated by *Roe*. In addition to speaking out against government funding, the Court also stated that *Roe* did not provide the right of governmental assistance in obtaining an abortion.[131] Over the years, Congress further solidified the notion that, even if the legal landscape permits abortion, free exercise still provides an escape hatch. In 1996, the Coats Amendment to the Public Health Service Act §245 prohibited discrimination in the federal funding of entities that refused to provide abortion related services.[132] In 2009, the Weldon Amendment to the Appropriations Act prohibited federal funding to organizations that discriminated against entities that did not participate in abortion services.[133] And, in 2010, the Patient Protection and Affordable Care Act protected providers who discriminated in health insurance coverage and those that refused to provide or refer for abortions.[134]

This cursory glance at key legislation since *Roe* shows a picture of the Court putting and keeping free exercise in the forefront. If the Free Exercise Clause stood alone, the paramount concern for the religious liberty would not be an issue. But, because free exercise often runs counter to the establishment of religion, courts must expand their focus. There are few examples more illustrative of the blurring lines between the Establishment Clause and Free Exercise Clause than Catholic hospitals.

V.
CONFLICTS POSED BY CATHOLIC HOSPITALS

Under the operation of the Directives, Catholic owned and affiliated hospitals pose a particularly unique conflict for First Amendment jurisprudence and the tension between the two religion clauses. On one hand, the Court has expressed a clear preference for valuing claims of free exercise over those of religious

tions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment.").

130. Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

131. *Shifting Boundaries, supra* note 6.

132. Jere Odell et al., *Conscientious Objection in the Healing Professions: A Readers' Guide to the Ethical and Social Issues, A Short Overview*, IUPUI SCHOOL OF MEDICINE (2014), https://scholarworks.iupui.edu/bitstream/handle/1805/3845/conscientious-objection-short-overview.pdf?sequence=10 [https://perma.cc/E833-G9RD].

133. *Id.*

134. *Id.*

establishment, particularly within the school context.[135] On the other hand, the Court has only allowed federal funding to religious institutions under the guise of presumptions that are hard to apply to Catholic hospitals. These conflicts are best understood through the lenses of direct and indirect aid as previously discussed.

A. Direct Aid

Direct aid is permitted in two forms: (1) when the aid, and institution to which it flows, is secular in nature or (2) when the institution is not secular, but safeguards exist to prevent the funds from being used for religious purposes. In *Aguilar*, and later *Agostini*, Justice O'Connor found that direct aid to religiously affiliated schools was permissible under the *Lemon* Test.[136] In order to get there, however, O'Connor had to find a way around the excessive governmental monitoring that would be required to ensure that the funds were being used only for secular purposes.[137] This excessive monitoring, if necessary, would have been the death knell for many federally funded programs, because the monitoring would create excessive entanglement of government and religion and, thus, violate *Lemon*'s third prong. Seeking to reconcile this problem, Justice O'Connor relied on a presumption that teachers, as public servants, would use funds appropriately and for non-religious purposes and found that excessive monitoring was not required.[138]

This presumption, although perfectly accurate for teachers who operate with relative autonomy, poses an issue in a narrower and virtually untouched area of Establishment Clause jurisprudence—direct aid to religious hospitals. Specifically, aid to Catholic hospitals directly conflicts with the public servant presumption. Catholic owned or affiliated hospitals now account for 14.5 percent of all acute care hospitals in the United States.[139] By design, Catholic hospitals operate under ethical directives issued by the U.S. Conference of Catholic bishops that prohibit the provision of key reproductive health services,[140] such as abortion, even when the

135. Agostini v. Felton, 521 U.S. 203, 224 (1997).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Women Who Have Been Denied Medically Necessary Health Care at Catholic Hospitals Speak Out*, Am. Civil Liberties Union (May 5, 2016), https://www.aclu.org/news/new-report-reveals-1-6-us-hospital-beds-are-catholic-facilities-prohibit-essential-health-care [https://perma.cc/UAD7-PRVR].

140. These include key services such as contraception, abortion, sterilization, and infertility services.

mother's life is at stake.[141] Thus, O'Connor's presumption in *Agostini*—that public servants will in effect be good stewards of government aid and will not require excessive monitoring—no longer makes sense in the context of Catholic hospitals, because, unlike school teachers, doctors are obligated to follow the Directives.

While one might be tempted to argue that the Directives control the hospital and not the doctors themselves, it is almost impossible to divorce the entity from the individual. As a precondition for employment, most Catholic hospitals require doctors to adhere to the Directives or lose their jobs.[142] Because of this, it is both foreseeable and likely that funds given to Catholic hospitals could be used to provide care that is in support of religious practices rather than what is best for the patient. When the choice between a practice favoring the Directives or disobeying protocol occurs, the inevitable result will be that the doctors adhere to religious principles and, if government funds are involved, those funds will be used to further that purpose. Or, in the words of Justice Sotomayor in reference to the playground involved in *Trinity Lutheran*, "The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its alter."[143] Catholic hospitals are inextricably intertwined with the Directives and that religious mission cannot be separated from the services it provides. Where the Directives are directly in tension with the Establishment Clause, as occurs in the context of reproductive services, it cannot be said, or justifiably believed, that these institutions will employ the kind of neutrality the Court assumed in *Trinity Lutheran*.

This is particularly true in the case of SCHs where there is no private choice to seek alternative care, which also effectively nullifies the freedom of choice provisions located in the Medicare and Medicaid provisions. Professor Michael McConnell of Stanford Law School noted, "The historical focus of church-state separation was on forcing taxpayers to support churches as such—that is, to give churches financial aid to which other comparable secular organizations are not eligible."[144] In the context of SCHs, the federal government is doing precisely this by conferring a benefit when there

141. Directives, *supra* note 100.

142. KAYE ET AL., *supra* note 99, at 27.

143. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2030 (2017) (Sotomayor, J., dissenting).

144. McConnell, *supra* note 41.

is no comparable secular organization and, consequently, no freedom of choice. While it is hard to conceptualize direct aid to Catholic hospitals as permissible under the Establishment Clause, indirect aid presents an even more perplexing problem.

B. Indirect Aid

Throughout the latter half of the 21st century, the Court has continued to justify indirect aid through the lens of true private choice between religious and secular options. With respect to religious hospitals, the potential issues arising out of this reasoning are: What happens if individuals who receive governmental funds do not have a choice between an institution that is secular and one that is religious? If Medicare and Medicaid recipients can only go to a religious hospital, can the aid even be classified as indirect at all? Further and finally, if this aid is indirect, does it violate the Establishment Clause in so far as it favors and supports one religion?

These questions are no longer lurking in the shadows. Specifically, the rise of Catholic hospitals in the United States poses a potential problem for Establishment Clause jurisprudence given their growth rate of 22 percent in the past fifteen years.[145] Moreover, it is the 46 Catholic hospitals that currently operate as SCHs[146] that pose the largest issue of all.[147] Embedded in SCH status is the absence of what is central to the Court's rationale for upholding indirect aid: true private choice.[148]

Because Catholic hospitals are so pervasive, particularly in areas in which they are an SCH, it becomes increasingly more difficult to categorize the aid the government provides to these institutions as indirect. If the option a sick resident in these areas faces is the lone Catholic hospital or no healthcare facility at all, it follows that the individual is not meaningfully choosing to support a religious institution with her federal funds. In reality, the government is providing direct aid to the religious institutions itself. This problem is exacerbated by the extra funds that SCHs are entitled to under

145. UTTLEY & KHAIKIN, *supra* note 91, at 1.

146. *Id.* at 5. (Designation as a Sole Community Hospital means that the facility is located at last 35 miles away from other hospitals, or is located in a rural area and meets certain other criteria, such as being at least 45 minutes in travel time away from the nearest similar hospital.).

147. *Id.* at 1.

148. Robin F. Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 714 (2014) ("Clearly, society should be especially vigilant about awarding an absolute right to object to a contested service when the objector possesses monopoly power in their particular community.").

Medicaid provisions.[149] Given the virtual certainty that many recipients of aid will have no choice but to go to these institutions for medical care, it is hard to imagine a court justifying this aid as anything other than direct aid by the government to a religious organization.

Notwithstanding its being permitted, two problems surface in the direct aid to religious organizations context. First, public funding directly to religious organizations without a true private choice to allocate those funds has not yet been permitted via tax appropriation.[150] The HI trust for Medicare is funded in part through payroll taxes,[151]and one could argue that, because the only presumable end for some Medicare and Medicaid payments are to religious institutions, this equates to a direct funding of religious organizations with taxpayer funds.

Second, Medicaid is a joint state-federal program that poses the problem of direct funding to religious institutions when recipients do not have a true private choice. Acknowledging that Medicare funding is tenuous because it involves conceptualizing direct funding as a step removed, this becomes less clear with regards to Medicaid, which is a joint state-federal program. Because there are actually fifty different Medicaid programs and the federal government only funds up to 50 percent, it is possible that in states like Washington, where residents pay taxes on a state Medicaid program, those state funds are directly supporting the Catholic hospitals, which make up over 40 percent of acute care beds in the state.[152]

However, assuming arguendo that taxes used to fund Medicaid programs do transform into direct funding, the problem of satisfying the *Lemon* Test still arises when the government gives funds to a person who does not have true private choice. Unlike school teach-

149. MEDICARE PAYMENT ADVISORY, *supra* note 88.

150. Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 425 (8th Cir. 2007) ("In this case, there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange. The legislative appropriation could not be directed to a secular program, or to general prison programs.").

151. Mark Cussen, *How Much Medicaid and Medicare Cost Americans*, INVESTOPEDIA, (Aug. 20, 2015), https://www.investopedia.com/articles/personal-finance/082015/how-much-medicaid-and-medicare-cost-americans.asp [https://perma.cc/PXX2-3L6V].

152. Judy Stone, *Healthcare Denied at 550 Hospitals Because of Catholic Doctrine*, FORBES (May 2016), https://www.forbes.com/sites/judystone/2016/05/07/health-care-denied-at-550-hospitals-because-of-catholic-doctrine/ [https://perma.cc/3AL5-FWVR].

ers, the Court cannot presume that doctors and staff in Catholic hospitals will not use government funds for religious purposes because they must follow the Directives. Thus, the excessive governmental monitoring that Justice O'Connor worked so hard to avoid in *Aguilar* and *Agostini* would be necessary in order for the Court to uphold direct funding to religious hospitals. However, just as Justice O'Connor was able to resolve this tension in the context of schools, a potential solution exists to resolve this conflict in the realm of Catholic hospitals as well.

VI.
PROPOSAL

While the issues here are somewhat novel as applied to Catholic hospitals, the solution need not be. When dealing with the complex interplay between both the Free Exercise and the Establishment Clauses, the easiest way to address the problem might be to go around it, not through it.

Without alternatives, a person needing emergency medical services in an area where a Catholic hospital is the SCH is essentially forced to allocate her Medicare or Medicaid granted funds to a Catholic owned or affiliated hospital and no longer retains true private choice. In some instances, this will not be an issue. There are a variety of fields in which treatment at a Catholic owned or affiliated hospital would appear no different than treatment rendered at an unaffiliated hospital. However, services rendered under the umbrella of reproductive care create a drastically different landscape between these two institutions in terms of both the type and the quality of care provided.[153] The Directives put forth by the Archdio-

153. It should be noted that the American Civil Liberties Union filed suit in 2015 against Trinity Health Corporation, one of the largest Catholic health systems in the country, for its systematic failure to provide women suffering pregnancy complications an emergency abortion as required by the Emergency Medical Treatment and Active Labor Act. While this lawsuit is of grave importance, the issue in this paper is not about the services that Catholic health providers must perform, but rather about their funding structure and the intra-First Amendment conflicts that are raised when these funds are dispersed. Moreover, it should be noted that a potential case related to funding differs significantly from the case brought by the ACLU with respect to the question of standing. Whereas in *Trinity Health*, the ACLU had to define the injury with respect to the pregnant plaintiff which led to issues regarding probabilistic harms. Here, the injury is not about a service that was or was not provided, but rather about the structure of appropriations, which the Court has previously found to meet the threshold for an injury under Article III. *See* ACLU v. Trinity Health Corp., 178 F. Supp. 3d 614 (E.D. Mich. 2016).

cese require Catholic hospitals to follow a certain set of guidelines when rendering care to patients. Because of these Directives, patients, most often women admitted for reproductive issues or labor and delivery, are forced to undergo a treatment or procedural plan that conforms to the beliefs of the Catholic Church as embodied by the Directives.

To avoid this, I propose Congress create a bifurcated funding structure analogous to the structure created to fund Legal Aid Services. In 1974, Congress created the Legal Services Corporation (LSC) as a publicly funded 501(c)(3) non-profit corporation.[154] It has an extensive budget that makes up over half of the operating budget of legal services. In fiscal year 2015, this amounted to $375,000,000.[155] This funding structure allows public funds to be distributed privately and overseen by a board of directors. In so doing, LSC allows for more discretion over the flow of funds.[156] Congress could utilize this same structure to fund Catholic hospitals, in particular in areas where they serve as SCHs. If Congress were to look at the areas identified as having Catholic SCHs and determine the amount of Medicare and Medicaid funds granted to residents in those areas, it could use a bifurcated structure to divert that portion of funds to a separate non-profit corporation.

Said corporation could then distribute those diverted funds to isolated geographic areas and establish unaffiliated treatment centers that would offer the very services that the Directives forbid. In this way, the Catholic hospital do not violate their Directives and no free exercise problem ensues, but simultaneously, individuals in those isolated areas have a choice between the Catholic SCH and the privately funded treatment facility. This arrangement would mean that the individuals seeking treatment would no longer feel that, in order to receive care, they must direct their funds to a source that does not align with their own religious beliefs. Consequently, the government would be unencumbered from many potential Establishment Clause violations.

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154. *About LSC,* Legal Services Corp. (2018), https://www.lsc.gov/about-lsc [https://perma.cc/EH7P-PXGG].

155. *LSC Funding,* Legal Services Corp. (2018), https://www.lsc.gov/lsc-funding [https://perma.cc/77GE-W8J5].

156. Conference of Chief Justices, The Importance of Funding for the Legal Services Corporation From the Perspective of the Conference of Chief Justices and the Conference of State Court Administrators, http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx [https://perma.cc/XQ5B-K8DH], (last visited Dec. 6, 2018).

While this solution may seem rather slight,[157] it is worth noting that it avoids the justiciability issues that might plague broader challenges to the type of services Catholic hospitals provide from the outset. By targeting the appropriation structure and seeking a Congressional remedy, the issues of injury and redressability are more easily satisfied for Article III purposes.[158]

CONCLUSION

Although, as detailed above, the Court has often favored free exercise concerns over establishment ones, there is a new area of law that may change this calculus. Religious hospitals, and Catholic hospitals in particular, pose a new and challenging problem for First Amendment jurisprudence previously decided in the context of religious schools.

With federal and state funding to religious institutions coming in the form of both direct and indirect aid, the problems that arise in the context of Catholic hospitals are two-fold. First, with regards to direct aid, the Catholic Church operates on a set of ethical directives that force them to prioritize religious concerns with respect to abortion, sterilization, euthanasia and the like that could very well implicate the excessive entanglement provision of the *Lemon* Test. In the context of funding religious schools, the Court determined that excessive entanglement had not occurred because it could presume that teachers, as public servants, would use the aid for only secular purposes and, thus, excessive monitoring would not be needed to ensure the aid was used correctly.[159] In the funding of Catholic hospitals context, however, this presumption likely does not apply as the Directives may force doctors within those institutions to prioritize religious treatment over other forms of care, even if this means using federal or state funds to do so.

Second, indirect aid, in contrast, has been held permissible through the lens of true private choice. For decades, the Court has

157. It is worth acknowledging that this solution poses additional complex political issues with respect to using tax payer funds to build facilities that would primarily be used for reproductive care. However, these political issues are beyond the scope of this paper.

158. *See* Flast v. Cohen, 392 U.S. 83, 103 (1968) ("Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment.").

159. *Aguilar*, 473 U.S. at 413.

justified indirect aid to schools in the form of things like vouchers by explaining that the aid was general aid and the parents or guardians of certain students decided where to direct those funds. Because of this, the government was merely a conduit and the ultimate affiliation with religion was the choice of the parents or guardians, not of the government itself. This cannot be said for Catholic hospitals that serve as SCHs for certain geographic areas. Because Catholic hospitals are the only service provider available to many individuals, the funds they receive through Medicare and/or Medicaid are no longer subject to their freedom of choice provisions that allow the aid to be directed at the institution of the recipient's choice. As such, the recipients in these isolated areas are forced to use the aid at Catholic hospitals, and the government is effectively subsidizing those religious hospitals in a manner more analogous to direct aid, given the lack of true private choice necessary to qualify the aid as indirect. This is particularly troubling given that SCHs qualify for increased funding through Medicare and thus receive more federal funding than their non-religious analogs.

The only way around this problem within the current framework is to increase the level of monitoring in Catholic hospitals receiving federal funding in a way that does not violate *Lemon*. Rather than go down that route, I propose that Congress establish a bifurcated system, one analogous to the LSC used to fund legal services organizations, to extricate itself from this entanglement. This system would allow Congress to divert Medicare and Medicaid funds utilized by SCHs to a separate entity that could then distribute those funds to a separate group of physicians, unaffiliated with the Catholic Church, who could render a greater panoply of services if desired by the patient.

Just such a solution is urgently needed. Between 2001 and 2016, Catholic owned or affiliated hospitals grew by 22 percent while acute care hospitals dropped by 6 percent.[160] Today, one in every six acute care hospital beds is in a facility that is Catholic owned or affiliated.[161] As the number of Catholic owned or affiliated facilities rise, the government's excessive entanglement with Catholicism will deepen. Given this, the danger of silent accumulations and encroachments by ecclesiastical bodies will continue to press forward and blur the lines between free exercise and religious establishment. This paper offers a possible solution.

160. UTTLEY & KHAIKIN, *supra* note 91, at 1.
161. *Id.*