RECONSIDERING HOSTILE TAKEOVER OF RELIGIOUS ORGANIZATIONS

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TABLE OF CONTENTS

INTRODUCTION

Beginning in 2016, the headlines of major publications began announcing that Donald Trump had successfully completed a "hostile takeover" of the Republican Party.[1] What was meant by this claim, it appears, is that Trump had replaced the Grand Old Party's commitment to free markets, balanced budgets, and low taxes with promises of "universal health-care, tax hikes on hedge-fund managers, and a $1 trillion infrastructure plan."[2] And rather than finding himself a dissenter within a party that rejected his views, Trump instead skyrocketed to the top of the party, which accordingly transformed itself to accommodate him. Whether this appraisal is accurate or not,[3] it reflects concern about the associational

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1. *See, e.g.*, Eric Levitz, *Donald Trump's Not-So-Hostile Takeover of the GOP*, INTELLIGENCER (Dec. 24, 2019), https://nymag.com/intelligencer/2019/12/trump-takeover-gop-impeachment-prescription-drugs.html [https://perma.cc/3KLX-Q5DZ]; Joe Scarborough, Opinion, *Donald Trump's Hostile Takeover of the Republican Party*, WASH. POST (Mar. 1, 2016, 10:57 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/01/donald-trumps-hostile-takeover-of-the-republican-party/ [https://perma.cc/MA78-RXMX]; Ryan Lizza, *Donald Trump's Hostile Takeover of the G.O.P.*, NEW YORKER (Jan. 28, 2016), https://www.newyorker.com/news/daily-comment/donald-trumps-hostile-takeover-of-the-g-o-p [https://perma.cc/9THA-JQR2].

2. Levitz, *supra* note 1.

3. At least one source suggests it is not. Levitz, *supra* note 1.

integrity of a voluntary private organization—the Republican Party—and it suggests that some forms of organizational transformation could be problematic.

The same concern might arise regarding other private associations, including religious associations. Of course, all organizations undergo change. Notwithstanding stereotypical assumptions about religious organizations as ossified and impermeable to change, reform and transformation are endemic to religious communities, which inevitably partake in "an ongoing, dynamic relationship with the realities of everyday life."[4] Often, change occurs because of external events or pressures, which lead to internal disputes and, perhaps, the organization adopting new leadership and new values. For example, debates over pressing social issues such as slavery in the nineteenth century and same-sex marriage in the twenty-first century have permeated religious communities, leading ultimately to changed beliefs and sometimes schisms within congregations.[5] Given that some transformation is inevitable and universal within religious and other voluntary organizations, it would be unwarranted to assume that all change within a religious organization that touches on the structure or teachings of that religion is necessarily problematic.

Moreover, it might appear at first glance that outsiders to those organizations—including the government—have no interest in either encouraging or discouraging such change. But perhaps the matter is not so simple. In fact, several constitutional doctrines appear to be aimed at protecting against some forms of organizational transformation, particularly for religious organizations. Yet, courts applying those doctrines rarely ask some of the difficult questions underlying this concern for associational integrity. For example, when does organizational transformation constitute

4. Robert Orsi, *Everyday Miracles: The Study of Lived Religion*, *in* LIVED RELIGION IN AMERICA: TOWARD A HISTORY OF PRACTICE 3, 7 (David D. Hall ed., 1997); *see also id.* at 11–12 (describing an incorrect view of religion as "a phenomenon of closure and stasis"); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1423 (2003) [hereinafter Sunder, *Veil*] ("While traditional theories of religion as a sphere of injustice held religious beliefs to be unchanging, contemporary theorists argue that, in fact, religion is much more internally contested and subject to reasoned argument and change than earlier theorists acknowledged."); Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 RUTGERS J.L. & RELIGION 3, 9 (2005) ("Church doctrine is a living organism. It responds to challenges across time and cultures."). Professor Kelly notes that Roman Catholic scholars are somewhat resistant to the notion that Church teachings, which are labeled "infallible," can subsequently change; change has, however, occurred with regularity. *Id.* at 9–21.

5. *See, e.g.*, Watson v. Jones, 80 U.S. 679, 690–91 (1871); Meg Anderson, *United Methodist Church Announces Proposal to Split over Gay Marriage*, NPR (Jan. 4, 2020, 1:56 PM), https://www.npr.org/2020/01/04/793614135/united-methodist-church-announces-proposal-to-split-over-gay-marriage [https://perma.cc/38NR-MFHM].

a "hostile takeover"? And why, exactly, is this form of transformation a cause for concern?

This Article aims to grapple with these difficult questions about the meaning of hostile takeover, as well as about whether the state should care about it—that is, whether the state should ever act either to prevent or to encourage hostile takeover. Part I of this Article attempts to define hostile takeover in the context of religious organizations and compares it to the concept of hostile takeover in some secular contexts. Part II then considers what the position of the state should be vis-à-vis hostile takeover of religious organizations. This Article ultimately concludes that the state has only a very limited interest in either the facilitation or the prevention of hostile takeover.

I. DEFINING HOSTILE TAKEOVER

The first task of this paper is to define the concept of "hostile takeover." As explained in Part I.A., the term "hostile takeover" was first used by the Supreme Court in the context of religious organizations in the 2010 case *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*.[6] While that case dealt primarily with freedom of speech and association, rather than religious freedom, I argue in Part I.B. that the concept of hostile takeover plays a broader role in both Free Exercise Clause and Establishment Clause doctrines, as well as in other First Amendment contexts. Finally, Part I.C. highlights some fundamental questions about the scope and meaning of hostile takeover.

A. CLS v. Martinez

The U.S. Supreme Court introduced the concept of "hostile takeover" in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, which involved a challenge by a student chapter of the national organization Christian Legal Society (CLS) to a public law school's nondiscrimination policy requiring Registered Student Organizations (RSOs), which enjoyed certain benefits from the university, to accept any student who wished to join as a member or seek a leadership

6. 561 U.S. 661 (2010). "Hostile takeover" in the context of religious and other voluntary associations borrows from the concept of hostile takeover in the corporate law context. In corporate law, a hostile takeover is generally defined as a corporate acquisition that takes place without the consent of the target company's board of directors. *See, e.g.*, Bradley R. Aronstam, *The Interplay of* Blasius *and* Unocal*—A Compelling Problem Justifying the Call for Substantial Change*, 81 OR. L. REV. 429, 433–34, 434 n.21 (2002). In this Article, the term "hostile takeover" is used in a slightly different sense, to refer to an ill-defined type of change in the structure or beliefs of a religious or other voluntary association.

position within the organization.[7] This condition posed a problem for CLS, because it embraced very specific views about marriage and sexuality, including a belief that homosexuality was immoral.[8] Because the organization's rules required members to sign an affirmation of faith and excluded those who engaged in "unrepentant homosexual conduct," it could not comply with the so-called "all-comers" policy and was consequently excluded from the benefits of being an RSO (although it was still permitted to operate and use some of the school's resources).[9] While continuing to function outside of the RSO system, CLS also brought suit against the University of California, Hastings College of the Law, claiming that the school's enforcement of the policy against it violated CLS's rights of free speech, expressive association, and religious free exercise.[10]

In the U.S. Supreme Court, the case revolved primarily around CLS's free-speech claim, which the Court ultimately rejected. The Court found that the law school's RSO program constituted a "limited public forum" for speech.[11] As such, the Court held that the law school's policy only had to be reasonable and viewpoint neutral in order to be constitutional.[12] The Court found that the policy met both requirements.[13] It then made quick work of CLS's other two claims. The Court first subsumed the expressive-association claim under the free-speech claim.[14] Then, almost in passing, it dismissed the free-exercise claim because, under *Employment Division v. Smith*, the policy was neutral and generally applicable and therefore constitutional.[15]

Because CLS involved the student organization context and the issue of what sort of support or recognition from the law school CLS would receive, Hastings's policy was subject to a lower level of scrutiny than the Court would have applied to governmental interference with a freestanding association. In other words, in *CLS v. Martinez*, the student organization was seeking financial and other forms of support from the law school, which

7. *CLS*, 561 U.S. at 675. The policy as written simply forbids discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." *Id.* at 670. However, the parties stipulated earlier in the litigation that the effect of this policy was to "allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs," and the Supreme Court treated that stipulation as binding. *Id.* at 675–76 (alteration in original).

8. *Id.* at 672.

9. *Id.* at 672–73.

10. *Id.* at 673.

11. *Id.* at 682.

12. *Id.* at 685.

13. *Id.* at 697.

14. *Id.* at 680–83.

15. *Id.* at 697 n.27.

gave the law school greater control over its policies.[16] The decision in *CLS* should not, therefore, be taken to mean that the state would be similarly free to impose a comparable membership policy on religious groups outside of school walls.[17]

The concern about hostile takeover was raised by CLS in its principal brief. As CLS explained, the all-comers rule burdened its ability to "control and present its message," because it could not prevent students who oppose that message from joining the group and diluting or undermining that message publicly.[18] "If non-Christians could walk in and insist on taking a turn leading one of CLS's weekly studies of the Bible—a book whose interpretation is not free from controversy," CLS explained, "those meetings would cease to be an expression of CLS's beliefs . . . ."[19] The majority opinion in *CLS* largely dismissed this possibility as "more hypothetical than real," noting that there had been no "history or prospect of RSO hijackings at" the law school.[20] Justice Kennedy, who concurred, similarly noted that there was no evidence of such a phenomenon, but he suggested that this would be a different case—a "substantial" one—if the policy were "either designed or used to infiltrate the group or challenge its leadership in order to stifle its views," or if the all-comers policy had the "purpose or effect" of facilitating such takeover.[21] CLS, however, argued that because of the all-comers policy,

> [e]ither no outsiders will join CLS, in which case the College's Policy is essentially symbolic and does not serve any concrete legitimate purpose, or the opposite: Heterodox or hostile students will join and seek to assume leadership positions, in which case CLS's message will be distorted, and quite possibly sabotaged.[22]

Justice Alito's dissent took CLS's suggestion far more seriously, while acknowledging that it was not his primary concern.[23] Specifically, Justice Alito worried that "[a] true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses," presumably because larger groups, which are by

16. *Id.* at 680–83.

17. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) (holding that application of a nondiscrimination law that would force the Boy Scouts to accept a gay scoutmaster, in contravention of its beliefs, unconstitutionally infringes the Scouts' freedom of association).

18. Brief for Petitioner at 30–31, *CLS*, 561 U.S. 661 (No. 08-1371), 2010 WL 711183, at *30–31.

19. *Id.* at 30.

20. *CLS*, 561 U.S. at 692.

21. *Id.* at 706 (Kennedy, J., concurring).

22. Brief for Petitioner, *supra* note 18, at *31.

23. *CLS*, 561 U.S. at 740–41 (Alito, J., dissenting).

definition more popular, would be harder for a small group of committed antagonists to dominate.[24] He also criticized Justice Kennedy's caveat as incoherent and difficult to apply: "The Court holds that the accept-all-comers policy is viewpoint neutral and reasonable in light of the purposes of the RSO forum. How could those characteristics be altered by a change in the membership of one of the forum's registered groups? No explanation is apparent."[25] In other words, according to Justice Alito, the imagined change in membership does not make the all-comers policy any less viewpoint-neutral, and it does not make it any less reasonable in relation to the purposes of the limited public form.[26]

Justice Alito also acknowledged that hostile takeover will not necessarily be self-evident from the group's change in membership, or from any other objectively verifiable factors. For example, Justice Alito described a hypothetical scenario in which students who are hostile to the group's message "joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message."[27] Does this constitute hostile takeover or simply normal and healthy change in the group's identity through prescribed organizational channels? In Justice Alito's elegant formulation, "[w]hether a change represents reform or transformation may depend very much on the eye of the beholder."[28]

The concern about hostile takeover thus appears to focus not so much on the autonomy of the organization to choose its own leaders and shape its own message without government interference—a concern that was surely at the center of CLS's claims—but rather on the integrity of the organization. An interest in autonomy is an interest in conducting one's own affairs independently of intervention from the state.[29] An interest in associational or organizational integrity, as the term is used here, is an organization's interest in maintaining its existing identity, mission, or message. It is a concern about preventing hostile takeover that results in a change in the structure or beliefs of the association. As this Article argues, protecting institutional autonomy may have the effect of protecting institutional integrity, but that is not always the case. In some cases,

24. *Id.* Justice Alito noted that CLS had only seven members one year, so it would not take very many hostile students to join that group and overwhelm its prior membership. *Id.* at 740.

25. *Id.* at 740.

26. Perhaps Justice Kennedy was viewing the "reasonableness" prong of the test as the tool that courts could use to strike down policies having the purpose or effect of facilitating hostile takeover.

27. *CLS*, 561 U.S. at 740 (Alito, J., dissenting).

28. *Id.*

29. *See, e.g.*, Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 1001 (2004).

enforcing a "hands-off" stance for the state with respect to religious institutions may actually facilitate hostile takeover.

Indeed, interestingly, the lawsuit itself came about precisely because the group, which had previously been known as the Hastings Christian Legal Society or the Hastings Christian Fellowship, underwent a significant change in its governing structure and rules not long before the conflict with Hastings's policy arose.[30] As explained by the district court, during the 2003-2004 academic year, the organization had approximately five to seven regular members, one of whom was openly gay and two others of whom did not subscribe to "orthodox" Christian beliefs.[31] Then, the court explained, at the end of that academic year, three new students took on leadership roles in the organization, two of whom decided to affiliate the organization with the national Christian Legal Society.[32] That affiliation brought with it a requirement that all members sign the Statement of Faith and conform to CLS's code of conduct, including the aforementioned prescriptions about sexual morality.[33] This history raises the obvious question of which scenario represents a hostile takeover: the actual series of events leading the student group to adopt the Statement of Faith and code of conduct prescribed by the national CLS, or the hypothetical scenario in which a group of students takes back the group's identity by cutting off its affiliation with the national organization?

One final point should be highlighted before moving on from this discussion of *CLS v. Martinez*. Whether the decision was correct or incorrect—and there is ample commentary on both sides of that debate[34]—it does not address a much harder question lurking within the case. Specifically, while focused on discrimination against gays and lesbians, the

30. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. May 19, 2006), *aff'd*, 319 F. App'x 645 (9th Cir. 2009), *aff'd and remanded sub nom.* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010).

31. *Id.* at *3.

32. *Id.*; *see also CLS*, 561 U.S. at 672. The joint stipulation of the parties further noted that "[t]hese [three] individuals assumed leadership informally and no formal vote of the [organization's] membership was taken to elect them." Joint Stipulation of Facts for Cross-Motions for Summary Judgment at 9, *CLS*, 2006 WL 997217 (No. 3:04-cv-04484-JSW).

33. *CLS*, 2006 WL 997217, at *2.

34. *See, e.g.*, Sarah J. Kurfis, Note, *In Defense of the Hostile Takeover: A Move Towards More Democratic Student Organizations in* Christian Legal Society v. Martinez, 44 U. TOL. L. REV. 457 (2013); Mark Strasser, *Leaving the* Dale *to Be More* Fair*: On* CLS v. Martinez *and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 235 (2012) ("[T]he *Martinez* reasoning and result make the best of a jurisprudence that has lost its moorings."); Zachary R. Cormier, Christian Legal Society v. Martinez*: The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287 (2011) (criticizing the decision for erasing associational rights); Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2009 CATO SUP. CT. REV. 105, 110 (criticizing the decision on multiple grounds).

Court did not directly engage with the fact that a nondiscrimination rule forbidding discrimination on various protected grounds, including religion, forces religious organizations to accept members, and even leaders, who do not share the group's doctrinal beliefs. This possibility, which is implicit in the Court's rejection of the hostile takeover scenario, unquestionably imposes a unique burden on religious organizations, unlike those imposed on secular groups for whom religious discrimination is not central to their message. Of course, the decision to ignore this issue can be explained by the Court's decision to accept the parties' stipulation that the nondiscrimination policy was actually an all-comers policy. However, the possibility of enforcing religious nondiscrimination policies against religious groups raises significant questions at the heart of the idea of hostile takeover.

Consider, for example, *InterVarsity Christian Fellowship/USA v. University of Iowa*,[35] a case decided after *CLS* that involved the claim of a Christian student organization that the university's anti-discrimination policy violated its First Amendment rights.[36] The organization argued that its religious free exercise rights were violated by the university rule providing that it could not discriminate on the basis of religion, even in selecting its leaders. As the group explained, InterVarsity's "officers are its religious leaders who minister to its members, personify its beliefs, and play an important role in conveying InterVarsity's religious message and carrying out its religious mission;" thus, interfering with the group's ability to select its own leaders is tantamount to undermining the group's "right to shape its own faith and mission."[37] As discussed below, at the heart of the concept of hostile takeover is a concern about attacking a group's mission and message by interfering with its leadership and membership policies in a way that encourages or enables outsiders to shape those policies, and *InterVarsity* arguably represents one scenario in which courts may actually wish to avoid facilitating a hostile takeover.

B. Hostile Takeover Outside of CLS

The fear of hostile takeover is admittedly not central to the reasoning or holding in the *CLS* case itself. Antipathy toward the scenario it describes, however, may be understood to ground various First Amendment doctrines

35. 408 F. Supp. 3d 960 (S.D. Iowa 2019), *appeal docketed*, No. 19-3389 (8th Cir. Nov. 5, 2019).

36. *Id.* at 960.

37. *Id.* at 985 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012)). The district court in *InterVarsity* rejected the group's free exercise claim, however, finding that it was subject only to the same public-forum analysis as the group's free-speech and free-association rights. *Id.* at 987.

in differing contexts. Fundamentally, the concern about hostile takeover may be understood to reflect the fact that an organization's membership and (especially) its leadership not only convey but also help to constitute its message; the group's messengers embody its message, and the group must be free to ensure that those it has chosen to carry its message are doing so effectively.[38] As Chad Flanders explains, a group's leader is its "'standard-bearer' or 'ambassador.'"[39] Thus, "[i]f the [group] loses control of who gets to lead it, the meaning of that group is in jeopardy."[40] Both the Free Exercise Clause and the Establishment Clause have been mobilized in various contexts to protect associational integrity against hostile takeover by outsiders.

1. Other Religion Clauses Contexts

Numerous doctrines purport to protect religious organizations against being forced to accept members who do not share, and may undermine, their message. Of course, the Religion Clauses reflect numerous values and purposes,[41] and I do not mean to claim that institutional integrity is the sole or even primary one. Rather, this Article makes the more modest claim that one thread running through various Free Exercise Clause and Establishment Clause cases is a concern about preventing the takeover of religious institutions by those who do not share their missions and beliefs.

Most obviously, the ministerial exception, which is dictated by both the Free Exercise and Establishment Clauses, exempts religious institutions from lawsuits based on the hiring and firing of their ministers—a category of employee that is ill-defined but assumes some religious functions and some measure of leadership within the organization.[42] As Justice Alito, the author of the principal dissent in *CLS*, stated in *Hosanna-Tabor Evangelical*

38. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000) ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other."); Chad Flanders, *Religious Organizations and the Analogy to Political Parties*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 103, 105 (Micah Schwartzman et al. eds., 2016).

39. Flanders, *supra* note 38, at 105.

40. *Id.*

41. *See, e.g.*, Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 855 & n.117 (2009) [hereinafter Garnett, *Hands-Off Approach*].

42. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012); *id.* at 192 (weighing "the formal title given . . . by the Church, the substance reflected in that title, [the employee's] own use of that title, and the important religious functions [the employee] performed for the Church" in determining that a particular employee was a minister); *see also* Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir.) (outlining factors for determining when an employee qualifies as "ministerial"), *cert. granted*, 140 S. Ct. 679 (2019) (No. 19-267).

Lutheran Church & School v. EEOC, "a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful.'"[43] Were it otherwise, a woman who wished to be a Roman Catholic priest—or, more troublingly, a woman who wished only to challenge Roman Catholic doctrine—could presumably sue the church under sex discrimination laws, such as Title VII of the Civil Rights Act, for its refusal to hire her.[44]

Title VII of the Civil Rights Act of 1964 also exempts religious organizations from claims of religious discrimination, even when the employee is performing non-religious functions.[45] In a case involving a custodial worker who was fired from his job at a gymnasium run by the Mormon Church because of his failure to meet the requirements for church membership, the U.S. Supreme Court not only held that the Title VII exemption allowing religious employers to hire and fire on the basis of religion did not violate the Establishment Clause, but also suggested that it might be required, at least in part, by the Free Exercise Clause—that is, the Court suggested that religious employers were constitutionally entitled to an exemption from the anti-discrimination laws with respect to those employees who were hired to perform religious functions.[46] Moreover, the Court observed, if courts were able to require religious organizations to hire those who did not share their beliefs for non-religious jobs—and to decide which jobs were religious or non-religious, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[47] Thus, outside the public university student

43. *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (quoting Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006)).

44. *Id.* at 189; *cf.* Ordinatio Sacerdotalis, Apostolic Letter of Pope John Paul II to the Bishops of the Catholic Church on Reserving Priestly Ordination to Men Alone (May 22, 1994), http://www.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html [https://perma.cc/U5LD-VVAM] (explaining the Roman Catholic church's rationale for limiting the priesthood to men). Of course, this is a far-fetched scenario; it is hard to imagine such an individual who is otherwise qualified for the job of religious leader seeking a position purely in order to undermine the rules of the church. The more common scenario in ministerial-exception cases is that the religious organization does *not* officially discriminate on the protected ground, but is claimed to have violated its own rules by discriminating in the plaintiff's case. Jessie Hill, *Ties that Bind? The Questionable Consent Justification for* Hosanna-Tabor, 109 NW. U. L. REV. 563, 574 (2015) (discussing *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 352 (Minn. Ct. App. 2004), in which a Methodist church allegedly fired its music director for being gay, in violation of church rules).

45. "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a) (2018).

46. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335–36 (1987).

47. *Id.* at 336.

organizations context in which *CLS* arose, religious organizations enjoy greater protection from hostile takeover and are even constitutionally entitled to prevent those who do not share their beliefs from performing core religious functions.[48]

The so-called church property cases, in which the Supreme Court has largely decided not to decide disputes over church property when doctrinal questions are implicated, appear to cut the other way with respect to institutional integrity, while foregrounding the importance of institutional autonomy. For example, both *Watson v. Jones*[49] and *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*[50] involved disputes over religious doctrine in which one faction of the Presbyterian church, embracing doctrinal views that differed from the traditional views, sought recognition, as well as the control of church property, as the "true" church. In *Watson*, two factions within the church had differed over the issue of slavery in relation to church teachings; in *Mary Elizabeth Blue Hull*, the controversy revolved around the decision to ordain women and to take positions on social issues of the day.[51] In both cases, the situation could be characterized as a hostile takeover of the church by a particular faction. The Court's decision not to intervene in each case reflected, at least in part, an Establishment-Clause-related concern that courts should avoid intervening in doctrinal disputes.[52] Courts' hesitancy to delve into doctrinal disputes usually entails that they cannot take sides in a hostile takeover situation. Thus, the Court's embrace of institutional autonomy, as well as its insistence that courts should not decide ecclesiastical questions, was in tension with any interest it might have had in preserving institutional integrity.

The 1976 Supreme Court case of *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*[53] illustrates the tension between

48. Because *Amos* dealt directly only with the question whether the Title VII exemption for religious discrimination violated the Establishment Clause—particularly because it allowed such discrimination against employees performing religious as well as non-religious (e.g., custodial) duties—that case did not discuss the extent to which the Free Exercise Clause might or might not require religious employers be allowed to discriminate against employees performing non-religious functions.

49. 80 U.S. 679 (1871).

50. 393 U.S. 440 (1969).

51. *Watson*, 80 U.S. at 684; *Mary Elizabeth Blue Hull*, 393 U.S. at 442 & n.1; *see generally* Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1652–58 (2004) [hereinafter Garnett, *Assimilation*].

52. Garnett, *Assimilation*, *supra* note 51, at 1655. *Watson* was decided before the Establishment Clause was incorporated against the states, so it did not expressly rely on the Establishment Clause, but it was later understood and interpreted by the Supreme Court to rely on First Amendment principles. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 115–16 (1952).

53. 426 U.S. 696 (1976).

institutional autonomy and institutional integrity with particular acuity. *Milivojevich* centered on a dispute between the Serbian Mother Church and its North American diocese over the removal of a U.S. bishop and the reorganization of the diocese into three separate dioceses.[54] The diocese claimed that the bishop's removal and the diocesan reorganization were both improper under binding church rules, and the Illinois Supreme Court ultimately agreed, ordering the bishop's reinstatement and invalidating the reorganization.[55] The U.S. Supreme Court then reversed, holding that the state court had violated the First Amendment by "impermissibl[y] reject[ing] . . . the decisions of the highest ecclesiastical tribunals of this hierarchical church . . . and impermissibly substitut[ing] its own inquiry into church polity and resolutions based thereon" for the church hierarchy's determinations.[56] Instead, the Court insisted, using jurisdictional language, that the secular courts had no authority to override a decision by church authorities.[57]

It was key to the American diocese's argument that the church hierarchy had allegedly disregarded its own rules in replacing the bishop and had overridden the Church's constitution in reorganizing the dioceses. In other words, the diocese appeared to be claiming that the Mother Church had engaged in a hostile takeover of the American diocese by improperly replacing its leadership and restructuring its churches. Yet, in this instance, the Supreme Court was largely unconcerned about institutional integrity and appeared to favor a principle of institutional autonomy instead, suggesting that courts should not "inhibit[] the free development of religious doctrine."[58] The Court's statement fails to acknowledge, of course, that the "development of religious doctrine" could be a product of hostile takeover; instead—in the words of the dissent—the Court chose to credit "any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court."[59] In any case, the Court's deference to the church's internal decision-making structure would seem to have the virtue of maintaining the

54. *Id.* at 697–98.

55. *Id.* at 698.

56. *Id.* at 708.

57. *Id.* at 713 (stating that deciding the issue "would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them" and that "ecclesiastical decisions of the highest church judicatories need only be accepted if the subject matter of the dispute is within their 'jurisdiction'").

58. *Id.* at 710 (quoting Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).

59. *Id.* at 727 (Rehnquist, J., dissenting). Justice Rehnquist further suggested that the Court's refusal to review the underlying procedures leading to the Mother Church's decision risked "convert[ing the courts] into handmaidens of arbitrary lawlessness." *Id.*

neutrality of secular courts with respect to hostile takeover; thus, whether a transformation occurs or does not occur, the state simply has no role and cannot take sides in an internal ecclesiastical dispute.[60]

2. Secular Voluntary Associations

The problem of hostile takeover arises outside the context of religious organizations as well. Nearly every voluntary association will profess an interest in its own organizational integrity—that is, in preventing individuals who do not subscribe to the mission or values of the organization from usurping that organization's membership or leadership. For example, some scholars have noted the analogy between religious organizations and political parties with respect to the constitutional protection afforded to their identities, as against those who seek to compel inclusion and undermine their messages.[61] The Court has stated that the "inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'"[62] And much of the precedent relied upon by CLS in its briefs in the Supreme Court involved the associational rights of non-religious voluntary associations, such as the Boy Scouts.[63]

Although these secular contexts present helpful analogies, and in some cases provide the relevant constitutional principles regarding hostile takeover, it is important to recognize some significant differences. For one thing, political parties are engaged in a public function and therefore occupy a sort of middle ground with respect to their associational rights. The state has a stronger interest in how political parties function and therefore may

60. One might also argue that one goal of the Establishment Clause is to prevent "hostile takeover" of civil society by religion. For example, case law forbidding government sponsorship of sectarian religious prayer and symbols may be aimed at preventing a symbolic takeover of secular government by particular religious groups. An extreme example of a religious takeover of civil society is the case of the Rajneesh religious community, which occupied virtually all government positions in a small town in Oregon in the 1980s and organized it under religious rule. *See generally* David E. Steinberg, Note, *Church Control of a Municipality: Establishing a First Amendment Institutional Suit*, 38 STAN. L. REV. 1363 (1986); Janice L. Sperow, Note, *Rajneeshpuram: Religion Incorporated*, 36 HASTINGS L.J. 917, 928–32 (1985). This form of hostile takeover seems to me to raise very different questions from those discussed in this Article, concerning the state's stance with respect to the transformation of voluntary private organizations, and I therefore do not discuss it here.

61. *See, e.g.*, Flanders, *supra* note 38; Garnett, *Assimilation*, *supra* note 51, at 1689–90; Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 IND. L.J. 1 (2008). Of course, this analogy is implicit in the discussion of the Trumpian takeover of the Republican party with which this Article begins.

62. Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (quoting Ray v. Blair, 343 U.S. 214, 221–22 (1952)).

63. *See* Brief for Petitioner, *supra* note 18, at 18.

impose anti-discrimination norms upon them.[64] Religious organizations do not usually perform public functions—although it may be argued that some religious organizations are sufficiently implicated in public functions or public funding, such that the state has an interest in enforcing anti-discrimination norms to some degree. For example, religious hospitals and universities receive large amounts of public funding, and this funding may depend upon the religious institution's agreement not to engage in discrimination, even if its doctrinal principles were to require it.[65] Religious adoption and foster care agencies provide a service that is also provided by government agencies and under close state supervision.[66] Thus, the state may have an interest in how the private organization carries out its work, which may at times prevail over concerns about associational integrity, though perhaps not to the same extent that the state is concerned with political parties.

In addition, in many instances, membership in a religious group differs from membership in other voluntary associations because individual identity is often more tightly bound up with the former than the latter. Religious identity is experienced by many individuals as more akin to an immutable characteristic—such as ethnic identity or sexual orientation—than to membership in the Kiwanis.[67] Membership in a religious community may be inherited and unchosen, rather than purely voluntary, and family and social life may revolve around the religious community.[68] Abandoning

64. Smith v. Allwright, 321 U.S. 649, 658–59 (1944); Nixon v. Condon, 286 U.S. 73, 83–84 (1932); Nixon v. Herndon, 273 U.S. 536, 540–41 (1927).

65. *Cf.* Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (holding that subjecting a college to a requirement of nondiscrimination as a condition of receiving federal funds did not violate its First Amendment rights); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983). The Court specifically noted in *Bob Jones* that its holding—that a racially discriminatory university could be denied a tax exemption—applied specifically to religious schools and not to "churches or other purely religious institutions." *Id.* at 604 n.29.

66. *Cf.* Fulton v. City of Philadelphia, 922 F.3d 140, 160 (3d Cir. 2019) (involving a religious foster care agency that was carrying out a "public service pursuant to a contract with the government"), *cert. granted*, 2020 WL 871694 (U.S. Feb. 24, 2020) (No. 19-123); *see* Flanders, *supra* note 38, at 115–16.

67. *See* Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 51 (explaining that "[w]hen a group tells a person who she is, or supplies the meaning of his life, the prospect of being cut off from the group is chilling," and noting one commentator has given "examples of individuals who are so deeply socialized in and so closely identify with a group that leaving it would feel like killing off a part of themselves").

68. *See* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 117 (noting that "a significant portion of an individual's personality and identity often is tied to identification and interaction with a group," such that "the threat of expulsion or disapproval from the group understandably exerts significant coercive pressure on individual choice"); *see also id.* at 161 n.290 (observing that, while remaining in a religious community is a voluntary choice, "[k]inship relationships and membership in churches that practice infant or youth baptism are both examples of groups whose members did not make an initial voluntary decision to join the group").

one's religion simply because it does not reflect, or perhaps no longer reflects, one's deeply held convictions is thus "analogous to asking a person to conceal his ethnic identity or to disavow his sexual orientation—perhaps possible, but only at a profound personal cost."[69] Although it is conceivable that some individuals feel the same intergenerational attachment to their identity as, say, Democrats or Republicans, it is probably a safe supposition that this phenomenon is less common in secular voluntary associations.

C. Identifying When Hostile Takeover Is Occurring

I have so far engaged in a largely descriptive account of hostile takeover as a concept with a broad set of applications in the Religion Clauses context. But several questions, both normative and conceptual, remain. In particular, echoing Justice Alito's concern, it is reasonable to ask how we can determine whether hostile takeover has occurred or is occurring. That conceptual question, and the numerous sub-questions that it generates, are the topic of this section. This Part suggests that hostile takeover appears to have both a substantive component—in that it matters *which* values or beliefs are affected by the transformation, and *why*; as well as a procedural component—in that it matters *how* the takeover occurs and whether the institution's own internal rules are disregarded.[70] It nonetheless remains difficult to identify when hostile takeover is occurring, and this Part raises the possibility that the term is not actually a meaningful one. The next Part will directly address the normative question of what position the state should take, if any, vis-à-vis hostile takeover.

The examples from *CLS v. Martinez*—of a possible real hostile takeover that took place before the litigation began, and of a second possible hostile takeover hypothesized by Justice Alito's dissent—reveal several lacunae in the articulation of this concept. First, must a hostile takeover strike at the heart of the association's mission and values, or does any kind of change in the beliefs or doctrines of the organization potentially count? For example, the Boy Scouts of America changed its position on gay scouts and leaders amidst internal strife and at least partly as a result of a change in national leadership the year before. This change was probably not a fundamental alteration in the organization's mission or beliefs, however.[71] By contrast,

69. B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 38, at 419, 426.

70. Thanks to Chad Flanders for making this point.

71. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 675 (2000) (Stevens, J., dissenting) (noting that the Boy Scouts did not claim the exclusion of homosexuals was central to its message). After litigating before the Supreme Court for the right to exclude gay scoutmasters, on April 19, 2013, the Boy Scouts of America changed its policy and voted to allow gay scouts; in 2015, it voted to allow gay

the hypothetical scenario envisioned in *CLS* entails a takeover by individuals with not just a different or slightly more relaxed set of views, but rather with a set of views diametrically opposed to those of the existing association and its members. The original *CLS* could truly be said to be destroyed after such a process. Thus, we might ask whether a relatively marginal change could ever constitute a threat to associational integrity, and where to draw the line between a minor change and a major one. In other words, does the magnitude or importance of the change make the difference between "reform" and "transformation"?[72]

The idea that the takeover must somehow strike at the heart of the organization's mission or structure is an appealing one. Given that some doctrinal evolution over time is both expected and inevitable,[73] it may make the most sense to be concerned only about those changes that fundamentally threaten a religious organization's existence and risk eradicating it for all intents and purposes. But at the same time, it may not always be easy to determine which beliefs or structural elements are truly central to a religious organization's identity. For example, the Boy Scouts had initially tried to suggest that the exclusion of gays and lesbians was central to its tenets, before later abandoning that argument.[74] And if the state or the courts are expected to intervene to prevent hostile takeover—as discussed below—then how are they to determine whether this is the case, given courts' general discomfort with deciding questions of religious centrality?[75]

The recent evolution of the Roman Catholic Church on the subject of divorce provides an illustration of these difficulties. The Catholic Church does not recognize divorce and therefore teaches that remarriage after divorce is adultery—which constitutes the most serious of sins.[76] Because

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scout leaders. For a brief overview of the events leading up to this change, see Marice Richter, *Boy Scouts Lift Blanket Ban on Gay Adult Leaders, Employees*, REUTERS (July 27, 2015, 7:12 PM), https://www.reuters.com/article/usa-boyscouts/update-1-boy-scouts-lift-blanket-ban-on-gay-adult-leaders-employees-idUSL1N1072OF20150728 [https://perma.cc/L3NP-NY36].

72. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 740 (2010) (Alito, J., dissenting).

73. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981) ("A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality. The dominant view of what is central to the religion, and of what practices are required by the religion, may gradually change. Today's pious custom may be tomorrow's moral obligation, and vice versa." (footnote omitted)).

74. *Boy Scouts of Am.*, 530 U.S. at 675 (Stevens, J., dissenting).

75. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988) (rejecting the notion that courts should decide whether a belief or practice is central to a particular religion and arguing that doing so "would cast the Judiciary in a role that we were never intended to play").

76. Catechism of the Catholic Church ¶¶ 2380–84 (1993), http://www.vatican.va/archive/ENG0015/_P87.HTM [https://perma.cc/KV2P-ZWX6].

adultery is a "mortal" sin, remarried Catholics were long excluded from participating in the sacrament of Communion (also referred to as receiving the Eucharist).[77] However, Pope Francis, who assumed leadership of the hierarchical church in 2013, announced first in a private letter, and later in what he declared an official teaching entitled to deference by all Catholics, that not all remarried Catholics must be excluded from the Eucharist.[78] This evolution in the Catholic Church's teachings was highly controversial. While some within the church declared that Pope Francis's new approach simply resurrected dormant Catholic teachings about the primacy of individual conscience, or that the new teaching was less radical than it appeared, others declared the teachings to be "heresies" that violated "the moral and sacramental truth of the faith."[79] Thus, although the rule that hostile takeover must strike at the heart of a community's most central beliefs or practices is intuitively appealing, it is exceedingly difficult to apply, especially since religious adherents themselves often disagree over which beliefs are fundamental.

Second, what makes the takeover "hostile"? Is there a difference between change within an organization that is organic and legitimate and change that is inappropriate and perverse? The idea of hostile takeover seems to imply a *purpose* or *intent* on the part of the agents of change to undermine the organization. Perhaps it even implies bad faith on the part of the usurpers. For example, part of what is so troubling about the hypothetical takeover scenario described in *CLS* is the apparent evil motive of the students who would join an organization simply to destroy it. Yet, again, the reality on the ground is rarely so straightforward. For example, Richard Garnett, discussing the role of the state with respect to doctrinal change within religious organizations, has observed that sometimes governments "seek to assimilate religious traditions' doctrines and demands to their own," and adopt particular policies with precisely this purpose.[80] Do such policies constitute an example of the state acting in a way that facilitates hostile takeover, and if so, is it because of the purpose behind the policy? And does this imply that neutral state actions having only the incidental effect of encouraging particular doctrinal stances—such as, for example, tying anti-discrimination requirements to receipt of public funds—could not constitute

77. *See, e.g.*, Tyler Arnold, *Pope Francis's Controversial Step on Communion for the Divorced and Remarried*, NAT'L REV. (Dec. 12, 2017, 5:00 PM), https://www.nationalreview.com/2017/12/pope-francis-divorce-remarriage-communion-guidelines-letter/ [https://perma.cc/B9V6-9X24].

78. *Id.*

79. *Id.*

80. Garnett, *Assimilation*, *supra* note 51, at 1652, 1677 ("[G]overnments like ours sometimes act for the *purpose* of changing religious teachings. In other words, sometimes, promoting heterodoxy is policy.").

facilitation of hostile takeover? A test for hostile takeover that requires an inquiry into purpose or subjective motivation, of course, raises the question of how one is to determine when the change agents are acting in bad faith or with improper purpose—a notoriously treacherous path to follow.[81]

Third, if hostile takeover is concerned with preventing change that fundamentally undermines or even essentially eradicates religious organizations, one might be inclined to ask how we are to determine what is the essence of the religious organization in the first place, and in particular, who is entitled to define it. In other words, we might ask, "who is the Church?"[82] Otherwise, there will be no way to tell whether organizational change reflects a fundamental transformation that is hostile to the organization or, perhaps, a return to the organization's true mission. In *Mary Elizabeth Blue Hull*, for example, did the modernist reformers or the traditionalists represent the "true" church? Indeed, the question of the religious organization's identity has both a theoretical and a practical dimension. On the practical side, it is necessary to identify which entity can represent the church in litigation and other legal transactions. For example, in one recent case, a dispute arose over whether the Roman Catholic and Apostolic Church in Puerto Rico was the sole entity possessing a "legal personality," or whether individual Catholic schools in Puerto Rico could also be sued for eliminating pension payments.[83] The case was remanded because of a jurisdictional defect, but in a concurrence, Justice Alito noted the "difficult question[]"of "the degree to which the First Amendment permits civil authorities to question a religious body's own understanding of its structure and the relationship between associated entities."[84]

There is also the more theoretical question of which individuals or entities within the religious organization should be permitted to control that organization's identity and decision-making on behalf of its members. Supreme Court case law suggests that this question should be answered by considering the structure of the religious organization. In *Milivojevich*, the Court made clear that the decisions of the Mother Church—even if they were in violation of Church rules—should have been left alone by the courts, because the church structure was hierarchical and it was the Mother Church that had ultimate decision-making authority over matters like the

81. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

82. Karlan, *supra* note 61, at 9.

83. Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano, 140 S. Ct. 696 (2020).

84. *Id.* at 702 (Alito, J., concurring).

appointment of bishops and organizational structure.[85] In other words, *Milivojevich* suggests that courts should assume a deferential stance toward the religious entity's articulation of its own structure (even, presumably, when that articulation is one adopted in the course of litigation). To oversimplify a bit, within hierarchical religious associations, change has to come from the top down; within congregational organizations, it must come about through a majority vote.[86]

This third question, about the identity of the church itself, implicates the procedural dimension of hostile takeover. It suggests that the means by which the organizational change occurs informs whether the transformation is a hostile one. One could argue that change within religious organizations should occur only by the means approved by the organization itself, as articulated by the group's authorized decision-makers. As long as this is occurring, there is no hostile takeover, and the state has neither played a role in facilitating the change, nor is it required to help to prevent the change.

There are at least two problems with this account, however. First, most apparent hostile takeover scenarios involve change that is, in fact, brought about through proper channels. CLS members voted to join the national organization. The Boy Scouts of America leadership proposed, and the national board voted to approve, the change in policy with respect to gay scout leaders. Donald Trump won the Republican nomination fair and square. Dissenters who refuse to follow the established procedure within an organization usually do not get their way; instead, they remain dissenters.

A second problem is that this seemingly clear rule—defining the propriety of organizational change according to the procedure by which it occurs—admits of substantial ambiguity in its application. For example, in *Milivojevich*, it is true that the disputed actions concerning church leadership and diocesan structure were made by the highest authorities in the hierarchy, but the essence of the American diocese's complaint was that the Mother Church had disregarded its own rules and violated the church constitution, and therefore that it was actually without authority to take those actions. Thus, as Justice Rehnquist explained in dissent, unless church property claims "are to be resolved by brute force," courts will inevitably have to decide who is the proper authority within the religious organization and what its pronouncements mean.[87] There is no true "hands off" position that the court can take when this issue arises. As Justice Rehnquist continued:

85. Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 718–20 (1976).

86. *Id.* at 729 (Rehnquist, J., dissenting).

87. *Id.* at 726.

> We are told that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." But even this rule requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice is to be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.[88]

Thus, even if institutional decision-making structures are to be respected, there is no escaping court involvement in essentially ecclesiastical questions about internal decision-making structure.

In addition, the imperative of respecting institutional decision-making structures is made even more complex by the fact that those decision-making structures—including allocation of decision-making authority—are often precisely the subject of the dispute. As in *Milivojevich*, courts can rarely take it for granted that all parties will be in agreement about who has the authority to make a particular decision; instead, parties tend to bring disputes to court when they believe someone has acted without authority and in contravention of the agreed-upon rules.[89] To refuse to intervene in such a case is not to protect "the Church's" associational integrity or even its autonomy—it is simply to preserve the status quo and allow "brute force" to decide the matter. As Samuel Levine has argued, "in a case of a genuine dispute between parties regarding church doctrine, particularly when no religious tribunal has rendered an opinion, the majority's rationale [in *Milivojevich*] would not apply. In such a case, then, it would seem both proper and necessary for a court to adjudicate the matter."[90] At a minimum, courts will be required to make decisions about the decision-making and dispute-resolution structure of religious organizations.

Ultimately, the idea of hostile takeover seems, like Eurydice, to recede the moment one looks directly at it. Perhaps "hostile takeover" is more of a conclusion than a premise—a label, like "judicial activism," for doctrinal

88. *Id.* at 726–27 (citation omitted) (quoting *id.* at 713 (majority opinion)).

89. For example, in *Hosanna-Tabor*, the employee who was terminated from her teaching position claimed that the church had engaged in numerous violations of its own rules and procedures in terminating her. Brief for Respondent Cheryl Perich at 5–13, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3380507, at *5–13.

90. Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 92 (1997).

change that one dislikes or considers incorrect.[91] This possibility suggests that the concern underlying the specter of hostile takeover is not really about the associational integrity of religious organizations, but rather the competence of courts to decide ecclesiastical questions, voluntariness in religious organizations, or something else. At the same time, however, there may be a small subset of cases in which religious organizations—particularly smaller, more vulnerable ones—are truly threatened by the possibility of takeover. The next Part considers whether the state ever has an interest in intervening, either to prevent or to facilitate such takeover.

II. WHAT IS THE ROLE OF THE STATE?

The preceding discussion suggests that associational integrity is not a particularly compelling concern in and of itself. Due to the Free Exercise Clause and related concerns about the autonomy of religious organizations, it is obviously problematic for the state to order a religious organization to accept a leader or a member not of its own choosing.[92] One might nonetheless argue that the state itself should have no role with respect to encouraging *or* discouraging hostile takeover, and that courts should therefore guard against the state purposely either facilitating or preventing change within religious organizations. But what about adopting neutral rules—as in *CLS*—that predictably have such a result? Or what about adopting rules that do not coerce but strongly encourage such a result, through the use of subsidies and other incentives (also as in *CLS*)?

These questions evoke the additional problem of determining what the proper baseline is for identifying when the state has acted in a way that is likely to effect change within religious organizations. Is the appropriate baseline, as Pamela Karlan suggests, "no state regulation and no state benefits"?[93] Or on the other hand, do we have to acknowledge, as Richard Garnett argues, that doctrinal development can rarely be truly free of state interventions?[94] As explained above, there is no way that courts can escape becoming entangled in religious questions to some extent once their jurisdiction has been invoked in the context of a dispute between two factions of a religious organization.[95] It becomes difficult to determine exactly what positions government bodies can or should take to avoid

91. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002) (referring to one commentator's quip that "[j]udicial activism means a decision one does not like").

92. *E.g.*, *Hosanna-Tabor*, 565 U.S. 171.

93. Karlan, *supra* note 61, at 10.

94. Garnett, *Assimilation*, *supra* note 51, at 1671.

95. *See supra* text accompanying notes 87–90.

effecting internal change or empowering some groups within a religious organization over others.

Various positions can be gleaned from the existing literature on the autonomy and integrity of religious organizations. At one extreme, Madhavi Sunder has argued that the law should take a generous stance toward those who wish to change religious organizations from within and encourage dissent in the name of promoting equality and justice within those organizations. Thus, for example, she argues that decisionmakers should "cease privileging the norms of religious elites and . . . instead place elites and dissenters on an equal footing . . . when a specific dispute is brought before a decisionmaker."[96] This proposal suggests that courts cannot simply defer to the decisions of those currently in power and must instead hear the claims of those seeking to make religious organizations more just. Indeed, Sunder recognizes that religious identity often plays a unique and fundamental role in individuals' lives and identities. Thus, she suggests, religious organizations should make space for dissenters, allowing them to exercise their religion while retaining their identities.[97] Under such an approach, for example, women who wish to militate for equal rights within the Roman Catholic Church would have a strong claim to retain their claim to Roman Catholic identity while arguing for positions at odds with official church dogma.[98] The rights of dissenters—each one a potential participant in a hostile takeover—might therefore deserve more respect, and the state might be justified in seeking to encourage rather than discourage dissent.

Alternately, on the other end of the spectrum, the possibility of religious transformation also gives rise to the prospect that members of a religious community might find themselves suddenly at odds with official doctrine that has recently changed because of hostile takeover of the institution. Individuals who have committed deeply both to a faith community and to its tenets may suffer distress, finding themselves unmoored at the prospect of being asked to trade in their long-held values for brand new ones. The potential harm to individual members of an existing religious community that could arise from hostile takeover could suggest a concomitant

96. Sunder, *Veil*, *supra* note 4, at 1466.

97. *Cf.* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 495 (2001) (arguing that, too often, "cultural dissenters have either a right to culture (with no right to contest cultural meaning) or a right to equality (with no right to cultural membership), but not to both"); *see also* Kurfis, *supra* note 34, at 476–77 (praising rules that encourage debate and dissent within voluntary associations).

98. *Cf.* Gene Burns, *Secular Liberalism, Roman Catholicism, and Social Hierarchies: Understanding Multiple Paths*, *in* RELIGION, THE SECULAR, AND THE POLITICS OF SEXUAL DIFFERENCE 79, 93 (Linell E. Cady & Tracy Fessenden eds., 2013) (discussing the Roman Catholic sisters who took out full-page ads in the *New York Times* supporting abortion rights in 1984 and ultimately received relatively mild reprimands).

obligation on the part of the state to do what it can to protect against that hostile takeover.

Other possibilities lie somewhere in between. Corey Brettschneider, for example, argues that religious organizations should be subject to "democratic persuasion," but not coercion, to encourage them to adopt values that are compatible with those of liberal society.[99] In so doing, he rejects the "static" view of religious freedom which holds that the state should work to protect current or existing religious beliefs from state influence.[100] Brettschneider explicitly considers institutional integrity—which he calls a concern about "religious extinction"—but suggests that this concern is overstated, for two reasons.[101] First, he argues that there is and should be a dialectic of mutual influence between a religious group and the democracy in which it is embedded.[102] And second, he argues that there is no threat to religious freedom as long as the state is not acting coercively in nudging religious groups toward particular democratic values.[103] Brettschneider's framework suggests, then, that an action that would replace a religious leader at the behest of the state is clearly problematic because it is coercive,[104] but an action such as Hastings's imposition of an all-comers rule on the student CLS group is a mere denial of a subsidy and therefore acceptable.[105]

Taking yet another perspective on the problem, Richard Garnett argues that courts should avoid involvement in intrachurch disputes to the greatest extent possible, but not because of a concern about protecting the missions and beliefs of religious organizations from transformation.[106] Instead, he argues that churches have importance as independent centers of value formation and inculcation that is beneficial to society, and their ability to perform this function without intervention from the state must be protected.[107] Although religious organizations perform a socially valuable function, this aspect of churches justifies greater autonomy from the state rather than greater regulation, because religious organizations can only

99. COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 143 (2012).

100. *Id.* at 145.

101. *Id.* at 157.

102. *Id.*

103. *Id.*

104. *Cf.* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 115 (1952) (holding unconstitutional a New York law declaring the American arm of a Russian church to be autonomous from, and not subject to the leadership of, the Russian mother church).

105. BRETTSCHNEIDER, *supra* note 99, at 119.

106. Garnett, *Assimilation*, *supra* note 51, at 1699.

107. *Id.*; *see also generally* John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335 (2013).

perform this function of fostering and promulgating alternative value and belief structures if they maintain a high degree of independence from the state and its policy goals.[108] Going further, Garnett has also argued that religious associations possess a "sovereignty" so deeply rooted in our history that the state simply lacks jurisdiction over intrachurch disputes.[109]

One final possibility is that these difficult questions could be avoided through private ordering mechanisms. After all, corporations avoid hostile takeovers through contractual provisions such as "poison pills."[110] Perhaps religious organizations can similarly incorporate provisions into their governing documents that prescribe certain procedures or results (such as schism) in the case of particular kinds of doctrinal or structural change.[111] This approach could have the advantage of keeping state actors out of church property disputes and similar controversies arising from internal disagreements, except perhaps in the most extreme circumstances. At the same time, it is possible that such a solution would just push the dispute back to a different level, such that opposing factions would call on the courts to adjudicate the meaning and intent of those documents rather than adjudicating the original dispute. It would likely also raise substantial questions about the enforceability of those documents.[112]

None of these approaches presents an obvious answer to the proper role of the state with respect to hostile takeover, beyond suggesting the relatively straightforward rule that states should not directly intervene in religious organizations to name their leaders or actively shape their membership.[113] But such actions would be forbidden by other doctrines protecting religious autonomy anyway. Regarding the imposition of neutral rules that lack an easily identifiable purpose to infringe associational integrity, however, it is not clear that the state should concern itself at all with whether the rule is likely to foster or inhibit change within those organizations. Rather, this

108. Garnett, *Assimilation*, *supra* note 51, at 1699; Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008).

109. Garnett, *Hands-Off Approach*, *supra* note 41, at 861–62.

110. *See generally* Suzanne S. Dawson et al., *Poison Pill Defensive Measures*, 42 BUS. LAW. 423 (1987).

111. Michael Helfand has written extensively about private ordering within religious communities. *See generally, e.g.*, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769, 773 (2015).

112. *Cf.* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 516–17 (2013) ("Indeed, any case in which parties incorporate religious terminology [into a contract] is susceptible to being rendered unenforceable for fear of excessive entanglement with religious doctrine."). Helfand gives numerous examples of cases in which courts have abstained from deciding disputes because religious terminology or doctrine was involved. *Id.* at 513–19.

113. Indeed, to the extent that an all-comers rule forbidding *religious* discrimination might require such a result, this might suggest that both *CLS* and the *InterVarsity* case were wrongly decided.

Article contends that associational integrity is in most cases not a cognizable interest for the state or for courts reviewing the constitutionality of legal rules.

CONCLUSION

A concern about hostile takeover of voluntary associations, and particularly of religious organizations, appears to animate, at least in part, several different First Amendment doctrines. Yet the concept of hostile takeover eludes straightforward definition. It appears to have both substantive and procedural dimensions, but it is not easy to say at what point organizational change has crossed the line from natural evolution to wholesale evisceration of an association's fundamental values and principles. In addition, it is not entirely clear what attitude the state should assume with respect to hostile takeover—that is, whether associational integrity is a value worth protecting in the context of religious organizations. And if it is, it is not clear how the state should go about protecting it. Simple rules of neutrality or procedural deference do not appear to provide a way out.

Ultimately, it seems that the state's interest in associational integrity is highly circumscribed at best. In some instances, the courts may not be able to avoid intervening in internal disputes over control of church property or a church's legal identity in a way that implicates questions about church governance. In most cases, however, rather than concerning themselves with protecting existing religious beliefs and hierarchies, courts should rely on other Religion Clauses doctrines—such as those requiring courts to avoid answering ecclesiastical questions and protecting the autonomy of religious institutions—when directly confronted with disputes concerning hostile takeover.