From *Hobby Lobby* to Hospitals: Religious Autonomy for Religious Healthcare Institutions

Patrick M. Judd*

Introduction

The state cannot intrude upon the internal self-governance of institutional conscience. Religious convictions and beliefs often inform individual conscience, and secular law protects their choices of conscience, particularly in the realm of healthcare. However, American religious freedom law also protects an institution's choices of conscience inspired by religious beliefs. These institutions include not only non-profit religious worship centers and religious schools and charities, but also for-profit organizations that operate in accordance with clearly defined religious beliefs. Challenges emerge when an institution's decisions based on conscience transgress areas that secular law seeks to protect—particularly civil rights, labor, and healthcare. Nonetheless, the U.S. Supreme Court continually defers to religious institutions' rights to religious autonomy—the right for religious institutions to decide for themselves how to run their organizations free from government intrusion.[1] Religious autonomy permits churches and schools to hire and fire its ministers and clergy, even if the firing is discriminatory. Most recently in the 2014 *Burwell v. Hobby Lobby Stores, Inc.* case (573 U.S. 682), the Court extended the principle of religious autonomy to permit a closely held for-profit corporation to limit its mandatory health insurance coverage so as not to violate the corporation's claims of conscience. The principle of religious autonomy likewise permits religiously founded and religiously operated healthcare institutions to form a religious conscience, which can lead these institutions and its employees to be conscientiously opposed to participating in certain medical procedures.[2]

Religious autonomy advocates argue for a more "institution-sensitive" reading of the First Amendment religion clauses because religious institutions deserve as much of a right to form their own religious conscience as individuals do (see Garnet 2008; Smith 2014: 76).

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* Patrick M. Judd is a J.D. candidate at Emory University School of Law, an incoming law clerk at the U.S. Court of Appeals for the Fifth Circuit, and the Executive Managing Editor of the *Emory Law Journal*, volume 71. Many thanks to Prof. John Witte, Jr., along with the staff and editors at *Religio et Lex* and *Emory Law Journal*, for their insightful feedback on this article.

[1] Douglas Laycock's seminal article on the topic defined religious autonomy as the "constitutionally protected interest in managing their own institutions free of government interference" (1981: 1373).

[2] Religious accommodation schemes protecting conscience through the right to religious autonomy are ingrained in U.S. religious liberty jurisprudence because they "create spaces for believers to exercise their faiths peacefully, not licenses to do harm to their neighbors or the common good" (Witte and Nichols 2016: 248).

Religious autonomy critics argue that freedom of *individual* conscience alone is sufficient to protect Free Exercise rights (Schragger and Schwartzman 2013: 920). The Supreme Court, however, has consistently sided with the religious institutionalists by extending the First Amendment principle of religious autonomy to religious institutions like churches and religious schools, granting them the right to determine their own religious conscience and to act on it in decisions about their mission, membership, leadership, property, and employment. The Court in *Hobby Lobby* used a statute—the Religious Freedom Restoration Act (42 U.S.C.A. § 2000bb, hereafter referred to as RFRA)—to extend this principle of religious autonomy to closely held for-profit corporations. Does the same religious autonomy extend to religiously founded and religiously operated pharmaceutical and healthcare institutions, too, allowing them to make decisions about what services and products to provide based on their institutional religious conscience?

The combat over conscience claims of healthcare institutions is caught between two contradictory extremes. Opponents argue that medical institutions "should be professionally required to carry out" a patient's requested medical services that do not violate the law, regardless of the institution's "ethical convictions or religious beliefs" (Genuis and Lipp 2013: 4; see also Dickens 2009: 244-45; Weiss et al. 2002: 9). Supporters "argue that absolute regulation requiring" a medical institution "to act contrary to" its religious conscience "is imprudent, prejudicial, and unacceptable" (Genuis and Lipp 2013: 4; see also Theriot and Connelly 2017: 552). Lynn Wardle identifies a variety of contentious medical practices that raise moral implications for many religious healthcare facilities, including:

> [H]uman stem cell research; cloning; genetic engineering …; DNA screening and medical treatment for various genetic disorders; surgical abortion …; pharmaceutical abortion …; sterilization; capital punishment; assisted suicide; sex-change procedures; provision of contraceptives to minors; and provision of assisted reproduction technologies to unmarried persons and couples including gay, lesbian, and transgendered couples. (2010: 2)

This article argues that religious healthcare facilities should have the religious freedom right to determine which medical procedures and pharmaceuticals, otherwise authorized by government, its institutional conscience prohibits it from performing or using; to hold all of its employees to the healthcare policies formulated in expression of these choices of conscience; and to implement those conscientiously-informed policies in the healthcare and pharmaceutical services, without government interference or reprisal.

Part I analyzes three recent suits between the two sides of the medical conscience battle. In these cases, religious healthcare institutions refused to provide medical procedures or pharmaceuticals that they viewed as morally questionable. The cases included state mandates and civil suits enjoining religious healthcare institutions to provide these pharmaceuticals or procedures. These disputes illustrate the increasing number of challenges religious healthcare institutions face given the controversial secular shift in healthcare regulation ("Real-life Examples of Discrimination in Healthcare" n.d.; Theriot and Connelly 2017: 553-56). Part II offers a snapshot of the Supreme Court's development of the religious autonomy principle through three lines of cases: internal church governance disputes; the

ministerial exception for religious employers; and corporate religious liberty. The state of the religious autonomy principle after *Hobby Lobby*—the case recognizing corporate religious liberty—is of particular importance here because it illustrates the furthest lengths to which the Court extends religious autonomy to protect institutional conscience.

In Part III we will see how the principle of religious autonomy was at the heart of the decision in *Hobby Lobby*, and thus prohibits state intervention into an institution's decisions for its own conscience. Tensions arise, however, when institutions with a sincere religious conscience, like those involved in the disputes discussed in Part I, provide healthcare services.[3] In response to this tension, in Part IV we will apply religious autonomy protection to religiously chartered medical institutions. Given the growing number of "contemporary threats to medical conscience," a religious medical institution should not be forced to provide healthcare procedures that its religious conscience prohibits (Theriot and Connelly 2017: 553-56). The principle of religious autonomy affords religious medical institutions the "power to decide for themselves" a religious conscience (*Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 1953: 116), and thus decide for themselves which procedures and pharmaceuticals that conscience prohibits and permits.

I. Recent Disputes Over Institutional Medical Conscience

Three recent suits and regulations forced medical institutions to provide procedures and pharmaceuticals contrary to their sincerely held religious consciences. In *Stormans v. Wiesman* (794 F. 3d 1064, 2015), the State of Washington forced pharmacists to violate their religious convictions by providing abortifacient contraceptives. In *Minton v. Dignity Health* (252 Cal. Rptr. 3d 616, 2019), a Catholic hospital was sued to provide vasectomies or hysterectomies for the purpose of sex-change operations, which goes against Catholic Church teaching. And in *Chamorro v. Dignity Health* (No. CGC-15-549626, Cal. Super. Ct., 2016), a claimant sought to force a Catholic hospital to perform a tubal ligation following a Caesarian section ("C-section") delivery, which also violates Catholic Church teaching. All three cases illustrate the growing divergence between state-licensed medical services and the rights of religious medical institutions to form their own consciences.[4]

The *Stormans* case involved two administrative rules adopted by the Washington Pharmacy Quality Assurance Commission that functionally required pharmacies to fill any

[3] The majority and dissenting opinions in *Hobby Lobby* and *Little Sisters of the Poor v. Pennsylvania* (140 S. Ct. 2367, 2020) sufficiently encapsulate this tension. One side argues that access to abortifacient contraceptives is paramount. The other side argues that the "Free Exercise" right to an exemption from the government mandate to provide contraceptives prevails because the mandate contravenes sincerely held religious consciences. Compare *Hobby Lobby*, 691 with *Hobby Lobby*, 740; or *Little Sisters*, 2386 with *Little Sisters*, 2400-01.

[4] This article only provides three challenges to the religious conscience of medical institutions. For a survey of similar occasions of religious discrimination against medical professionals and institutions, see "Real-life Examples of Discrimination in Healthcare" n.d.; Theriot and Connelly 2017: 553-56.

lawful prescription. The state rules provided no exemptions for pharmacists or pharmacies that objected to the delivery of certain medication for personal, philosophical, moral, or religious reasons, and no right to refer the recipients to another pharmacy (*Stormans*, 1072-73). Plaintiffs, including the family-owned pharmacy company Stormans, Inc., sought declaratory and injunctive relief from filling prescriptions for drugs that would "cause early-stage abortion" because "[s]elling them would violate [their] religious beliefs and [their] commitment to helping all people, even the unborn" (Stormans 2016). Nevertheless, the U.S. Ninth Circuit Court of Appeals held that the "coextensive" Free Exercise and Fourteenth Amendment claims failed because the rules were neutral and generally applicable (*Stormans*, 1074, 1088).[5]

The Supreme Court denied certiorari the following year with a lengthy dissent written by Justice Alito and joined by Chief Justice Roberts and Justice Thomas (136 S.Ct. 2433, 2016). Justice Alito gave an "ominous" warning that the decision legalized regulation that was "targeted at religious conduct alone, to stamp out religiously motivated referrals while allowing referrals for secular reasons" (ibid., 2440). This case presents a prime example of where the right to religious autonomy should permit pharmacies to form and act on their own medical consciences, particularly when so many nearby pharmacies could and would fill the prescription.

The *Minton* case is a typical case where claimants have sought to force Catholic hospitals to provide vasectomies or hysterectomies for the purpose of sex-change operations. Minton was diagnosed with gender dysphoria and alleged that a hysterectomy was an accepted "medical step[] to affirm one's gender identity and help an individual transition from living as one gender to another" (Complaint, *Minton v. Dignity Health*, No. 17-558259, Cal. Ct. App. 19 April 2017: 4). Minton was scheduled for a hysterectomy at Mercy San Juan Medical Center (hereafter referred to as "Mercy"), which is owned and operated by Dignity Health, a Catholic healthcare facility.[6] Mercy canceled the operation when it discovered that the hysterectomy was part of a sex change transition. Minton sued Dignity Health, alleging discrimination based on Minton's gender identity (*Minton,* 619-20).

Dignity Health claimed "Free Exercise" clause protection, arguing that, as a Catholic hospital, Mercy must follow the *Ethical and Religious Directives for Catholic Health Care Services* (2016). The Directives, promulgated by the United States Conference of Catholic Bishops (USCCB), prohibit Catholic hospitals from performing procedures that result in the "[d]irect sterilization of either men or women" (see ibid., 19; Francis [Pope] 2015: 115-16; *Catechism of the Catholic Church* 1997: ¶2297). The trial court dismissed the case because Minton had not shown that having the procedure done three days later at a different facility "deprived him of full and equal access to the procedure" (*Minton*, 621). A California court of appeals reinstated the case because, in its view, the discrimination occurred when Mercy first

[5] The current standard of review for "Free Exercise" claims, according to *Employment Division v. Smith* (494 U.S. 872, 1990), is the rational basis test—which requires only a rational basis for neutral and generally applicable laws affecting religiously motivated conduct.

[6] Dignity Health is the fifth largest healthcare provider in the United States and the largest in California (see "About Us" 2021).

cancelled the surgery (*Minton*, 624). Dignity filed a Petition for a Writ of Certiorari by the U.S. Supreme Court, where it is currently docketed. This case presents another unresolved dispute in which a discrimination claimant seeks relief in a manner that directly contravenes a defendant institution's sincere religious conscience. The right to religious autonomy, however, should permit religious healthcare institutions, such as Dignity Health, to decide which procedures it may or may not perform in accordance with its religious conscience.

Chamorro involved another suit against Dignity Health. Chamorro was scheduled for a C-section at Mercy Medical Center Redding, owned and operated by Dignity Health. Pursuant to the same *Ethical and Religious Directives* referred to in *Minton*, the hospital refused to perform a tubal ligation after the C-section because this was a "[d]irect sterilization" procedure in violation of Catholic medical ethics (2016: 19). Chamorro sought an injunction to force the hospital to provide the operation because the refusal constituted sexual discrimination against her (Complaint, *Chamorro v. Dignity Health*, No. CGC-15-549626, 2016 WL 4159043, Cal. Super. Ct. 1 Aug. 2016: 3).

These suits are a few of the dozens of cases in which religious healthcare institutions are challenged for holding differing views of medical ethics. The American Civil Liberties Union (ACLU) launched a campaign in 2016 to force religious healthcare institutions to perform medical procedures that their religious consciences often prohibit (see generally Kaye et al. 2016; Smith 2017).[7] Most States have legislation in place protecting religious healthcare institutions from providing abortions and some sterilization procedures (see *Church Amendment*, P.L. 93-45, §401(b)). However, state protections often stop there and do not extend to other procedures and pharmaceuticals with serious moral implications, and do not protect religious institutions as they do individuals (Frank 1996: 349; Theriot and Connelly 2017: 580-81). As these three cases illustrate, those statutory accommodations have not gone far enough to deal with the challenges to conscience presented by new technologies and medications. Legislatures and regulators, however, are only one government power that can create these conscience exemptions.

Courts extend conscience exemptions in individual cases as needed under the First Amendment right to religious liberty (see *Lynch v. Donnelly*, 465 U.S. 668, 1984: 673). As Michael McConnell notes, conscience exemptions have the "purpose and effect" of facilitating religious liberty by operating in-between "the accommodations compelled by the Free Exercise Clause and the benefits prohibited by the Establishment Clause" (McConnell 1985: 3). The Court has established a religious liberty mechanism to protect Stormans and Dignity Health from having to provide healthcare that conflicts with their religious consciences through the principle of religious autonomy. This principle should permit institutions like Stormans Pharmacy and Dignity Health to determine which medical procedures and pharmaceuticals its institutional conscience prohibits it from performing or using; to hold its employees to its healthcare policies formulated in expression of these

[7] Scholars have joined the ACLU's argument, claiming that "a health care professional cannot deny patients access to medications for mental health conditions, sexual dysfunction, or contraception on the basis of their conscience" (Stahl and Emanuel 2017: 1383; see also Wolfe and Pope 2020).

choices of conscience; and to implement those conscientiously informed policies in the healthcare and pharmaceutical services, without government interference or reprisal.

II. The Right to Religious Autonomy

Three lines of cases in U.S. Supreme Court history illustrate the Court's understanding of religious autonomy—the principle that religious institutions deserve the freedom to make certain internal decisions free from government interference. As we will see, the caselaw includes internal church governance disputes, a ministerial exception for religious employers, and corporate religious liberty. The Supreme Court has ruled that courts must defer to religious groups in matters of internal governance over property disputes and divisions (see *Watson v. Jones*, 80 U.S. 679, 1871; *Kedroff*). Second, the Court has ruled that the "ministerial exception" requires courts to defer to religious institutions on employment decisions for employees acting as "ministers" (*Hosanna-Tabor v. EEOC*, 565 U.S. 171, 2012; *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2020). And third, the Court has ruled that corporations are "persons" that can limit mandatory health insurance coverage so as not to violate corporations' claims of conscience under the RFRA (*Hobby Lobby*, 736; *Little Sisters*, 2389). As we will see, these three lines of cases reveal that religious autonomy permits religious institutions to make certain decisions free from government interference, particularly with reference to the right for churches, schools, and corporations to determine their own religious conscience and to act on it in decisions about their mission, membership, leadership, property, and employment.

The Supreme Court first deferred to a religious institution's decisions of internal governance in *Watson v. Jones* (1871), affirming that the government may not delve into a church's determination of religious doctrine. Civil courts have no jurisdiction over determinations of faith, doctrine, or church law made by a church's highest ecclesiastical judicatory (*Watson*, 684). *Kedroff v. St. Nicholas Cathedral* (1953) grounded this deference principle in the First Amendment and clarified that the deference extended to a church's choice of clergy.

Watson left internal controversies over faith and doctrine to the determination of a church's highest ecclesiastical tribunal. At issue was an intra-church property dispute in which a Presbyterian Church divided over the issue of slavery. Most of its members opposed slavery, siding with the highest ruling body of the Presbyterian Church. A minority (albeit a majority of the local leadership) embraced slavery. Both factions claimed to be the true church and claimed the right to retain possession of the church property. The Supreme Court held that secular tribunals must accept the decisions of church judicatories—in this case the highest ruling body of the Presbyterian Church—as final and binding in matters of church discipline, faith, ecclesiastical rule, custom, or law (*Watson*, 727). Churches can decide their internal policies, free from government interference, through hierarchical decision-making

tribunals.[8] The Court decided *Watson* according to an interpretation of church-state relations, not the First Amendment.[9]

Eighty years later, *Kedroff* established that the principle of religious autonomy is grounded in the First Amendment and protects a church's choice of clergy. A New York law gave a subordinate North American church council the authority to appoint a Russian Orthodox archbishop. Russian Orthodox canon law, however, gave that authority to the Moscow patriarch. The Supreme Court deferred to Russian Orthodox canon law as the highest ecclesiastical governing body because selecting clergy requires intrusion into matters of faith and doctrine (*Kedroff*, 115). According to the Court, churches embody a "quasi-sovereign sphere[]" (Horwitz 2013b: 190) where they enjoy "a spirit of freedom … to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" (*Kedroff*, 116). This "spirit of freedom" defines the principle of religious autonomy as it is understood today (see Horwitz 2012: 979).

The deference granted to churches in the internal governance disputes under the principle of religious autonomy was not unlimited, and it did not aim to grant more rights to institutions than individuals (but see Schragger and Schwartzman 2013: 921 n.13; Sepper 2012: 1518-25). The deference reflected the "distinctive nature, role, and freedoms" of the churches, which included matters "of faith and doctrine" (*Kedroff*, 116). According to Paul Horwitz, "[t]he nature and extent of judicial deference should follow the nature of the institution"—namely, "their own sense of institutional mission" (Horwitz 2013a: 1053), as we shall see is central in the ministerial exception for religious employers. *Watson* initiated the principle of religious autonomy in matters of faith and doctrine, and *Kedroff* established this principle under the First Amendment. Since *Kedroff*, the Supreme Court has consistently reaffirmed the right for religious organizations to "decide for themselves, free from state interference," matters of faith, doctrine, and internal governance (*Kedroff*, 116; see *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 1976; *Presbyterian Church of the U.S. v. Hull Presbyterian Church*, 393 U.S. 440, 1968).

The Supreme Court further developed the boundaries of the religious autonomy principle in 2012 when it recognized the "ministerial exception." The ministerial exception prohibits any state interference or reprisal in a church's employment decisions for its ministers. It extends to religiously chartered schools because the classroom plays an important role in passing on the faith to its students. The Court recognized the ministerial exception under the First Amendment in the seminal case, *Hosanna-Tabor* (2012). In *Our Lady of Guadalupe* (2020), the Court extended the ministerial exception to a school's decision to fire teachers even if they did not hold the title "minister."

Hosanna-Tabor recognized the ministerial exception under the "Free Exercise" and "No Establishment" clauses. The First Amendment precludes any state intervention into matters

[8] Hierarchical churches are "those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head" (*Kedroff*, 119).

[9] *Watson* was decided prior to the incorporation of the "Free Exercise" clause into the Fourteenth Amendment in *Cantwell v. Connecticut* (310 U.S. 296, 1940). Thus, at the time, the "Free Exercise" clause only prohibited federal interference.

"concerning the employment relationship between a religious institution and its ministers" (*Hosanna-Tabor*, 188). A fired teacher at a religious primary school filed a claim with the Equal Employment Opportunity Commission (EEOC) under the nonretaliation provision of the *Americans with Disabilities Act of 1990*. The religious school claimed that several factors contributed to the teacher being a "minister," thus warranting the ministerial exception.

The Court agreed with the school and held that state interference with its employment decisions regarding such key employees violated both the "Free Exercise" clause and the "No Establishment" clause (*Hosanna-Tabor*, 188-89). Writing for a unanimous Court, Chief Justice Roberts provided the historical background from which the First Amendment drafters sought to prevent government intervention in a church's appointment of ministers.[10] He emphasized the great lengths to which the First Amendment goes to protect "the rights of religious organizations," confirming the Court's willingness to recognize the school's right to religious autonomy (ibid., 189).[11] However, pertinent questions remained as to how far the ministerial exception could immunize religious employers from civil rights claims in employment disputes.[12]

Justice Alito's concurring opinion recommended that the ministerial exception test should be tailored toward the employee's role in conveying the religious organization's message and mission, similar to the decision in *Kedroff* (*Hosanna-Tabor*, 204). He claimed that the Religion Clauses have long protected religious autonomy by creating "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs" (ibid., 200). According to Justice Alito, the right to religious autonomy permitted the school to make employment decisions free from government interference.

His position carried weight in the next ministerial exception case decided last term when *Our Lady of Guadalupe* expanded *Hosanna-Tabor*'s holding and applied it to religious schoolteachers irrespective of their official title. Writing this time for the majority, Justice Alito held that the First Amendment prohibits court intervention in employment disputes between religious schools and its teachers (*Our Lady of Guadalupe*, 2055). Two fired teachers brought employment discrimination claims against two Catholic primary schools. The Court ruled that an employee's title may be a factor in this analysis, but it is not determinative.

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[10] Chief Justice Roberts traced the common law foundation for the ministerial exception back to the recognition of religious autonomy in the *Magna Carta*. Religious autonomy was eventually discarded by the Church of England's various acts of uniformity (*Hosanna-Tabor.*, 182-84).

[11] Micah Schwartzman, Chad Flanders, and Zoë Robinson (2016: xvii) identify *Hosanna-Tabor* as the source and legal foundation for corporate religious freedom, which will be discussed in Part II.

[12] The majority enumerated four circumstances lending the teacher to be considered a "minister": her formal title as a "called" teacher; her special training and endorsement by the religious congregation for her calling; her holding herself out as a minister; and her "role in conveying the church's message and carrying out its mission" (*Hosanna-Tabor*, 191-192). These factors did not create "a rigid formula for deciding when an employee qualifies as a minister" (ibid., 190).

However, the centrality of an employee's responsibilities and duties to the religious organization's mission is essential. A teacher, therefore, is a minster entrusted with the responsibility of carrying out the core mission of a religious school: religious education. Therefore, courts must stay out of employment disputes involving "important positions" essential to the mission of religious churches and schools.[13]

Our Lady of Guadalupe broadened the ministerial exception test and required courts to review whether facts implicate the "fundamental purpose of the exception" (2067). Both the ministerial exception and the internal church governance cases indicate this fundamental purpose is a religious institution's right to religious autonomy.[14] Religious autonomy permits churches and schools to hire and fire its ministers and clergy, even if the firing is discriminatory (*Our Lady of Guadalupe*, 2060). The Supreme Court has firmly resolved that the principle of religious autonomy grants institutions, not individuals alone, conscience protection (contra Schragger and Schwartzman 2013: 979). The next line of cases illustrates the Court extending the principle of religious autonomy to permit for-profit corporations to articulate a religious conscience.

American religious freedom law protects the choices of conscience inspired by religious beliefs that are made by institutions—not only non-profit religious worship centers and religious schools and charities, but also for-profit organizations that operate in accordance with clearly defined religious beliefs. In the 2014 *Hobby Lobby* case, the Court extended the principle of religious autonomy to permit a closely held for-profit corporation to limit its mandatory health insurance coverage so as not to violate the corporation's claims of conscience under RFRA (736).[15] The Court next held in *Little Sisters of the Poor v. Pennsylvania* (2020) that the executive branch had the statutory authority to grant institutions the same religious conscience exemptions extended in *Hobby Lobby*. The majority in *Hobby Lobby* and a concurrence in *Little Sisters* indicates that the principle of religious autonomy was at the heart of both decisions.

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[13] Justice Alito's concurrence in *Hosanna-Tabor* argued that a minister is one who plays a role "of substantial religious importance" in furthering the religious institution's mission (*Hosanna-Tabor*, 200). The majority seemed to adopt that definition of minister in *Our Lady of Guadalupe* when it extended the ministerial exception to "employment disputes involving those holding certain *important positions*" in a religious institution's mission (*Our Lady of Guadalupe*, 2060, emphasis added). For a discussion on this argument, see Pope 2020: 2172.

[14] Although the *Hosanna-Tabor* majority did not explicitly adopt this position, Justices Thomas and Alito clearly articulated the religious autonomy principle in their concurring opinions. Justice Thomas's concurrence in *Our Lady of Guadalupe*, joined by Justice Gorsuch, reiterated his position in *Hosanna-Tabor*, stating unequivocally that the principle of religious autonomy requires extreme deference to a religious organization's determination of whether an employee is considered a "minister" (*Our Lady of Guadalupe*, 2069-70).

[15] Hobby Lobby had a stronger cause of action under RFRA than the First Amendment because RFRA restored the compelling interest test from *Sherbet v. Verner* (374 U.S. 398, 1963) for "Free Exercise" claims (see Witte and Nichols 2016: 125).

Hobby Lobby held that RFRA protects the choices of conscience that are made by closely held for-profit corporations that operate in accordance with clearly defined religious beliefs. These organizations exercise religious freedom by forming a conscience (*Hobby Lobby*, 688-89). According to RFRA, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest" (RFRA, §§2000bb–1(a)-(b)). Hobby Lobby and two other closely held for-profit corporations asserted that the Health and Human Services (HHS) mandate requiring them to provide health insurance to their employees that included abortifacient contraceptives violated sincerely held religious beliefs.[16] Writing for the majority, Justice Alito held that Congress envisioned "person" for purposes of RFRA to includes corporations because it showed no intention to deviate from the *Dictionary Act*'s definition of "person" (*Hobby Lobby*, 708).

Having established that closely held for-profit corporations are persons that can claim a religious conscience, the Court found that the HHS mandate failed the strict scrutiny test required by RFRA. Because the corporations articulated sincere religious consciences, HHS would have to show that "any action that substantially burden[ed] the exercise of" these consciences "constitute[d] the least restrictive means of serving a compelling government interest" (*Hobby Lobby*, 690-91). Although the HHS mandate furthered a compelling governmental interest in providing healthcare, the Court held that HHS failed to prove that it lacked any other means of achieving this interest without substantially burdening the corporations' religious exercise.[17] A law that makes the practice of religion more expensive in the business context substantially burdens a corporation's religious exercise (ibid., 710).

Hobby Lobby held that the principle of religious autonomy protects a for-profit corporation's choices of conscience inspired by religious beliefs. To justify this claim, the Supreme Court found that appreciating corporate religious autonomy better protects the individual religious liberty of its constituent members (*Hobby Lobby*, 709).[18] This is especially

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[16] The HHS mandate was promulgated under the *Affordable Care Act of 2010*, which "requires employers with [fifty] or more full-time employees," at the risk of a substantial penalty, "to offer '… group health insurance coverage' that provides 'minimum essential coverage'" (*Hobby Lobby*, 697, quoting the *Affordable Care Act*, 26 U.S.C. §5000A(f)(2); §§4980H(a), (c)(2)). Subsequent guidelines defining "minimum essential coverage" included various approved abortifacient "contraceptive methods, sterilization procedures, and patient education and counseling" (ibid., quoting Women's Preventive Services Guidelines, 77 Fed. Reg. 8725, 2012). Closely held for-profit corporations were not considered exempted employers.

[17] Hobby Lobby would have had to pay $26 million per year, Conestoga $1.8 million, and Mardel $800,000 (see *Hobby Lobby*, 720).

[18] *Hobby Lobby* falls squarely in line with arguments proposed by religious institutionalists: "[T]he existence and independence of religious institutions—and specifically, of the Church—long served, and is still needed today, as the 'social armature to the sacred order,'

true because "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all" (ibid., 707; citations omitted). The majority warned of the extreme implications that a contrary ruling would have on employers like Hobby Lobby (ibid., 733). Without the religious autonomy to determine their own consciences, for which it receives statutory protection, the government could require these "employers to provide coverage for any medical procedure," including "third-trimester abortions or assisted suicide" (ibid.). Thus, corporate religious autonomy "furthers individual religious freedom as well" (ibid., 709, quoting *Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 1987: 342). In the wake of *Hobby Lobby*, the question as to what other types of institutions can limit its mandatory health insurance coverage so as not to violate its claims of conscience remained unanswered (see Witte and Nichols 2016: 244; Bassett 2017: §5:1). This unexplored issue was presented to the Court twice to no avail, each time with the Little Sisters of the Poor as the plaintiff.

In the 2019-2020 term, *Little Sisters* upheld the statutory authority for an executive final order granting a religious exemption from the same contraceptive mandate as was at issue in *Hobby Lobby*. In 2013, the Little Sisters of the Poor, a Catholic order of religious sisters inspired by their religious convictions to care for the elderly, challenged the "self-certification accommodation" from the HHS mandate (see *Zubik v. Burwell*, 136 S.Ct. 1557, 2016). The accommodation from the Obama Administration exempted religious organizations from having to provide its employees with contraceptives if they completed a certification form that handed the responsibility to their healthcare providers (*Little Sisters*, 2375). The Little Sisters argued that signing the waiver still made them "complicit" in the morally objectionable act of "deliberately avoiding reproduction through medical means" (ibid., 2376-77). Rather than decide whether the self-certification accommodation violated the Little Sisters' religious conscience, the Supreme Court in *Zubik* vacated and remanded the case instructing the parties to come to an agreement that accommodated religious exercise while also ensuring proper access to contraceptives (1557).

In 2020, the Little Sisters appeared before the Supreme Court once more. This time, the Court upheld a far-reaching religious exemption promulgated by the Trump Administration through the Health Resources and Services Administration (HRSA) (*Little Sisters*, 2386). The Trump Administration, motivated by the recent decision in *Hobby Lobby*, issued interim final rules exempting employers (including nonprofits and closely held for-profit corporations) with religious or moral objections to the contraceptive mandate. Pennsylvania and New Jersey sued contending that the rules were unlawful because HRSA did not have the statutory authority to grant such exemptions. Writing for the majority, Justice Thomas disagreed and upheld the new religious and moral accommodations as statutorily valid because the *Affordable Care Act* gave HRSA such authority (ibid.). HRSA had the sweeping authority to define what constituted necessary preventative care and any necessary exemptions from the guidelines (see HRSA, § 300gg–13(a)(4)). The Court did not address the Little Sisters' RFRA claim because the exemptions were statutorily valid. The majority did, however, maintain that the Trump Administration could consider RFRA in

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within which the individual human person could be 'secure in all the freedoms that his sacredness demands'" (Garnett 2008: 295, quoting Murray 1988: 205).

issuing its exemptions because, as the Court held in *Hobby Lobby*, the contraceptive mandate can violate RFRA (*Little Sisters*, 2382-83).

In concurrence, Justice Alito recommended the Court "bring the Little Sisters' legal odyssey to an end" and proceed to the Little Sisters' RFRA claim (*Little Sisters*, 2396). Not only were the Departments permitted to accommodate corporate religious objections, he thought they were required to do so under *Hobby Lobby*, which protected any employer with a religious objection to a government mandate that imposed a substantial burden on their religious convictions. Justice Alito drew on the same principle of religious autonomy found in internal church governance disputes, the ministerial exception, and *Hobby Lobby*: "it is not for us to say that [a religious institution's] religious beliefs are mistaken or insubstantial" (ibid., 2390). Although Justice Thomas's majority opinion did not rule on the Little Sisters' RFRA claim, he likely would take Justice Alito's approach if a case demanded such a decision. His concurrence in *Our Lady of Guadalupe*, decided on the same day as *Little Sisters of the Poor*, called for extreme deference to a religious organization's right to religious autonomy (see *Our Lady of Guadalupe*, 2069-70; *Hosanna-Tabor*, 196). If the Little Sisters are brought back before the Court as Justice Alito warned (*Our Lady of Guadalupe*, 2387), Justice Thomas would most likely choose to extend *Hobby Lobby*'s religious autonomy principle to the Little Sisters, especially given the note he dropped at the very end of his *Little Sisters* opinion, stating that the exemptions should allow the sisters to "continue in their noble work without violating their sincerely held religious beliefs" (ibid., 2386).

Religious autonomy protects the choices of conscience inspired by religious beliefs that are made by institutions. These institutions include not only non-profit religious worship centers and religious schools, but also for-profit organizations that operate in accordance with clearly defined religious beliefs. Language in the majority and concurring opinions in *Little Sisters* indicates that the same autonomy extends to religious institutions, such as a group of Catholic sisters, engaged in providing medical care.

III. Religious Autonomy After *Hobby Lobby*

The three lines of Supreme Court precedents discussed above rely upon one common principle: religious autonomy, which is the right for religious organizations to decide for themselves how to run their institutions free from government interference or reprisal. *Hobby Lobby* expanded "the boundaries of First Amendment institutionalism" to include the corporate workplace (Horwitz 2013b: 244; compare *Kedroff*, 116).[19] Extending religious freedom law to corporations was proper for two reasons. First, permitting corporations to determine religious consciences protects the individual religious believers associated with those corporations. Second, *Hobby Lobby* protected individual religious conscience in the same manner as the cases involving internal governance disputes and the ministerial exception, by adopting an infrastructure of religious autonomy. Therefore, the principle of

[19] Cynthia Estlund claims that the corporate workplace acts as a "satellite domain" for First Amendment rights: it "lies outside of the core of public discourse but contributes to that discourse in unique and important ways" (1997: 693-94).

religious autonomy permits corporations to avoid or limit otherwise valid government regulations so as not to violate the corporations' claims in conscience.

Hobby Lobby recognized corporate religious freedom to protect the individual religious believers "associated with a corporation in one way or another" (706). The compromise offered by the Court to these private employers was essentially this: the state mandates that individual employers provide these services in its stead; however, the court will exempt employers on an individual basis from the mandate if they have a sincere conscience objection to providing such services.[20] Judicial religious freedom accommodations "have been part of American law from its colonial beginnings," and they "have not proved unworkable, unwieldly, or … 'anarchic' undermining of general laws" (Witte and Nichols 2016: 284). Therefore, granting religious freedom accommodations to institutions is a proper and controlled way to "further[] individual religious freedom" (*Hobby Lobby*, 709).

Nevertheless, the "corporate shift" in religious freedom has received sharp criticism, particularly concerning its implications on corporate constitutional standing (see Schwartzman et al. 2016: xiii-xiv; Sepper 2016: 307-08; Garrett 2014: 146). According to these critics, for-profit corporations do not deserve special religious accommodations because doing so improperly shifts onto the individual the burden created by accommodations (see Nejaime and Siegel 2015: 2566; Sepper 2016: 318-21). *Hobby Lobby*, however, did not seek to adhere stringently to established norms of corporate law or restrict healthcare access. It did not allow for-profit corporations to opt out of all laws incompatible with their religious beliefs, require the public to pick up on disadvantages imposed by corporations, or demand that courts accommodate their religious beliefs no matter the impact of its employees (*Hobby Lobby*, 692-93). Rather, the decision recognized institutional religious liberty as one of the primary "structural devices to preserve individual liberty" embodied in the "genius of the American Constitution" (Garnett 2009: 903).

At the heart of *Hobby Lobby* is a concept that the *Civil Rights Act of 1964* already illustrated, that religious believers should be accommodated from generally applicable laws that would force them to violate sincerely held religious beliefs (see Garnett 2014: 41). The *Civil Rights Act* protected religious autonomy by exempting religious employers in certain situations from the Act's generally applicable requirements (*Civil Rights Act of 1964*, 42 U.S.C. § 2000a et seq.). *Hobby Lobby* upheld the importance of religious accommodations as "a necessary condition for the meaningful enjoyment and reliable protection of other human and civil rights" (Garnett 2015: 500). The long tradition of religious freedom in the United

[20] As Horwitz notes, the government must face the consequences "that result from enlisting private employers in the provision of what ought to be a public good" (Horwitz 2014: 157 n.16). Historically, accommodations such as this were not contested because religion was seen to be "a good thing" and "[a]ccommodation of religion as such is permissible" (Koppelman 2013: 2). It was commonly understood, regardless of what side of the dispute one is on, "that *someone* should make such accommodations" (ibid., 5). Martha Nussbaum also claims that "Congress and the Court have ironed out their differences to at least some extent, converging on a regime that protects at least some judicial accommodations and allows others to be introduced legislatively, at both the federal and the state level" (2008: 120).

States protects the "private profession" of religion just as much as it does public practice and expression (ibid., 495; see also Witte and Nichols 2016: 45; *Virginia Declaration of Rights* §16, 1776). By granting these accommodations to corporations, *Hobby Lobby* faithfully captured the freedom that religious believers deserve in practicing their religion at the corporate workplace.[21] These religious accommodations are, as Laycock put it, "prime illustrations" of where the right to religious autonomy is most pertinent (1981: 1374).

Hobby Lobby also protected individual religious consciences with the same infrastructure of religious autonomy adopted by the cases involving internal governance disputes and the ministerial exception (707). The government cannot interfere with non-profit churches and schools' decisions regarding faith, doctrine, or who it hires as clergy and teachers (see *Watson*, 727; *Kedroff*, 115; *Our Lady of Guadalupe*, 2060). *Hobby Lobby* applied the same principle of religious autonomy to for-profit corporations when it held that they are "persons" that can limit mandatory health insurance coverage so as not to violate their claims of conscience (707).

As *Hobby Lobby* recognized, "[a] corporation is simply a form of organization used by human beings to achieve desired ends" (706). Store owners may face difficult choices between profit-maximization and the right to practice their religion in the workplace. HHS would have elected to force these owners to either surrender their religious convictions or forgo the financial benefits offered to competitor corporations. Not willing to punish financially corporation owners for their religious beliefs, the Supreme Court elected to accommodate the corporations' religious consciences, asserting "[i]t is not for the Court to say that the religious beliefs of [a corporation] are mistaken or unreasonable" (686).

Religious institutionalism as the infrastructural means to "further[] individual religious freedom" is not original to *Hobby Lobby*. (709). The lines of cases deferring to religious autonomy in the ministerial exception and internal governance disputes recognized the infrastructural role religious institutions play "in clearing out and protecting the civil-society space within which the freedom of [religion] can be well exercised, and in creating the conditions and opportunities for that exercise" (Garnett 2013: 40). *Hobby Lobby*'s novelty lies in its recognition that one's conscience and religious exercise are not restricted to a church or school; it extends to the workplace and other aspects of public life (see ibid., 41).[22]

Religious institutionalists have heralded this position in response to critics calling for the reduction of religious freedom protection to individual consciences alone. Proponents of

[21] Mary Ann Glendon and Raul Yanes illustrate the constitutional failings if First Amendment protection is reduced to just individual freedom of conscience or religious exercise: "[I]gnoring [the] associational and institutional dimensions" of religious liberty by focusing on "mechanical separationism" misrepresents "the complex interplay among free exercise, free speech, and equal protection principles" (1991: 489, 549). Garnett also notes: "We should want, in other words, our human rights laws to 'see,' and so to respect and protect, the freedom that belongs rightfully to religious groups, associations, institutions, and communities" (2010: 229).

[22] For a discussion on the need to protect religious autonomy outside a church structure to create a more morally diverse civil society, see Carmella 2015: 414-16.

conscience reductionism argue that "a general theory of conscientious objection takes care of the problems that the doctrinal concept of church autonomy seeks to address," making the principle of religious autonomy unnecessary (Schragger and Schwartzman 2013: 957). However, as religious institutionalists contend, protecting individual conscience cannot account for the complexity and dynamism of religious organizations (see Laycock 1981: 1391). Fundamental to the First Amendment right to religious freedom is the right for a religious institution to govern itself "and to exercise appropriate authority" without government intrusion or reprisal (Garnett 2010: 233). Institutions, therefore, and not just its individual members, deserve protection under the First Amendment religion clauses because they, "like religious believers," can exercise a religious conscience (see Garnett 2008: 291). Since *Hobby Lobby* the Court has imputed religious autonomy protection for religious institutions beyond non-profit churches, schools, or charities, and has assigned the same religious freedom principle to for-profit corporations (*Hobby Lobby*, 707). The state can neither punish a corporation for its religious beliefs nor will it decide if those beliefs "are mistaken or insubstantial" (ibid., 686, 707). *Hobby Lobby* adopted the infrastructure of religious autonomy to protect the dynamism of individual religious consciences publicly engaged at the organizations where they work.[23]

At the core of any religious autonomy claim is the freedom for institutions to make claims in conscience. Each case discussed in Part II illustrates the necessary Free Exercise protection for institutional freedom of conscience. At the outset, institutions can claim the right to religious autonomy. Underlying this right is the ability to form their own religious conscience free from government intrusion. These institutions can make claims in conscience if the state mandates practices proscribed by their consciences (see, e.g., *Hobby Lobby*, 733; *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 2018: 1732; *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 2010: 741). The "Free Exercise" clause historically has permitted conscience exemptions to protect these claims in conscience—including conscience objections to bearing arms, swearing oaths, and more recently the provision of contraceptives (see Witte and Nichols 2016: 284). As institutionalists argue and the Supreme Court in *Hobby Lobby* agreed, protection for institutional conscience underlies the Free Exercise right to religious autonomy.

A claim in conscience arises at a "conjunction of will and judgment" (Sulmasy 2008: 138). In the first element—an act of the will—one fundamentally must commit to acting in accordance with moral beliefs. However, conscience also involves action—making

[23] For example, religious conscience is implicated when corporations are forced to decide either to "give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations" (*Hobby Lobby*, 706). The *Hobby Lobby* Court allowed corporations to decide whether it "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line" because it was not for the Court "to say that their religious beliefs are mistaken or insubstantial" (707). As Justice O'Connor stated in her concurrence in *Smith*, "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause" (*Smith*, 893).

"judgments" as to whether one's actions "are in violation of this fundamental commitment to be moral" (ibid.). If a government mandate would force an action that violates one's fundamental commitment to being moral, then the government should provide moral actors a way out, an exemption from the mandate. A claim in conscience requires such exemptions because conscience freedom does not implicate the right to do what one *wants*; it rather implicates "a right to do what one judges oneself to be under an *obligation* to do, whether one welcomes the obligation or must overcome strong aversion in order to fulfill it" (George 2016: 16, emphasis added).

Modern corporations act in accord with the two fundamental components of conscience. Medical ethicist Daniel Sulmasy accurately argues that corporations are persons at law worthy of conscience claims because they can willfully commit to a moral code and make judgments as to whether certain actions "would violate [their] fundamental moral commitments" (Sulmasy 2008: 138).[24] Corporations are moral agents with internal decision-making structures acting on behalf of the institution at large, which is more than just the sum of its individual constituent members (Sulmasy 2008: 143). Institutions bear the responsibility to make moral decisions that do not "undermine the fundamental self-identifying commitments of the institution" (ibid.) Thus, an institution has the *duty* to follow its conscience, even if it does not want to do so, which distinguishes a claim in conscience from mere licentiousness (George 2016: 16). A claim in conscience often involves matters of religion because "the right of conscience takes the form of religious liberty [for] individuals and communities of faith" (ibid.). The Free Exercise of religion therefore envisions conscience claims wherever a person, whether an individual or an institution, commits to a particular system of morality and makes judgments as to whether actions are in accord with that commitment.[25]

Such deference is not a "rubber stamp" to allow religious institutions to violate one's civil liberties as they please (contra Justice Sotomayor's dissent in *Our Lady of Guadalupe*, 2076). The decision in *Hobby Lobby* went to great lengths to clarify that it did not grant "a

[24] Prior to *Hobby Lobby*, various other legal structures recognized corporations as persons, importantly RFRA, which envisioned "person" with a religious conscience to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" (*Hobby Lobby*, 707-08). Additionally, Richard De George shows that that the Joint Commission on Accreditation of Hospitals recognizes a hospital as a person with moral agency (1982: 91, 92).

[25] Dissenters from this view argue that a healthcare institution itself cannot claim an independent conscience because it is merely a conglomerate of its constituents' consciences, which already receive sufficient First Amendment protection (for example, see, Sepper 2012: 1540–45, 1546–47). This argument, however, is no longer tenable given the complexities resulting from advances in technology and medicine that "demand institutionalization of resources and dependence on the knowledge and skill of others" (Pellegrino 1982: 3). A healthcare worker joins "a corporate entity [, and] implicitly accepts a code of ethics, becomes part of a corporate mission, subject to corporate policies and decisions that have profound effects on patients and society" (ibid., 4).

blanket exemption" for all religious and moral objections from all generally applicable laws (*Hobby Lobby*, 719 n.30; see also Horwitz 2013b: 190). Moral philosopher Robert George similarly explains the proper "limits to the rights of conscience," a right that does not permit "gross evils" in the name of religion (2016: 16). However, the state bears a heavy burden to justify a regulation requiring an institution "to do something contrary to [its] faith or forbidding the [institution] to do something [its] faith requires" (ibid., 17). Corporate conscience claims subject these religious objections to the normal scrutiny required by RFRA. RFRA protects claimants' rights to practice their religion free from government interference "without compelling justification" (RFRA, §2000bb(a)(3)), for, as Laycock says, some "religious decisions are simply beyond the jurisdiction of government" (2009: 264). As *Hobby Lobby* illustrated, the institutional right to form a conscience and make a claim in conscience lies at the heart of the principle of religious autonomy.

IV. Religious Autonomy of Religious-Based Medical Institutions

Religious healthcare institutions like Stormans' Pharmacy and Dignity Health deserve the same conscience protection as that provided in *Hobby Lobby* rooted in the principle of religious autonomy. If a for-profit corporation whose primary mission involves sales of yarn, décor, and crafts has religious autonomy (see "Our Story" 2021), a religious healthcare facility must have a comparable claim. Their business of providing healthcare for the human body and making life and death decisions for their patients is much more morally fraught and fragile, and sometimes involves difficult choices of belief and conscience.[26] Religious autonomy permits churches and schools to hire and fire its ministers and clergy, even if the firing is discriminatory. The Court extended the principle of religious autonomy to permit a closely held for-profit corporation that sold craft supplies and décor to limit its mandatory health insurance coverage so as not to violate the corporation's claims of conscience.

Religious healthcare facilities should likewise have the religious freedom right to determine which medical procedures and pharmaceuticals its institutional conscience prohibits it from performing or using; to hold all of its employees to the healthcare policies formulated in expression of these choices of conscience; and to implement those conscientiously informed policies in the healthcare and pharmaceutical services, without government interference or reprisal.[27] First, given that medicine is a moral endeavor,

[26] See, for example, the mission statement of Dignity Health, the defendant in two of the healthcare conscience challenges discussed in Part I: "We are committed to furthering the healing ministry of Jesus. We dedicate our resources to delivering compassionate, high-quality, affordable health services; serving and advocating for our sisters and brothers who are poor and disenfranchised; and partnering with others in the community to improve the quality of life" (*Our Mission Integration Standards* n.d.: 3).

[27] Religious healthcare institutions commonly retain a "religious identity" in that they provide healthcare according to the dictates of its prescribed religious conscience (Bassett et al. 2017: §27:2). This article does not address the open debate on whether religiously owned hospitals,

healthcare institutions with an articulated religious mission have claims in conscience comparable to closely held for-profit corporations. Second, given the increasing challenges to religious conscience, religious healthcare facilities should be permitted to form their own consciences according to the principle of religious autonomy.

Healthcare implicates heightened conscience concerns for those that provide medical care in line with a religious conscience. Historically, many churches see it as their religious mission to provide healthcare in a moral and dignified manner. Additionally, the practice of medicine itself is a moral endeavor that seeks to care for the human body in accord with a moral code. This is why both legislators and the courts have recognized the need to protect medical providers in the wake of increasing moral divergences on the best way to care for the body.

Religiously motivated people and organizations have for centuries taken up the mission to "[c]are for the ill in society … by providing medical care and rehabilitation," often filling in the gaps where state provision does not suffice (Bassett et al. 2017: § 27:1). Recent data shows that "18.5% of hospitals were religiously affiliated," which is to say that 9.4% were "Catholic-owned nonprofit hospitals," 5.1% were "Catholic-affiliated hospitals," and 4.0% were "other religious nonprofit hospitals" (Guiahi et al. 2019: 2). Hospitals sponsored by the Catholic Church serve one in seven hospital patients in the United States ("U.S. Catholic Health Care" 2020). Religiously chartered healthcare institutions are commonly "organized and chartered as a nonprofit, public benefit corporation," and retain a "religious identity" and conscience through the "mechanisms of internal control" (ibid.). These institutions "adopt corporate policies" directed toward adhering to this religious conscience (Bassett et al. 2017: §27:5). For example, hospitals chartered by the Catholic Church must adopt the "ethical standards of behavior in healthcare that flow from the Church's teaching about the dignity of the human person" (*Ethical and Religious Directives* 2016: 4). Given the government's ever-expanding role in healthcare, discrepancies emerge between religious institutional medical ethics and the state's national healthcare program.[28]

The diversity of opinions in medical ethics indicates that the moral endeavor of medicine implies higher conscience stakes than selling yarn, décor, and crafts. Medicine is "conducted in accordance with a definite set of beliefs about what is right and wrong medical behavior," which is embodied in the Hippocratic Oath (Pellegrino 2006: 65; Koop 1996: 2). The Hippocratic Oath infused the medical profession with a demand for morality and ethics that is oriented toward a fundamental need to protect human life. *Primum non nocere*—the promise to do no harm—"is irrevocably bound" to the sanctity of human life protected by the Hippocratic Oath (Koop 1996: 2). Unfortunately, history necessitates such a promise

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distinguished from religiously affiliated hospitals, have the right to deny treatment (see ibid., §27:2, §27:5; see also Bassett 2001: 456).

[28] Ira Lupu and Robert Tuttle recount the complications religious freedom law faces given the government's "dramatic expansion" in the last century: "Where religious organizations once occupied much of the public square—as principal sites of education, charity and moral formation—the activist, post-New Deal state now dominates" (2002: 39; compare Witte and Nichols 2016: 291; Genuis and Lipp 2013: 2).

because society is always "attempting to make the physician into a killer—to kill the defective child at birth, to leave the sleeping pills beside the bed of the cancer patient" (Levine 1972: 325, quoting Margaret Mead). As medical technology advances, the practice of medicine delves further into sensitive areas of conscience, including reproduction, genetics, and the end of life, each of which warrant individual and institutional conscience protection.

Moral concerns in the practice of medicine often implicate a particular religious conscience. The consciences of "[m]any Jewish, Protestant, [Catholic,] and Moslem physicians" dictate that they follow religious teachings "on medical morals and human life issues" that "are distinctly and unapologetically ethically counter-cultural" (Pellegrino 2002: 224-25). The "Free Exercise" clause protects medical morality that is inspired by religious convictions because "one way to exercise one's religion is to follow its moral dictates" (Laycock 1981: 1390; see also Pellegrino 2002: 228). This protection strengthens the incorporation of diverse viewpoints on "morals and ethics" within the medical profession (see Genuis and Lipp 2013: 5).

Freedom of conscience is necessary to preserve the Hippocratic principle of the sanctity of human life. When government stifles freedom of conscience in medicine, medical providers become entirely submissive to government direction, which sadly has forced many physicians to commit terrible atrocities in violation of their freedom to do no harm (see Theriot and Connelly 2017: 562).[29] A robust system of conscience protection for medical institutions from compulsory practices best maintains medicine's focus on healing, avoiding governmental or societal coercion to do harm. The simultaneous divergence in the medical community on the best moral way for physicians to treat patients and greater governmental presence in healthcare heighten the need for vigorous conscience protection in the medical field (see Pellegrino 2001: 66; Genuis and Lipp 2013: 6; Rienzi 2011: 6). When institutional religious conviction informs that medical conscience, its protection finds its appropriate source in the First Amendment principle of religious autonomy.

The Supreme Court and legislatures recognized the need to protect medical consciences through extensive religious exemption schemes. Medical conscience protection dates back to what may have been one of the sparks in the current divergence in medical morality: *Roe v. Wade* (410 U.S. 113, 1973; see also *Doe v. Bolton*, 410 U.S. 179, 1973; *Church Amendment*). The Court in *Roe* agreed that "no party to [an abortion] should be required to violate personally held moral principles" (143 n.38). The Court confirmed in the same year in *Doe* that a hospital "has the right to refrain, for moral or religious reasons, from participating in the abortion procedure" (197-98). A unanimous Court at the dawn of the

[29] Genuis and Lipp offer as examples the "atrocities committed by Nazi physicians and, more recently, those of some American physicians working in Iraq and Afghanistan are testaments to the potential brutal activity that can occur when governments stifle the consciences of physicians" (2013: 5). Sociologist James Nolan recently resurrected a discussion of the ethical issues involved during the U.S. Manhattan Project at the dawn of the nuclear age, arguing that the "cover-up and secrecy … suggest the overriding military concerns caused doctors to, in essence, violate one of the central tenets of the Hippocratic ideal: 'First, do no harm'" (2020: 164).

abortion era supported the constitutionality of "statutory conscience protections for both individual and institutional health-care providers" alike (Wardle 2010: 19).

Federal and state legislatures passed statutes protecting medical conscience in response to *Roe*. The federal *Church Amendments* exempt anyone from performing or assisting in "any sterilization procedure or abortion if the performance of such procedure" is prohibited by the medical facility or individual practitioner "on the basis of religious beliefs or moral convictions." Most state legislatures followed Congress's example and enacted similar legislation (see Charo 2005: 2471; Theriot and Connelly 2017: 587-600). Some states provide broader protections from various medical procedures, not limited to sterilizations and abortions (see, e.g., Miss. Code Ann. §41-107-5, 2016). Very few states, however, provide for a private cause of action, making conscience claimants "beholden to the federal government to enforce" their rights (Theriot and Connelly 2017: 584). That legislatures and courts recognize the divergence in medical morality indicates the need to protect religious healthcare institutions from having to provide services that violate their consciences.

In Part I we examined common discrimination cases challenging the religious identity and consciences of these religious medical institutions. With the rapid introduction of new medical technologies and an areligious shift in the culture of reproductive medical morals, the statutory protection for religious institutional conscience in the medical field no longer suffices. For example, religious hospitals are pressured by civil rights groups to provide access to "abortion, euthanasia, ending life support, various reproductive technologies, and stem cell research" along with the hysterectomies, vasectomies, tubal ligations, and abortifacient contraceptives discussed in Part I (Pellegrino 2002: 234-35; see Kaye et al. 2016). However, most of these religious institutions are committed to a set of morals informed by an institutional conscience that absolutely prohibits these procedures and medications. Most statues and conscience clauses only cover "a limited range of procedures and medical practitioners," and thus "lack meaningful enforcement mechanisms, … inadequate to the task of protecting the right to conscience" (Theriot and Connelly 2017: 551). In the face of constant developments of "morally questionable" medical technologies, most religious healthcare institutions are left unaided by current statutory conscience protections.

Religious medical institutions' proper protection in the face of encroaching conscience challenges should come through the First Amendment right to religious autonomy. Religious medical institutions are the type of institutions that the Supreme Court sought to protect when it recognized institutional religious autonomy. It permits religious hospitals and healthcare facilities—including, for example, the Little Sisters of the Poor—to determine which medical procedures and pharmaceuticals its institutional conscience prohibits it from performing or using. They can hold all of its employees to the healthcare policies formulated in expression of these choices of conscience, and implement those conscientiously-informed policies in the healthcare and pharmaceutical services, without government interference or reprisal (compare *Kedroff*, 116; *Hosanna-Tabor*, 189; *Hobby Lobby*, 725). Neither legislatures, regulators, nor courts can determine that their conscience decisions, informed by "religious

beliefs[,] are mistaken or insubstantial" (*Hobby Lobby*, 725). These healthcare institutions deserve the same conscience protection rooted in the principle of religious autonomy.[30]

Unless the Court recognizes this broad conscience protection, a continuous flow of legal challenges will chip away at religious medical institutional conscience until it no longer holds legal fervor. The three suits discussed in Part I illustrate the difficulty that secular law has in recognizing religious autonomy claims against civil rights claims. Secular law goes to great lengths to protect against sex and gender identity discrimination, along with the right to proper healthcare, often at the expense of individual or institutional religious conscience.[31] Indeed, the purpose for the right to religious autonomy is to patch up this discrepancy. The intersection of religious accommodations and other civil rights claims are "prime illustrations" of where the right to religious autonomy is most pertinent (see Laycock 1981: 1374). Religious autonomy law goes to great lengths to protect the right of religious institutional and communal self-governance.

The ACLU and other civil rights groups have directly contradicted this constitutional commitment to religious autonomy. They stated, "The law should not permit an institution's religious strictures to interfere with the public's access to reproductive health care" (Weiss et al. 2002: 9; see also Swartz 2006: 279). This position, embodied in dozens of suits seeking injunctions against religious healthcare institutions, starkly contrasts the deference the First Amendment affords religious institutions according to the principle of religious autonomy. As we found in Part II, the Supreme Court has consistently deferred to an institution's religious autonomy to form and act in accord with a religious conscience.

Institutional legal protection is particularly necessary given that the religious and medical character of religious healthcare facilities often join as an inseparable "public juridical person" (Bassett et al. 2017: §8:28). For example, the Catholic Church recognizes the inextricable relationship of the hospital and its tenants of faith (ibid.), and hospital administrators have the responsibility to preserve its fundamental religious commitments in addition to complying with civil laws (see Sulmasy 2008: 143). Consequently, the staff and directors of a religiously chartered hospital are bound by both the civil laws governing healthcare facilities and the organization's religious mission. Thus, religious healthcare institutions can make a claim in conscience because they commit to a set of moral values and make moral judgments as to whether a decision "would violate those fundamental moral commitments" (ibid., 144). These conscience decisions should be accommodated when they

[30] Angela Carmella associated religious autonomy protection to religious medical care because of the centrality of healthcare to a church's "concrete expression [of] faith and mission" (2015: 409).

[31] In 2020, a majority of the Court read Title VII of the *Civil Rights Act of 1964* to protect against discrimination "because of" that individual's sex in circumstances that the individual was fired for being homosexual or transgender (see *Bostock v. Clayton County*, 140 S. Ct. 1731, 2020). Perry Dane placed deference to religious autonomy at the forefront of "questions over the extent to which regulatory regimes such as labor law, civil rights law, and even malpractice and defamation and contract law, can intervene in the internal relations of religious institutions and communities" (2001: 117).

inevitably transgress civil healthcare laws, assuming they are not "gross evils" (see George 2016: 16).

The First Amendment, the *Civil Rights Act*, and *Hobby Lobby* support extending religious autonomy protection to religious hospitals and healthcare providers. These sources maintain that religious institutions and corporations should be exempted from generally applicable laws that would force them to violate sincerely held religious beliefs. Religious hospitals and healthcare institutions deserve protection through accommodations exempting those with sincerely held conscience objections to providing certain medical procedures. If the state can mandate a religious hospital to directly violate its institutional religious conscience, it would put that hospital in a similar difficult position to the one that the Court sought to avoid in *Hobby Lobby* (compare *Hobby Lobby*, 706). Furthermore, an organization's religious mission of caring for the body arguably involves heightened conscience implications (see *Ethical and Religious Directives* 2016: 7). Deference to institutional religious autonomy protects these institutions from being forced to carry out this healing mission in a manner contrary to their religious beliefs.

Conclusion

The U.S. Supreme Court has repeatedly refused to tell religious institutions that their religious beliefs are flawed. Religious convictions and beliefs often inform institutional consciences, and secular law protects choices of conscience, particularly in the realm of healthcare. These institutions include not only non-profit religious worship centers and religious schools and charities, but also for-profit organizations that operate in accordance with clearly defined religious beliefs. When an institution's conscience decision transgresses areas of civil rights laws, the Supreme Court continually defers to the religious institution's rights to religious autonomy—the right for religious institutions to decide for themselves how to run their organizations free from government intrusion.

Dating back to 1871, the principle of religious autonomy permits churches and schools to hire and fire its ministers and clergy, even if the firing is discriminatory. The Court has consistently sided with religious institutionalists by extending the First Amendment principle of religious autonomy to religious institutions like churches and schools, granting them the right to determine their own religious conscience and to act on it in decisions about their mission, membership, leadership, property, and employment. Religious autonomy permits organizations like Hobby Lobby to make claims in conscience to receive exemptions from state mandated actions that would violate sincerely held and clearly identifiable religious convictions. The principle of religious autonomy likewise permits religiously founded and religiously operated healthcare institutions to form a religious conscience, which can lead the institutions and its employees to be conscientiously opposed to participating in certain medical procedures. Their business of providing healthcare for the human body and making life and death decisions for their patients is much more morally fraught and fragile than selling crafts and décor, and sometimes involves difficult choices of belief and conscience.

Regulations that would require medical institutions to act contrary to their consciences would violate religious healthcare institutions' rights to religious autonomy. Increasingly contentious medical practices pertaining to sexual, reproductive, and end-of-life procedures

and pharmaceuticals raise serious moral implications for these institutions endeavoring on the moral enterprise of medical care. Religious healthcare facilities should have the religious freedom right to determine which medical procedures and pharmaceuticals its institutional conscience prohibits it from performing or using; to hold all of its employees to the healthcare policies formulated in expression of these choices of conscience; and to implement those conscientiously informed policies in the healthcare and pharmaceutical services, without government interference or reprisal. Religious healthcare institutions deserve conscience protection rooted in the principle of religious autonomy.

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