What Catholic Social Teaching Says to Catholic Sponsors of Church Plans

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As we enter the third millennium, men and women, especially in the poorest countries, are unfortunately still deprived of access to health services and the essential medicines for their treatment. Many of our brothers and sisters die each day of malaria, leprosy and AIDS, sometimes in the midst of the general indifference of those who could or should offer them support. May your hearts be attentive to these silent pleas! It is your task, dear members of Catholic medical associations, to work so that every person, regardless of his social or economic status, can exercise his primary right to what is necessary for restoring his health and thus to adequate medical care.¹

- Pope John Paul II (July 7, 2000)

The Holy Father may not have had the citizens of the United States in mind when he spoke these words at an international Jubilee gathering of Catholic doctors in July 2000. The United States obviously does not stand among the "poorest countries,"² and, while AIDS is rife in our country,
malaria and leprosy do not pose a threat to most Americans with anything close to the fear they inspire in nations with less sophisticated health systems. Nonetheless, the United States health insurance system does challenge the ability of an uninsured or underinsured person to "exercise his primary right to what is necessary for restoring his health and thus to adequate medical care." Most Americans under the age of sixty-five are enrolled in health insurance plans that are maintained by the employer of a family member. As a result, an American's struggle to obtain payment for the level of medical services that he or she desires must often take place in the field of employee benefits. However, the strong preemption clause of the Employee Retirement Income Security Act of 1974 (ERISA) poses a significant threat to the enforcement of claims based on state law. In the United States, therefore, whether a person may obtain access to and payment for "what is necessary for restoring his health and... adequate medical care" implicates two important issues: first, whether there is a right to a just wage, and, second (and more particularly), how the notion of a just wage is affected when health insurance benefits are offered as part of a compensation arrangement.

This article addresses, in very narrow terms, the concept of a just wage in terms of per capita gross national product); see generally John Maggs, Much Better Than Just Good, THE NATIONAL JOURNAL (Jan. 16, 1999).

3. See Appendix A, infra.


5. See, e.g., CAMPBELL, supra note 4, at 1-2 (noting that part-time workers are more likely to be uninsured than full-time workers).


7. John Paul II, supra note 1, ¶ 4.
as it has developed in modern Catholic social teaching. The United States workplace has sometimes been slow to recognize the parameters of what it means to offer a just wage and our courts have generally been loathe to recognize an absolute right to health care. In contrast, the social teachings of the Roman Catholic Church are not nearly so vague. The article proposes that a self-consciously Catholic notion of justice must form the basis for the response of an institutional Catholic employer to the civil law issues involved in the design and operation of a private employee health benefit plan in the United States. For the Catholic employer, choices concerning the design of employee health

8. This article adopts the term “Catholic social teaching” to refer to the collection of papal encyclicals, conciliar documents and episcopal teachings that address the Roman Catholic Church’s understanding of and role in promoting justice in society. An explanation of the term “Catholic social teaching” and other names applied to this body of work is presented in Richard P. McBrien, An Ecclesiological Analysis of Catholic Social Teachings in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER - BUILDING ON ONE HUNDRED YEARS 147, 147-48 (Oliver F. Williams & John W. Houck eds., 1993). See also William J. Byron, Ten Building Blocks of Catholic Social Teaching, 179(13) AMERICA 9 (Oct. 31, 1998).


12. Throughout this article, the term “Catholic employer” is used to describe an institutional employer whose affiliation with the Catholic Church is sufficiently strong to enable the employer to qualify for the church plan exemption described in Section 3(33) of ERISA. Thus, while a Catholic person might find that the same principles have bearing on his or her own employment-related decisions, this article is not specifically addressing the moral ethics that might govern such a person’s duties in a secular corporation or in his or her own personal life. See generally James Martin, The Business of Belief, 183(1) AMERICA 16 (2000).
benefit plans cannot be viewed as morally neutral, economically driven business decisions. The Catholic employer must take into account the social teachings of the Catholic Church, which, in turn, means coming to grips with the church’s understanding of a just wage.

These social teachings must inform the most basic decision that a Catholic employer makes in the operation of his or her employee benefit plans: whether to offer his or her employees a plan that is subject to ERISA’s protections and obligations or to claim exemption from both, electing to retain church plan status. Unlike the compensation arrangements offered by secular employers, employee benefit plans that are sponsored by churches and certain church affiliates may qualify as “church plans” under Section 3(33) of ERISA and Section 414(e) of the Internal Revenue Code of 1986 (Code). A plan that qualifies as a church plan is normally exempt from the requirements of ERISA, as well as from many of the requirements of the Code. On the other hand, the administrator of a church plan may elect to treat the plan as an ERISA plan and, by extension, to comply with any applicable provisions of the Code. This prerogative - the choice to avoid or adhere to ERISA - is unique to the administrators of church plans.

The plan administrator’s decision regarding this issue defines not only the extent to which governmental regulation may intrude into the design and administration of the plan, but also the nature of the participants’


17. Legal scholarship on church plans is not prolific. See, e.g., Wendy Gerzog Shaller, Churches and Their Enviably Tax Status, 51 U. PITT. L. REV. 345 (1990). There are, however, some very useful materials that have been published by practitioners in this area. See, e.g., Glenn R. Drury, Employee Benefits Law II § 15S.1 et seq., EBLII IL-CLE 15 S-1 (1994, 1997 supp.); G. Daniel Miller, Health Care Acquisitions and Dispositions: Church Benefit Plan Issues, SD18 ALI-ABA 587 (Sept. 10, 1998) (continuing legal education materials); Terry A.M. Mumford, Church Plans: The Statutory Framework, SC14 ALI-ABA 165 (Sept. 11, 1997) (continuing legal education materials);
rights under the plan and the manner in which they may be enforced. The "church plan election" thus offers the occasion for sponsors of eligible plans to judge whether the civil legislation governing employee benefits adequately comports with the obligations prescribed by their religious missions. It is, of course, possible that such a decision might be based solely on the estimated impact of ERISA compliance on the employer's balance sheet. However, viewed in the context of Catholic social teachings, the decision-making process may also be seen as presenting the employer with two valuable topics for ethical and theological reflection. First, the decision to accept or reject the church plan exemption patently requires the church-affiliated employer to examine the viability of his or her business goals; in other words, the employer must obviously consider the extent to which the choice to remain exempt from ERISA or to subject his or her plans to ERISA regulation burdens his or her ability to accomplish his or her corporate objectives. The second consideration, however, is the extent to which this choice fulfills the employer's obligations to his or her employees within the mandates of his or her religious affiliation. It is this second opportunity which is the primary focus of this article. To put the issue in the terms made popular by Vatican II, the church plan election is yet another instance in which the church must consider its response to the modern world.18

This article does not attempt to place the same issue within the traditions of other religions or, indeed, within the framework of the larger secular society. Instead, its parameters are limited to the articulation of the Roman Catholic tradition set forth in the social teachings of the hierarchical magisterium.19 One should note, of course, that the concerns of justice in the field of employee benefits are not solely of interest to Roman Catholics; nor is it necessary that such concerns be analyzed exclusively in terms of the Roman Catholic tradition. Moreover, even when discussion is limited to the Roman Catholic tradition, it would be


19. Within the Catholic tradition, the term "magisterium" may refer, in its broadest sense, to the teaching authority of the entire "People of God." In this article the term is used in its most narrow sense to refer to "the teaching authority of the pope and the other bishops." Richard P. McBrien, Catholicism 64-66 (2d ed. 1994) (defining hierarchical magisterium).
naïve to ignore the voices that call for a new understanding of Roman Catholicism and its impact on the well being of workers.20 The broader scope of these issues, however, is not the focus of this article. Instead, this article asks Roman Catholic employers to listen to the radical cry for justice that resounds within the most orthodox of Roman Catholic teachings - the papal encyclicals and the conciliar and episcopal documents of the modern era - and to answer that plea in the responsible administration of employee benefit plans. Once this cry is heard, interpreted and answered by Roman Catholic employers, we can perhaps begin to ask where the weaknesses in this tradition might be found and what this tradition, as well as the critique articulated by its dissenters, might say to those who make decisions in the secular employment world. For now, however, this article strictly addresses the tenets of the social teachings that have been promulgated by the hierarchy itself and their application to the employee benefits issues faced by institutional Catholic employers.

A secondary theme is addressed to lawyers who actively represent

20. This article does not focus, for example, on the critique of democratic capitalism, which is certainly a relevant subject for consideration in light of Catholic social teachings. See Dennis P. McCann, Toward a Theology of the Corporation: A Second Chance for Catholic Social Teaching in Catholic Social Thought and the New World Order - Building on One Hundred Years, supra note 8, at 329, 331 (critiquing Michael Novak's concept of the theology of the corporation as "a religious legitimation of the system sustaining [business organizations], namely, democratic capitalism"). Nor is the theological critique offered by liberation theology or the theology of religious pluralism the focus of my discussion. See generally John L. Allen, Exclusive Claim B New Vatican Document Asserts Superiority of Christian Faith and Catholic Church, 36(3) NAT'L CATH. REP. 3 (Sept. 15, 2000).

Instead, the article's more narrow focus offers an opportunity for Catholics to reflect upon "and make sense of their own vocation within [democratic capitalism] and its role in fulfilling God's purpose in history." Id. In other words, we momentarily turn our attention towards living out Catholic social teachings in day-to-day business decisions. This does not mean that the social economy of our society is to be accepted, but rather to ask how a Catholic employer should operate his or her business within the society in which he operates. Another way to say this, in a specifically Catholic language, would be to say that this article is asking us to reflect on the transformative power of grace in our immediate surroundings. That transformation is indeed likely to recur at the larger level of society. However, for the Catholic employer who is faced with making business decisions for his or her own corporation, there is some value to asking how that grace might operate in the daily work which he performs. See generally Rembert Weakland, "Economic Justice for All" 10 Years Later, 176(9) AMERICA 8 (Mar. 22, 1997).
religiously affiliated institutions. The representation of a religiously
affiliated institution requires the lawyer to bridge the gaps between his or
her client's religious mission and its secular aspirations. This task
demands not only an expertise in secular law, but also an appreciation of
the theological dimensions of the social mission of the religion with which
the institution is affiliated, as well as its self-governing ordinances. The
necessity of understanding the interplay between civil law and theology
surfaces at least twice in the analysis of a Catholic employer's decisions
with regard to the establishment of an employee benefit plan. First,
secular law determines which organizations may elect special treatment as
“church plans” under ERISA or the Code. It is therefore imperative that
an understanding of this term in its secular context prevail in order to
safely establish whether an organization is eligible for church plan status
under civil law. This is not to say that religious organizations should place
the secular definition of a “church plan” at the forefront of their
institutional planning. Rather, the decision-makers for the religious
organization should fully understand the bearing that their institutional
structures will have on their ability to qualify for special treatment under
ERISA and the Code. Second, once a religious organization has
established its eligibility to exercise “church plan” status, whether or not it
should do so is an issue that must be informed by the organization's

21. See Melanie DiPietro, S.C., The Interfacing of Canonical Principles and
American Law in the Negotiation of Joint Ventures Between Church-Related and
Non-Church-Related Corporations 181, 186-87 (“Whether ... a public juridic
person or a private juridic person or other canonical association, there is a formal
nexus to the Church and all are bound by the same faith and discipline which
forms membership in the Church.”) in ACTS OF THE COLLOQUIUM - PUBLIC
ECCLESIASTICAL JURIDIC PERSONS AND THEIR CIVILLY INCORPORATED
APOSTOLATES (E.G., UNIVERSITIES, HEALTHCARE INSTITUTIONS, SOCIAL SERVICE
AGENCIES) IN THE CATHOLIC CHURCH IN THE U.S.A.: CANONICAL - CIVIL
ASPECTS (Pontifical University of Saint Thomas Aquinas and Duquesne
University School of Law 1998) (proceedings of conference held Apr. 24, 1998 in
Rome, Italy); see also Sister Melanie DiPietro, Remarks at the Jubilee
International and Ecumenical Canon Law Conference (Feb. 5, 2000). See generally
ADAM J. MAIDA & NICHOLAS P. CAFARDI, CHURCH PROPERTY, CHURCH
FINANCES AND CHURCH-RELATED CORPORATIONS 103-15 (2d ed. 1988)
discussing the relationship of canon law and civil law);

22. Id. at 132 (suggesting that the Roman Catholic Church cannot “accept” a
description of itself as a “voluntary association” analogous to a labor union under
civil law and that “[t]here is a genuine danger in acquiescing in legal
descriptions of the Church that do not jibe with ... ecclesial policy”)

mission or, to put it in terms more familiar to Roman Catholics, its apostolate. The ethical dimensions of this decision must be considered in mindful awareness of the religious tradition within which the religious organization operates. 

I. EMPLOYEE BENEFIT PLANS OF RELIGIOUSLY AFFILIATED INSTITUTIONS

A. What is a church plan?

The term “church plan” appears deceptively simple. In the everyday jargon of the employee benefits world, where acronyms such as QDRO and QMCSO abound, the terms “church” and “plan” seem refreshingly straightforward. A “church” is a church and a “plan” is a plan; *ergo*, a “church plan” must be a plan sponsored by a church. Right? Wrong. In fact, the term is not nearly as straightforward as the familiarity of its component words suggests. Embedded in the term “church plan” are two highly technical, yet elusive, definitions- that of a “plan” and that of a “church.” In combination, they join to create a third term which defines the scope of the church plan exemption.

1. What is a plan?

The first of these terms, “plan,” has plagued plan sponsors and their attorneys for years. The statutory definition of the term is frustratingly circular. Section 3(3) of ERISA states:

*The term ‘employee benefit plan’ or ‘plan’ means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.*

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While ERISA offers some indication as to how one might go about distinguishing between a welfare plan and a pension plan, that is the end of the statutory guidance regarding the nature of a “plan” itself. Not surprisingly, the courts have stepped in to help us understand the nature of this somewhat ephemeral concept. In Fort Halifax Packing v. Coyne, for example, the Court held that a plan was something more than a one-time payout of state-mandated severance pay. By using the term “plan”, the Court reasoned, Congress must have intended to refer to an arrangement that, as a bare minimum, required an ongoing administrative scheme. Massachusetts v. Morash similarly emphasizes the administrative continuity that is required in order for a plan to be present. In Donovan v. Dillingham, the Eleventh Circuit elaborated on this notion, explaining that the prescient observer would discern the existence of a plan if he were able to “determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.”

One might easily adapt Donovan v. Mercer’s analysis of the term “fiduciary” to provide the essence of the Donovan v. Dillingham court’s analysis of the term “plan” in the most forceful terms: “If it [t]alks [l]ike a [d]uck ... and [w]alks [l]ike a [d]uck ... [i]t is a [d]uck.”

Once one has obtained an understanding of the term “plan,” however, one must still appreciate the nuances of this term that are peculiar to employee benefits law. In Section 3(3) of ERISA, we receive the somewhat disconcerting news that a “plan” can be an “employee welfare plan,” an “employee pension benefit plan,” or “a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” The statute sketches the broad parameters of the first two categories.

An employee welfare plan is perhaps most easily identified, as the statute clearly lists the categories of benefits that may be provided by such a plan. Chief among the statutory examples are health insurance

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29. See id. at 12.
30. Massachusetts v. Morash, 490 U.S. 107, 115-16 (1989) (“The distinguishing feature of most of these benefits is that they accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee.”).
31. See Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982).
32. Donovan v. Mercer, 747 F.2d 304, 308-09 (5th Cir. 1984).
34. See ERISA § 3(1), 29 U.S.C. § 1002(1) (“[A] medical, surgical, or hospital
benefits ("medical, surgical, or hospital care or benefits"). As a welfare plan, an employer-provided health insurance arrangement is subject to the provisions of ERISA pertaining to disclosure obligations and fiduciary standards. However, in the absence of a contractual obligation undertaken by the employer, or a federal statutory mandate, a welfare plan is not required to provide any particular level of benefits and, indeed, may be terminated at any time by the employer.

In contrast to the bullet-point definition of an employee welfare plan, the statute's definition of a pension plan is more functional in nature. Under ERISA, an employee pension benefit plan is "any plan, fund, or program" which "provides retirement income to employees" or "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." In common usage, the term "pension plan" often refers to traditional defined benefit pension plans, to which an employer makes contributions in order to fulfill its obligation to provide definitely determinable benefits to vested employees upon their retirement. However, the term, as used in ERISA, may also address defined contribution plans which permit both the employer and/or the employee to make contributions to an individual account on the employee's behalf. In this case, an employee's benefit is based on the fulfillment of the employer's promise to make contributions pursuant to a "definite predetermined formula." Whether articulated as

care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)

35. ERISA § 3(1), 29 U.S.C. § 1002(1).
42. See 26 C.F.R. § 1.401-1(b)(1)(ii); ERISA § 3(17), 29 U.S.C. § 1002(17) (definition of a special account plan); see also Malbon v. U.S., 43 F.3d 466, 470-71 (9th Cir. 1991); see generally Peter J. Wiedenbeck & Russell K. Osgood, Cases and Materials on Employee Benefits Law 134 (1996) (explaining the differences between the terminology of ERISA and the tax law with respect to pension plans).
defined benefit plans or defined contribution plans, most pension benefit plans are subject to detailed requirements regarding the funding, vesting and distribution of benefits, in addition to the rules regarding disclosure and fiduciary obligations to which all ERISA plans are subject.43

A further explanation of the language in which employee benefits professionals speak of the different forms of pension benefits is in order. An arrangement that meets the definition of an “employee pension benefit plan” may also offer both the sponsor and the plan participants a variety of tax advantages, provided that the plan is structured and operated as a “qualified” plan under the strictures of the Code.44 An employee pension plan that does not comply with the Code’s qualification requirements is known as a “non-qualified” plan.45 One should be clear that the terms “qualified” and “non-qualified” do not carry a moral or ethical significance; there is no disgrace in maintaining a non-qualified plan.46 A non-qualified employee pension plan may be perfectly in compliance with any applicable ERISA requirements.47 Moreover, in some circumstances, a non-qualified plan may be the most appropriate compensation arrangement to meet the needs of an employer and its employees.48 The terms “qualified” and “non-qualified” simply refer to the status of the plan for purposes of evaluating the income tax consequences to the plan sponsor and to the participants.

2. **What is a church?**

In using the term “plan”, we enter into a world of jargon; yet, debates about the term’s meaning are at least familiar to lawyers whose work

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44. See 26 U.S.C. § 401(7).


46. A qualified plan that has lost its tax-qualified status is known as a “disqualified” plan. See, e.g., Buzetta Construction Corp. v. I.R.S., 92 T.C. 641, 653 (1989).

47. See generally Gary E. Jenkins, Designing Top Hat and Other Nonqualified Plans Secured by Trusts under ERISA, 22 TAX MGMT’ COMP. PLANNING J. 43 (1994).

48. Id.
requires them to bandy it about. The same cannot necessarily be said of the term "church" when it is used in conjunction with the term "plan." The easy use of this term by both ERISA and the Code invites reflection on two issues that shape any understanding of the term "church plan." First, what is the meaning of "church?" Second, how does the term "church" apply to institutions, such as social services agencies or hospitals that are closely affiliated with churches? Neither ERISA nor the Code provides a satisfactory answer to these preliminary issues.

It might be tempting, if a tad irreverent, to suggest that we simply go back to Donovan v. Mercer: if it talks like a duck and walks like a duck, it is a duck. Yet, for the purpose of defining a church plan, the fact that an employer looks and sounds like a church suggests only two features that might help establish the employer's eligibility to sponsor a church plan; neither individually nor collectively are these features dispositive of the issue. Indeed, tax litigation has already explored the potential for tax abuse that lies within a system that permits groups to identify themselves as churches without further objective analysis of their goals. The regulations and jurisprudence interpreting ERISA and the Code do not permit an organization's self-identification as a church to be the sole factor in determining whether the organization qualifies for legal status as a church. In other words, an organization's internal understanding of the definition of a church is relevant to, but not dispositive of its status as a church for purposes of ERISA and the Code.

How then are we to understand what the term "church" means for the secular purpose of determining whether a plan qualifies for special treatment under ERISA and the Code? The ambiguity of the word "church" - which we use in daily life to describe a physical location, an organization of people, an assembly for worship - is obvious even if one is

49. See generally Wiedenbeck, ERISA's Curious Coverage, supra note 26, at 333.


52. See text accompanying n. 109, infra.
not pondering what ERISA or the Code might have to say about the matter. When we refer to a “church,” are we talking about a place, a group of people, or an activity? Moreover, which places, people or activities might be described as “churches?” What are the common ties of ideology and property that bind places, people or activities together in a way that makes them a “church?” Finally, how can regulatory agencies and courts ruling on church plans within the strictures of the First Amendment and the Establishment Clause, distinguish among fraudulent and legitimate claims to church identity?

This is a secular question which demands a secular response. The message of this article - that Catholic social teaching can and should have a bearing on a Catholic employer’s decisions regarding employee benefits - is hardly compatible with the suggestion that it is wise to leave one’s religion at the church exit. However, an attorney who is trying to establish church plan status on behalf of his or her client might indeed be wise to abandon his or her own faith-based conception of “church” in order to fully appreciate both the generality and the details of the working definition applied by the Internal Revenue Service (IRS). In establishing a plan’s eligibility for church plan status, the issue is not whether the sponsor of the plan falls within a set of theologically defined precepts; the issue is instead whether it meets the secular precepts established by the IRS in fulfillment of its mandate to administer the Code. One may safely posit that the First Amendment and the Establishment Clause require, at a minimum, that “church plan” status be available to a variety of faith-based organizations without demanding that they adhere to one particular understanding of how a corporate faith group should be organized.53

The problem becomes immediately apparent if one considers whether a Jewish synagogue or an Islamic mosque qualifies as a “church” for purposes of ERISA or the Code. Although Congress’ use of the term “church” does seem to derive from language originating in the Christian tradition, it is unlikely that Congress or the government’s regulatory agencies could fulfill the constitutional obligation of neutrality in the face of religious diversity if they were to adopt a definition that was strictly Christian in concept, thereby excluding synagogues or mosques from attaining the preferential status accorded to churches. Even within the Christian tradition, a definition of the term “church” which is based on

theological principles seems an inherently inappropriate tool for distinguishing between organizations that may validly claim status as a “church” under ERISA and the Code and those that may not. Each Christian denomination answers the question “what is church?” in its own manner and many of these answers are not compatible with other approaches. The government cannot honor its obligation to uphold neutrality in the face of different religions if the definition of the term “church” is drawn from within the tradition of one religion in a manner that excludes such qualification for organizations with different belief systems.

a. Theological definitions of “church”: Catholicism as a case study

Conflating a theological understanding of “church” with the secular conception of the term as it is employed in ERISA and the Code leads to an unnecessary degree of confusion in determining which entities are actually eligible to make a church plan election. In essence, in a pluralistic society like the United States, any theological definition of the term “church” is likely to raise serious difficulties if it becomes the sole standard which determines the secular legal rights of a variety of faith-based organizations. If theology defines which organizations qualify as churches and which do not, someone - no matter how holy their persons or how sincere their beliefs - will be left out in the cold. From a theological perspective, it may be both necessary and appropriate to understand the set of beliefs that mark some organizations as orthodox and identify others in a different category. Yet the simple fact that one organization might fail to meet the requirements for conformity with the religious expectations implicit in a theological definition of church does not mean that it should necessarily be treated differently under secular law as well. In a religiously pluralistic society governed by secular law, one cannot safely import theological constructs into an analysis of whether an organization qualifies as a church for secular legal purposes. To do otherwise would be to prioritize the theology of those who happen to adhere to the chosen definition of church and to deprive theological dissidents of their secular rights simply because they do not conform to the structure mandated by the dominant theology.

Consider, for example, the theological definition of “church” articulated by the hierarchical magisterium of the Roman Catholic Church as a hypothetical definition for the term “church” as used in
ERISA and the Code. One must, of course, acknowledge that there is not a consensus on the theological significance of "church" either within the larger Christian tradition in general or within the Roman Catholic tradition in particular. Within Catholicism, for example, Richard McBrien distinguishes between an "ecclesiology 'from above,'" which is identified with Joseph Cardinal Ratzinger among others and reflected in the CATECHISM OF THE CATHOLIC CHURCH, and an "ecclesiology 'from below,'" which is reflected in the work of more contemporary ecclesiologists such as Hans Kung. Ecclesiology "from above" regards the "church" as a "'communion of saints' created and sanctified by the Holy Spirit." Ecclesiology "from below," on the other hand, posits the "nature of the Church as an earthly community of human beings who... have a mission in and for the world that includes, in addition to the preaching of the Word and the celebration of the sacraments, the struggle on behalf of justice, peace, and human rights."

Assume, for purposes of argument, however, that we were to adopt the more traditional "top-down" view of "church" that is reflected in the writings of the hierarchical magisterium as our working definition of "church" for purposes of ERISA and the Code. Would this be a wise, useful or just strategy? Would it even be compatible with Catholic social teaching itself?

Let us start with the most basic elements of Catholic ecclesiology. In the CATECHISM OF THE CATHOLIC CHURCH, we learn that

[i]n Christian usage, the word "church" designates the liturgical

54. Of course, it would neither be responsible nor defensible to suggest that the more traditional ecclesiology advocated by the hierarchical magisterium is alone unsuitable for use as a definition of "church" for secular purposes. However, since this article focuses on the hierarchy's teachings regarding social justice, I have chosen to examine the definition of church that is at work in the same writings. I have similar reservations about the use of any theologically based definition in a secular context.

55. See McBrien, supra note 8, at 691-92 (stating that Joseph Ratzinger and Hans Urs von Balthasar identify the roots of "ecclesiology from above" in the Second Vatican Council).

56. See, e.g., HANS KUNG, THE CHURCH 129 (Ray and Rosaleen Ockendon trans. 1967) ("If the Church is the people of God, it is clear that the Church can never be merely a super-entity poised above real human beings and their real decision."); see generally McBrien, supra note 8, at 695-96 (analysis of Hans Kung's contribution to Catholic ecclesiology).

57. Id. at 705-06 (quoting Hans Urs von Balthasar).

58. Id. at 692.

59. Id. at 715.
assembly, but also the local community or the whole universal community of believers. These three meanings are inseparable. “The Church” is the People that God gathers in the whole world.60

The CATECHISM recognizes the difficulty of distinguishing a term that refers to a place and an activity (“the liturgical assembly”) and to “the local community.”61 Yet it answers the question “What is a church?” in a strikingly universal or “catholic” way: “‘The Church’ is the People that God gathers in the whole world.”62 Despite the acknowledgment that God’s call might resound among those who are not Catholics, however, a strict reading of the rhetoric in which the CATECHISM is presented suggests that it is within the Roman Catholic Church that the “Church of Christ” “subsists.”63

The CATECHISM is not the only authoritative church document to articulate this position. In analyzing the notion of “church”, for example, the Second Vatican Council did not stray from the proposition that the Roman Catholic Church was the sole custodian of the “Church of Christ.” In the DOGMATIC CONSTITUTION OF THE CHURCH, popularly known as LUMEN GENTIUM,64 the Second Vatican Council explained:

[T]he unique Church of Christ which in the Creed we avow as one, holy catholic, and apostolic... constituted and organized in the world as a society, subsists in the Catholic Church, which is governed by the successor of Peter and by the bishops in union with that successor.65

LUMEN GENTIUM clearly reserves to the Roman Catholic tradition the ability to qualify without limitation as “the Church of Christ.”66 In Catholic doctrine, “the Catholic Church alone has all the institutional elements which are necessary for the integrity of the Body of Christ... (e.g., the Petrine ministry, the seven sacraments).”67

It is, of course, important to understand the hierarchy’s insistence on a

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60. CATECHISM OF THE CATHOLIC CHURCH 752 (1994).
61. Id.
62. Id.
63. Id.
65. Id.
66. This position seems at odds with that of a variety of contemporary Catholic theologians, including the analysis put forward by Richard McBrien. See McBrien, supra note 8, at 723.
67. Id. at 732.
Catholic Sponsors of Church Plans

theology predicated on the institutional fullness of "the Catholic Church alone" in the context of modern ecumenical developments. In the past forty years, both the Catholic laity and the Catholic hierarchy have actively sought and found encouragement in ecumenical dialogue. The Second Vatican Council certainly did not close its eyes to the existence of other Christian denominations. The Council took great strides in proclaiming the importance of ecumenism and this advance in interfaith relations resounds throughout the CATECHISM. The Council pointed out that all Christians who are baptized - whether Catholic or not - are part of the "People of God." Several of the writings that emerged since Vatican II struggled with similar issues. How can this desire "that all might be one" be reconciled with a definition of "church" that seems to point, with little dissimulation, to the Roman Catholic Church as the full and correct expression of Christian life on earth?

In part, the answer might be found in the tight bonds between Catholic ecclesiology and Catholic eschatology. In the broadest sense, Christians are defined and unified by their common belief in the messianic status of Jesus of Nazareth. Yet, in the twenty-first century of Christian belief, it is clear that Christian identity is experienced in a variety of Protestant faith communities that remain outside the Catholic Church. Louis Bouyer, a

68. See generally Thomas P. Rausch, The Unfinished Agenda of Vatican II, 172(21) AMERICA 23 (June 17, 1995) (discussing status of ecumenism).

69. See generally, McBrien, supra note 8, at 388-89 (summarizing teachings of Vatican II with respect to religious pluralism); id. at 673-74 (summarizing Council's teachings on ecumenism).

70. See, e.g., UNITATIS REDINTEGRATIO in DOCUMENTS OF VATICAN II, supra note 64, ¶ 4, at 347 ("This sacred Synod, therefore, exhorts all the Catholic faithful to recognize the signs of the times and to participate skillfully in the work of ecumenism.").


73. Id. ¶ 1 (translation of Latin phrase "ut unum sint").

74. See, e.g., UNITATIS REDINTEGRATIO in DOCUMENTS OF VATICAN II, supra note 64, ¶ 3, at 346 ("For it is through Christ's Catholic Church alone, which is the all-embracing means of salvation, that the fullness of the means of salvation can be obtained."). It is important to note, however, that the Latin terminology employed in the cited sentence quotes directly from the Holy See's condemnation of the radical views of Father Leonard Feeney, a Boston priest who claimed that salvation was impossible outside the Catholic Church. See id. at n.18.
Protestant who converted to Catholicism, devoted much attention to explaining the points of commonality and difference between the two broad categories of Christian experience. Drawing on the theology of Karl Barth, Bouyer described the essence of Protestant theology as “[a] conception of the Word as an act of God, who seeks out and pursues us, as a creative and recreative act in whose very outpouring we encounter the world of the new creation in Christ; this discovery of the Word as the presence of God with us and finally as the very Person of the Incarnate Son of God.”

For Bouyer, the basic difference between Protestantism and Catholicism emerges not from disagreement over the integral importance of the Scriptures, but rather from setting “the authority of Scripture in opposition to the authority of the Church.” Bouyer suggested that Roman Catholicism does recognize Scripture as “the sole sovereign authority in questions of doctrine.” However, unlike Protestants, Roman Catholics view the church as possessing the authority that is necessary to interpret scripture in a way that leads individuals to full salvation. Thus, for Catholics, “Scripture keeps its true and complete sense only when it remains a vital part of that living tradition of

75. See Louis Bouyer, The Word, Church and Sacraments in Protestantism and Catholicism 19 (A.V. Littledale trans. 1961); see also Louis Bouyer, The Spirit and Forms of Protestantism 122 (A.V. Littledale trans. 1956) (“For the objection often made, that Protestantism tends to replace a living religion with the religion of a lifeless book, misunderstands the very essence of Protestantism; a collective experience, ever sought after and renewed, of a life discovered and maintained by familiarity with the Bible, is the very opposite of a bookish devotion.”). For additional reflection on the importance of the theology of Karl Barth, see id. at 124-128.

76. See Bouyer, The Word, Church and Sacraments, supra note 75, at 26.

77. Id. at 53; see also Bouyer, The Spirit and Forms of Protestantism, supra note 75, at 130-31.

78. See Bouyer, The Word, Church and Sacraments, supra note 75, at 46-47 (“This is the only thing that the Catholic Church claims when it claims authority for its tradition and hierarchy.... [I]t does assert that it is the very community to which the apostles communicated the Spirit of Christ so that the kerygma of Christ might be preserved therein.... And, at the same time, it does affirm that its bishops... have been established by the apostles themselves, not to... put forward a new teaching, but to continue to proclaim with the same authority that the apostles received from God in Christ the same Gospel and in particular to correct and rectify all the adulterations it might undergo in a community which is still human....”); see also John Paul II, Ut Unum Sint, supra note ¶ 66, at 72 (describing the Catholic Church’s “authentic teaching office” with regard to scripture).
the Church in which the inspired writers actually composed it." According to this line of reasoning, the Roman Catholic Church assumes a unique role in transmitting the message of salvation because it alone is the authentic custodian of the church of the apostles and its concomitant authority to interpret the Word of God in a way that leads individuals to salvation. This integral link between ecclesiology and eschatology explains how the Roman Catholic Church recognizes that non-Catholic Christians are authentic in their faith and belong to the Church of Christ, while at the same time reserving to itself the authority to offer individuals the full path to redemption and union with Jesus.

The Council's teachings in *Lumen Gentium* touched on "the very delicate point of the relationship of the Catholic Church as it presently exists... to the Church of Christ" in order to explain this distinction:

> According to the Constitution, the Church of Christ survives in the world today in its institutional fullness in the Catholic Church, although elements of the Church are present in other Churches and ecclesial communities.

In *Unitatis Redintegratio*, for instance, the Council noted that Christians are found "not merely as individuals but also as members of the corporate groups in which they have heard the gospel, and which each regards as his Church and, indeed, God's." These "corporate groups," which *Unitatis Redintegratio* later refers to as "separated Churches and Communities," are not in full communion with the Roman Catholic Church through which, according to *Unitatis Redintegratio*, "the fullness of the means of salvation can be obtained." While urging Catholics "to acquire a more adequate understanding of the distinctive doctrines of our separated brethren," the Council drew a clear distinction between those Christians who are in full communion with the

79. Id. at 53-54.
81. *Lumen Gentium*, supra note 64, at n.23 (editorial note).
82. Id.
83. *Unitatis Redintegratio* in *Documents of Vatican II*, supra note 64, ¶ 1 at 341.
84. Id. ¶ 1, at 342.
85. Id. ¶ 3, at 346.
86. Id. ¶ 9, at 353.
Roman Catholic Church and those who are not. According to the Council, Orthodox Christians, through “their entire heritage of spirituality and liturgy, of discipline and theology, in their various traditions,” participated in “the full catholic and apostolic character of the Church.” However, despite the “special affinity and close relationship” between Protestant and Catholic Christians, the Council found that differences of opinion regarding holy orders and the “reality of the Eucharistic” ministry precluded Protestants from being in full communion with the Catholic Church.

In spite of the many advances in ecumenical dialogue that have taken place since the Second Vatican Council, the hierarchical magisterium has continued to distinguish between the Catholic Church, which is in full compliance with its understanding of the term “church,” and other Christian denominations. In its recent declaration entitled DOMINUS IESUS, the Congregation for the Doctrine of the Faith reiterated this point, in declaring:

The Churches which, while not existing in perfect communion with the Catholic Church, remain united to her by means of the closest bonds, that is, by apostolic succession and a valid Eucharist, are true particular Churches. . . . On the other hand, the ecclesial communities which have not preserved the valid Episcopate and the genuine and integral substance of the Eucharistic mystery, are not Churches in the proper sense. . . .

The hierarchical magisterium’s understanding of “church,” then, as promulgated in the documents of the Second Vatican Council and as further explained in the DOMINUS IESUS, would not recognize the full participation of many Protestant denominations in a form that would qualify as “church” and certainly would not be applicable to non-Christian religious communities.

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87. Id. ¶ 17, at 360.
88. Id. ¶ 19, at 361.
89. UNITATIS REDINTEGRATIO in DOCUMENTS OF VATICAN II, supra note 64, ¶ 22, at 363-64.
90. See generally UT UNUM SINT, supra note 72, ¶¶ 59-61, at 71-73.
92. UNITATIS REDINTEGRATIO in DOCUMENTS OF VATICAN II supra note 64, ¶ 1, at 359.
This distinctly Catholic definition of “church” as “God’s only flock”\(^9\) does not seem to coexist peacefully with the more pluralistic notion of “church” or, indeed, in many expressions of Christian thinking outside the writings of the hierarchical magisterium.\(^9\) To require full compliance with the magisterium’s understanding of “church” would require full communion with the Catholic Church, including acceptance of the teaching authority of the hierarchical magisterium, the Petrine tradition of apostolic succession and Catholic teachings concerning the Eucharist.\(^9\) These positions have numbered among the most persistent obstacles to uniting Roman Catholicism with the expressions of Protestant Christianity that are most closely tied to Roman Catholic spirituality.\(^9\) If one were to demand that all faith-based organizations comply with the understanding of “church” that is implicit in the writings of the Roman Catholic hierarchy, it is certain that non-Christian religious organizations would fail the test and that most, if not all, Protestant denominations would be unable to meet the precepts which are most central to the hierarchy’s understanding of church. Ecumenism remains a goal, rather than a reality, in the modern world.

If ecumenism has not been achieved in religious life, there is no reason to expect that a theologically based definition of church would function within constitutional constraints in secular life. The expectation of universality implicit in saying that the Catholic Christian believes in a church that is “one, holy, catholic and apostolic”\(^9\) does not lend itself to the secular purposes of ERISA’s church plan provisions in the United States’ modern-day pluralistic society. Such a definition would exclude those religious denominations which do not share Catholic beliefs from qualifying as a “church” for purposes of maintaining a “church plan.” Moreover, it is doubtful that the exclusion of some religious organizations from the obligations and benefits imposed on other religious organizations by civil law would be compatible with the hierarchical


\(^9\) See, e.g., *UNITATIS REDINTEGRATIO* in *DOCUMENTS OF VATICAN II*, supra note 64, ¶ 22, at 364.


\(^9\) *LUMEN GENTIUM* in *THE DOCUMENTS OF VATICAN II*, supra note 64, ¶ 8, at 23.
magisterium's published writings on ecumenism.\textsuperscript{98} If the hierarchy is willing to recognize that the “People of God” might include those who are not in full communion with the Roman Catholic Church,\textsuperscript{99} it is very doubtful that their call for respect for the dignity of all people\textsuperscript{100} could be harmonized with any policy that categorically excluded non-Catholics from attaining secular rights accessible to those who are in communion with the Catholic Church.

If the \textsc{Catechism}'s definition of “church” is “the whole world,” or if the mainstream Protestant religions derive their definition as “the community of believers,” how is secular government to distinguish between legitimate and fraudulent claimants seeking church plan status? The answer, simply, is that it cannot. The far-reaching spiritual and moral aspirations of an organization which calls itself a “church”—which, although illustrated by the \textsc{Catechism}'s definition of the term, are hardly limited to Roman Catholicism—simply do not constitute an adequate definition for purposes of designating which institutions are eligible to receive special treatment under secular law as sponsors of church plans. To adopt the definition of “church” promoted by one denomination such as that present in the \textsc{Catechism}—would threaten to exclude other denominations from the benefits of this status. Stated differently, a denominational definition of “church” does not meet the governments’ obligation to act within the confines of the First Amendment. The definition of a “church” for purposes of \textsc{ERISA} is required to stretch across denominational differences, while allowing the government to distinguish between organizations that merit the protection offered by the First Amendment and those that do not.

\textit{b. Sociological definition of “church”}

Sociological explanations of the term “church” may serve somewhat better as a secular test for church status, but they pose their own points of

\textsuperscript{98} See, e.g., \textsc{Gaudium et spes}, \textit{supra} note 18, \S\ 26, at 225 (“there must be made available to all men everything necessary for leading a life truly human,\ldots [including] the right to employment”); \textit{id.}, \S\ 29, at 227-28 (“[W]ith respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language, or religion is to be overcome and eradicated as contrary to God’s intent.”); \textit{id.}, \S\ 40, at 239 (“[T]he Catholic Church gladly holds in high esteem the things which other Christian Churches or ecclesial communities have done or are doing .\ldots ”).

\textsuperscript{99} See, e.g., \textit{Unitatis Redintegratio} \textit{in Documents of Vatican II, supra} note 64, \S\ 3, at 345.

\textsuperscript{100} See, e.g., \textsc{Gaudium et spes}, \textit{supra} note 18, \S\ 26, at 225.
frailty when pressed into use as concepts to delineate an organization’s status under ERISA or the Code. Sociological analysis addresses the range, development and meaning of human behavior in different social arrangements, while the concern of those struggling with qualification as a church under ERISA and the Code is merely in demonstrating that a particular organization demonstrates enough external characteristics to fit into a predetermined concept of what a church might be. Both the perspective and the objectives of the sociologist and the attorney differ in this regard.

Durkheim, for example, saw the term “church” as a sociological construct: “A Church is not a fraternity of priests; it is a moral community formed by all the believers in a single faith, laymen as well as priests.” While Durkheim recognized the necessary element of “community” in his understanding of “church,” he drew the boundaries of that community in accordance with the common beliefs of the faithful. The language of this definition is similar to, but clearly more narrow than that of the Catechism. For Durkheim, members of a church are drawn together by their common belief system; he explained,

A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.

Adherence to common beliefs thus distinguishes between the members of a “church” and outsiders. Thus, for Durkheim, many different systems of belief and rituals might qualify as churches as long as they demonstrate adherence to an integrated belief system. However, Durkheim’s system also implies that church status hinges, to some degree, on the members’ sincerity of belief—a concept that may be more amenable to measurement for the purposes of sociology than for the purposes of the assessment of tax-exempt status by a governmental body constrained to act within the neutrality prescribed by the First Amendment.

Weber also considered the sociology of religious behavior and offered a


103. Id. at 62.
distinction between a 'sect' and a 'church.' Had Weber been able to read the text of the CATECHISM that was published in 1994, he would perhaps not have been surprised to see the far-reaching aspirations of the CATECHISM's definition of "church." In his analysis of civil or secular life, Weber proposed a distinction between "voluntary" and "compulsory" associations. In a voluntary association, "established order claims authority over the members only by virtue of a personal act of adherence." In a compulsory association, "the established order... has, within a given specific sphere of activity, been successfully imposed on every individual who conforms with certain specific criteria." Weber thought that "[i]n the religious sphere, the corresponding types are 'sect' and 'church.'" He explained:

It is its character as a compulsory association, particularly the fact that one becomes a member of the church by birth which distinguishes a church from a "sect." It is characteristic of the latter that it is a voluntary association and admits only persons with specific religious qualifications.

Weber found it "normal for a church to strive for complete imperative control on a territorial basis and to attempt to set up the corresponding territorial or parochial organization." Yet, like Durkheim, Weber's concern was primarily in understanding the behavior of human beings when they function in such associations, rather than with the nature of the church itself. In this light, it is easy to understand why Weber could easily analogize the concept of a church to that of a compulsory association. Without further investigation into the religious qualifications that define membership characteristics, this definition would not serve the government's purpose - distinguishing between true and fraudulent churches - in an efficacious manner. Not only would compulsory membership be possible in an organization that was not a church, but many organizations which would be classified as "sects" under Weber's analysis would likely be promising candidates for tax-favored status in terms of the Code's tax treatment of churches.

c. IRS' definition of church

The working definition of a church that is currently employed by the
IRS has more in common with the sociological understanding of church entities than with the religious definitions. Sociology, like the IRS and unlike theology, has little interest in demonstrating the verity of the religious truths that bind a church together. Yet, unlike the sociological explanations, the Service’s working definition is not as accepting of the quality of belief or the nature of membership criteria as the indicator of correct “church” status. The Internal Revenue’s Manual of Guidelines for Exempt Organizations lists the following criteria, which stress the functions, rather than the beliefs, that might be found in a religiously affiliated organization:

(a) a distinct legal existence;
(b) a recognized creed and form of worship;
(c) a definite and distinct ecclesiastical government;
(d) a formal code of doctrine and discipline;
(e) a distinct religious history;
(f) a membership not associated with any other church or denomination;
(g) a complete organization of ordained ministers ministering to their congregations;
(h) ordained ministers selected after completing prescribed courses of study;
(i) a literature of its own;
(j) established places of worship;
(k) regular congregations;
(l) regular religious services;
(m) Sunday schools for the religious instruction of children;
(n) schools for the preparation of its ministers.  

Like many of the IRS’s bullet-point tests, this test is multifaceted and does not identify any single criterion as dispositive in the identification of which organizations are properly classified as churches. Despite the easy fit between most mainstream Christian congregations and the list of


criteria," it is noteworthy that the IRS does not require adherence to any particular denominational belief system in order for an organization to qualify as a church. Although the IRS does require that an organization that is qualifying as a "church" have "a recognized creed and form of worship," the list of criteria focuses on external, form-related characteristics of the religiously affiliated organization rather on the depth of the individual adherent's convictions. Moreover, the list of characteristics assumes that a church will meet regularly at established places for worship, thus limiting (if not, indeed, precluding) the possibility that an individual could realistically hope to establish a "church" in the absence of community activity or that a group might constitute a church without the regular practice of worship. Indeed, the IRS's analysis seems to focus on external indicators of the regular "church-like" behavior of a group of persons rather than on litmus tests for faith on an individualized basis.

B. What is a "church plan" and when is it eligible for special treatment under ERISA?

The basic definitional elements that we have already addressed do not solve the problem of determining which arrangements qualify as church plans. The fact that a "plan" is sponsored by a "church" does not necessarily mean that the plan may safely be called a "church plan" as defined in Section 3(33) of ERISA.\(^{11}\) Even the basic definition of a "church plan" which is set forth in Section 3(33)(A) of ERISA extends the complexity of the analysis beyond simply finding a "church" and looking for a "plan." Section 3(33)(A) imposes the additional requirements that the sponsor of a plan must be a "church" or "association of churches" exempt from taxation under Section 501 of the Code and that the plan be maintained (within certain limits) for the benefit of the church's employees.

1. Opening the Church Doors: Who is a Church Employee?

As addressed above, the term "church" brings plenty of ambiguity to the term "church plan" merely by distinguishing between an organization that qualifies as a "church" for tax-purposes and one that does not. The definition of a "church plan," however, intriguingly widens the category of organizations that might appropriately serve as the sponsor of a church

\(^{11}\) See, e.g., Lutheran Soc. Servs. of Minn. v. United States, 758 F.2d 1283 (8th Cir. 1985).

plan beyond "churches" per se. There are two main ways in which Section 3(33) broadens the class of appropriate sponsors beyond the class of "churches."

First, a church plan, as described in Section 3(33)(A) of ERISA, is not simply a plan maintained by a church; it also includes a plan that is sponsored by a "convention or association" of churches. Glenn Drury has suggested that this term is "an ambiguous one, to be relied on with caution by the practitioner attempting to qualify for church plan status under ERISA." The IRS originally interpreted the concept of a "convention or association of churches" as a "cooperative undertaking by churches of the same [or differing] denominations." However, the definitional significance of this position may be somewhat overstated. In Lutheran Social Services of Minnesota v. United States, the Eighth Circuit examined the legislative history of the provision and determined that the language derived from a request that these provisions be drafted in a way that reflected "congregational" as well as "hierarchical" churches. Regardless of the origins of the phrase, the term "convention or association of churches" opens the opportunity of plan sponsorship to groups of churches whose common bonds are tied more loosely than might be true with respect to an organization that clearly qualifies as a church in its own right.

Second, ERISA Section 3(33)(C)(ii)(II) also provides that the term "employee of a church or a convention or association of churches includes... an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches." Thus, employees of an organization "controlled by or associated with a church or a convention or association of churches" are eligible to participate in a church plan as long as a number of requirements are met.

This language dates from the Multiemployer Pension Plan

113. Drury, supra note 109, § 15.68.
114. Id. (citing Rev. Rul. 74-224, 1974-1 C.B. 61 (1974)).
115. Lutheran Soc. Serv. of Minn. v. United States, 758 F.2d 1283, 1288 (8th Cir. 1985).
Amendments Act of 1980. In its absence, employees who worked for church affiliates, rather than as direct employees of a church, were ineligible to participate in a church-sponsored plan. Thus, a secretary directly employed by a church might have been eligible to participate in a church plan, but a secretary employed by a primary school affiliated with that church would have been covered by a plan that was required to meet the requirements of ERISA and the Code. In practical terms, compliance with the requirements of ERISA and the Code most likely imposed a financial and legal burden on the school's sponsorship of a plan, while the church plan exemption relieved the church's plan of this burden. It was entirely possible that the church would have been able to find the resources to permit its secretary and its other employees to participate in a church plan, while the affiliated school might only have been able to offer benefits to its employees if its resources were sufficiently robust and its philosophy sufficiently compatible with government requirements to enable it to meet the additional burdens imposed by ERISA and the Code on a plan that was not eligible for the church plan exemption. The impact of Congress's decision to amend the language of ERISA Section 3(33) in order to permit employees of tax-exempt church affiliates to participate in plans that would qualify for the church plan exemption should not be underestimated. This seemingly insignificant change of words now permits church-affiliated hospitals,

122. Id.
123. Id.
124. Note that the Internal Revenue Service's regulations on church plans specifically provide that for purposes of evaluating church plan status, "... the term 'church' includes a religious order or a religious organization if such order or organization is (1) an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise." Treas. Reg. §1.414(e)-1(e) (2000); see also Treas. Reg. § 1.511-2(a)(3)(ii) (2000). However, prior to the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the Internal Revenue Service did not exercise infinite patience with the religious orders of the Roman Catholic Church. The De La Salle brothers, for example, could not qualify as a church within the meaning of these regulations after it was determined that their main activities included the operation of a winery rather than more traditional religious functions. See generally De La Salle Institute v. United States, 195 F.Supp. 891 (N.D. Cal. 1961); see also Chapman v. Commissioner, 48 T.C. 358 (1967); see generally General Counsel Mem. 39007, 1983 WL 197946 (1983).
nursing homes, universities and other charities to offer benefits within the church plan exemption.\footnote{125}

Grasping the significance of this development is critically important to the task of understanding how the church plan exemption works in the context of a modern corporation that advertises itself as "Catholic." First, the statute requires that the benefit plan of an organization that seeks church plan status be "controlled by or associated with" the church.\footnote{126} It is important to note that these requirements are alternative, rather than cumulative. Direct control is a fairly common notion in the analysis of corporate relationships of nonprofit organizations;\footnote{127} if the diocese owns and operates a seminary under the authority of the bishop, control is surely present. However, the notion that a mere "association" is sufficient to enable an institution's plans to achieve church plan status is an important broadening of the class of potential benefit plan sponsors. In order to qualify as being "associated" with a church, the institution needs to demonstrate only that it shares "common religious bonds and convictions" with the church, not that a direct line of ownership or institutional control by the church itself is present.\footnote{128} Administrative decisions frequently cite adherence "to the tenet and teachings of the Church" and sharing "common religious bonds and convictions with the Church" as sufficient evidence of such association.\footnote{129}

The importance of this highly nuanced distinction between "control" and "association" to the Roman Catholic tradition emerges quite clearly when the institution that aspires to claim church plan status for its employee benefit arrangements is affiliated with a Roman Catholic religious order. In the United States, a religious order,\footnote{130} while owing

\footnote{125. See generally General Counsel Mem. 39007,\textit{ supra} note 124; General Counsel Mem. 39793,\textit{ supra} note 121.}


\footnote{127. \textit{See, e.g.}, Revised Model Nonprofit Corporation Act § 8.01(b), as cited in \textit{Marilyn E. Phelan, 3 Nonprofit Enterprises: Corporations, Trusts, Associations} app. E (West 2000); 26 U.S.C. § 414(c) (defining controlled group of corporations).}

\footnote{128. On the incorporation of various diocesan functions and the desirability of various degrees of control by the diocese, see generally \textit{Maida and Cafardi, supra} note 21, at 133-34 ("The principle to follow is the following: the greater legal risk an activity carries, the greater the need to give that activity its own legal identity.").}


\footnote{130. A religious order is a canonically recognized group of men or women
certain canonically defined duties to the local bishop or to the Holy See, may be separately incorporated under civil law and generally may hold its property separately from that of the diocese in which it operates. Moreover, the apostolic works of the religious order—such as a hospital or school system operated by the order—may also be separately incorporated. Therefore, there may not be a direct ownership who live in communal life and service to the Catholic Church. In modern canon law, religious orders are called “religious institutes.” See MAIDA AND CAFARDI, supra note 21, at 42. The term “religious institute,” as used in canon law, refers to “a society in which members, according to proper law, pronounce public vows . . . and live a life in common as brothers or sisters.” 1983 Code C. 607 § 2.


132. See NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 139 (“Most religious institutes active in the United States have taken action to incorporate themselves.”).

133. See generally 1983 Code C. 634, § 1 (religious institutes “are capable of acquiring, possessing, administering, and alienating temporal goods”); NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 789-99 (indicating that superiors of religious institutes must “ensure that their ownership is safeguarded through civilly valid methods,” including, in the U.S., incorporation under civil law and through the separate incorporation of apostolic works).

134. An example of the sophisticated structure of modern religious orders may be found in Op. No. 92-09A, 1992 WL 67322 (E.R.I.S.A.) (1992) (determining that plan was eligible for church plan status). The Poor Sisters of St. Francis Seraph of Perpetual Adoration, Province of St. Joseph incorporated a nonprofit civil corporation to hold the assets of the order. Id. In 1981 the order established the Franciscan Healthcare Corporation of Colorado Springs (FHCCS) as a tax-exempt nonprofit civil corporation. Id. In 1989 FHCCS merged with another nonprofit organization controlled by the Sisters of Charity of Cincinnati, Ohio, members of an unrelated order. Id. The two orders shared control of the merged corporation.

The merged corporation sponsored a defined benefit plan in which employees at eight other facilities participated. Five of these entities were separately incorporated in their own right under the control of their own parent corporations or the holding corporation. Both the parent corporations and the holding corporations were controlled by the order. The remaining facilities were not separately incorporated.
connection recognizable in civil law between the local bishop and a hospital that is separately incorporated and operated by a religious order. Although canon law considers the property "public juridic persons" persons such as religious orders to be "ecclesiastical goods," the legal ownership of such entities and the right, under civil law, to make decisions on their behalf may vest in the religious order, and not directly in the local church hierarchy. The element of "control" may very well be missing in such arrangements.

Despite the possibility that "control" might be lacking, the element of "association" may still be present. A two-step analysis must therefore take place in order to determine whether the employees of these institutions may properly participate in church plans by virtue of their employer's "association" with the Roman Catholic Church. First, the relationship between the hierarchical Roman Catholic Church and the order itself must be examined. In analyzing this relationship, the Department of Labor (DOL) has usually concluded that they share "common religious bonds and convictions with the church." Many opinion letters generally treat the analysis of an order's "religious bonds and convictions" somewhat gingerly, if not exactly with reverence. In many cases, the DOL notes that the Order itself is listed in the Catholic Directory, an indication that the DOL generally accepts the hierarchy's official determination of which organizations actually share its religious convictions.


137. See generally MAIDA AND CAFARDI, supra note 21, at 75-76.
139. See e.g., id. at *1. The reliance on the Catholic Directory is consistent with the notion that an organization bearing the name "Catholic" is in fact associated with the Roman Catholic Church. Note, for example, that Canon 803, § 1 provides that "[a] Catholic school is understood as one which a competent ecclesiastical authority or a public ecclesiastical juridic person directs or which ecclesiastical authority recognizes as such through a written document." 1983 Code C. 803, § 1. Canon 803, 3 goes on to provide that "even if it is in fact Catholic, no school is to bear the name Catholic school without the consent of competent ecclesiastical authority." 1983 Code C. 803, § 3. See generally J. Michael
While the IRS and the DOL are not given to discoursing on the canonical organization of Catholic employers, understanding the basic elements of canon law may prove helpful in demonstrating that sufficient association is present for purposes of Section 3(33) of ERISA.\(^{140}\) This is particularly true due to the fact that the organizational structure of a Catholic employer is dictated not only by the requirements of civil law, but also by the strictures of canon law. Understanding the employer's status under canon law permits the observer to gain an understanding of the extent to which it is subject to direct ecclesiastical control by the Roman Catholic hierarchy. For example, some commentators suggest that "the level of perceived Catholicity" is higher when the canonical status of a Catholic hospital prescribes a close relationship between the hierarchy and the hospital in question.\(^{141}\) This perception seems directly relevant to establishing sufficient "association" with the Roman Catholic Church to enable such an organization to claim church plan status.

The canon law of the Roman Catholic Church recognizes not only "physical persons," but also "moral persons" and "juridic persons." The NEW COMMENTARY ON THE CODE OF CANON LAW explains that

[a] moral person is a group or succession of natural persons who are united by a common purpose and, hence, who have a particular relationship to each other and who, because of that relationship may be conceived of as a single entity.\(^{142}\)


140. See generally NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131; MAIDA AND CAFARDI, supra note 21.

141. On the general issue of Catholic identity, see generally MAIDA AND CAFARDI, supra note 19, at 158 ("[T]he establishment of a corporate philosophy, the statements of corporate purpose and structure in articles and bylaws, and the effectuation of this philosophy and legal structure by the trustees are the major source of the corporation's Catholic identity."); Morrisey, *supra* note 131.


142. See NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at
The rights or obligations that devolve upon moral persons are, in fact, the rights and obligations of the individuals who compose the group.\textsuperscript{143} A moral person might "also be understood as an accumulation or mass of material goods or assets which have been set aside for a common purpose and which, therefore, can be conceived of as a single entity, as, for example, a fund, such as a pension . . . fund."\textsuperscript{144}

In contrast, Canon 113, explains that juridic persons are the "subjects in canon law of obligations and rights which correspond to their natures." Roughly analogous to the concept of a corporation in American civil law, a juridic person is "an artificial person . . . constituted by competent ecclesiastical authority for an apostolic purpose, with a capacity for continuous existence and with canonical rights and duties like those of a natural person (e.g., to own property, enter into contracts, sue or be sued)."\textsuperscript{145} The Code of Canon Law further divides the category of juridic persons into "public" and "private"; a public juridic person, being more closely associated with the church hierarchy, acts "in the name of the Church," possesses assets identified as "ecclesiastical goods," and fulfills "entrusted functions . . . pursuant to a mission received from hierarchical authority and under the close supervision and direction of hierarchical authority."\textsuperscript{146} In contrast, a private juridic person acts in its own name and its assets are not construed as church property subject to all of the prescriptions of canon law.\textsuperscript{147}

It is important to understand that under canon law, institutions such as universities or hospitals which are commonly thought to be affiliated with

\textsuperscript{154.}

\textsuperscript{143.} Id.

\textsuperscript{144.} Id.

\textsuperscript{145.} Id. at 155; see also MAIDA AND CAFARDI, supra note 21, at 22.

\textsuperscript{146.} NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 103, at 162. See MAIDA AND CAFARDI, supra note 21, at 10 (all church property is owned by one public juridic person or another and all property held by public juridic persons is church property); Id. at 75-84 (explaining the concept of ecclesiastical goods).

\textsuperscript{147.} See NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 162; see generally 1983 Code C. 115; NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 159-61 (explaining the status of juridic persons); 1983 Code C. 116; NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 161-62 (explaining the difference between private and public juridic persons); MAIDA AND CAFARDI, supra note 21, at 21-29 (examining the status of public juridic persons under canon law and explaining that private juridic persons are "a rare and little-used entity" in the American Catholic Church).
the Roman Catholic Church may be organized in a variety of canonically acceptable structures. Under canon law, for example, a Catholic hospital might be organized as a "public juridic person" in its own right and, as such, subject to the requirements of canon law with respect to public juridic persons, including the understanding that the assets of the hospital would be "ecclesiastical goods." It is also possible that a hospital might be organized merely as the apostolic work of a sponsoring public juridic person whose assets and liabilities, for purposes of canon law, belong to its sponsor (and thus are "ecclesiastical goods"). In the alternative, a Catholic hospital may be structured as a "private juridic person" owing less accountability to the authority of the hierarchy and possessing assets that do not meet the strict requirements of "ecclesiastical goods." Finally, it is possible that a hospital might simply be organized as a "private association of the faithful," the assets of which are held by the private association and deemed to be the joint assets of the members for purposes of canon law. Although it is not necessary for a hospital to be organized as a public juridic person in order to make a persuasive case that it is associated with the Catholic Church, the stronger canonical ties will likely present the most convincing factual argument for a finding of association.

One might perhaps generalize that for purposes of demonstrating to the IRS or to the DOL that the institution under examination possesses a degree of association that satisfies the statute's mandate, a Catholic employer operating as a public juridic person in its own right or as the apostolic work of a religious order which is itself a public juridic person


150. See New Commentary on the Code of Canon Law, supra note 131, at 173 (noting that the "vast majority" of Catholic hospitals in the United States fall into this category). See also Maida and Cafardi, supra note 19, at 25-26 (noting that "[t]he canonical understanding of public juridic persons is a holistic one" and "includes all apostolic activities of the public juridic person" even when such activities have been separately incorporated under civil law).


152. Id. at 174.

under canon law would make a stronger case than an employer that operates as a private association of the faithful or a “de facto” Catholic institution.\(^\text{154}\) Consider again the example of a Catholic employer that is operated as the separately incorporated apostolic work of a religious order. For purposes of the Code and ERISA, once the order’s association with the church is established, the second step of the analysis is to determine whether the order exercises sufficient control over the separately incorporated institution which it owns or operates. In general, the DOL has found that sufficient association is present when the board of trustees of the civil corporation is comprised of members of the order.\(^\text{155}\) The IRS has issued opinion letters that similarly construe the requisite element of control.\(^\text{156}\)

For instance, the New York Province of the Sisters of Mercy established a skilled nursing facility that later became part of the Eastern Mercy Health System, a tax-exempt nonprofit membership corporation.\(^\text{157}\) The major superiors of the Mercy Sister’s eight provinces were the members of Eastern Mercy Health System.\(^\text{158}\) In turn, Eastern Mercy became the sole member of the skilled nursing facility.\(^\text{159}\) The DOL found that the order was an integral part of the Roman Catholic Church and that its structure under civil law insured that it exercised control over the skilled nursing facility.\(^\text{160}\)

In Op. No. 95-10A, the DOL found sufficient association to be present in the governance of a Jesuit university that was separately incorporated by the order, even though the corporate bylaws of the university only provided that “approximately” twelve Jesuits serve on the university’s board of trustees.\(^\text{161}\) At the time the Opinion Letter was issued, only ten

\(^{154}\) For a brief discussion of “de facto” Catholic institutions see id. at 174. For a discussion of the idea that status as a public juridic person secures Catholic identity with greater reliability, see generally Mulvihill, supra note 149.


\(^{159}\) Id.

\(^{160}\) Id.

of the twenty-seven members of the board were also members of the Society of Jesus. In both cases, the DOL found sufficient control to permit the employees of the corporation to be deemed to be employees of the church.

The canonical status of the incorporated apostolate of a religious order may be of evidentiary value in supporting the argument that sufficient control or association is present to establish that the corporation's lay employees should be regarded as employees of the church under Section 3(33) of ERISA. As the apostolic work of a public juridic person, "those who administer the affairs of the public juridic person [i.e., the order] are, canonically ultimately responsible for the affairs of the... institution, and the assets and liabilities of the institution are, canonically, assets and liabilities of the sponsoring public juridic person." While canonical responsibility does not necessarily translate into civil responsibility, the close alliance between the order and its incorporated apostolate which is dictated by canon law does suggest that the order has a canonical obligation to control the affairs of the corporation, in addition to any civil obligation dictated by its civil articles of incorporation or by-laws.

While ERISA and the Code may rightly be viewed as being generous in their description of "church employees," the scope of this generosity is not without limitations. The requirement that a plan be maintained for the benefit of the employees of the church or association of churches is significant not only for the broad definition of employees, but also for the restrictions implicit in that term. This is not simply a restatement of the language emphasizing that the plan must be maintained for the benefit of the employees, which can be found in both Sections 3(1) and 3(2). Instead, the statute specifies even further the closeness of the relationship between the church and the beneficiaries for whom the plan is operated. In order to qualify for church plan status, "substantially all" of the plan's membership must be composed of its own employees, the ordained ministers of the church, the employees of church-controlled tax-exempt

incorporated as a nonprofit membership corporation, whose members were elected by the order and whose bylaws required that members of the order fill at least one-third plus one of the total number of seats on the board of directors).

162. See Op. No. 95-10A, 1995 WL 456696 at *1. The Department of Labor also noted that the bylaws mandated a Jesuit presence on the board, provided that the board consults the order in the selection of the university president and expressed a preference that the university president be a Jesuit.


164. See NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 131, at 173.
organizations or former employees. Moreover, Section 3(33)(B) specifically provides that a church plan does not include a plan "which is established and maintained primarily for the benefit of employees . . . who are employed in connection with one or more unrelated trades or businesses." Thus, it would be fair to say that church plan status is only available to a plan that not only shares a close bond with the church itself, but that also benefits employees who share a similarly close bond.

Once again, a glance at the Catholic contribution to the modern health care economy easily shows that this is not simply a semantic issue. The modern integrated delivery system is equally identifiable in Catholic and secular health care structures. Within a modern hospital system, one might find a hospital, a primary care clinic, a nursing home, a gift shop, a parking garage, and a pharmacy. While the hospital, the clinic and the nursing home may fall within the scope of the businesses related to the hospital's tax-exempt purposes, the activities of other components of the system may not. Section 3(33)(B)(i) of ERISA indicates that a plan that is established and maintained primarily for the benefit of employees of such unrelated businesses may not qualify for church plan status. Thus, while the canonical status of the civil corporation is helpful for establishing whether the relationship between the employer and the church is close enough to satisfy Congress' requirements, we also have to look at the demographics of the plan in order to insure that the composition of the plan membership meets the expectations of the statute. In other words, while the gift shop operated by a hospital that is fulfilling the apostolate of a religious order may be sufficiently close in its relationship to the order to be "associated" with it for purposes of Section 3(33) of ERISA, the order cannot sponsor a plan whose membership is


166. See, e.g., Carle Foundation v. U.S., 611 F.2d 1192, 1198-1200 (7th Cir. 1979) (reviewing revenue rulings related to hospital systems that include gift shops, parking garages, and other services); see also Hitchner et al., supra note 165, at 274 ("An integrated delivery system normally provides, at a minimum, hospital, physician, and ancillary health services.").

167. See, e.g., Carle Found., 611 F.2d at 1198 (sales by tax-exempt clinic pharmacy to non-exempt clinic constitute an unrelated trade or business within the meaning of 26 U.S.C. §§ 511-513). For a discussion of the application of tax-exemption standards to integrated delivery systems, see, e.g., Geisinger Health Plan v. C.I.R., 30 F.3d 494 (3rd Cir. 1994).
predominantly composed of gift shop employees and expect that the IRS will view that plan as a "church plan." To put it more simply, church plans must be both closely associated with a church-affiliated institution and operated primarily for the benefit of employees whose jobs are closely associated with the purposes of the institution.

The IRS has created a rather mechanical test to determine whether a plan is established and maintained in an appropriate manner. The establishment/maintenance test first examines plan membership at its inception and then monitors the plan's population over time.\textsuperscript{168} In general, plans that were established following the enactment of ERISA, must first satisfy the requirement of being "established and maintained primarily for the benefit of employees (or their beneficiaries) that are not employed in connection with one or more unrelated trades or business."\textsuperscript{169} The "establishment" requirement is met if fewer than half of the employees who are eligible to participate in the plan on the date of its establishment are in fact employed in unrelated trades or businesses.\textsuperscript{170} This preliminary inquiry must be supplemented by a more complex, ongoing examination of the plan's ability to be maintained for the benefit of those employees on an on-going basis.\textsuperscript{171} A plan is satisfactorily maintained as a church plan if fewer than half of plan participants are employees of unrelated trades or businesses for four of the five immediately prior plan years.\textsuperscript{172} Plans that calculate benefits or contributions in relation to an employee's compensation must also be able to demonstrate that during the same plan years less than half of the total compensation paid by the employer to employees who participate in the plan was attributable to the compensation paid to employees of unrelated trades or businesses.\textsuperscript{173} Plans that fail these tests by a small margin or by virtue of "a reasonable mistake as to what constituted an unrelated trade or business" are afforded an exemption based on facts and circumstances.\textsuperscript{174}

2. \textit{Holding the Keys: Who is the Plan Administrator?}

A final important issue for plans designed to be eligible for church plan status is the identity of the plan administrator. Section 3(33)(C)(i) of

\textsuperscript{168} 26 C.F.R. § 1.414(e)-1(b)(1) (2000).
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} See § 1. 414(e)-1(b)(2)(i)(A).
\textsuperscript{171} See § 1.414(e)-1(b)(2)(ii).
\textsuperscript{172} See § 1.414(e)-1(b)(2)(B)(ii)(A).
\textsuperscript{173} See § 1.414(e)-1(b)(2)(B)(ii)(B).
\textsuperscript{174} § 1.414(e)-1(b)(2)(iii).
ERISA provides:

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches. 175

In other words, not only is it important to be able to establish that the plan is maintained for the benefit of employees of corporations that are controlled by or associated with a church, but it is also important that the plan administrator enjoy the same relationship with the church. For example, the Sisters of St. Joseph operated a defined benefit plan for the benefit of lay employees of their convent. 176 The Official Catholic Directory specifically included both the order and its convent, thus evidencing the order's association with the Roman Catholic Church. 177 The order appointed the Board of Directors of the convent, who in turn appointed the members of the plan's administrative committee. 178 In addition, only members of the order were eligible to serve on the administrative committee. 179 In this instance, the DOL determined that the composition of the administrative committee insured that its relationship with the order was sufficiently close to satisfy the requirements of Section 3(33) of ERISA. 180

In Op. No. 91-11A, the DOL found that a religious order that was the sole corporate member of the parent corporation of a general hospital and nursing home was in control of the hospital's benefit plan committee by virtue of the order's participation in the selection and supervision of

177. Id.
178. Id.
179. Id.
180. Id. at *2. See also Op. No. 86, 1986 WL 38843 (E.R.I.S.A.) (sufficient control found where administrative committee of pension plan established for benefit of school employees consisted of four members of religious order who serve at the direction of the Board of Directors of the school that is also subject to the control of the religious order); Op. No. 81-14A, 1981 WL 17735 (E.R.I.S.A.).
the administrative committee. In the case of a plan that is administered by a third-party administrator, this requirement has been interpreted to mean that the third-party administrator must be controlled by the church. While this analysis may seem to place form over function in some respects, it is clear that in some instances churches have not asserted sufficient control to satisfy the statutory requirements.

3. What are the results of classification as a church plan?

Section 4(b)(2) of ERISA provides that the provisions of Title I of ERISA shall not apply to a church plan that has not made an election under Section 410(d) of the Code. Similar provisions exempt a non-electing church plan from ERISA-related amendments to the Code.

Once eligibility for church plan status has been established, the plan administrator has the authority, under civil law, to determine whether to elect to participate in ERISA and the related requirements of the Code. Section 410(d) of the Code and the corresponding regulations set forth the basic method and the consequences of a church plan election. While the statute speaks of the “church” as making the election, the associated treasury regulations clearly state that “[t]he election provided by this section may be made only by the plan administrator of the church plan.”

187. The Internal Revenue Code provides:

(d) Election by church to have participation, vesting, funding, etc., provisions apply.

(1) In general.- If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe), then the provisions of this title relating to participation, vesting, funding, etc. (as in effect from time to time) shall apply to such church plan as if such provisions did not contain an exclusion for church plans.

26 U.S.C. § 410(d)(1) (2000). Moreover, once made, the election is irrevocable with respect to that plan. See also id. § 410(d)(2) (2000).

188. See Treas. Reg. 26 C.F.R. § 1.410-1(c)(3) (2000). An election may, however, be conditional upon the receipt of a favorable determination letter. See
Thus, by designating the plan administrator as the sole entity authorized to make such a decision, the regulations insure that an election may not be forced upon a church or inferred from its conduct. This is of particular importance in considering the rights of a plan participant whose own interests may dictate that a plan either is subject to ERISA or exempt from it. It is the plan administrator and not the plan participant who may elect for the plan to be covered under ERISA.

For example, in *Tucker v. Ochsner Health Plan*, a Baptist minister voluntarily terminated his participation in a church-sponsored health plan. Unfortunately, shortly after he terminated his participation in the plan, the minister fell out of a tree and injured himself. In attempting to establish the plan’s obligation to provide coverage for his quite substantial injuries, he argued that even though the plan met the definition of a church plan, it had waived its exemption from ERISA because the group health services agreement documenting the plan’s administration apparently incorporated the requirements of COBRA, codified at Section 609 of ERISA. Since there was no evidence that the plan administrator had specifically elected to be subject to ERISA, the Louisiana Court of Appeals held that the language of the group services agreement could not be considered to be a waiver of the church plan’s ERISA exemption.

It is interesting to note that while Section 414(e) of the Code and the related treasury regulations primarily address the concerns of pension plans, the DOL and the courts have clearly recognized that the concept of a church plan may just as easily be applied to a welfare benefit plan. In Opinion Letter 90-12A, for example, the DOL listed life insurance and health insurance arrangements as church plans. Moreover, the plan under which the minister sought benefits in *Tucker v. Ochsner Health Plan*...
Plan provided health insurance benefits and therefore, had ERISA coverage been elected, it would clearly have been classified as a welfare benefit plan.\textsuperscript{195}

There is a range of regulations to which non-electing pension and welfare plans sponsored by churches and church affiliates remain subject.\textsuperscript{196} However, the consequences of electing ERISA coverage are, in some respects, quite different for pension plans and welfare plans. The following sections briefly discuss the specific application of this election to pension plans before discussing the points of commonality between pension and welfare benefit plans.

\textit{a. Pension Plans}

While ERISA has been subjected to many criticisms since it was signed into law on September 2, 1974,\textsuperscript{197} one should not forget that ERISA was the instrument by which workers claimed a right to early vesting of their benefits and to the enforcement of an employer’s promises of pension benefits.\textsuperscript{198} A decision to subject a church plan to ERISA regulation is a decision to allow a participant in a church plan to share the assumptions that the employee of a secular corporation may now make regarding the security of his or her benefits. A plan administrator electing to treat his or her company’s pension plan as an ERISA plan has extended to the plan, among other requirements, the following obligations under the Code and the related provisions of ERISA: (1) minimum participation standards under Section 410; (2) vesting standards under Section 411; (3) minimum funding standards under Section 412; (4) limitations on prohibited transactions under Section 4975; and (5) the obligations to provide joint and survivor annuities, where applicable, under Section 401(a)(11).\textsuperscript{199} In

\textsuperscript{195} Tucker, 720 So. 2d at 840.

\textsuperscript{196} Significant among these is the reporting requirements set forth in 26 U.S.C. § 6039 (2000).

\textsuperscript{197} See, e.g., Suggs v. Pan Am. Life Ins. Co., 847 F. Supp. 1324, 1355 (S.D. Miss. 1994) (“When an analysis is made of present controlling case law under ERISA in the field of health insurance, it seems that when most major provisions or terms have had to be interpreted, an interpretation has prevailed that provided less protection to ‘employees and their beneficiaries,’ than they had before ERISA was adopted.”).


\textsuperscript{199} See 26 C.F.R. § 11.410-1(a) (2000). Additional requirements include: 26 U.S.C. §§ 401(a)(12) (mergers); 401(a)(13) (assignment or alienation of benefits); 401(a)(14) (time of benefit commencement); 401(a)(15) (social security) and
addition, the pension plan also becomes subject to the disclosure and fiduciary obligations of ERISA, together with its enforcement provisions.

The difference between a pension plan that elects to be subject to ERISA and a non-electing church plan amounts to a decision between being a part of the modern pension regulatory system or remaining part of the pre-ERISA world that existed before 1974. To put it plainly, a non-electing church plan need not comply with ERISA’s major advances in the protection of employee rights. To name only three of ERISA’s many requirements, it need not offer vesting within the five year period currently obligated by Section 410(a); it need not comply with minimum funding requirements; and it need not subscribe for plan termination insurance.200

A non-electing church pension plan is not exempt from compliance with a wide variety of Code requirements. The difference, however, is that the scope of the obligations defined by those requirements is determined by reference to law dating prior to the enactment of ERISA. However, non-electing plans do remain subject to a wide variety of pre-ERISA regulations that remain extant under the Code in order to preserve their tax-qualified status. While tax-exempt organizations such as churches do not reap as many benefits from tax qualification as private entities that may take advantage of the accelerated deductibility of plan contributions, tax-qualified status nonetheless offers a substantial benefit to the employee who can defer taxation of his or her retirement savings until distribution.201 In particular, a non-electing church plan continues to be subject to the requirement that benefits be provided pursuant to a written instrument. Moreover, the plan must provide a definitely determinable benefit.202 A variety of nondiscrimination requirements remain in effect for non-electing church plans, including, among others, Sections 415, 416, 401(a)(26) and 401(m).203 In addition, several pre-

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201. See, e.g., 26 U.S.C. § 402(a) (deferral of taxation for participants in tax-qualified trust); cf. Id. § 402(b) (principles of Section 83 apply to taxation of contributions to nonqualified trusts).

202. See id. § 401(a)(2).


ERISA requirements apply to non-electing church plans, the most significant of which are the pre-ERISA vesting requirements set forth in pre-ERISA 401(a)(4) and 401(a)(7), which required vesting at normal retirement age, and the pre-ERISA funding requirements of Section 401(a)(7).

It is imperative that one understands that ERISA prescribes minimum levels of protection for employees who participate in pension plans. Moreover, exemption from ERISA does not mean that the sponsor of a church plan may not contractually bind itself to compliance with these minimum protections or other similar obligations. In the most blunt terms, one might simply say that in retaining exemption from ERISA, the church plan sponsor has also retained the right to define, in large part, the extent to which his or her plan will offer protected benefits to his or her employees. It is the sponsor of a non-electing church plan, and not the government, which decides the extent to which those benefits are protected.

b. Welfare Plans

The difference between church welfare plans that become subject to ERISA and non-electing church welfare plans is not quite as stark. Welfare plans have never been subject to as significant an amount of legislation as have pension plans. ERISA itself provides very few mandates to which a welfare plan is subject. However, like a pension plan, a church welfare plan may be operated in a certain manner in order to procure tax-related benefits for its employees and to avoid financial penalties to its sponsor. A church welfare plan that is designed to receive special tax treatment under Sections 105 and 106 of the Code, among others, and must comply with those provisions regardless of whether they

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Catholic Sponsors of Church Plans

are subject to ERISA. In addition, some special consideration must be given to the relevance of COBRA requirements for church-sponsored group health insurance plans. The DOL has noted that a church plan, which is not subject to ERISA, is not required to comply with the provisions of ERISA that pertain to COBRA. In Op. No. 95-10, the Jesuits received an acknowledgment that the benefit plans of St. Joseph University, including a variety of welfare benefit plans, were church plans exempt from ERISA. The DOL specifically noted, however that its decision did not extend to any tax issues, and that COBRA, a requirement that appears both in the Code and in ERISA, was administered by the IRS.

c. The Common Problem: ERISA Preemption

One of the most controversial aspects of ERISA is its forceful preemption clause. Section 514(a) of ERISA provides that ERISA preempts state laws that relate to employee benefit plans. Although this language is subject to several significant exceptions set forth in Section 514(b), it remains a very broad statement of Congress' intent to subject ERISA plans to federal, rather than state, regulation. During the early years of ERISA jurisprudence, the self-consciously broad construction of this language laid the groundwork for an interpretation of ERISA preemption as "sweeping." The term "relates to" was the instrument by which courts felled almost any state law that "ha[d] a
connection with or reference to” an employee benefit plan.212 Thus, state law claims based on breach of contract, state-mandated benefits, and a variety of other legislative initiatives or interpretations of common law were laid waste by ERISA's determined focus on the right of the federal government to regulate employee benefit plans.213

Although the force of ERISA preemption applies to both pension plans and welfare plans, the impact of ERISA preemption is greater with respect to welfare plans.214 While ERISA preempts state law attempts to regulate pension plans, it also provides pension plan participants with some level of protection by specifying a variety of rules concerning the calculation and distribution of benefits, as well as certain limitations on funding and vesting of benefits.215 Moreover, tax-qualified pension plans must also adhere to a vast number of specific regulations under the Code, many of which are concerned with securing the employer’s promise of employee benefits and insuring that tax advantages are not immoderately biased towards the highly compensated employees.216 In contrast, ERISA says very little about the regulation of the content or form of distribution of benefits under welfare plans. Beyond mandatory compliance with the essential requirements of disclosure, fiduciary responsibility and enforcement procedures, welfare plans may be operated with little regard to any content mandated by ERISA.217 Moreover, the influence of other federal legislation is also insubstantial in comparison to the specific requirements imposed upon pension plans. Since Metropolitan Life v. Massachusetts218 sensational observation that Section 514(b)(2)(A) saved state-based insurance laws from ERISA preemption only with regard to insured plans, there has been widespread acknowledgment that a self-funded employee welfare benefit plan operates in what is often called “the ERISA vacuum.”219 In other words, a self-funded employee welfare

215. See supra text accompanying note 199.
217. See Curtiss-Wright, 514 U.S. at 78.
benefit plan may count on the preemption of state laws relating to that plan (including laws regulating health insurance). That same plan is unlikely to find many limitations with respect its design and structure in federal law beyond ERISA's general directives regarding the provision of continuation benefits and parity for mental health benefits. Moreover, because ERISA provides no vesting requirement for welfare benefits, a participant in an employer-sponsored health insurance plan is likely to find that his or her employer possesses the right to amend or terminate his or her plan without constraint.\(^{220}\)

The application of ERISA preemption to claims based on an employer's promises of health insurance benefits has drawn significant attention in the past decade. Among the most dire cases to examine the effect of ERISA preemption on claims based on health insurance benefits within a managed care system stand Corcoran v. United Healthcare, Inc.,\(^{221}\) Kuhl v. Lincoln National Health Plan,\(^{222}\) and Andrews-Clarke v. Travelers Insurance Co.\(^{223}\) In each of these cases, the plaintiff alleged a significant loss that was directly traceable to the design of his or her employee benefit plan and yet uncompensable under state law due to ERISA preemption. In Corcoran, a pregnant woman was denied hospitalization and lost her baby during a period when her home health nurse was unavailable.\(^{224}\) In Kuhl, a heart patient who was required to utilize a particular hospital for a transplant operation passed away before the facilities became available for his transplant.\(^{225}\) In Andrews-Clarke, limitations on the benefits available to a depressed alcoholic patient seemed to be directly connected to his subsequent suicide.\(^{226}\) In each of these cases, the patient or his heirs pressed a suit based on state law, which was ultimately preempted.\(^{227}\) Moreover, in each case, the courts found that no additional damages were available under ERISA beyond the payment for the care that had actually been rendered.\(^{228}\) Although, in

\(^{220}\) See Curtiss-Wright, 514 U.S. at 73, 75.

\(^{221}\) Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).

\(^{222}\) Kuhl v. Lincoln Nat'l Health Plan of Kansas City, Inc., 999 F.2d 298 (11th Cir. 1993).


\(^{224}\) Corcoran, 965 F.2d at 1321.

\(^{225}\) Kuhl, 999 F.2d at 299.

\(^{226}\) Andrews-Clarke, 984 F. Supp. at 52.

\(^{227}\) See Corcoran, 965 F.2d at 1331; Kuhl, 999 F.2d at 302; Andrews-Clarke, 984 F. Supp. at 53.

\(^{228}\) See Corcoran, 965 F.2d at 1338; Kuhl, 999 F.2d at 304; Andrews-Clarke,
recent years, courts have attempted to place limitations on the impact of ERISA preemption, the fact remains that as long as Section 514 is in operation, many plaintiffs will find that their claims under state law—legitimate or otherwise—will be preempted and that ERISA's deliberately limited range of damages will not recompense them to a similar extent.

When we ask what is at stake for an employee when his or her employer decides whether to maintain a church plan within or outside ERISA, we must look both at the choice regarding the content of the plan and the enforcement of its promises. In some ways, the differences in the content of the plan may be less significant. If an employer were to examine the effect of the church plan exemption on the well-being of employees who participate in a pension plan,229 for instance, he would have to weigh the employees' interest in subjecting the plan to federal vesting and funding requirements against the costs that the employer would incur in funding a benefit that vests after five years. It is important to remember, however, that nothing prevents an employer from contractually binding himself to similar constraints in a non-electing church plan. Likewise, a non-electing church plan that provides health insurance benefits would differ in the obligations concerning the content of its plan under federal law only with respect to the continuation coverage required by COBRA (required of ERISA plans) and the mental health parity provisions (also set forth in ERISA).

However, in the area of claims enforcement, the election concerning whether a plan should be subject to ERISA raises much larger concerns. Simply put, a plan that is subject to ERISA is a plan that is protected, to a very large degree, from claims based on state law. A plan that is not subject to ERISA cannot claim the same protection. In other words, a non-electing church plan may not be subject to the requirements of ERISA but is subject to the requirements of state law. Thus, the result of cases such as Corcoran, Kuhl and Andrews might be quite different if the defendants were deprived of the opportunity to argue that ERISA preempted state law claims based on common law theories of breach of contract, misrepresentation or other similar claims.

The decision to preserve a plan's exemption from ERISA is not, however, a simple, high-minded decision to avoid the consequences of ERISA preemption with respect to the enforcement of participants’

984 F. Supp. at 53.

229. The church plan election is primarily a design decision and, as such, is not subject to fiduciary requirements. See generally Bryant v. Food Lion, Inc., 774 F. Supp. 1484, 1491-92 (explaining the difference between design decisions and fiduciary decisions).
claims. Until very recently, two practical problems befuddled the administrators of church plans that claimed exemption from ERISA and thus subjected themselves to state law. Stripped of ERISA's protections for self-insured plans, church plan sponsors that elected exemption from ERISA faced the possible enforcement of a confusing array of state insurance laws. The decision to remain exempt from ERISA and thus bereft of ERISA preemption resulted in the potential application of many state insurance laws to church plans, including compliance with licensure laws as well as basic state insurance provisions regarding protection against insolvency. A secondary consequence of this "entangled" state of affairs was the reported reluctance of service providers to do business with church plans under these ambiguous circumstances. The Church Plan Parity and Entanglement Prevention Act of 1999, which was signed into law in July 2000, offers a very limited haven to sponsors and administrators of church plans. Under the new legislation, church plans are deemed to be in compliance with state insurance laws regarding licensure and insolvency. Administrators of non-electing church welfare plans need no longer fear that state insurance laws will require the financial securities that are expected of true insurance companies. On the other hand, the assistance offered by this legislation is very limited.

230. See generally, S. 1309, Church Plan Parity and Entanglement Prevention Act, Statement of Hon. Boehner (June 26, 2000) available at http://thomas.loc.gov/cgi-bin/query/D?rl06:2:./temp/-rl06HbevHA:: (last visited Sept. 22, 2000) (stating that due to the church plan exemption, "these church programs are potentially subject to regulation by individual States, which was never intended when church plans were designed.").

231. See Church Plan Parity and Entanglement Prevention Act, P.L. No. 106-244, § 1 (stating that the purpose of the Act is to clarify the status of church plans with respect to "State insurance laws that require or solely relate to licensing, solvency, insolvency, or the status of such plan as a single employer plan.").


233. See Church Plan Parity and Entanglement Prevention Act, supra note 231, § 2(d) (stating that for the purposes of enforcing provisions of state insurance laws relating to licensure or solvency, "the church plan shall be subject to State enforcement as if the church plan were an insurer licensed by the State.").

234. Id.
All other state insurance laws remain in effect with respect to insured plans and there is no preemption of state laws other than those described in the legislation as relating to these limited financial matters.

The basic choice that faces the sponsor of a church plan remains the same: should the plan be subject to ERISA, with all of its potential for protecting the plan and related parties from claims based on state law, or should it remain outside ERISA's safety zone?

The remainder of this article analyzes this choice in light of the Catholic Church's precept that an employer must pay an employee a just wage. To put it differently, does the Catholic notion of a just wage weigh for or against a decision to subject a plan to ERISA?

II. CATHOLIC SOCIAL TEACHINGS AND THE TRADITION OF A JUST WAGE

It was Leo XIII who brought the weight of the papacy to bear on the notion of a just wage in his 1891 encyclical, RERUM NOVARUM. Before we examine RERUM NOVARUM and the "new things" it brought to the Roman Catholic hierarchy's analysis of justice in the workplace, it is perhaps fitting to recall that Leo XIII also advised Catholic scholars to return to the methodology and the substance of the writings of Saint Thomas Aquinas.

235. See LEO XIII, RERUM NOVARUM: THE CONDITION OF LABOR IN CATHOLIC SOCIAL THOUGHT - THE DOCUMENTARY HERITAGE 13 (David J. O'Brien & Thomas A. Shannon eds., 1992). Thomas Bokenkotter has described RERUM NOVARUM as "the Magna Carta of social Catholicism, the movement that more than any other within the Church gradually forced Catholics out of their medievalism and state of siege mentality and inspired them to grapple realistically with the problems of the twentieth century." See also THOMAS BOKENKOTTER, A CONCISE HISTORY OF THE CATHOLIC CHURCH 311-12 (1977); Richard T. DeGeorge, Neither the Hammer and Sickle Nor the Eye of the Needle: One Hundred Years of Catholic Social Thought on Economic Systems in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER - BUILDING ON ONE HUNDRED YEARS, supra note 8, at 127 (stating that Catholic social teaching cannot be understood without comprehending Marxism).

236. LEO XIII, AETERNI PATRIS (1879) available at http://www.vatican.va/holyfather/leoxii/en.../hf_1-xiii_enc_04081879_aeterni-patris_en.html (last visited Sept. 17, 2000): see also JOHN PAUL II, VERITATIS SPLENDOR, supra note 80, § 44 ("The Church has often made reference to the Thomistic doctrine of natural law."); see generally Oliver F. Williams, Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER - BUILDING ON ONE HUNDRED YEARS, supra note 8, at 5, 17 (describing "the formation of
The vision of the common good as the normative end to which human endeavor should strive is the distinctive marking of the articulated social teachings of the Catholic Church. Leo's appeal to Aquinas suggests that the origins of modern Catholic social teaching hearken both to a traditional conception of justice as the pursuit of the common good and to the idea that human beings exercise certain "natural" rights which derive from God and not from human legislation. Aquinas defined law as "nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." For Aquinas, God's "conception of things is not subject to time, but is eternal... therefore it is that this kind of law must be called eternal." His conception of the natural law posited the human being's "partaking of a share of providence, by being provident both for itself and for others." Aquinas explained:

Wherefore [the rational creature] has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist... implied that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else

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238. See Rommen, supra note 236, at 4 ("The idea of a natural law can emerge only when men come to perceive that not all law is unalterable and unchanging divine law.").

239. See Aquinas, supra note 237, at 145.

240. Id. at 154.

241. Id. at 159.
than the rational creature’s participation of the eternal law.\textsuperscript{242}

In reflecting upon the role of human law (as opposed to natural law), Aquinas believed that since “the end of law is the common good . . . . human laws should be proportionate to the common good.”\textsuperscript{243} Thus, human laws should be directed to the welfare of the community of the state, which is “composed of many persons.”\textsuperscript{244} However, a human law which does not always further the welfare of the community—in other words, that is in conflict with the natural law—may in certain limited circumstances be disregarded or changed. Aquinas’ vision of life in society focused on the human being’s inherent understanding of the obligation to strive toward an ideal of “bliss or happiness”\textsuperscript{245} and his pragmatic view that this endeavor must take place in a social context.

Leo’s appeal to the writings of Aquinas should remind us that even when the rhetoric of RERUM NOVARUM faintly echoes the Marxist critique which permeated the European secular left of its time,\textsuperscript{246} Leo wrote from a different, decidedly non-Marxist perspective.\textsuperscript{247} Rooted in Thomist philosophy and the conception of a natural law, RERUM NOVARUM rejects neither private property nor the disparity between rich and poor.\textsuperscript{248} Instead, RERUM NOVARUM accepts these elements: the first

\begin{itemize}
\item \textsuperscript{242} Id. at 159-60.
\item \textsuperscript{243} Id. at 311.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} See Aquinas, supra note 189, at 6.
\item \textsuperscript{246} See, e.g., RERUM NOVARUM, supra note 235, ¶ 32 (“On the one side there is the party which holds the power because it holds the wealth . . . . On the other side there is the needy and powerless multitude, sore and suffering, always ready for disturbance.”); see generally David L. Gregory, Catholic Labor Theory and the Transformation of Work, 45 WASH. & LEE L. REV. 119, 119 (1988) (“Catholic social teaching on labor incorporates and differs from both Marxist and capitalist teachings.”).
\item \textsuperscript{248} See, e.g., RERUM NOVARUM, in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER - BUILDING ON ONE HUNDRED YEARS, supra note 235, at 28-29 (“[N]either justice nor the common good allows anyone to seize that which belongs to another, or, under the pretext of futile and ridiculous equality, to lay hands on other people’s fortunes.”).
\end{itemize}
is a right that is necessary for a person’s dignity and the second is an assessment of how society is organized. Nonetheless, RERUM NOVARUM directly raises the question of a just wage in a less than ideal society.\textsuperscript{249} It is not difficult to note the difference between a purely capitalist conception of an appropriate wage—the point of efficient functioning in the marketplace—and Marx’s observation that capital was simply objectified labor.\textsuperscript{250} Leo’s contribution was to state that this was not simply a question of economics, Marxist or otherwise. Instead, he asserted not only the right to a just wage but a conception of how that just wage should be calculated.\textsuperscript{251}

One should pause here and reflect on Leo’s words from more than a century ago:

Let it be granted, then, that, as a rule, workman and employer should make free agreements, and in particular should freely agree as to wages; nevertheless there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage earner in reasonable and frugal comfort.\textsuperscript{252}

More specifically, Leo called for the worker to receive a wage that would “enable him to maintain himself, his wife, and his children in reasonable comfort.”\textsuperscript{253} This wage should be delivered to the worker regardless of the fact that it might limit the profits of the employer because the worker himself had the right to sell his labor in order to acquire private property. The markings of Aquinas’ influence can be seen in Leo’s words. First, the worker and the employer shared what Leo viewed as a “natural” right to own private property. Second, the common good demanded that the employer properly compensate his workers in order that they may exercise that right.

The concept of a just wage has held steady even as church documents
have grown more accepting of capitalism as an organizational structure.\textsuperscript{254} Even when the economy is governed by marketplace values and calculations based on efficiency in wage negotiations, Catholic social teachings draw a line beyond which an employer should not venture. That line is the just wage. Just as many of the twentieth-century encyclicals on Catholic social teachings have marked anniversaries, like \textsc{Rerum Novarum} (consider, for example, \textsc{Quadragesimo Anno}, \textsc{Octogesimo Anno} and \textsc{Centesimus Anno} directly marking the fortieth, eightieth and hundredth anniversaries of the first of the social encyclicals), so have subsequent church teachings on a "just wage" always returned to the two basic notions articulated by Leo XIII.

First, the amount of a worker's wage not only requires his consent, but is also subject to a non-negotiable minimum in order to be considered to be a just wage. It should be noted, of course, that these precepts do not operate in a vacuum. Pius XI, who brought the term "social justice" to Catholic social teachings,\textsuperscript{255} saw the just wage in the context of the common good, noting that wages should not destroy the viability of a business.\textsuperscript{256} John XXIII in particular noted that the common good could not demand that business affairs be neglected. In \textsc{Mater et Magistra}, John XXIII recalled that the "norms of justice and equity" should govern compensation decisions in order to insure that "workers receive a wage sufficient to lead a life worthy of man and to fulfill family responsibilities properly."\textsuperscript{257} Yet even \textsc{Mater et Magistra} was at pains to explain the parameters of that decision within the employer's economic context.

But in determining what constitutes an appropriate wage, the following must necessarily be taken into account: first of all, the contribution of individuals to the economic effort; the economic state of the enterprises within which they work; the requirements of each community, especially as regards overall employment; finally, what concerns the common good of all peoples, namely, of the various States associated among

\begin{itemize}
  \item \textsuperscript{254} \textit{See}, \textit{e.g.,} John Paul II, \textsc{Centesimus Annus} \textit{in} Catholic Social Thought and the New World Order - Building on One Hundred Years, \textit{supra} note 8, \textsection{} 15.
  \item \textsuperscript{255} \textit{See} Pius XI, \textsc{Quadragesimo Anno}, \textit{in} Catholic Social Thought and the New World Order - Building on One Hundred Years, \textit{supra} note 8, \textsection{} 57.
  \item \textsuperscript{256} \textit{Id.} at \textsection{} 57.
  \item \textsuperscript{257} \textit{See} John XXIII, \textsc{Mater et Magistra}: Christianity and Social Progress \textit{in} Catholic Social Thought and the New World Order - Building on One Hundred Years, \textit{supra} note 8, \textsection{} 136.
\end{itemize}
themselves but differing in character and extent.\textsuperscript{258}

Thus, because the opportunity to work is a basic right of all members of
the community,\textsuperscript{259} the common good requires that the amount of the just
wage not exceed the employer's ability to stay in business. Neither,
however, do the social teachings justify an employer's paying the
minimum amount required by civil law when that amount cannot support
the worker within the boundaries considered acceptable under the social
teachings.

Second, the just wage is defined not solely in relation to the employee's
capacity to work, but also with reference to the amount needed to sustain
the worker and his family in "reasonable and frugal comfort."\textsuperscript{260} Thus, the
employer's responsibility to provide a just wage to his employee is also a
responsibility to contribute to the common good by insuring that the
employee can support his family. This notion is reiterated in every major
encyclical pertaining to work from \textit{Rerum Novarum} to \textit{Centesimus Annus}.
The worker is viewed not only as an individual, but also as a
member of a family and a member of a community. Just as \textit{Rerum Novarum} and, more recently, \textit{Labores Exercens} have called for the
respect of a worker's right to exercise his religion and to have time to
pray, so have they assumed and mandated respect for his participation in
the economic well-being of his family. A just wage is a wage that permits
a worker to care for his family.

Because Catholic social teaching has developed over a span of the
century and has not remained a static expression of Leo's assessment of
the world economy in 1891, it has also responded to the development of
the modern economy and the pressures of the modern marketplace. In
recent years, Catholic social teachings have taken account of the
importance that the workplace and the compensation that is earned play
in financing a worker's health insurance and his pension benefits as well.
In \textit{Labores Exercens}, John Paul II painted a picture of the just wage
in the modern economy. In describing the relations between worker and
employer, John Paul II noted:

\textsuperscript{258} \textit{Id.} at § 71.

\textsuperscript{259} See generally, Gregory, \textit{supra} note 246, at 130 ("Work is a fundamental
dimension of human existence.").

\textsuperscript{260} \textit{Rerum Novarum}, \textit{supra} note 235, § 34.

\textsuperscript{261} See, e.g., \textit{id.}; see also \textit{Quadragesimo Anno}, \textit{supra} note 255, § 71; \textit{Mater et
Magistra}, \textit{supra} note 257, § 71; \textit{Centesimus Anno}, \textit{supra} note 254, § 8; see generally
\textit{Centesimus Anno}, \textit{supra} note 254, §§ 39, 49.
Besides wages, various social benefits intended to ensure the life and health of workers and their families play a part here. The expenses involved in health care, especially in the case of accidents at work, demand that medical assistance should be easily available for workers and that as far as possible it should be cheap or even free of charge. . . . A third sector concerns the right to a pension and to insurance for old age and in case of accidents at work.262

To put it simply, LABORENS EXERCENS seems to say that a just wage includes access to just benefits.

How can one identify a just benefit? In some societies, of course, social benefits are provided by the state in the form of national health insurance or social security. LABORENS EXERCENS is thus sometimes analyzed in terms of its impact on the discussion regarding the desirability of government mandates.263 In the United States, however, the dominant means of access to health insurance is through access to a job that provices health insurance benefits.264 The Catholic employer cannot, therefore, dismiss LABORENS EXERCENS and its interpretation of a just wage as pertaining strictly to government-provided benefits. LABORENS EXERCENS speaks not only to the Catholic voter, but also to the Catholic worker and the Catholic employer.

Further explanation of the meaning of a just wage may be found in canon law, which resonates with echoes of Catholic social teaching regarding a just wage. Canon 1286, ‘2, which addresses the management of ecclesiastical goods states, for example, that churches “. . . are to pay employees a just and decent wage so that they may provide appropriately for their needs and those of their family.” Canon 230, ‘2 explicitly states:

[Lay persons employed by the church] have a right to a decent remuneration suited to their condition; by such remuneration they should be able to provide decently for their own needs and for those of their family with due regard for the prescriptions of civil law; they likewise have a right that their pension, social

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262. JOHN PAUL II, LABORENS EXERCENS: ON HUMAN WORK, in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER - BUILDING ON ONE HUNDRED YEARS, supra note 8, at 379-80.


264. See supra note 5 and accompanying text.
security and health benefits be duly provided.\textsuperscript{265} These themes resound again at the level of the National Conference of Catholic Bishops. The bishops' 1986 pastoral letter, \textit{ECONOMIC JUSTICE FOR ALL},\textsuperscript{266} has made an important contribution to the analysis of a just wage in the American context.\textsuperscript{267} The bishops reiterated the principle of the common good as an objective to be sought in compensation relationships within the American economy. The bishops also committed themselves, as employers, "to the principle that those who serve the Church . . . should receive a sufficient livelihood and the social benefits provided by responsible employers in our nation."\textsuperscript{268} Moreover, the Conference has recently published a working paper that reminds Catholic health care institutions of the importance of applying Catholic social teachings, including the requirement of "just compensation," to their workplaces.\textsuperscript{269} The working paper cites \textit{ECONOMIC JUSTICE FOR ALL} in reminding employers that "[w]ork is also the ordinary way most people meet their material needs, so wages and benefits need to be adequate to sustain workers and their families."\textsuperscript{270} The "elements of a just and fair workplace" include "fair wages" and "adequate benefits."\textsuperscript{271}

In some ways, the structure of the American civil law governing employee benefits puts in the employer's hands the responsibility to determine the "adequacy" of benefits. A secular employer who thinks that ERISA preemption is unjust can do very little to change that situation. In contrast, a Catholic employer must at least ask himself whether his benefits can be considered "adequate" and his plans "just" if they preclude the right to litigate claims that would otherwise be valid under state law. Of course, one cannot exclude from this analysis the important observation that, with all other compensation being equal, a job

\textsuperscript{265} 1983 Code C. 230, § 2.
\textsuperscript{266} \textsc{National Conference of Catholic Bishops, Economic Justice for All, in Catholic Social Thought and the New World Order - Building on One Hundred Years, supra note 8.}
\textsuperscript{267} \textit{See generally} Gregory, \textit{supra} note 246, at 149-53 (analyzing \textit{Economic Justice for All}).
\textsuperscript{268} \textit{Economic Justice for All, supra note 20, ¶ 351.}
\textsuperscript{270} Id.
\textsuperscript{271} Id.
that offers ERISA benefits is better than a job that offers no benefits at all. Indeed, Congress made a secular judgment in favor of limiting liability in order to prevent secular employers from reaching this conclusion. Yet, in challenging themselves to provide a “just wage,” Catholic employers must ask themselves whether an election to operate a church plan in compliance with the minimum protections which ERISA affords to employees of secular employers is enough to satisfy the church’s requirement that a wage be just. If Catholic social teachings ask the Catholic employer to pay his employee a just wage, then the employee should not have to pay the price exacted by ERISA preemption in order to secure the employer’s promise of employee benefits.
APPENDIX A: MORTALITY RATES FOR HIV/AIDS, MALARIA AND LEPROSY

The following data, which were obtained from Table 3 of the 1997-1999 World Health Statistics Annual, indicate that the mortality rates for HIV/AIDS and malaria in the Americas and in Europe are low in comparison to those in other regions of the world. In addition, the mortality rate for leprosy is also substantially lower in the Americas than in South-East Asia.

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See WORLD HEALTH STATISTICS ANNUAL, Table 3, Life Expectancy, Number of Survivors, and Chances per 1000 of Eventually Dying from Specified Causes, at Selected Ages, by Sex, 1997-1999 http://www-nt.who.int/whosis/statistics (last visited Oct. 17, 2000).