

## NOTES

### **The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services**

*“Just as the identity of Catholic Charities is firmly rooted in the teaching of its Church, the identity of this nation is based on a respect for religious beliefs . . . . At a time when so many of our nation’s children and families need organizations like Catholic Charities more than ever, we continue to depend upon government at all levels to respect our religious beliefs and protect our freedom to serve the communities in which we live.”<sup>1</sup>*

#### I. INTRODUCTION

The Massachusetts Constitution declares the equality of all people and the right of all people to practice religion as they see fit.<sup>2</sup> In article XVIII, the Massachusetts Constitution also declares it unlawful for the state government to pass any law that prohibits an individual’s right to the free exercise of religion.<sup>3</sup> The state’s desire to protect both the equality of people and the practice of religion does not always play out harmoniously and recently, the Catholic Church found its religious views regarding homosexuality and morality in conflict with state adoption laws.<sup>4</sup>

In 2003, the Vatican responded to the debate over gay marriage with a statement entitled “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons.”<sup>5</sup> In addition to

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1. Press Release, Rev. Larry Snyder, President, Catholic Charities USA, CCUSA Statement on Adoption Practices and Catholic Charities (Mar. 30, 2006) (on file with author) [hereinafter Press Release, Snyder] (stating Catholic Charities’s commitment to children and pledging to remain faithful to Catholic teaching).

2. See MASS. CONST. art. CVI (declaring equality of all people an inalienable right); MASS. CONST. art. II (prohibiting interference with right to worship according to one’s own conscience).

3. See MASS. CONST. art. XVIII (prohibiting laws violating free exercise of religion).

4. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1 (discussing Church leaders’ request for exemption to Massachusetts adoption laws). The article also discusses the controversy arising out of the *Boston Globe*’s report that Catholic Charities completed a small number of homosexual adoptions. *Id.*

5. See generally VATICAN, CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (2003), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexua1-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexua1-unions_en.html) [hereinafter VATICAN, CONSIDERATIONS] (outlining Catholic Church’s opposition to same-

unequivocally opposing homosexual marriage and unions, the statement set forth the Church's position against homosexual adoptions.<sup>6</sup> The Vatican declared that homosexual adoptions violate church doctrine and are contrary to a child's best interests.<sup>7</sup> This statement created serious questions about the ability of the Church's social-service agency, Catholic Charities, to continue offering adoption services in Massachusetts in light of state adoption laws prohibiting discrimination on the basis of sexual orientation.<sup>8</sup>

In Massachusetts, the first case recognizing the legality of adoption by same-sex couples dates back more than a decade.<sup>9</sup> Further, in order to offer adoption services for special-needs children, any potential agency must receive licenses from the Department of Early Education and Child Care and the Massachusetts Department of Social Services, both of which have regulations forbidding licensees to discriminate on the basis of sexual orientation.<sup>10</sup> Prior to the Vatican's statement, the Boston branch of Catholic Charities placed a small number of children with homosexual couples since receiving its license in 1987.<sup>11</sup> However, in light of the official statement and increased media attention, and despite any objections from disagreeing members of the branch, church officials decided adoption services could only be offered in accordance with church teaching.<sup>12</sup>

Shortly thereafter, Massachusetts Governor Mitt Romney filed a bill allowing for a religious exemption to the state's antidiscrimination laws.<sup>13</sup> The

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sex marriages, adoptions and laws relating thereto).

6. See Patricia Wen, "They Cared for the Children"; *Amid Shifting Social Winds, Catholic Charities Prepares to End its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1 (discussing Vatican's first public statement regarding gay adoptions).

7. See VATICAN, CONSIDERATIONS, *supra* note 5, at 7 (calling homosexual adoption "gravely immoral" and inconsistent with child's best interests).

8. See Wen, *supra* note 6 (quoting president of Catholic Charities on inevitable clash between Vatican's statement and agency adoption service).

9. See *Adoption of Tammy*, 619 N.E.2d 315, 318-19 (Mass. 1993) (explaining statute does not explicitly prohibit homosexual adoption and allowing such adoptions enhances its purpose).

10. See 102 MASS. CODE REGS. 1.03 (2006) (forbidding discrimination by licensees on basis of sexual orientation among other factors); 110 MASS CODE REGS. 1.09 (2006) (forbidding denial of services on basis of sexual orientation among other factors). See generally John Garvey, Op-Ed., *State Putting Church Out of Adoption Business*, BOSTON GLOBE, Mar. 14, 2006, at A15 (discussing licensing requirements for Catholic Charities).

11. See Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays Says It's Bound by Antibias Laws*, BOSTON GLOBE, Oct. 22, 2005, at A1 (discussing same-sex adoptions allowed through Catholic Charities). Since 1987, when Catholic Charities signed its state adoption contract, the agency placed thirteen children with same-sex couples. *Id.* Other branches of the agency, such as the office in the Worcester diocese, would not work with gay couples, referring them to other agencies. *Id.*

12. See Wen, *supra* note 6 (discussing controversy after reports revealed gay adoptions allowed through Catholic Charities).

13. H.B. 4776, 184th Gen. Ct., Reg. Sess. (Mass. 2006) (amending chapter 210 of General Laws of Massachusetts to provide religious exemption). The act would allow Catholic Charities

[t]o take any action with respect to the provision of adoption or foster placement services which is calculated by such organization to promote its religious principles and which does not discriminate

proposed bill did not curtail the functions of any agency allowing adoptions to gay couples.<sup>14</sup> Instead, the bill permitted religious organizations to act in accordance with their doctrinal beliefs, provided they did not discriminate against potential adoptive parents on grounds triggering strict scrutiny judicial review under the federal or state Equal Protection Clauses.<sup>15</sup> The bill received little support from state legislators and organizations supporting gay and lesbian rights.<sup>16</sup> Following the bill's failure, the Catholic Church found itself at an impasse with state laws and decided it could not continue offering adoption services in Massachusetts.<sup>17</sup>

In the wake of these events, little commentary has focused on the antibias provisions of the Massachusetts adoption laws that essentially forced the Catholic Church to choose between faithful service to its God or to the state.<sup>18</sup> While some may characterize the Catholic Church's beliefs as intolerant and archaic, considerations of religion and morality have long played a judicially recognized role in adoption proceedings.<sup>19</sup> If, in the name of equality, state

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among prospective adoptive parents on the basis of race, creed, national origin, gender, handicap or any other classification triggering judicial review under a strict scrutiny analysis under either the Equal Protection Clause of the United States Constitution or the Constitution of the Commonwealth.

*Id.*

14. *See id.* (requiring no changes for agencies allowing same-sex adoptions).

15. *See id.*; *see also* Brian Ballou, *Romney Eyes Gay Adopt Exemption*, BOSTON HERALD, Mar. 14, 2006, at 17 (quoting Governor Romney on bill's narrow scope). Governor Romney noted the bill's narrow design would allow Catholic Charities to continue its work while staying true to its religious values. *See* Ballou, *supra*.

16. *See* Ballou, *supra* note 15 (citing responses to filing of bill). U.S. Representative Barney Frank commented that "those who protest gay adoptions fundamentally misunderstand the issue," and Matt Foreman, the executive director of the National Gay and Lesbian Task Force in Washington, D.C., referred to the bill as an example of "draconian anti-gay policies." *Id.* The American Civil Liberties Union of Massachusetts (ACLU) announced its opposition to the bill the day after its filing, claiming it allowed religious doctrine to "override state laws." *See* LESLIE COOPER & PAUL GATES, ACLU FOUND., TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 15-16 (2006) (highlighting mainstream children's organizations' questioning of limiting pool of potential adoptive parents); *see also* *Romney Adoption Bill Hurts Kids; Does not Protect Religious Freedom*, DOCKET (ACLU of Mass.), Apr. 2006, at 4 (discussing opposition of ACLU to exemption bill).

17. *See* Press Release, Snyder, *supra* note 1 (discussing difficulties new laws placed on Catholic Charities's adoption services); Wen, *supra* note 6 (explaining agency could not find way to satisfy church doctrine and state laws). The agencies are "first and foremost" Catholic institutions whose identity is directly tied to the teachings of the Church. Press Release, Snyder, *supra* note 1. Local agencies must follow relevant statutes and regulations in providing services, but are also under the authority of local bishops who interpret Catholic teachings and oversee application in various dioceses. *Id.*

18. *See* Dwight G. Duncan, *Catholic Charities and the End of Tolerance*, MASS. LAW. WKLY., Apr. 10, 2006, at 55 (noting Catholic Charities forced to choose between charity and Catholicism); *see also* Garvey, *supra* note 10 (commenting works of mercy no less important to Church than sacramental ministry).

19. *See* MASS. GEN. LAWS ch. 210, § 5B (2006) (providing judges must consider child's moral health and parents surrendering child may request religious designation). Requests for religious designations are given effect so long as they do not contravene a child's best interests. *Id.* Massachusetts has recognized the significance of a parent's request for a religious designation for their child since 1907. *See* Purinton v. Jamrock, 80 N.E. 802, 805 (Mass. 1907) (stating judges must consider wishes of parent concerning religion of child in adoption proceedings). Religious beliefs are not controlling factors in determining the suitability of

laws require churches to choose between community service and deep-seated doctrinal beliefs, Massachusetts may see an exodus of faith-based organizations and find its ability to serve the best interests of its needy children severely crippled.<sup>20</sup>

In Part II, this Note discusses constitutional principles and developments concerning church and state separation as well as Massachusetts state principles of Establishment and Free Exercise.<sup>21</sup> Part II then addresses Massachusetts adoption laws, specifically the roles played by religion and sexual orientation in the best interests of the child standard.<sup>22</sup> Additionally, Part II examines the history of Catholic Charities and its relation to the Catholic Church and its teachings, focusing on adoption services as an essential manifestation of Catholic worship and practice.<sup>23</sup> Finally, Part III argues that an exemption for religious organizations in Massachusetts adoption laws would not violate current principles of the Establishment and Free Exercise Clauses.<sup>24</sup> This Note suggests that by declining to provide an exemption for religious adoption agencies, the Massachusetts legislature has chosen to protect the interests of a small group of potential parents with only a state-created, and not fundamental, right to adoption.<sup>25</sup> Ultimately, this Note concludes that, under the guise of promoting equality, Massachusetts has lost its most successful adoption agency and contravened the central principle of its enacted adoption laws: to serve the best interests of the child.<sup>26</sup>

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adoptive parents, but are nonetheless considered proper matters for consideration. *See* Don Vaccaro, *Religion as Factor in Adoption Proceedings*, 48 A.L.R.3d 383, \*2a (2006) (discussing religion's role in adoption proceedings).

20. *See* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 824-25 (2007) (suggesting forced compliance with public norms fosters conflict between religious and nonreligious groups). Sympathy for religious conduct can extend to groups that share differing beliefs, and forced compliance can turn religious groups into martyrs. *Id.* Additionally, "[f]or many who are devoted to a religion, the state's policy and law are relevant but hardly the last or most important word." *Id.* at 825; *see also* Jeff Jacoby, Op-Ed, *Kids Take Back Seat to Gay Agenda*, BOSTON GLOBE, Mar. 15, 2006, at 11 (recognizing potentially negative impact of Catholic Charities closure on children needing adoption).

21. *See infra* Part II.A (discussing principles of federal and state Establishment and Free Exercise Clauses).

22. *See infra* Part II.B (examining sexual orientation and religion as relevant considerations in the best interests of adoptive children).

23. *See infra* Part II.C (addressing fundamental tenets of Catholic worship and practice).

24. *See infra* Part III (discussing constitutional permissibility of religious exemption).

25. *See infra* Part III (arguing lack of religious exemption furthers interests of potential homosexual parents, not orphaned children).

26. *See infra* Part III (concluding religious exemption would serve best interests of children needing adoption).

## II. HISTORY

### A. *Basic Constitutional Principles of Church and State Separation*

Balancing the influence of religion with the ideals of secular democracy has been a challenge in the development of American law and government.<sup>27</sup> Thomas Jefferson proposed a model of complete disestablishment, envisioning a “wall of separation” whereby religion would remain “solely between a man and his God,” and the state would neither aid nor focus its laws toward religious purposes.<sup>28</sup> John Adams took a decidedly different position, proposing a “mild and equitable establishment of religion,” in which a state established, by law, an ideal of itself reflecting common values and beliefs.<sup>29</sup> In other words, Adams believed a state could not disestablish itself from religion and morality because they alone “establish the principles upon which freedom can securely stand.”<sup>30</sup> Ultimately, neither complete disestablishment, nor mild establishment received full acceptance.<sup>31</sup> Nonetheless, the federal and state governments have historically acknowledged and endorsed religious beliefs.<sup>32</sup>

The United States Supreme Court took a more forceful approach to separation of church and state when it joined the First Amendment religion clauses to the Fourteenth Amendment’s Due Process Clause.<sup>33</sup> In *Cantwell v. Connecticut*,<sup>34</sup> the Court struck down a state law requiring procurement of a

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27. See *infra* notes 28-32 and accompanying text (discussing church and state separation in early American history).

28. See John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499, 502 (2004) [hereinafter Witte, *Freedom of Religion*] (quoting Thomas Jefferson and discussing his position on religious liberty). According to Jefferson, true religious liberty required both free exercise and disestablishment. *Id.* at 501.

29. See *id.* at 503 (discussing John Adams’ approach to religious freedom). In 1780, Adams codified his position on religion by drafting the Massachusetts Constitution. *Id.*

30. See *id.* at 504 n.15 (noting John Adams defended his views in letter to Abigail Adams).

31. See John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 497-99 (1991) (depicting religious tension reflected in laws of late-eighteenth and early-nineteenth century America). Witte highlights the criticism directed at religious establishment such as Massachusetts’s support of the Congregational Church until 1833. *Id.* at 497.

32. See *id.* at 498-99 (noting endorsement of religious beliefs by state and federal government). Historically, Christianity received much governmental endorsement. *Id.* For example, the “In God We Trust” confession appeared on currency, holy days became state holidays, Congress appointed chaplains, and various congressional sessions included prayers. *Id.* Additionally, early federal and state governments designed numerous laws after biblical teachings. *Id.* at 498-99. Such laws include the requirements for state-prison, reformatory and orphanage employees to teach Christian beliefs, and prohibitions against polygamy, prostitution, pornography and gambling houses. *Id.*

33. See Witte, *Freedom of Religion*, *supra* note 28, at 510 (noting United States Supreme Court applied First Amendment religion clauses to states). Witte argues that early Court decisions adhere more closely to a Jeffersonian model of separation, coming down strongly against state establishment of public religion. *Id.* at 510-11.

34. 310 U.S. 296 (1940).

license to solicit aid in support of one's religion.<sup>35</sup> The Court stated that the liberty protected by the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment, combining freedom to believe and freedom to act.<sup>36</sup>

Similarly, *Everson v. Board of Education*<sup>37</sup> firmly applied the Establishment Clause against state laws.<sup>38</sup> Here, the Court upheld a state law providing reimbursement to parents of school-related transportation expenses regardless of whether the school was public or parochial.<sup>39</sup> The majority opinion invoked Jefferson's "wall of separation" language, indicating both state and federal governments must maintain strict religious neutrality, taking care not to favor or dissuade belief in any one religion.<sup>40</sup> Nonetheless, despite their strong separationist attitude, the majority did not want to prohibit a state from extending its general laws to all citizens regardless of their religious beliefs.<sup>41</sup> Because the law applied generally to aid all parents in getting their children to school, and because the state did not contribute any money or support directly to the parochial schools, the Court did not find a breach in the wall of separation.<sup>42</sup>

More recently, the Court held that a law restricting religious practice does not need to be justified by a compelling governmental interest if it is neutral and generally applied.<sup>43</sup> In *Church of the Lukumi Babalu Aye, Inc. v. City of*

35. *Id.* at 305 (holding such religious "censorship" violates First Amendment liberties). The statute at issue required a religious group to submit an application to the secretary of the public welfare council of the state, who in his discretion would determine whether the cause was truly a religious one. *Id.*

36. *Id.* at 303. The Court did not want its holding to stand for the proposition that it allowed people the freedom to use religion to defraud the public. *See id.* at 306. In the interests of public safety, a state may regulate the time and manner of solicitation generally, though it may not condition religious solicitation on a state determination of what is or is not a religious cause. *See id.* at 306-07.

37. 330 U.S. 1 (1947).

38. *See* THE CONSTITUTION & RELIGION: LEADING SUPREME COURT CASES ON CHURCH AND STATE 47 (Robert S. Alley ed., 1999) (discussing significance of *Everson v. Board of Education*). Both the majority and dissenting opinions look to Thomas Jefferson and James Madison for guidance in interpreting the First Amendment religion clauses. *Id.*

39. *See Everson*, 330 U.S. at 17-18 (upholding reimbursement of transportation expenses to parents of parochial school children).

40. *Id.* at 15-16 (reiterating time-honored limitations imposed by First Amendment). The Court stated:

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

*Id.*

41. *Id.* at 16 (expressing concern to not prohibit benefits of state laws to all citizens).

42. *Id.* at 18 (approving state law reimbursing transportation costs for children to parochial schools). The majority also noted prior precedent stating that parents have the right to send their children to secular as opposed to public schools provided the secular schools meet lawfully enacted state education requirements. *Id.*

43. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (stating religious beliefs do not excuse

*Hialeah*,<sup>44</sup> the Court affirmed the ability of states to pass neutral laws resulting in restriction of religious practices, and also held that, though a law may be facially neutral and generally applicable, it must satisfy strict scrutiny if it singles out religious conduct for restriction.<sup>45</sup> Here, the Court struck down an ordinance prohibiting animal sacrifices in public and private rituals because the ordinance's central purpose was to restrict the Santeria religion.<sup>46</sup> Though the text of the statute appeared neutral and did not single out the Santeria religion, the Court looked to the "real operation" of the ordinance as evidence of its purpose.<sup>47</sup> Despite legitimate governmental concerns regarding animal sacrifice, the design of the ordinance resulted in a "religious gerrymander," only functioning to curb actions of Santeria devotees.<sup>48</sup>

On the other hand, the Court reached a different conclusion in *Locke v.*

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compliance with laws restricting conduct appropriate for state regulation). In *Smith*, the Court upheld an agency decision to refuse unemployment benefits for two men fired from their jobs at a drug rehabilitation center for using peyote in a sacramental Native American religious ceremony. *See id.* at 874. Their use of peyote violated a state law criminalizing the drug. *Id.* at 876. The Court upheld the decision because the law criminalizing peyote was constitutional and did not attempt to regulate religious beliefs, or the communication or teaching of those beliefs. *Id.* at 882, 890. Regarding the petitioners' request for a religious exemption, the Court stated:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process . . . . It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use . . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

*Id.* at 890.

44. 508 U.S. 520 (1993).

45. *See id.* at 534-35 (noting facial neutrality not determinative). The Court determined the restriction failed the strict-scrutiny test. *Id.* at 546.

46. *See id.* (stating case record compels finding ordinances restrict Santeria worship).

47. *See id.* (finding restriction of Santeria worship primary legislative purpose). The Court noted that the ordinances' definition of prohibited sacrifice exempted almost all killing of animals except for religious purposes with the exception of kosher slaughter. *Id.* at 535-36.

48. *See Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 (discussing operation of ordinances as evidence of legislative intent). The Court stated, "[t]he net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice . . . careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. Because the state government singled out the Santeria religion for "disparate treatment," the Court found a free-exercise violation. *See id.* at 547 (declaring ordinances unconstitutional); *see also* Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 123-24 (2006) (discussing *Lukumi* holding). Reuveni notes that "[t]he Free Exercise Clause combats two distinct, pernicious effects of governmental imposition on religious practice – restrictions on an individual's actions that are based on religious beliefs, and encroachments on the ability of a religious body to manage its internal affairs." Reuveni, *supra*, at 125.

*Davey*,<sup>49</sup> upholding a state scholarship program which restricted use of state scholarship funds to nontheological degrees.<sup>50</sup> The Court distinguished the scholarship program from the ordinances in *Lukumi* because the scholarship program neither imposed criminal or civil sanctions on religious services or rites, nor required students to choose between receiving a government benefit and following their religious beliefs.<sup>51</sup> The majority stated that the treatment of religious vocational education reflected federal and state views favoring free exercise while opposing establishment and did “not evidence . . . hostility toward religion.”<sup>52</sup>

In *Mitchell v. Helms*,<sup>53</sup> the Court examined whether the Education Consolidation and Improvement Act of 1981 constituted a “law respecting an establishment of religion.”<sup>54</sup> The Court rejected arguments that direct government aid to religious schools and aid “divertible to religious use[s]” are impermissible.<sup>55</sup> The Act provided government aid to public and private schools in the form of materials and equipment.<sup>56</sup> The Court held that the Act did not amount to establishment of religion because it determined eligibility for benefits neutrally and based allocation on private choices.<sup>57</sup> Additionally, the Act did not provide benefits containing inappropriate religious content and did not define its recipients with inappropriate references thereto.<sup>58</sup> The Court

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49. 540 U.S. 712 (2004).

50. *See id.* at 725 (holding denial of funding for vocational religious instruction not constitutionally suspect).

51. *See id.* at 720-21 (differentiating scholarship program from prohibition on animal sacrifice in *Lukumi*). The majority found this program’s disfavor of religion “far milder” than the ordinances in *Lukumi*. *Id.* at 720.

52. *See id.* at 721-22 (defending position against fungibility of training for secular and religious professions). Notably, Justice Scalia, who joined with the majority in *Lukumi*, dissented, writing:

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

*Id.* at 726-27 (Scalia, J., dissenting). In Justice Scalia’s opinion, the petitioner sought only an equal opportunity to choose his course of study with the freedom enjoyed by other Promise Scholarship recipients. *Id.* at 727.

53. 530 U.S. 793 (2000).

54. *See id.* at 801 (addressing whether Education Consolidation and Improvement Act of 1981 violated separation of church and state).

55. *See id.* at 814-15 (rejecting respondents’ arguments as inconsistent with recent precedent).

56. *See id.* at 801-03 (describing Chapter 2’s provisions in Education Consolidation and Improvement Act of 1981).

57. *See Mitchell*, 530 U.S. at 816 (rejecting impermissibility of direct aid to religious schools). The majority’s opinion states that the determinative factor is whether “‘direct’ aid is neutrally available and, before reaching or benefiting any religious school, first passes through the hands, either literally or figuratively, of numerous private citizens who are free to direct the aid elsewhere. . . .” *Id.* If this is the case, the government cannot be accused of supporting religion. *Id.* Further, this case did not involve the “special Establishment Clause dangers” present when schools directly receive money as opposed to materials. *Id.* at 819-20.

58. *See id.* at 820 (rejecting argument aid to religious schools must not be divertible to religious use). So

emphasized that the recipient's religious affiliation is irrelevant if the government's secular purpose is furthered and the aid is equally available to non-religious recipients.<sup>59</sup>

Similarly, in *Bowen v. Kendrick*,<sup>60</sup> the Court addressed a constitutional challenge to the Adolescent Family Life Act (AFLA), which permitted religious organizations to receive grants and play a direct role in carrying out AFLA purposes.<sup>61</sup> The district court declared the AFLA unconstitutional, finding that it advanced religion by allowing religious organizations to receive AFLA grants and requiring all applicants to include in their plans ways to incorporate the assistance of religious organizations.<sup>62</sup> The Court found it permissible for Congress to make the judgment that religious organizations might play a valuable role in solving secular problems and that "religious institutions may receive public benefits that are neutrally available to all."<sup>63</sup> Further, the possibility of religious organizations teaching doctrines or principles of faith did not concern the Court because:

[T]he possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding

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long as the aid is not unsuitable for use in a public school because of its religious content, use of the aid by religious schools to teach religion cannot be attributed to the government. *Id.* If the concern was divertibility, the government could disallow all forms of aid no matter how small or seemingly meaningless. *Id.* at 824 (noting such rule would bar receipt of pens, crayons, chalk, etc.).

59. *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (noting immateriality of recipient's sectarian character in constitutional analysis). Justice O'Connor emphasized the distinction between endorsement of a per-capita aid program and a private-choice program. *See id.* at 842 (O'Connor, J., concurring). She articulates:

In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement.

*Id.* at 842-43.

60. 487 U.S. 589 (1988).

61. *See id.* at 593-97 (discussing provisions and purposes of AFLA). Congress designed AFLA to combat premarital sexual intercourse and pregnancy among teenagers. *Id.* at 595. The Act recognizes the need for more than just government action and seeks to incorporate parents, families, religious organizations, and social groups in attacking the problem. *Id.* at 595-96.

62. *Id.* at 598 (discussing district court's application of three-part Establishment Clause test (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971))). Applying the *Lemon* test, the district court found that the Act had a valid secular purpose in seeking to prevent teenage pregnancy and premarital sex. *Id.* The ability of religious organizations to teach teenagers fundamental elements of religion, however, concerned the district court. *Id.*

63. *Id.* at 608-09 (rejecting district court's basis for finding AFLA unconstitutional). The Court declined to presume that religious organizations receiving grants would not perform their functions lawfully. *Id.* at 612. The Court noted that it has invalidated aid programs only regarding "pervasively sectarian" organizations with a "substantial" risk of religious indoctrination. *Id.*

that the statute on its face has the primary effect of advancing religion.<sup>64</sup>

The Court's decision in *Boy Scouts of America v. Dale*<sup>65</sup> presents an interesting example of the intersection and clash between religious freedom and public morality.<sup>66</sup> In a 5-4 decision, the Court upheld the Boy Scouts's right not to extend membership on the basis of sexual orientation despite being in violation of New Jersey's public accommodation laws.<sup>67</sup> Notably, while faith and morality motivated the Boy Scouts's discrimination policy, the Court did not acknowledge the group's religious ties in reaching its holding.<sup>68</sup> Despite the lack of religious discussion, some labeled the decision a victory for religious freedom.<sup>69</sup> However, the decision created a backlash against the Boy Scouts, including denial of access to public facilities, rescission of contracts and privileges by state governments, and withdrawal of funding from private individuals and organizations.<sup>70</sup> The case and its aftermath demonstrate the difficult reality faced by religious groups even when their policies are constitutionally protected.<sup>71</sup>

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64. See *Bowen*, 487 U.S. at 612-13 (discussing potential overlap of state and religious views). The programs proposed by the statute, including adoption and abstinence counseling, child care, and educational services, did not constitute religious activities even though they aligned with certain religious views. *Id.* at 613.

65. 530 U.S. 640 (2000).

66. See Reuveni, *supra* note 48, at 111 (noting case sparked "public debate over anti-discrimination laws, gay rights, religion, and morality").

67. See *Dale*, 530 U.S. at 659 (applying First Amendment analysis while upholding right to refuse membership). The New Jersey Supreme Court held that the state's public accommodation laws required the Boy Scouts to admit James Dale, a homosexual who participated in gay rights activism. *Id.* at 644. The Court held that New Jersey's interests in its public accommodation laws did not justify the intrusion on the Boy Scout's First Amendment right to freedom of religion. *Id.* at 659.

68. See Reuveni, *supra* note 48, at 112-13 (noting Court did not acknowledge Boy Scouts's nondenominational religious ties). The Boy Scouts, while not officially affiliated with a particular church denomination, nor exclusively a faith-based organization, nonetheless teach a value system heavily influenced by religion and require its members to profess belief in a theistic God. *Id.*

69. See Reuveni, *supra* note 48, at 110 (noting initial heralding of decision as victory for religious and associational freedom).

70. See Reuveni, *supra* note 48, at 110-11 (articulating retaliation against Boy Scouts).

71. See Reuveni, *supra* note 48, at 110-13 (discussing case and its aftermath). Some governmental bodies do not want to risk alienating voters by supporting the Boy Scouts and some private organizations similar to the Boy Scouts may fear alienating their donors. *Id.* at 111. Reuveni also points out the Court "failed to articulate when a governing body may pass anti-discrimination laws that do not directly affect a private association's membership, but instead attempt to influence membership policies by excluding the group from public forums and benefits." *Id.* at 112; see also David Saperstein, *Public Values in an Era of Privatization: Public Accountability and Faith Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1354 (2003) (discussing problems faced by public-religious partnerships). Saperstein discusses how individually redeemable vouchers utilizing public subsidies risk looking like government support of religion and that such vouchers may potentially push people into choosing religious affiliated services when other secular services are not present. Saperstein, *supra*, at 1354-55. Government money also has the potential to alter the character of religion-based social services sometimes forcing them "either to compromise their mission or to ignore the rules, with potentially dire consequences to their beneficiaries and to their institutions." *Id.* at 1367.

### B. *The Separation of Church and State in Massachusetts*

Massachusetts court decisions involving church and state reflect the strong ideals of separation maintained on the federal level.<sup>72</sup> The Massachusetts Supreme Judicial Court considered whether the state constitution sufficiently prohibited passing laws establishing religion and stated that “[t]he Constitution of the Commonwealth . . . guarantees to all our people absolute freedom as to religious belief and . . . practices” and it “absolutely prohibit[s] the enactment of any law establishing any particular religion or restraining the free exercise of any particular religion.”<sup>73</sup> Furthermore, the Massachusetts Constitution prohibits certain laws regarding religion from being subject to referendum.<sup>74</sup> According to the Massachusetts Supreme Judicial Court, the framers of the state constitution designed this provision to prevent matters of religion from being subject to public debate.<sup>75</sup>

Case law in Massachusetts displays the challenges facing the state’s courts in determining the boundaries of the establishment of religion.<sup>76</sup> In a case considering whether the exemption of religious institutions from certain zoning laws amounted to unconstitutional support of religion, the Massachusetts Supreme Judicial Court stated, “We do not think it an establishment of religion merely to exempt such institutions from some aspect of governmental supervision or restriction.”<sup>77</sup> Also, the Massachusetts Supreme Judicial Court has declared that the appointment and compensation of legislative chaplains does not constitute establishment of religion.<sup>78</sup> On the other hand, in 1982, the

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72. See *Colo v. Treasurer and Receiver Gen.*, 392 N.E.2d 1195, 1198-99 (Mass. 1979) (discussing legal shift in Massachusetts toward ending public support of religion).

73. See *In re Opinion of the Justices*, 102 N.E. 464, 464 (Mass. 1913) (opining that state constitution adequately prohibits establishment of religion). The justices also noted that the state constitution prohibited the use of tax money to fund religious grade schools, but did not prohibit the appropriation of funds for “higher educational institutions, societies or undertakings under sectarian or ecclesiastical control.” *Id.* at 465.

74. See *Collins v. Sec’y of the Commonwealth*, 556 N.E.2d 348, 348 (Mass. 1990) (discussing Massachusetts Constitution article 48 excluding laws relating to religion from referendum process).

75. See *id.* at 352-53 (discussing purpose behind article 48). *Collins* dealt with whether amendments to Massachusetts’s public accommodation laws broadening the exemption to religious organizations from antidiscrimination provisions could be subject to referendum. *Id.* 348-49. The court held that article 48 barred the exemption amendments from referendum because to do otherwise would allow voters “to consider whether the scope of freedom of religious institutions to discriminate should be expanded or constricted.” *Id.* at 353. In other words, “the public would be permitted to vote directly on how religious institutions may conduct themselves.” *Id.* at 354.

76. See *infra* notes 77-80 and accompanying text (discussing cases grappling with boundaries of religious establishment).

77. See *Sisters of the Holy Cross v. Town of Brookline*, 198 N.E.2d 624, 633 (Mass. 1964) (discussing zoning law exemption for religious institutions).

78. See *Colo v. Treasurer and Receiver Gen.*, 392 N.E.2d 1195, 1201 (Mass. 1979) (denying injunction against appointing and compensating legislative chaplains). The court stated:

The complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions. We do not think either the Massachusetts or United States Constitutions require the

state's highest court issued an opinion stating that a proposed bill allowing a period for voluntary prayer or meditation in public schools would violate the Establishment Clause.<sup>79</sup> The Massachusetts Supreme Judicial Court has also found laws requiring public schools to loan books to private schools an unconstitutional endorsement of religion.<sup>80</sup>

The court's willingness to involve itself in matters of establishment is juxtaposed with its stark unwillingness to embroil itself in church-governance disputes.<sup>81</sup> The court has declined jurisdiction in cases where the members of religious corporations, subject to state law and a hierarchical ecclesiastical body, dispute the corporation's governing authority and in cases where church officials challenge removal from or denial of employment.<sup>82</sup> This unwillingness to embroil itself in internal policy matters also extends to para-church organizations, as the court has upheld a religious organization's right to release an employee based on the employee's sexual preferences.<sup>83</sup>

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cessation of the practices challenged here.

*Id.*

79. Opinion of the Justices to the House of Representatives, 440 N.E.2d 1159, 1162-63 (Mass. 1982) (opining period of voluntary prayer or meditation in public schools violates Establishment Clause). The fact that the prayer was voluntary and the bill included the option of meditation did not cure the bill's constitutional defect. *Id.* at 1162. The opinion states, "The opening exercise, if the student volunteer chooses to offer a prayer, is a religious ceremony and is intended by the bill to be so." *Id.*

80. See *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 584-86 (Mass. 1978) (holding textbook loan law unconstitutional and enjoining its enforcement). "Textbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished from generalized services government might provide to schools in common with others." *Id.* at 584 (quoting *Norwood v. Harrison*, 413 U.S. 455, 463-65 (1973)). Interestingly, the court did mention that if the state wanted to relax limitations on aid to private schools, the choice should be put to the voters. *Id.* at 586.

81. See *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002) (declining jurisdiction over claim arising from gender discrimination at church). The court declined jurisdiction because a trial would require the court to decide and evaluate internal church policies and management. *Id.* at 824-25. It did not matter that the plaintiff's claims did not question the truth of the church's doctrinal beliefs. *Id.* at 825.

82. See *id.* at 827 (affirming dismissal of employment discrimination claim); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 934 (Mass. 1997) (dismissing complaint regarding church election scheme for lack of jurisdiction). The court stated that "religious organizations as spiritual bodies have rights which require distinct constitutional protection. It is for this reason that the [United States] Supreme Court consistently has maintained that matters of church government must be as independent from secular control as matters of faith and doctrine." *Parish*, 688 N.E.2d at 934 (citation and internal quotation marks omitted).

83. See *Madsen v. Erwin*, 481 N.E.2d 1160, 1165 (Mass. 1985) (determining Church made religious decision firing employee based on sexual preference). In *Madsen*, the court did not distinguish between the Christian Science Monitor and the Christian Science Church, and found the plaintiff was an employee of the Church. *Id.* at 1164. "[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.* at 1165 (alteration in original) (citation omitted). The court declined to review the Church's assessment of the "spiritual suitability" of its employees. *Id.* at 1166. Interestingly, the court also noted that requiring the Church to pay damages for following its religious beliefs burdened its right to free exercise. *Id.*

### C. Adoption Laws in Massachusetts

In 1851, Massachusetts became the first state to enact laws providing for judicial supervision of adoptions.<sup>84</sup> Currently, Massachusetts forbids private adoptions and children must be placed through a licensed agency.<sup>85</sup> Furthermore, the law provides that judges ruling on adoption orders are to consider the children's needs "for loving and responsible parental care" and all other factors relevant to their "physical, mental and moral health."<sup>86</sup> The central policy of the state is to "assure every child a fair and full opportunity to reach his full potential by providing and encouraging services which strengthen family life and support families in their essential function of nurture for a child's physical, social, educational, moral, and spiritual development."<sup>87</sup>

Advancing a child's best interests is also a primary consideration in judicial adoption proceedings.<sup>88</sup> The consideration is so strong that a judge may decide it is in a child's best interests to prevent a biological parent from withdrawing consent to adoption.<sup>89</sup> In *In re Child*,<sup>90</sup> the Appeals Court of Massachusetts sustained a probate court judge's ruling that removal of a child from his adoptive home would not be in the child's best interests despite the birth mother's claim that she consented to the adoption under considerable emotional stress.<sup>91</sup> A more recent example of the weight given to a child's best interests

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84. See generally MORTON L. LEAVY, LAW OF ADOPTION (Roy D. Weinberg ed., 1968) (discussing adoption-law history). A few states passed adoption statutes prior to 1851, but these merely served to make a public record of private adoption agreements rather than provide judicial oversight or safeguards. See *id.* at 2 (discussing first general adoption statutes).

85. See MASS. GEN. LAWS ch. 28A, § 11(c) (2006) (requiring licensed agency to control placement of children for adoption); see also MASS. GEN. LAWS ch. 210, § 11A (2006) (prohibiting advertisement and solicitation of adoption services by unlicensed agencies or persons).

86. See MASS. GEN. LAWS ch. 210, § 5B (outlining considerations for judges making adoption orders). The importance of serving a child's best interests is an internationally accepted legal notion. See Donovan M. Steltzner, Note, *Intercountry Adoption: Toward a Regime That Recognizes the "Best Interests" of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 139-40 (2003) (discussing United Nations Declaration of the Rights of the Child). The United Nations 1948 Universal Declaration of Human Rights states that in enacting laws for care and assistance of motherhood and childhood, "the best interests of the child shall be the paramount consideration." *Id.* at 139.

87. See MASS. GEN. LAWS ch. 28A, § 1 (defining state policy respecting children). The Massachusetts Department of Early Education and Care states in its adoption regulations that "the child is the primary client of all placement agencies" and that its goal is to "assure every child a fair and full opportunity to reach his or her full potential." See 102 MASS. CODE REGS. 5.01 (2006) (discussing purposes and goals of organization).

88. See, e.g., Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993) (stating primary purpose of adoption statute is advancement of child's best interests); Adoption of a Minor, 178 N.E.2d 264, 265 (Mass. 1961) (emphasizing conflicting interests must yield to child's best interests); Purinton v. Jamrock, 80 N.E. 802, 805 (Mass. 1907) (opining child's welfare paramount objective of court). See generally Donald L. Beschle, *God Bless The Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 383 (1989) (noting state adoption proceedings will continue using best interests test).

89. See *In re Child*, 295 N.E.2d 693, 697-98 (Mass. App. Ct. 1973) (denying withdrawal of consent where child's best interests supported adoption).

90. 295 N.E.2d 693 (Mass. App. Ct. 1973).

91. See *id.* at 697 (affirming lower-court determination of child's best interests). The appeals court reasoned that the interests of the natural parents become subordinate to the child's interests in situations where

is *Adoption of Gregory*,<sup>92</sup> where the Massachusetts Supreme Judicial Court affirmed the judicial termination of a couple's parental right to consent to the adoption of their disabled child.<sup>93</sup> The court explicitly stated that parental rights are secondary to a child's welfare.<sup>94</sup>

Directly related to the importance placed on a child's best interests is the role of religion in adoption proceedings.<sup>95</sup> Licensed adoption agencies cannot discriminate on the basis of religion.<sup>96</sup> However, while Massachusetts does not allow religion to be a determinative factor, it may be considered among other persuasive criteria.<sup>97</sup> Massachusetts adoption laws also contain a provision that provides parents who are surrendering a child for adoption the ability to request that the child be placed with a family of a designated religion.<sup>98</sup> However, the

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a child placed in an adoptive home develops strong binds with the family. *Id.* at 698. The appeals court further reasoned that emotional stress often accompanies adoption consents and is not determinative for purposes of invalidation. *Id.* at 697.

92. 747 N.E.2d 120 (Mass. 2001).

93. *See id.* at 123 (discussing posture and outcome of case). The child, Gregory, suffered from complex medical and developmental problems and required assistance in daily activities. *Id.* at 124. The mother did not attend prenatal classes and her poor personal hygiene and inability to learn basic parenting skills like changing diapers demonstrated an inability to care for her child. *Id.* at 123.

94. *See id.* at 125 (determining child's best interest paramount in parental termination proceedings). Notably, Gregory's father argued that the Department of Social Services failed to accommodate his own disabilities. *Id.* at 124. The Massachusetts Supreme Judicial Court rejected this argument observing that, in addition to its own instructions on parenting, the Department referred the father to Catholic Charities parenting classes, which he largely failed to attend. *Id.* at 126-27. Another noteworthy example of parental rights ceding to children's rights is *Kendall v. Kendall*, where the Massachusetts Supreme Judicial Court stated, "[p]romoting the best interests of the children is an interest sufficiently compelling to impose a burden on the defendant's right to practice religion and his parental right to determine the religious upbringing of his children." 687 N.E.2d at 1235. In *Kendall*, the court affirmed an award of joint custody requiring the father to limit sharing parts of his religion deemed substantially harmful with his children. *Id.* at 1235-36.

95. *See In re Bourque*, 245 So.2d 525, 530 (La. Ct. App. 1971) (suggesting church attendance of couple may be relevant in adoption consideration); *see also* Vaccaro, *supra* note 19, at \*2a (discussing importance of neutrality in religious matters and giving priority consideration to child's best interests). Despite the constitutional requirement of neutrality toward religion, courts nonetheless find it proper to take religion into account when assessing a child's best interests. Vaccaro, *supra* note 19, at \*2a. Some courts consider a prospective adoptive parent's church attendance as relevant to determining a child's best interests. *Id.* The constitutional analysis involved in adoption cases is similar, if not identical, to that required in child custody cases. *See Beschle*, *supra* note 88, at 384 (discussing similarity between custody disputes and adoption proceedings). Beschle notes that the role of religion in child custody disputes dates back to nineteenth-century England where evidence of a father's atheism played a role in persuading the court to override paternal custody. *Id.* at 396.

96. *See* 102 MASS. CODE REGS. 1.03(1) (2006) (prohibiting discrimination on basis of religion).

97. *See Purinton v. Jamrock*, 80 N.E. 802, 805 (Mass. 1907) (stating court will not prefer one church over another in seeking child's best interests). The Department of Early Education and Care states that one of the goals for adoption and placement agencies is to provide "an environment of caring . . . with consideration given to placing children in families of the same cultural background when it meets the best interest of the children." 102 MASS. CODE REGS. 5.01(d) (2006).

98. *See* MASS. GEN. LAWS ch. 210, § 5B (2006). The second clause of the statute reads:

If, at the time of surrender of the child for adoptive custody, the parent or parents of said child requested a religious designation for the child, the court may grant a petition for adoption of the child only to a person or persons of the religious designation so requested, unless a placement for

statute clearly states that the fulfillment of such requests is contingent on the placement satisfying the child's best interests.<sup>99</sup>

In practice, Massachusetts courts have placed limitations on a parent's ability to designate a religious preference for their child.<sup>100</sup> In *Adoption of Brooke*,<sup>101</sup> the Appeals Court of Massachusetts held that a mother's preference that her child be placed in a home of a particular religious faith is not binding in situations where the mother did not voluntarily surrender the child and the court terminated parental rights.<sup>102</sup> Also, the Massachusetts Supreme Judicial Court ruled that judges may not take judicial notice of the availability of homes with families of conforming religion for purposes of denying a petition for adoption.<sup>103</sup>

Related to determinations of the best interests of the child, and perhaps more contentious, is the subject of homosexuals and adoption.<sup>104</sup> The issue of homosexual adoption tends to spark discussions of social sciences and the psychological effect on a child being raised by homosexual parents.<sup>105</sup>

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adoptive custody based on such request would not have been in the best interests of the child. If a request for religious designation is not given effect, such reasons in support of such determination shall be made a part of the records of the proceedings.

*Id.*

99. *See id.* The 1950 version of the statute required that "the judge when practical must give custody only to persons of the same religious faith as that of the child" without the need for any request by the surrendering parents. *See* *Petitions of Goldman*, 121 N.E.2d 843, 844 (Mass. 1954) (quoting prior version of chapter 210, section 5B of General Laws of Massachusetts). In *Goldman*, the Massachusetts Supreme Judicial Court affirmed a decree denying the petition of a Jewish couple to adopt a Catholic child where Catholic families willing to adopt the child were available. *Id.* at 845. The court also stated that the religious faith of the child, as referred to in the statute, meant the religious faith of the parents, or in the event of a dispute, the faith of the mother. *Id.* at 846.

100. *See supra* notes 98-99 and accompanying text (discussing state restrictions on parental right to choose child's religion). Even under the 1950 version of the statute, the Massachusetts Supreme Judicial Court was willing to place a child's best interests above the statutory requirement to place children in homes of the same religion. *See generally* *Petition of Gally*, 107 N.E.2d 21 (Mass. 1952) (allowing placement of child with family differing in religion from birth mother).

101. 679 N.E.2d 569 (Mass. App. Ct. 1997).

102. *See id.* at 570. The mother, a Catholic, expressed a preference that her daughter be placed in a Christian home, and the Department of Social Services (DSS) initially sought to accommodate her request. *Id.* at 570-71. However, DSS did not locate a suitable Christian family and placed the child with a Jewish family. *Id.* at 571. The court did not find a state constitutional barrier to ignoring the mother's preference because her consent to the adoption was not required. *Id.*

103. *See* *Petition of Duarte*, 122 N.E.2d 890, 891 (Mass. 1954) (holding judicial notice of availability of homes of conforming faith inappropriate). The probate court judge ruled that in a predominantly Catholic community, with many pending adoption applications from Catholic families, it would not be "practicable" to place a Catholic baby in the home of Seventh Day Adventists. *Id.* The Massachusetts Supreme Judicial Court held that despite the judge's personal knowledge of the community, he could not use it to deny the petition without any record evidence. *Id.* at 891-92.

104. *See* Carolyn S. Grigsby, Note, *Lofton v. Kearney: Discrimination Declared Constitutional in Florida*, 21 ST. LOUIS U. PUB. L. REV. 199, 202 (2002) (discussing homosexual adoption debate). There is no fundamental right to adoption and because it is a statutorily created right, states may limit it extensively. *Id.* at 206.

105. *See* Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science*

However, because adoption is not considered a fundamental right, the states possess considerable discretion in whether to enter these discussions and statutorily limit or expand adoptions.<sup>106</sup>

Massachusetts is among the states that generally allow homosexuals to adopt; however, a number of states explicitly or effectively forbid the practice by statute.<sup>107</sup> For example, Florida law expressly declares that no person who is a homosexual may adopt, and recent case law has upheld the constitutionality of this provision.<sup>108</sup> The Eleventh Circuit, reviewing the Florida statute, noted that adoption is a state created relationship and, given the state's protective power over orphaned children, it may act with less concern for individual fairness and ensuring due process.<sup>109</sup> Mississippi's laws, while somewhat less

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*Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 196-202 (1995) (discussing social-science research on children raised by homosexuals). Patterson notes the lack of published studies addressing the effects on children adopted by homosexuals and suggests that social science cannot be used to support arguments that sexual orientation should play a role in who may adopt. *Id.* at 196; *see also* Grigsby, *supra* note 104, at 202 (noting advocates of homosexual adoption view parenting ability as central issue). Opponents of homosexual adoptions contest the ability of homosexuals to provide children with an "ideal environment." Grigsby, *supra* note 104, at 202.

106. *See infra* notes 108-112 and accompanying text (discussing states statutorily limiting or banning homosexual adoptions). State power to define who may and may not adopt is derived from the concept of *parens patriae*, which gives states the power to protect those who cannot protect themselves, including the ability to place children with good parents. *See* Kari E. Hong, *Parens Patriachy: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 3 (2003) (discussing state regulation of adoption under *parens patriae* theory).

107. *See infra* notes 117-123 and accompanying text (discussing development of legal recognition and support for homosexual adoption in Massachusetts). Until 1990, a Massachusetts regulation barred homosexuals from being foster parents. *See* William E. Adams, Jr., *Whose Family Is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 589 (1996) (explaining Massachusetts's policy against homosexual foster parents dropped in lawsuit settlement). New Jersey was the first state to explicitly afford homosexuals the same adoption rights as married couples, and Vermont and Hawaii both allow the practice based on state civil-union law and recognition of homosexual marriage. *See* Grigsby, *supra* note 104, at 211-13 (discussing various states permitting homosexual adoption).

108. *See* FLA. STAT. § 63.042(3) (2006) (prohibiting adoption by homosexuals); *see also* Lofton v. Kearney, 157 F. Supp. 2d 1372, 1381 (S.D. Fla. 2001) (upholding constitutionality of Florida statute prohibiting homosexual adoptions), *aff'd sub nom.*, Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004). The district court acknowledged that the creation of families can occur without biological ties, though "strong emotional bonds" do not grant fundamental rights to family privacy, integrity, and intimate association. *See* Lofton, 157 F. Supp. 2d at 1378-79. The court also reasoned that because adoption is only a privilege, there is no fundamental right to apply for adoption, and thus, the Florida statute does not infringe upon fundamental rights. *Id.* at 1380-81. Applying a rational-basis test to the statute, the court did not find the state's moral disapproval of homosexuality justified the provision. *Id.* 1382-83. The court did accept the argument that being raised in the home of a married couple is in a child's best interests. *Id.* at 1383-84; *see also* Grigsby, *supra* note 104, at 222 (noting emotional bonds do not amount to "fundamental right to family privacy . . . or family integrity"). Interestingly, the Lofton court stated that the Equal Protection Clause was not a license for judging the wisdom, fairness, or logic of the legislature. *See* Lofton, 157 F. Supp. 2d at 1385.

109. Lofton, 358 F.3d at 809-10 discussing nature of adoption laws and state power to serve child's best interests). The Eleventh Circuit also noted that foster families are created by the state and "whatever potential liberty interests such families might possess would be defined by state law and the justifiable expectations it created." *Id.* at 813. In addressing the appellants' due-process challenges, the Eleventh Circuit held that even if the Florida law created an expectation of permanency, the interest it created would only require procedural

explicit than Florida's, do not allow same-gender couples to adopt.<sup>110</sup> The Utah legislature decided that it is categorically against a child's best interests to be adopted by persons or couples "cohabiting" in a relationship not recognized as a legal marriage under the state's laws.<sup>111</sup> Along similar lines, the Michigan Court of Appeals interpreted its adoption laws as prohibiting joint adoption by persons not married to each other.<sup>112</sup>

In Massachusetts, before the courts addressed the issue of homosexual adoption, they dealt with questions of homosexuality in the area of child custody.<sup>113</sup> In a case where a divorced husband contested a joint-custody award on the basis of his wife's homosexual lifestyle, the Appeals Court of Massachusetts evaluated the wife's lifestyle in terms of interpersonal relationships and its effect on the child's well-being.<sup>114</sup> The court affirmed the award of joint custody emphasizing the lack of findings that the mother's relationship adversely affected the child.<sup>115</sup> The court did, however, leave open the possibility of modifying the custody arrangement should the effects of the mother's lifestyle prove detrimental to the child.<sup>116</sup>

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due process if the state sought to remove foster children from the homosexual couple. *Id.* at 814-15. However, procedural due process does not mean that appellants would have a substantive right to be free from state oversight, nor would it "create an affirmative right to be accorded official recognition as 'parent' and 'child.'" *Id.* at 815. Finally, the Eleventh Circuit declined to treat homosexuals as a suspect class and found there was a rational basis for Florida's conclusion that homes with a man and a woman are in a child's best interests. *Id.* at 818-20.

110. See MISS. CODE ANN. § 93-17-3(5) (2006) (prohibiting adoption by same-gender couples).

111. See UTAH CODE ANN. § 78-30-9(3)(a) (2006) (stating adoption by "cohabitating" persons against child's best interests). According to the statute, adoption by someone who is not in a legally-valid marriage is against a child's best interests, though a court may place a child with a single person so long as they are not living and having sexual relations with a person to whom they are not married. *Id.*

112. See *In re Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991) (stating joint adoption by unmarried persons inconsistent with scope and purpose of state adoption laws); see also *Validity of Out-of-State Same-sex Marriages in Michigan*, Op. of Att'y Gen. of Mich. No. 7160 (Sept. 14, 2004), 2004 Mich. AG Lexis 15, \*9 [hereinafter *Op. of Att'y Gen. of Mich., Out-of-State Same-sex Marriage*] (opining Michigan law prohibits allowing out-of-state married homosexuals to adopt in state). The state attorney general suggested that the state should not allow homosexual couples married in other states to adopt because Michigan does not recognize or permit such unions. See *Op. of Att'y Gen. of Mich., Out-of-State Same-sex Marriage*, *supra*, at \*9.

113. See *Doe v. Doe*, 452 N.E.2d 293, 295 (Mass. App. Ct. 1983) (addressing question of contested custody with divorced wife involved in homosexual relationship).

114. See *id.* at 296 (asserting importance of effects of mother's lifestyle on child-custody decision); see also *Custody of a Minor*, 452 N.E.2d 483, 491 (Mass. 1983) (stressing parent's lifestyle not grounds for severing bond between parent and child). Child-custody decisions take into account a child's happiness and welfare as well as consideration of the child's moral and emotional health. See *Doe*, 452 N.E.2d at 295.

115. See *Doe*, 452 N.E.2d at 296 (refusing to overturn trial court's custody decisions). The appeals court acknowledged the lack of evidence that the mother's lifestyle negatively affected the child. *Id.* Four psychiatrists testified at trial, three of whom thought the mother's lifestyle would not adversely affect the child's development, and one of whom testified to a study finding no difference in children raised by single parents who are homosexual versus heterosexual. *Id.* Social science often looks at the issue of whether homosexuals make suitable parents and the effect of their lifestyles on child development. See *Patterson*, *supra* note 105, at 205 (addressing whether homosexuals satisfy child's best interests and concluding no social-science evidence suggests otherwise).

116. See *Doe*, 452 N.E.2d at 296 (opining on possibility of modification in light of future evidence of

The Massachusetts Supreme Judicial Court directly addressed homosexual adoption in 1993, interpreting state laws as allowing such adoptions.<sup>117</sup> The majority reiterated the primary purpose to advance a child's best interests and determined that nothing on the face of the statute prohibited adoption by two unmarried cohabitants.<sup>118</sup> According to the court, where such an adoption furthers a child's best interests, the statute should be read expansively, which broadens the categories of persons entitled to adopt.<sup>119</sup> The majority, noting the legislature may not have envisioned homosexual adoptions when it composed the statute, declined to find that the legislature attempted to limit the categories of persons able to adopt.<sup>120</sup>

Massachusetts Department of Child Services regulations currently prohibit a licensed adoption agency from discriminating on numerous bases, including sexual orientation.<sup>121</sup> The Department's nondiscrimination policy must be incorporated into an agency's written statement of purpose.<sup>122</sup> The resulting conflict for religious organizations opposing homosexual adoption is easily

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detrimental effect). The court stated:

There is no evidence to show that the wife's life-style will adversely affect David [the child]. . . . The trial judge specifically found, and we think this an important fact, that David "has not been tormented by his friends in regard to his mother's lifestyle.

Should any of these present factors change, the custody award, upon suitable complaint and after hearing, may be modified.

*Id.*

117. See *Adoption of Tammy*, 619 N.E.2d 315, 319-20 (Mass. 1993) (interpreting statutory language to include adoptions by homosexuals); see also Rebra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 908-09 (2000) (analyzing court's reasoning in *Adoption of Tammy*). Among the court's reasons for allowing the biological mother's lesbian partner to adopt the child was the potential for the child to inherit from the nonbiological mother's family trust. See Hedges, *supra*, at 909. Additionally, the child would have two parents legally obligated to support her in the event of a death or separation. *Id.*

118. See *Adoption of Tammy*, 619 N.E.2d at 318-19 (interpreting statutory language).

119. See *id.* at 318-19 (expanding reach of statutory language). The court stated that where an adoption by two unmarried people serves a child's best interests, the statute should read "persons" instead of "person." *Id.*

120. See *id.* at 319-20 (interpreting "general" language defining who may adopt to include homosexuals). The dissenting opinion acknowledges that although the adoption may be appropriate in this case, the majority should not justify an interpretation inconsistent with the statutory language. *Id.* at 322 (Lynch, J., dissenting). "[N]othing in the statute indicat[es] a legislative intent to allow two or more unmarried persons jointly to petition for adoption." *Id.*

121. 102 MASS. CODE REGS. 1.03(1) (2006) (prohibiting discrimination on basis of sexual orientation). The regulation provides, "[t]he licensee shall not discriminate in providing services to children and their families on the basis of race, religion, cultural heritage, political beliefs, national origin, marital status, sexual orientation or disability." *Id.*; see also 110 MASS. CODE REGS. 1.09 (2006) (outlining Department's principles and responsibilities relating to nondiscrimination). The regulation further provides, "[n]o applicant for or recipient of Department services shall, on the ground of race, creed, color, religion, age, ancestry, marital status, sex, sexual orientation, language, disability, veteran status, or national origin, be excluded from participation in . . . any service . . . provided by the Department." 110 MASS. CODE REGS. 1.09(1).

122. See 102 MASS. CODE REGS. 1.03(1) (requiring nondiscrimination policy in statement of purpose).

discernible because, according to the law, an agency must make available at all times a statement of purpose containing its philosophy, goals, and the potentially contradictory nondiscrimination policy.<sup>123</sup>

#### D. Catholic Charities

Founded in 1903, Catholic Charities has placed more children in adoptive homes than any other state-licensed adoption agency.<sup>124</sup> Additionally, the organization runs 130 other programs, including substance-abuse counseling, legal services, daycare, and food pantries that have served hundreds of thousands of state residents in need.<sup>125</sup> In every aspect of its activities, Catholic Charities believes it is fulfilling the teaching of the Catholic Church.<sup>126</sup>

Catholic teaching views marriage between a man and a woman as an institution ordained by God and of such importance as to be considered a sacrament of the Church.<sup>127</sup> Catholic teaching views homosexuality and homosexual unions as not at all “similar or even remotely analogous to God’s plan for marriage and family.”<sup>128</sup> Despite the Church’s strong position on homosexuality, however, it also teaches that homosexuals are to be treated in an antidiscriminatory manner with compassion, sensitivity, and respect.<sup>129</sup> The Catholic Church thus charges its members with the task of simultaneously treating homosexuals with equality, yet firmly opposing homosexual unions and behavior.<sup>130</sup>

The Church’s teachings apply unequivocally to its associated institutions and organizations.<sup>131</sup> Catholic Charities are “first and foremost Catholic

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123. See 102 MASS. CODE REGS. 3.04(1) (requiring licensees maintain available written statement of purpose); see also *infra* Part II.D. (highlighting charity’s internal conflict between respecting religious beliefs and following state laws).

124. See Wen, *supra* note 6 (discussing charity’s performance of tens of thousands of adoptions).

125. See Wen, *supra* note 4 (noting additional services provided by Catholic Charities).

126. See Press Release, Snyder, *supra* note 1 (discussing relationship between Church and charity).

127. See VATICAN, CONSIDERATIONS, *supra* note 5 (stating Church position on marriage as only between man and woman).

128. See VATICAN, CONSIDERATIONS, *supra* note 5 (discussing Church view of homosexuality in regard to marriage). According to the teachings of the Church, marriage is holy and ordained by God, whereas homosexuality runs against the natural moral law. *Id.*

129. See VATICAN, CONSIDERATIONS, *supra* note 5 (stating Church position on treatment of homosexuals); see also CATECHISM OF THE CATHOLIC CHURCH, § 2358 (1994) (stating Church view on Christian treatment of homosexuals).

130. See VATICAN, CONSIDERATIONS, *supra* note 5 (discussing Catholic response to government acknowledgement of homosexual unions). The Church articulates that Christian approval of homosexual acts and unions contradicts the moral truth of the faith and, while laws promoting homosexuality should be objected to when possible, those engaged in homosexual acts should not be discriminated against. *Id.*; see also Laura Christine Henderson, Comment, *Equal Benefits, Unequal Burdens: How the Movement for Gay Rights in the Workplace is Affecting Religious Employers* 55 CATH. U. L. REV. 227, 251-52 (2005) (discussing Catholic teaching and paradox of Christian response taught by Church).

131. See Henderson, *supra* note 130, at 252 (discussing applicability of Church teaching to Church Institutions); see also Pope John Paul II, Address to the Bishops of the Provinces of Portland in Oregon, Seattle, and Anchorage on Their “Ad Limina” Visit 1 (June 24, 2004), *available at*

institutions” and, therefore, are charged with an allegiance and duty to spread the teachings of the Church.<sup>132</sup> Catholic Charities operates under the authority of the local Bishop who oversees proper application of Church doctrine in his diocese.<sup>133</sup> As an institution of the Church, Catholic Charities’s services must conform to both state laws and Catholic doctrine.<sup>134</sup> This balance between law and doctrine can lead to conflict, as demonstrated by the Boston branch of Catholic Charities adoption services’ completion of a small number of homosexual adoptions prior to the Vatican’s official statement.<sup>135</sup>

The conflict with Massachusetts adoption laws is not the first instance of Catholic Charities running afoul of state laws due to Catholic doctrine.<sup>136</sup> In Maine, failure to comply with ordinances requiring equal benefits for domestic partners resulted in Catholic Charities losing its funding for several child care and development programs.<sup>137</sup> In California, Catholic Charities failed to receive a “religious employer” exemption from a state law requiring insurance coverage for contraceptives.<sup>138</sup> In both Maine and California, Catholic

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[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/2004/june/documents/hf\\_jp-ii\\_spe\\_20040624\\_usa-bishops\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/june/documents/hf_jp-ii_spe_20040624_usa-bishops_en.html) [hereinafter Pope John Paul II, Address] (discussing role of Church institutions in United States). Pope John Paul II states that “[The Catholic Church’s] many religious, educational and charitable institutions exist for one reason only: to proclaim the Gospel. . . . It is of utmost importance, therefore, that the Church’s institutions be genuinely Catholic: Catholic in their self understanding and Catholic in their identity. See Pope John Paul II, Address, *supra*.

132. See Pope John Paul II, Address, *supra* note 131 (discussing applicability of Catholic teaching to Church’s charitable organizations).

133. See Press Release, Snyder, *supra* note 1 (explaining operation of Catholic Charities and role of Church teaching).

134. See Press Release, Snyder, *supra* note 1 (noting dual allegiances of Catholic Charities to state and Church).

135. See Wen, *supra* note 11 (discussing Catholic Charities of Boston’s completion of thirteen adoptions to homosexual couples). President of Catholic Charities of Boston, Rev. J. Bryan Hehir, described the practice as merely an accommodation that the organization, absent antidiscrimination laws, would not otherwise choose to perform. *Id.*

136. See *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 83-84 (D. Me. 2004) (reviewing facts of case). In 2002, Portland required any organization receiving city-housing and community-development funds to provide health and employment benefits to employees with domestic partners. *Id.* Catholic Charities was among the organizations subject to the law’s coverage. *Id.* at 83. To be associated with a church under ERISA, an organization must share “common religious bonds and convictions.” *Id.* at 85. The court determined that Catholic Charities was associated with the Catholic Church because the charity provided its services based on Church teaching and considered its work vital to church ministry. *Id.* The court further determined for purposes of analysis that the Charities’ employees are employees of the Catholic Church. *Id.* at 86.

137. See *id.* at 83-84 (reviewing result of Catholic Charities noncompliance); see also Henderson, *supra* note 130, at 228-29 (discussing outcome of Catholic Charities’s noncompliance).

138. See *Catholic Charities of Sacramento v. Superior Ct.*, 85 P.3d 67, 73-76 (Cal. 2004) (reviewing facts). The California Supreme Court determined that the central purpose of Catholic Charities was not promoting religious values, but rather providing public services. *Id.* at 73-76. The act in question contained an exemption if a religious employer had a purpose of teaching religious beliefs and primarily employed and served people with shared religious faith. *Id.* at 75 (outlining religious employer criteria in section 1367.25 of California Health & Safety Code); see also Kristen Colletta & Darya Kapulina, Note, *Employment Discrimination and the First Amendment: Case Analysis of Catholic Charities*, 23 HOFSTRA LAB. & EMP. L.J. 189, 203-04 (2005) (summarizing court’s holding and reasoning).

Charities reached an impasse between following church doctrine or state laws.<sup>139</sup>

### III. ANALYSIS

#### A. Catholic Charities Should Not Be Distinguished from the Catholic Church

The work of Catholic Charities is inextricably tied to the teachings and governance of the Catholic Church.<sup>140</sup> The organization's very existence is a direct outpouring of the Christian mission to serve the poor and needy.<sup>141</sup> Further, bishops and priests provide oversight to the organization in each parish.<sup>142</sup> Catholic Charities's decision not to offer adoption services to homosexuals is, therefore, a profoundly religious judgment regarding a child's best interests.<sup>143</sup>

Some courts and commentators have taken the position that Catholic Charities provides wide-ranging services to many people, regardless of their religion, and as a result the organization is not really tied to the Church's teaching.<sup>144</sup> However, this position mistakenly places the crux of Catholic Charities's religious connection on whether the organization's purpose is promoting the specific religious beliefs of the Catholic faith.<sup>145</sup> This position neglects to consider the inextricable link between faith and practice.<sup>146</sup> The Church serves not only to promote the beliefs of the faith, but also to turn those beliefs into action.<sup>147</sup> Catholic Charities is thus a vital means through which

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139. See *supra* notes 127-132, 136-138 and accompanying text (discussing examples of clash between state laws and Catholic Charities's beliefs).

140. See *supra* note 131 and accompanying text (discussing centrality of Catholic teaching to Catholic agencies).

141. See *supra* note 131 and accompanying text (discussing role played by Catholic teaching in directing focus and services of Catholic agencies).

142. See Press Release, Snyder, *supra* note 1; *supra* text accompanying note 133 (discussing leadership structure of Catholic Charities).

143. See VATICAN, CONSIDERATIONS, *supra* note 5 (discussing homosexual parents as depriving children of normal development and experiences of fatherhood and motherhood).

144. See Colletta & Kapulina, *supra* note 138, at 225-26 (discussing Catholic Charities's connection to Church). Catholic Charities's services are "wide-ranging, and such services are provided regardless of the recipients' religion. This generalized, religion-neutral charitable work . . . can be carried out by any charitable organization . . . . Therefore, the organization is not sufficiently connected to the religious beliefs of the Catholic Church . . . ." *Id.* at 226.

145. See Colletta & Kapulina, *supra* note 138, at 225-26 (surmising questionable nature of Catholic Charities's work as purposed to promote religion).

146. See Press Release, Snyder, *supra* note 1 (noting faithfulness to Catholic teaching essential to identity of Catholics).

147. See Press Release, Snyder, *supra* note 1 (explaining charity's belief it carries out teachings of Catholic Church). See generally James 1:22-2:17 (NRSV) (instructing believers). The Bible itself instructs followers to "[b]e doers of the word . . . . Religion that is pure and undefiled before God, the Father, is this: to care for orphans and widows in their distress, and to keep oneself unstained by the world . . . . So faith by itself, if it has no works, is dead." *Id.*

the Church carries out its teaching.<sup>148</sup> To view Catholic Charities as disconnected from the Church based on its broad range of charitable work and lack of explicit religious promotion, improperly narrows the definition of religious affiliation and displays an unfortunate ignorance of what it means to Catholics to be Catholic.<sup>149</sup>

### B. Constitutional Permissibility of a Religious Exemption

In evaluating the constitutionality of a religious exemption to Massachusetts's antidiscrimination regulations, it is instructive to first examine the Eleventh Circuit's treatment of Florida's ban on homosexual adoptions.<sup>150</sup> The Eleventh Circuit noted that adoption law, unlike criminal law, is not primarily concerned with avoiding the intrusion of individual liberty interests, procedural due process, and fairness.<sup>151</sup> The state, in pursuing its "high duty" to ensure the best interests of the children it places in adoptive homes, may make classifications that might well be "constitutionally suspect" in other situations.<sup>152</sup> The court treats adoption as a public act, wherein potential parents willingly submit themselves to state scrutiny hoping that the state will find them to be suitable providers for the child.<sup>153</sup> Under this paradigm, a state's adoption laws are not construed in terms of the opportunity granted to individuals to adopt, but rather in terms of the state ensuring the welfare of the children under its protection.<sup>154</sup>

It is, therefore, quite possible to view a religious exemption as a valid exercise of Massachusetts *parens patriae* power.<sup>155</sup> By licensing its agencies to

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148. See *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004) (discussing Catholic Charities's connection to Catholic Church). The district court correctly found that the "undisputed facts show that Catholic Charities share common religious bonds and convictions with the Roman Catholic Church and is, therefore, 'associated with' the Church." *Id.* at 85.

149. Compare *Colletta & Kapulina*, *supra* note 138, at 225-26 (lessening Catholic Charities's affiliation with Catholic Church), with Press Release, Snyder, *supra* note 1 (advancing Catholic Charities's affiliation with Catholic Church).

150. See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 812-27 (11th Cir. 2004) (evaluating constitutionality of Florida ban on homosexual adoptions).

151. See *id.* at 809 (discussing differences between criminal law and adoption law).

152. See *id.* at 810 (explaining broader power of state acting in *parens patriae* for orphaned children). According to the Eleventh Circuit, many of the criteria used to screen adoption applicants would not pass constitutional muster if employed outside the adoption arena, such as physical health, financial status, duration of marriage, residence, commitment to racial or ethnic heritage, and willingness to sign an affidavit of good moral character. *Id.*

153. See *id.* at 810-11 (discussing submission of prospective parents to state scrutiny of their lives and homes). Florida's primary concern is not to provide parents with the opportunity to adopt but rather to see that the state meets the best interests of the children in its care. *Id.* at 811.

154. See *Lofton*, 358 F.3d at 813 (rejecting argument that state must provide opportunity for adoption to homosexuals to protect family integrity). According to the court, the statute did not interfere "with natural family units that exist independent of its power," rather it only regulated state-created relationships. *Id.* at 814. Furthermore, the appellants in this case did not have, under Florida law, a "justifiable expectation of a permanent relationship with his or her child free from state oversight or intervention." *Id.*

155. See *Hong*, *supra* note 106, at 43 (discussing *parens patriae* power of states).

perform adoptions, the state essentially conveys to these agencies the *parens patriae* power to protect.<sup>156</sup> Parents then knowingly and willingly submit themselves to the scrutiny of agencies empowered to ensure a child's best interests, not to provide an opportunity for various individuals to adopt.<sup>157</sup> After all, Massachusetts's current adoption laws explicitly state that the child, not the potential parent, is the agency's primary client.<sup>158</sup>

Accordingly, a religious exemption, such as the one proposed by former Governor Romney that would not allow discrimination of any group to trigger strict scrutiny analysis, would fall well within the confines of the broad discretion afforded to states when acting in a child's best interests.<sup>159</sup> The exemption would allow religious adoption agencies to act in a child's best interests while avoiding unnecessary conflict with tangential concerns such as individual opportunity to adopt.<sup>160</sup> Furthermore, allowing a religious exemption is not the same as outlawing homosexual adoption and would not contravene the expectations of homosexuals desiring the opportunity to adopt in Massachusetts.<sup>161</sup> Rather, it would simply direct potential parents, who willingly submit themselves to agency scrutiny, to those agencies with shared ideologies.<sup>162</sup> Indeed, there would be little doubt about the philosophies of various agencies, as state law requires beliefs and goals be explicitly delineated in an agency's statement of purpose.<sup>163</sup>

The question of whether a religious exemption would constitute an establishment of religion presents an interesting dilemma given the United States Supreme Court's caution regarding aid to "pervasively sectarian" organizations.<sup>164</sup> The activities of Catholic Charities, while being the outward manifestation of religious beliefs, are directly aligned with the secular interests

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156. See *supra* note 87 and accompanying text (explaining state policies and goals for children focused on achieving child's full potential).

157. See *supra* notes 153-154 and accompanying text (discussing adoption as submitting to laws focused on child's best interests and not individual opportunity).

158. See 102 MASS. CODE REGS. 5.01 (2006) (stating child is primary client of adoption agency).

159. See *supra* note 152 and accompanying text (discussing preferences unlikely to withstand constitutional scrutiny outside of adoption arena).

160. See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 809-10 (11th Cir. 2004) (noting adoption laws not primarily concerned with individual liberty and fairness); see also 102 MASS. CODE REGS. 5.04(1) (2006) (establishing child's best interests as primary purpose of licensed adoption agencies).

161. See Ballou, *supra* note 15, at 17 (quoting Governor Romney on narrow scope of exemption). Governor Romney specifically emphasized the bill's narrow focus to allow Catholic Charities to remain "true to their religion," but not outlaw homosexual adoptions. *Id.*

162. See 102 MASS. CODE REGS. 5.10 (2006) (outlining procedures for applicant evaluations). The applicants must submit themselves to at least one interview and one meeting in their home. 102 MASS. CODE REGS. 5.10(5).

163. See 102 MASS. CODE REGS. 5.04(1) (setting forth requirements for agency statement of purpose). The statement of purpose must be up to date and made available to anyone who wishes to see it. 102 MASS. CODE REGS. 5.04(1)(c).

164. See *supra* note 63 (discussing Supreme Court's invalidation of aid program to pervasively sectarian organizations).

of the state to protect and provide for needy children.<sup>165</sup> Essentially, Catholic Charities simultaneously advances its Christian message and the secular goal of serving a child's best interests.<sup>166</sup> The secular purpose of state adoption laws in this situation is closely, if not inseparably, related to the Christian mission.<sup>167</sup>

As in *Bowen*, where religious services designed to prevent unmarried pregnancy and teen sex did not convert the secular nature of the services, providing adoptions suited to a child's best interests does not become a religious activity simply because a religious organization carries them out.<sup>168</sup> Affording religious adoption agencies an exemption from antidiscrimination laws poses even less danger of advancing religion because, unlike premarital-sex education, adoption services do not involve explicit teaching of religious principles.<sup>169</sup> Furthermore, an antidiscrimination exemption would not allow Catholic Charities to advance Catholicism by providing adoptions only to Catholic parents.<sup>170</sup> Rather, it allows a religious agency to provide a secular service in a manner consistent with their religious character, similar to promoting abstinence and discouraging abortion under the AFLA.<sup>171</sup> Thus, there is reason to distinguish religious adoption agencies from pervasively sectarian organizations carrying a substantial risk of advancing religion.<sup>172</sup>

### C. *Lack of a Religious Exemption Does Not Promote Massachusetts's Best Interests of the Child Standard*

Massachusetts statutes and case law reveal the significant and long-lasting role played by religion and morality in adoption proceedings.<sup>173</sup> While not determinative, religion and morality have long been significant factors in agency evaluations of potential adoptive parents' suitability.<sup>174</sup> By contrast, Massachusetts has judicially recognized homosexual adoptions only in the last

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165. See *supra* notes 86-94 and accompanying text (explaining state interest in promoting child's best interests).

166. See *supra* note 64 and accompanying text (discussing overlap of state interests and religious views).

167. See 102 MASS. CODE REGS. 5.01 (stating government policy to assure every child fair opportunity to reach full potential); Press Release, Snyder, *supra* note 1 (noting Catholic Charities's commitment to child welfare including belief it carries out teaching of faith).

168. See *supra* note 64 (discussing secular nature of activities religious organizations performed).

169. See *supra* note 64 and accompanying text (noting Supreme Court's lack of concern regarding teaching religious doctrines by religious organizations under AFLA).

170. See *supra* note 64 and accompanying text (emphasizing overlap of secular and religious purpose not necessarily inculcation of religion).

171. See *supra* note 64 and accompanying text (discussing permissible religious emphasis for programs proposed in AFLA).

172. See *supra* note 64 and accompanying text (highlighting distinction between religious agencies and promotion of sectarian values in AFLA).

173. See *supra* notes 96-103 and accompanying text (discussing role of religion and morality in Massachusetts adoption proceedings).

174. See *supra* note 97 and accompanying text (discussing role of religion in best interests of child determination).

fifteen years.<sup>175</sup> Interestingly, unlike the clear statutory language regarding the role of religion in adoptions, the first case to recognize adoption by homosexuals specifically notes that the legislature may not have intended such an interpretation.<sup>176</sup> The Massachusetts Supreme Judicial Court was, nonetheless, willing to stretch the statutory language to accommodate its determination of a child's best interests.<sup>177</sup>

In many ways, Massachusetts sacrifices one value judgment, the right of homosexuals to adopt, for another, the role of religion in determining a child's best interests.<sup>178</sup> While the adoption laws grant agencies the ability to determine a child's best interests, they simultaneously handicap the agencies' ability to make these judgments by removing certain religious considerations as evaluative criteria.<sup>179</sup> Despite a willingness to license agencies whose religion and morality motivate their operations, Massachusetts has essentially made a qualitative judgment on religious views opposing homosexuality in finding them untenable in the arena of adoptions.<sup>180</sup> This qualitative judgment allows the use of only those aspects of religion approved by the state in determining a child's best interests.<sup>181</sup> The situation begs the question of whether Massachusetts has entered into the murky ground of adjudicating the merits of religious principles, a road the courts have not been quick to travel down.<sup>182</sup>

Considering that Massachusetts adoption laws do not guarantee potential adoptive parents that they will be determined to satisfy a child's best interests, arguably no legally cognizable expectation is created.<sup>183</sup> As a result, a religious exemption would not contravene prospective adoptive parents' protected interests.<sup>184</sup> Further, the exemption would not trample any statutorily created

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175. See *Adoption of Tammy*, 619 N.E.2d 315, 319-20 (Mass. 1993) (determining homosexual persons capable of adopting).

176. See *id.* at 319 (acknowledging adoption by homosexuals not prohibited but likely not contemplated by legislature).

177. See *id.* (expanding statutory language to include homosexual persons).

178. Compare *supra* note 117 (discussing recognition of homosexual adoption), with *supra* notes 96-103 and accompanying text (discussing role of religion in decisions pertaining to child's best interests).

179. See *supra* notes 85-87 and accompanying text (discussing considerations in Massachusetts adoption laws).

180. Compare *Adoption of Tammy*, 619 N.E.2d at 319-20 (recognizing homosexual adoptions capable of satisfying child's best interests), with VATICAN, CONSIDERATIONS, *supra* note 5 (stating Church's position that homosexual adoptions against child's best interests).

181. See *supra* note 97 and accompanying text (discussing role of religion in determining child's best interests).

182. See *supra* note 74 and accompanying text (discussing Massachusetts Supreme Judicial Court's hesitance to adjudicate church policies and procedures); see also *supra* note 82 (noting Massachusetts Supreme Judicial Court's recognition of Supreme Court's position against involvement in church governance).

183. See *Lofton v. Kearney*, 358 F.3d 804, 813-15 (11th Cir. 2004) (explaining creation of legal interest in adoption and its effect on discrimination in state laws).

184. See *id.* (discussing creation of legal interest in adoption and possible due-process requirement). The exemption may necessitate procedural due-process protections in the event a court denies an adoption. The Eleventh Circuit pointed out in *Lofton* that procedural due-process protection does not create an affirmative right to be deemed a suitable adoptive parent. *Id.* at 815.

legal interests because Massachusetts laws provide ample opportunity for homosexuals to adopt through non-religious organizations.<sup>185</sup>

Opponents suggest the exemption does not serve a child's best interests because allowing an agency to deny adoptions to homosexual parents limits the pool of potential adoptive parents.<sup>186</sup> There is no suggestion, however, that Catholic Charities impaired a child's best interests by placing them in a heterosexual home.<sup>187</sup> In fact, the Massachusetts Supreme Judicial Court viewed a father's failure to attend Catholic Charities's parenting classes as persuasive in affirming an order terminating his parental rights.<sup>188</sup> The Appeals Court of Massachusetts, conversely, has stated that a parent's homosexual lifestyle may affect a court's determination about a child's best interests.<sup>189</sup> The issue, though, does not turn on whether homosexuals provide an environment conducive to a child's best interests, but whether the state serves a child's best interests by eliminating an agency that provided the lion's share of special-needs children with adoptive homes.<sup>190</sup> It is hard to argue that Massachusetts is better equipped to fulfill its *parens patriae* duty without one of its most successful adoption agencies.<sup>191</sup>

#### IV. CONCLUSION

The debate over a religious exemption wrongly focuses on whether homosexuals should be able to adopt from all agencies in the state, regardless of a particular agency's beliefs or founding principles. Safely couched in the language of antidiscrimination and equality, opponents of an exemption mask the unsettling truth that pursuing equality at any cost betrays the very purpose of adoption to serve and protect the welfare of children. Denying a religious exemption to agencies providing services for needy children only serves to further the rights of a small group of potential adoptive parents rather than the best interests of children needing adoption.

Without an exemption for religious agencies, Massachusetts risks damaging

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185. See *supra* note 13 and accompanying text (discussing proposed religious exemption and quoting bill's language). The exemption merely allows religious agencies to operate according to their religious principles, and in no way affects a secular organization's operations or determinations of a child's best interests.

186. See Ballou, *supra* note 15, at 17 (quoting associate director of National Center for Adoption Law and Policy in Ohio). "We are concerned . . . eliminating an entire category of adoptive parents is just not good public policy." *Id.* at 17.

187. See Wen, *supra* note 4 (noting Catholic Charities strong reputation and skill in placing children with special needs).

188. See *Adoption of Gregory*, 747 N.E.2d 120, 126-28, 130 (Mass. 2001) (discussing father's failure to attend DSS recommended parenting classes).

189. See *supra* note 116 and accompanying text (discussing possible modification of custody award if parent's homosexual lifestyle harms child).

190. See Editorial, *Adoption and Doctrine*, BOSTON GLOBE, Feb. 18, 2006, at A20 (noting Catholic Charities's 720 adoptions since 1987 and reputation for success with special-needs children).

191. See *id.* (stating children in Massachusetts benefit from Catholic Charities).

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the very purpose of the antidiscrimination provisions in adoption laws: protecting a child's best interests. While safeguarding its commitment to unequivocal equality, Massachusetts forces religious groups to choose between accepting the state's morality and acting in accordance with their own religious principles. It is unlikely that adoption laws will influence churches and their parishioners to reevaluate long-held tenets of their faith. More likely, the laws will drive organizations like Catholic Charities out of service and only polarize parties on both sides of the gay-rights issue. Unfortunately, while there are several agencies other than Catholic Charities willing to provide adoptions to homosexuals, there is one less agency to share the burden of finding families for the thousands of needy children in Massachusetts. Ultimately, in the name of equality, Massachusetts has set aside the interests of needy children and contravened the very purpose of its adoption laws.

*Matthew W. Clark*