



Put Not Your Trust in Princes: Catholics in the American Administrative State

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This article considers the fate of Catholics in the American administrative state, which has replaced the original constitutional system of three-branch government and checks and balances. It looks to the Catholic political experience in the United States, with an eye toward extracting lessons for contemporary Catholics about that experience. It then turns to the rise of an American administrative state and how it threatens Catholics and other believers. Finally, it considers the prospects for believers in secular democracies such as the United States.

The early twenty-first century has been an era in which social and political change has accelerated in ways not dreamed of only a few years before. At the opening of the century, federal and state laws protected the institution of marriage, religious institutions were able to conduct their affairs with a minimum of state interference, and no one seriously questioned which bathroom a male or a female should use. Since then, however, each of these facts has changed or has been seriously challenged: following passage of the Affordable Care Act (ACA) in 2010, the Obama Administration mandated that all employers in the nation—secular or religious—provide free contraceptive and abortifacient drugs to their employees;¹ in 2015, the U.S. Supreme Court discovered a right to same-sex marriage in the Constitution;² and in 2016, the Obama Administration tried to require schools across the nation to allow transgender students to use the bathroom or locker room that corresponds to each student’s “gender identity.”³ Along with these legal and regulatory changes, public opinion has changed: in 2001, 57 percent of Americans opposed same-sex marriage; by 2016, 55 percent supported it.⁴ What had once been the mainstream view in American society and public policy is increasingly being defined as a “fringe” position.

For Catholics in America, these changes stimulated both alarm and acquiescence. Catholic institutions, including colleges, hospitals, and nursing homes, came under assault from the Department of Health and Human Services (HHS) for not providing contraceptives to their employees. Most of these institutions resisted the attack, resulting in a number of

high-profile court cases, most notably one brought by the Little Sisters of the Poor. When polled, Americans expressed support for the Little Sisters of the Poor in their efforts to resist the HHS mandate.⁵ At the same time, however, polls indicated that most American Catholics support same-sex marriage,⁶ and two prominent Catholic politicians—Vice-President Joe Biden and Senator Tim Kaine (Democratic nominee for Vice-President) did so actively.⁷

The place of Catholics in America is more precarious than it has been in decades. Whereas only a half-century ago it seemed that Catholics had finally gained acceptance as part of American society, once again the Catholic Church in the United States seems to be under attack. What distinguishes the current situation for Catholics, however, is how American government has changed: at one time, Catholics may have been viewed with suspicion and even hostility by America's Protestant mainstream, but the Constitution and public law generally protected the independence of Catholic institutions; today, Catholics are viewed with both admiration (for social-service work) and hostility (for doctrine and ritual) by America's secular elites, while government policies increasingly threaten the independence of Catholic (and other religious) institutions.

The efforts of the Obama Administration to use the administrative state to advance an agenda of social change, as in the HHS mandate and the 2016 "bathroom directive," further reveal what has changed in the United States. In the past, disputes over Catholic schools and other institutions largely had to do with whether government could or should provide aid to these institutions. Today, government agencies have broad reach into American life and the activities of civil society, creating new threats for Catholics and their institutions that make the old debates about tax credits for parochial schools appear almost quaint. The Catholic Church in America, and the faithful who adhere to its teachings, now face not just the hostility of anti-Catholic bigots, but also the power of the administrative state.

This article considers the fate of Catholics in the American administrative state. To that end, it looks to the Catholic political experience in the United States, the rise of an American administrative state, and the prospects for believers in secular democracies such as the United States.

CATHOLICS IN THE UNITED STATES: A BRIEF, THEMATIC HISTORY

The history of Catholics and of the Church in the United States is marked by freedom and opportunity, but also suspicion and even hostility.⁸ Catholics lived in America since colonial times and some played key roles in the

Founding. As the nation grew, Catholics were part of its fabric, but often the subject of hostility from the Protestant majority. Often, anti-Catholic prejudice was open and pronounced, while at other times it was quiet, incidental, or irrelevant.⁹

Even in the twentieth century, as Catholics scored achievements in all sectors of American society, Catholicism continued to be the subject of suspicion and prejudice among both elites and masses. Governor Al Smith's (D-NY) 1928 presidential campaign was marred by anti-Catholic hostility, and even John Kennedy's successful candidacy faced resistance because of his religion.¹⁰ Several presidents were frustrated in their attempts to appoint an ambassador to the Holy See, until Ronald Reagan was able to overcome opposition to naming William Wilson to the position. Public aid to parochial school students provoked a long-standing fight in several jurisdictions.

The history of Catholics in America, and in American politics, is certainly not all negative, but neither is it a record of unconditional acceptance of Catholics. The record is complex, but certain patterns can be discerned in American Catholic history that have shaped the Catholic political experience in the United States:

1) The U.S. constitutional system created an environment that has been congenial to the growth and success of Catholic citizens and Catholic institutions. This system is marked by the religious provisions of the First Amendment, as well as the prohibition against a religious test for office.

The U.S. Constitution offered Catholics in America a more congenial legal environment in which to flourish than most nations in Europe had done. In Britain, the public practice of Catholicism was not outlawed, but Catholics were explicitly citizens of a lesser class until the nineteenth century. Although a minority in America, Catholics were not prohibited from holding office (No Religious Test Clause: Article VI, Section 3) and were guaranteed the free exercise of religion by the First Amendment. The first Catholic diocese in the United States (Baltimore, under Bishop John Carroll) was established in 1789; in contrast, the Catholic hierarchy in Britain was not restored by the Holy See after the Reformation until 1850. As George Washington made clear to Catholics in his letter of 1790, America was a place for people of all faiths. Responding to an address of congratulations from American Catholics on his election as president, he wrote that "all those who conduct themselves as worthy members of the Community are equally entitled to the protection of civil Government."¹¹ Although objects of suspicion and at times discrimination, Catholics in America enjoyed constitutional protection.

2) American culture—and therefore American political culture—has been shaped largely by non-Catholic influences: in the nineteenth and early twentieth centuries, a generic Protestantism served as a kind of civil religion; in the post-World War II era, this generic Christianity has increasingly given way to the secularism of the nation's post-Christian elites.

Officially, the United States was a country with no established religion, but for much of the nation's history American culture—including its political culture—had a distinctively Protestant cast. As Joseph Bottum put it succinctly, “Protestantism helped define the nation.”¹² Protestant Christianity set the tone for public morality and shaped national values regarding work, family, society, and politics.

For many American Protestants, Catholics were more or less alien to American culture. In the nineteenth century, this anti-Catholicism took two main forms: nativism and hostility toward Catholic schools. Nativism came in reaction to waves of immigration, much of it by Catholics from Ireland, Italy, Poland, and other European nations. Nativists saw this influx of Catholics as a threat to the fundamentally Protestant nature of American society, leading to anti-Catholic agitation and violence and pressure for restrictions on immigration.¹³

Schools were a further point of contention. Public schools socialized American children in a generic kind of Christianity, a fact which helped stimulate the creation of a Catholic parochial school system. Many Protestants feared that tax dollars would be used to support such schools, which for them amounted to subsidizing “popery.” In the second half of the nineteenth century, legislation at the state level and a proposed constitutional amendment sought to prohibit support for non-public schools. In 1875, President Ulysses Grant called for a constitutional amendment to bar the use of public funds to support “sectarian schools,” a measure that was formally proposed by Representative James G. Blaine. It passed the House, but failed in the Senate. Similar provisions, generally called “Blaine Amendments,” were adopted by more than thirty states.¹⁴

In the twentieth century, particularly after World War II, American culture became more accepting of Catholics and Jews. This trend seemed to peak in the 1950s, when the idea of defining America as a Judeo-Christian nation was promoted by President Eisenhower and others. The political rise of the Kennedys in the 1950s and 1960s seemed to symbolize a new American openness to Catholics, but the moment did not last for long.

With the social and political upheavals that occurred at the same time, the generally Protestant culture of America increasingly gave way to secularism. This change can be seen in widespread acceptance of abortion, sexual promiscuity, divorce, homosexuality, same-sex marriage, pornog-

raphy, and other developments. Catholics have just as awkward a place in this secular culture as they did in the formerly Protestant one; as R.R. Reno has put it, secular elites abandoned the Protestantism of previous generations, but they have retained the anti-Catholic prejudices of their forbears.¹⁵

3) *America's non-Catholic elites have generally treated Catholics and their institutions instrumentally, i.e., according to whether those elites view Catholicism as consistent with or an obstacle to their social and political agendas.*

This pattern can be seen most clearly in the record of the past half-century. During the civil rights era, Protestant and secular elites looked favorably on Catholics and their institutions, which largely supported an end to racial segregation and promoted greater racial equality. Catholic clergy, religious, and laity were active in the civil rights movement, and religiously motivated involvement in politics was looked upon positively because that participation supported the equality agenda of political and social elites. Within a few years, however, the tables would turn, as Catholics (along with many other Christians and Jews) became active in the emerging pro-life movement.

The Catholic Church opposed not only abortion, but also contraception, euthanasia, and same-sex marriage. On top of that, the Church was (and is) led by a celibate male clergy, which makes Catholicism the most visible “sign of contradiction” against the sexual revolution and radical feminism. Not surprisingly, Catholic involvement in politics—unless it was by Catholics (like Joe Biden or Tim Kaine) who have embraced the secular progressive social agenda—was now regarded by elites as a threat to American democracy. Many in the pro-life movement have complained that Republican politicians embraced pro-life positions in their campaigns, but once in office were not willing to spend much political capital promoting a prolife agenda. Likewise, as the Obama Administration has demonstrated with the HHS contraceptives mandate, the nation’s elites put their own agendas first. For political and social elites, Catholics serve either as useful companions or obstacles to be overcome.

This brief history highlights some key lessons for Catholics regarding their place in America. First, Catholics have prospered in the United States, although no one could mistake this nation for a Catholic one. Second, Catholics should not expect that American culture and policy will be congruent with their values and beliefs; even when American culture was more explicitly religious in tone, that tone was a Protestant one. Finally, as the Psalmist said, “put not your trust in princes”: political and social elites generally put their own agendas first, and Catholic concerns are not usually given a high priority in shaping these agendas. In a political system

that has grown increasingly centered on policies set by the executive and administrative agencies, Catholics must expect the political-legal environment to be one that constrains—and at times threatens—them.

AMERICA'S ADMINISTRATIVE STATE

Few citizens realize the extent to which government in the United States has been turned over to an administrative state. As Professor Bradley Smith has put it so succinctly, the U.S. Constitution was designed to create a federal government of limited power that would be held in check by the operation of its checks-and-balances system. In the twentieth century, that arrangement changed: the power of the federal government, as interpreted by the Supreme Court, came to be seen as essentially plenary in nature, and a functioning checks-and-balances system based in all three branches of government has given way to a system in which citizens, private institutions, or states and local governments take to the courts to halt or claim exceptions to policies they oppose.¹⁶

This new arrangement is rightly termed an “administrative state,” because administrative agencies have been given all three types of governmental power: Congress has delegated to them the power to write rules that have the force of law; they then enforce those rules and bring charges against violators; and most adjudications of administrative violations are heard before administrative judges. Administrative rules are not only now the fastest-growing body of law in the United States, but also the means by which some of the most significant and controversial aspects of public policy have been enacted. Two of the governmental actions that most concerned Catholics in the past few years—the “HHS mandate” on providing contraceptives to employees and the Obama Administration’s guidance letter on bathrooms—have been activities of the administrative state.

These two examples also highlight a feature of the American administrative state as it has developed in the past four decades: it has come under increasing White House control. The original impetus of administrative government came from the Progressives of the early twentieth century, who favored “government by expert” over governance by the traditional elected institutions. Although the federal government grew during the New Deal and World War II, the real metastasis of the administrative state occurred as a result of Johnson’s Great Society programs and laws passed in the 1970s. In response to the spate of new regulations being promulgated each year by agencies, presidents since Richard Nixon have worked to bring the rulemaking process under greater White House control. Chief executives of both parties worked to govern rulemaking and to make sure that the rules issued during their administrations better reflected the priori-

ties and preferences of the president. This trend of White House control came to greatest fruition in the two most recent presidencies.

Presidents George W. Bush and Barack Obama managed to bring agency rulemaking under de facto presidential control.¹⁷ For example, there is no doubt that the “HHS mandate” on contraceptives was created under White House influence. Indeed, when the initial proposed regulation was published in the *Federal Register* in August 2011,¹⁸ there was a significant backlash against it from Catholics as well as other religious groups. In response, in February 2012 President Obama announced a “compromise” version of the regulation, although it was a unilateral compromise made by the president himself.¹⁹

The battle over the HHS mandate further illuminates the principle of “put not your trust in princes.” During the congressional debate over passage of the Affordable Care Act, the United States Conference of Catholic Bishops (USCCB) and some Catholic organizations lobbied in favor of the bill. The bishops’ conference, while working hard to insure that the bill included language against abortion funding, nevertheless supported the bill in the House and offered to assist the bill’s advocates in promoting it in the Senate.²⁰ Ultimately, the USCCB opposed the final bill, because it did not explicitly prohibit abortion funding and included no clause protecting religious conscience. Nevertheless, the bishops had become associated with support for Obamacare. Up to almost the very end of debate over its passage, the bishops had worked to pass the Affordable Care Act. The Catholic Health Association, led by Sr. Carol Keehan, was particularly important in building support for it.²¹

The announcement of the HHS mandate in 2011 took the bishops by surprise. Cardinal Timothy Dolan, then-president of the USCCB, wrote to the people of the Archdiocese of New York that he had been assured by President Obama that the work of the Catholic Church would not be impaired.²² Many observers focused on Cardinal Dolan’s implication that the president had deceived him. Others saw Dolan’s surprise as the unfortunate consequence of trusting too much in a political leader. With the Affordable Care Act as law, the Obama Administration was now in a position to issue regulations that advanced the president’s agenda with impunity, save only the government’s ability to defend the rule in court.

CHALLENGING THE EXECUTIVE/ ADMINISTRATIVE STATE IN COURT

The Affordable Care Act provides a significant and useful example of the American administrative state in action. It was a sweeping bill (2700 pages of text) passed by Members of Congress who possessed only a vague

and general understanding of what it would do; it contained thousands of clauses that delegated to the Secretary of Health and Human Services discretion to write rules to implement the law; it enacted specific requirements and timetables for implementation of the act; and it created new bureaucratic institutions to make the law's provisions a reality.²³ By its very nature, it stimulated the bureaucracy to promulgate thousands of pages of regulations; many of these rules are technical in nature, while others—especially the mandate for all employers in the nation to provide coverage of contraceptive and abortifacient drugs in their health care plans (the “HHS mandate”)—reflect substantive political choices by the Obama Administration and are highly controversial.

Implementation of the Affordable Care Act presents a microcosm of the contemporary administrative state. Consider these examples:

- Shortly after passage of the law, President Obama issued an executive order that kept in place a previous prohibition of federal funds to pay for abortions, as part of a deal to win votes for the bill from several Catholic Democrats in Congress (because the bill contained no explicit restriction on abortion funding);
- In several instances, President Obama unilaterally suspended or delayed enforcement of explicit deadlines (e.g., employer-provided insurance, penalties for citizen failure to purchase insurance) in the act, without legal authority to do so;
- The Internal Revenue Service authorized taxpayers residing in states that did not establish health-insurance exchanges to receive a subsidy for health insurance bought through a federal exchange, despite language in the law (and considerable evidence about the background of the law) that restricted these benefits to consumers who bought insurance through state-established exchanges (litigated in *King v. Burwell*, 2014—the Court ruled in favor of the Obama Administration, and Justice Scalia's dissent said that the Act should henceforth be called “SCOTUSCare”); and,
- The HHS mandate required religious employers to provide contraceptive coverage in violation of their conscience, exempting only churches but not religious institutions or companies whose owners had strong religious convictions (litigated twice, in *Burwell v. Hobby Lobby Stores*, 2015,²⁴ and *Zubik v. Burwell*, 2016²⁵).

As implemented since 2010, the Affordable Care Act has moved the nation aggressively toward executive/administrative government, with the courts acting as partial (but more or less accommodating) restraints on the administrative state. As these examples demonstrate, implementation has proceeded according to the dictates of the White House. The actual language of the law has been taken by the administration as a license to regulate in pursuit of its policy goals.

One of the most contentious aspects of Obamacare has been the HHS contraceptives mandate, which led to a spate of lawsuits. The various suits were consolidated into two major cases, *Burwell v. Hobby Lobby Stores*, 2015, and *Zubik v. Burwell*, 2016. In the first, the Supreme Court ruled that privately-held corporations could not be compelled to comply with the mandate if it interfered with the free exercise of the owners' religious convictions. In *Zubik*, the Court sought to create a compromise between plaintiffs and the government over achieving the administration's objective of universal access to contraception. The Little Sisters of the Poor and other religiously-oriented institutions could not be required to offer contraceptive or abortifacient coverage in their health plans, or to facilitate their insurers offering such coverage, but at the cost of the federal government being able to provide access to these drugs to all employees in the United States covered by employer-provided plans. In short, the Court upheld the right of religious employers to avoid involvement in offering such drugs, but prevented religious non-profit organizations from insulating their employees from contraceptives.²⁶

The Supreme Court's compromise in *Zubik* also highlights how American government has changed. Rather than having a matter such as the nature and extent of health care policy in the United States be determined through the legislative process, health care policy is now set through administrative rules, executive fiat, and "compromises" concocted by a court. The Supreme Court was not willing to go as far as the Obama Administration wanted it to on the matter of forcing the Little Sisters of the Poor (and other plaintiffs) to violate their consciences, but the Court's compromise also insured that the administration could create a new kind of right of universal access to contraceptives and a mandate that every insurer in the country provide them.

THE FUTURE OF CATHOLICS IN THE ADMINISTRATIVE STATE

The development of American government in the modern era, particularly in the twenty-first century, ought to give Catholics pause. There is no reason to expect that the administrative state will be accommodating

to Catholic beliefs and concerns, nor will the courts provide a firewall of protection for religious believers. While it is not inevitable that the United States will become hostile to Catholics, it is the case that the nation has moved a long way from that moment in the 1950s and early 1960s when it seemed that America had accepted Catholics as part of a larger embrace of Judeo-Christian culture.

The United States has not only developed an administrative state, but presidents since Nixon have worked to make that arrangement an “executive administrative state.” Chief executives of both parties endeavored to bring rulemaking under White House control, either to promote presidential objectives or to thwart policies the president opposed, and the result has been that administrative rulemaking is now largely directed out of the Oval Office. Furthermore, presidents—especially the most recent ones—have expanded unilateral presidential powers, so more power to make substantive policy decisions has been taken away from lawmaking and placed on the desk of the president.

Once again, Obamacare serves as an excellent example of how this works and what it suggests about the future. President Obama issued an executive order to prevent the use of federal funds for abortion under the ACA; another president could reverse that order in minutes. The president suspended enforcement of the law, delayed deadlines, unilaterally re-wrote a proposed rule and called it a “compromise,” saw to it that the IRS re-interpreted the ACA to meet his policy goals, and used HHS to pressure believers in business and the non-profit sector to advance a pro-contraception and pro-abortion agenda. The Supreme Court blunted the direct attack on groups like the Little Sisters, but in doing so shaped a larger policy of mandatory access to contraceptives.

Catholics are likely to find that they inhabit an increasingly narrow space for practicing their religion outside of the sanctuary. Catholic dioceses and organizations have withdrawn from the business of adoption due to laws that require treating same-sex couples as equivalent to married men and women. Increasing pressure to accept anyone as having the right to define their own “gender identity” will further limit Catholic schools, hospitals, and other institutions. It is not unrealistic to think that federal funds given to aid educational, health, and social service institutions—including Catholic ones—will one day come with a requirement to accept a range of activities and practices unacceptable to Catholics (same-sex marriage, self-defined gender identity, etc.). These developments will further circumscribe Catholic participation in the larger life of the nation. Religion, as least for Catholics, will likely be restricted to the domain of the

strictly personal—what the Obama Administration referred to as “freedom of worship.”

It is not outlandish to suggest that Catholics will one day find themselves limited to practicing their faith almost exclusively within the confines of church buildings. Things appear to be moving in that direction. Catholic institutions will still have a place in American society, although they will find themselves without government support or able to participate in the public square only to the extent that their activities (e.g., feeding the hungry) are congruent with the agenda of America’s elites. Those activities that do not conform to the elite agenda or the secular mainstream, such as protecting natural marriage and families, will have to be self-supporting or will cease to exist.

In *Democracy in America*, Alexis de Tocqueville warned of problems in democracy, including the tyranny of the majority and the threat of a kind of soft despotism.²⁷ American Catholics, as a minority in a country dominated by a Protestant and/or secularist culture, will find it difficult to practice their faith beyond the sanctuary. As for soft despotism, Tocqueville warned that it would advance from democratic government’s desire to make citizens happy. In contemporary America, making citizens happy has come to mean satisfying the demands of particular groups and not offending those who claim certain identities. The citizens of the United States have not quite become the “timid and industrious” animals of which Tocqueville wrote, but the executive administrative state has moved the nation away from the kind of democratic republic that the Founders created. Catholics will have difficulty finding a comfortable place in this new order.

Notes

1. The so-called HHS mandate was first promulgated in 2011. See United States Office of the Federal Register, *Federal Register, Volume 76, Number 149, August 3, 2011, Pages 46595–47054*. Washington D.C. UNT Digital Library. <http://digital.library.unt.edu/ark:/67531/metadc52326/>. Accessed September 20, 2016.

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4. Pew Research Center, “Public Opinion on Same-Sex Marriage,” May 12, 2016, <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>. Accessed September 20, 2016.

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6. Robert P. Jones and Daniel Cox, "The Francis Effect: U.S. Catholic Attitudes on Pope Francis, the Catholic Church, and American Politics," August 2015, <http://www.ppri.org/wp-content/uploads/2015/08/PRRI-RNS-2015-Survey.pdf>. Accessed September 20, 2016.

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8. See, for example, Russell Shaw, *Catholics in America: Religious Identity and Cultural Assimilation from John Carroll to Flannery O'Connor* (San Francisco: Ignatius Press, 2016); James T. Fisher, *Communion of Immigrants: A History of Catholics in America* (New York: Oxford University Press, 2008); and Patrick W. Carey, *Catholics in America: A History* (Lanham, Md.: Rowman & Littlefield, 2008).

9. See, *inter alia*, Michael Schwartz, *The Persistent Prejudice: Anti-Catholicism in America* (Huntington, Ind.: Our Sunday Visitor, 1986).

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11. George Washington, "Letter to Roman Catholics in America," March 15, 1790, <http://founders.archives.gov/documents/Washington/05-05-02-0193>. Accessed September 22, 2016.

12. Joseph Bottum, "The Death of Protestant America: A Political Theory of the Protestant Mainline," *First Things*, August 2008, <https://www.firstthings.com/article/2008/08/001-the-death-of-protestant-america-a-political-theory-of-the-protestant-mainline>. Accessed September 22, 2016.

13. Joseph Zeitz, "When America Hated Catholics," *First Things*, September 23, 2015, <http://www.politico.com/magazine/story/2015/09/pope-francis-visit-catholic-history-213177>. Accessed September 22, 2016.

14. "Blaine Amendments," The Becket Fund for Religious Liberty, <http://www.becketfund.org/blaineamendments-old/>. Accessed September 22, 2016.

15. R. R. Reno, interviewed on "Kresta in the Afternoon," September 5, 2016, <https://avemariaradio.net/audio-archive/kresta-afternoon-august-12-2016-hour-1/>. Accessed September 22, 2016.

16. Remarks of Professor Bradley Smith, panel on "The Future of the Constitution," Miami University/Janus Forum Constitution Day symposium, held at Miami University, Oxford, Ohio, September 22, 2016.

17. See Ryan J. Barilleaux and Jewel Maxwell, "Has Barack Obama Embraced the Unitary Executive?," *PS: Political Science and Politics* 50(1) (January 2017): 31–34.

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24. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

25. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

26. See “Supreme Court Rules Unanimously in Favor of Little Sisters,” The Becket Fund for Religious Liberty, <http://thelittlesistersofthepoor.com/#supreme-court-ruling>. Accessed September 28, 2016.

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