

GABRIEL KLAPHOLZ

The Church's Treaties: How the Holy See Makes and Shapes International Law

ABSTRACT. The Holy See has bilateral treaties with sixty-four countries across the globe. These international legal documents, or concordats, are not mere diplomatic formalities but hard-won negotiated settlements between Church and state. Focusing on Italy, Poland, and Malta, this Note argues that the concordats often integrate Church doctrine and canon law into the domestic legal systems of signatory states, particularly in the areas of antidiscrimination law, marriage, and education. In so doing, this vast treaty regime subordinates LGBTQ people as a matter of law. Ultimately, I show that the Church today is not just a bottom-up force influencing moral and social attitudes toward queer people but also a top-down architect of international law.

The Note theorizes and evaluates the various avenues available to advocates and signatory states aiming to challenge the Church's treaties. Interpretation, litigation, withdrawal and renegotiation, and countermeasures are all viable methods of contesting the concordatarian structure. However, advocates and states must be cautious not to place too much pressure on the bedrock principle of international law: *pacta sunt servanda*, agreements must be honored. Activists and states can and should reform the Church's treaty regime to make room for full LGBTQ equality, but they should ensure that in doing so, they preserve the norms undergirding the international legal order.

AUTHOR. J.D. expected 2026, Yale Law School; B.A. 2022, Yale College. All views expressed in this Note are my own. Yet I am deeply indebted to Professor Oona A. Hathaway for teaching me the intellectual building blocks I needed to write this Note, from countermeasures to the basics of what a treaty is. Without her feedback and encouragement throughout the process, this Note would have never materialized. I also owe a debt of gratitude to Professors Paul Gewirtz, Abbe R. Gluck, Reva B. Siegel, and Emma Sokoloff-Rubin for teaching me to have faith in my own ideas during my first year of law school. I am grateful to the students in Professor Hathaway's "International Law" class who provided me feedback on my early drafts: Thomas Poston, Krister Rasmussen, Zachary Brown, and Tilly Brooks. I am thankful for the guidance and support of Yale Law School's fantastic international legal librarians, Lucie Olejnikova and Steven Mitchell. And, of course, I extend a huge thank you to the *Yale Law Journal* editors who sourcecited, edited, proofed, and substantially improved my Note, especially Fiona Furnari, whose careful and extensive edits challenged me to scrutinize and strengthen my ideas. I also thank Shreya Minama Reddy, Beatrice L. Brown, Deja R. Morehead, and Lily Moore-Eissenberg. Last but not least, I thank my mother,



Professor Marjorie Lehman, for teaching me the power of religion as a force for good – in law and in life. All errors are, regrettably, mine alone.



NOTE CONTENTS

INTRODUCTION	1458
I. VIOLENT ORIGINS: THE CREATION OF THE MODERN CONCORDAT	1461
A. Contracting with the Church: An Overview	1462
B. Italy	1465
1. Rivals at War: Mussolini and Pope Pius XI	1465
2. Peace at the Lateran Palace: A Concordat Emerges	1467
3. An International-Treaty Regime Takes Shape	1468
C. Poland: Communist Rule and Church-State Peace	1471
D. Malta: The “Schools War” and a Patchwork of Treaties	1473
II. CONTEMPORARY CONCORDATS: NEGOTIATED SETTLEMENTS IN ACTION	1475
A. Antidiscrimination	1476
1. Italy: The Zan Bill and the Return of the Lateran Pacts	1476
2. Poland: The Concordatarian Barrier	1479
3. Malta: An LGBTQ Revolution, with No Concordat to Stop It	1481
B. Marriage	1482
1. Italy: Concordatarian Marriage and Church Interventionism	1483
2. Poland: The Double Discrimination of Straight Marriage	1485
3. Malta: Renegotiating the Concordat and the Meaning of Marriage	1486
C. Education	1490
1. Italy: Church Control over Schools and Curricula	1490
2. Poland: A Stronger Concordat, a Stronger Church	1491
3. Malta: Legislative Protections for LGBTQ People	1494
III. CHALLENGING THE CONCORDATARIAN REGIME	1495
A. Interpretive Resistance	1496
1. “Ordinary Meaning”	1497
2. “Context”	1498
3. “Object and Purpose”	1498
4. “Good Faith”	1499
5. “Supplementary Means of Interpretation”	1499



B. Litigation and Complaint	1500
1. Domestic Litigation	1501
2. International Litigation	1505
3. United Nations Treaty Bodies	1510
C. Withdrawal and Renegotiation	1513
1. Exit by Consent: Referenda and Strategic Legislation	1514
2. Exit by Operation of Law: Change of Circumstance	1515
D. Coercive Responses: Countermeasures	1517
1. Violations of the Convention on the Rights of the Child	1517
2. The Principle of Nonintervention	1519
CONCLUSION	1520

INTRODUCTION

In November 2020, the lower house of the Italian Parliament approved a landmark bill protecting LGBTQ people from violence and hate speech.¹ When the so-called “Zan bill” reached the Senate, the Catholic Church² expressed its formal diplomatic opposition through a letter called a *note verbale*.³ The Holy See, the Catholic Church’s governing body, argued that the bill would violate its treaties with Italy, the Lateran Pacts of 1929, by limiting Italian Catholic freedom.⁴ By October 2021, the Zan bill was dead.⁵

This Note aims to unearth the role of concordats – the Church’s international treaties – in obstructing the advancement of LGBTQ rights in contemporary Europe. Contrary to the traditional scholarly view,⁶ concordats are not mere formalities establishing diplomatic relations between the Holy See and friendly countries. Instead, they are often instruments of Church power that integrate Church doctrine into state legal systems and subordinate LGBTQ people as a

-
1. Hannah Roberts, *Vatican Accused of Meddling in Italian LGBTQ+ Bill*, POLITICO (June 23, 2021, 8:31 PM CET), <https://www.politico.eu/article/vatican-accused-meddling-italian-politics-lgbtq-bill-homophobia-crime-law-zan> [<https://perma.cc/2E3H-WJBH>].
 2. I use the terms “Holy See” and “Catholic Church” in this Note interchangeably. Formally speaking, the two entities are distinct: the Holy See refers to the governing ecclesiastical body over the global Catholic Church. “The Church,” however, is a common way to refer to the Holy See and appears in both scholarly literature and news coverage.
 3. Roberts, *supra* note 1.
 4. *Id.*; see Treaty of the Lateran, Holy See-It., Feb. 11, 1929, 21 ACTA APOSTOLICAE SEDIS [A.A.S.] 209, translated in BENEDICT WILLIAMSON, THE TREATY OF THE LATERAN 42-66 (1929).
 5. Lorenzo Tondo, ‘Disgraceful’: Italy’s Senate Votes Down Anti-Homophobic Violence Bill, GUARDIAN (Oct. 27, 2021, 5:54 PM EDT), <https://www.theguardian.com/world/2021/oct/27/italy-senate-votes-down-anti-homophobic-violence-bill> [<https://perma.cc/YST4-SBCU>].
 6. Video Interview with Ulrich Rhode, S.J., Dean, Fac. of Canon L., Pontifical Gregorian Univ. (Feb. 27, 2024) (“[T]he real importance of these treaties is much less nowadays than it was in the past.”); Video Interview with Pius Pietrzyk, O.P., Assoc. Professor, Canon L., Pontifical Univ. of Saint Thomas Aquinas (Feb. 29, 2024) (“[T]he approach of the Holy See is to allow secular government to exist on its own and not to interfere. . . . The Lateran Treaty is sui generis, and there are no concordats quite like it.”); see Roland Minnerath, *The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective*, 47 CATH. U. L. REV. 467, 472-73 (1998) (arguing that after the Second Vatican Council, the Church’s treaties stopped providing “privileges for Catholics” and abided by “the doctrine of the neutrality of the state”); see also John A. Onorato, *Saving Grace or Saving Face: The Roman Catholic Church and Human Rights*, 8 DICK. J. INT’L L. 81, 86-88 (1989) (listing concordats as one of four methods of “papal diplomacy” for “matters in which the ‘Church and State both have a great interest” without delineating the ways that these documents codify Church power and Catholic doctrine in secular legal systems (quoting H. CARDINALE, THE HOLY SEE AND THE INTERNATIONAL ORDER 34 (1976))).

matter of law. Concordats have embedded Church influence and canon law⁷ into domestic legal domains like antidiscrimination law, marriage, and education, so that states must, for example, teach only Church-approved texts or provide Church marriages with civil legal effect.⁸ After uncovering the influence of concordats, this Note outlines how states and LGBTQ activists alike can confront and contest the concordatarian system. It does so by analyzing three case studies: Italy, Poland, and Malta. These three countries make for an instructive contrast. Despite their similarity on paper—they are all Catholic-majority European states⁹—Italy, Poland, and Malta have had very different fates under the concordatarian regime. In just the last nine years, Malta has become the most

-
7. Canon law refers to the “code of ecclesiastical laws governing the Catholic Church.” *Canon Law*, U.S. CONF. CATH. BISHOPS, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law> [<https://perma.cc/7W5H-GPH4>].
 8. Cedric Ryngaert, *The Legal Status of the Holy See*, 3 GOETTINGEN J. INT’L L. 829, 844 (2011); Jonathan Luxmoore, *European Countries Distinguish Between Religious, Civil Marriages*, NAT’L CATH. REP. (Apr. 15, 2015), <https://www.ncronline.org/news/world/european-countries-distinguish-between-religious-civil-marriages> [<https://perma.cc/35YP-FQV9>]; see, e.g., Bureau of Democracy, Hum. Rts., & Lab., *Dominican Republic 2018 International Religious Freedom Report*, U.S. DEP’T OF STATE 3 (2018) [hereinafter *Dominican Republic Religious Freedom Report*], <https://www.state.gov/wp-content/uploads/2019/05/dominican-republic-2018-international-religious-freedom-report.pdf> [<https://perma.cc/5RDG-SB7Z>] (documenting how the Dominican Republic’s concordat gives the Church power to approve and revise public-school textbooks); Concordat Between the Holy See and the Republic of Poland, Holy See-Pol., art. 10, July 28, 1993, U.N.T.S. no. 55362 [hereinafter *Polish Concordat*], <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56632/Part/I-56632-0800002804cf925.pdf> [<https://perma.cc/KK8H-9PAG>] (giving civil legal effect to Church marriages in Poland).
 9. Off. of Int’l Religious Freedom, *Italy 2023 International Religious Freedom Report*, U.S. DEP’T OF STATE [3] (2023) [hereinafter *Italy Religious Freedom Report*], <https://www.state.gov/wp-content/uploads/2024/04/547499-ITALY-2023-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [<https://perma.cc/4EHY-L625>] (stating that an estimated 74.5% of the population of Italy identifies as Catholic); Off. of Int’l Religious Freedom, *Poland 2023 International Religious Freedom Report*, U.S. DEP’T OF STATE [3] (2023) [hereinafter *Poland Religious Freedom Report*], <https://www.state.gov/wp-content/uploads/2024/04/547499-POLAND-2023-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [<https://perma.cc/N43V-ZAFM>] (indicating that 85% of the population of Poland identifies as Catholic); Kurt Sansone, *Census 2021: Maltese Citizens Overwhelmingly Identify as Roman Catholics*, MALTA TODAY (Feb. 16, 2023, 6:06 PM), https://www.maltatoday.com.mt/news/national/121338/census_2021_maltese_citizens_overwhelmingly_identify_as_roman_catholics [<https://perma.cc/NYX8-5UFD>] (noting that 82.6% of Maltese residents identify as Catholic). This was the share among Maltese *residents*, and the number among Maltese *citizens* is even higher at 96.4% Catholic. *Id.*

progressive country on LGBTQ issues in Europe, while Italy and Poland lag distantly behind.¹⁰

This Note aims to demonstrate that the modern Church is not only a bottom-up arbiter of social and cultural power but also a top-down creator of international law in its own image. Scholars have long studied how the Church helped build the modern architecture of international law.¹¹ A nineteenth-century scholar described the historical role of the Pope as an “independent international magistrate, head of the supreme tribunal for the settlement of international disputes.”¹² But the ways in which the Church today continues to enact and enforce international law remain woefully understudied.¹³ While the first concordat was signed in Worms in 1122,¹⁴ the Church has concluded more treaties in the last sixty years than it has in its entire history. As of the writing of this Note, the Church has formed 195 treaties since the Second Vatican Council in the 1960s – eighty-one of which were concluded since 2001.¹⁵ Concordats, then, are not a relic of history.

This Note proceeds in three Parts. Part I uses the history of the modern concordats in Italy, Poland, and Malta to illustrate how these treaties emerged amid sharp contestation between the Holy See and the state. These countries’ concordats are not the products of polite correspondences between diplomats. Rather, they are hard-won, negotiated settlements resulting from battles – sometimes violent ones – between Church and state. Ultimately, this Part demonstrates how the Church exacted major concessions from its state partners and, after decades of struggle, made sure to get those promises in ink.

-
10. See *2024 Rainbow Map*, ILGA-EUR., <https://rainbowmap.ilga-europe.org> [<https://perma.cc/53E6-H4WB>] (“Malta has sat on top of the [pro-LGBTI policy] rankings for the last 9 years.”).
 11. See, e.g., James Muldoon, *The Contribution of the Medieval Canon Lawyers to the Formation of International Law*, 28 *TRADITIO* 483, 483-84 (1972) (contending that foundational writings of international law, including those of Hugo Grotius, relied on the ideas of medieval canon lawyers and philosophers).
 12. A. Pearce Higgins, *The Papacy and International Law*, 9 *J. SOC’Y COMPAR. LEGIS.* 252, 254 (1908) (quoting 1 RENÉ DE MAULDE-LA-CLAVIÈRE, *LA DIPLOMATIE AU TEMPS DE MACHIAVEL* 23 (Paris, Ernest Leroux 1892)).
 13. Elizabeth Heger Boyle, Shannon Golden & Wenjie Liao, *The Catholic Church and International Law*, 13 *ANN. REV. L. & SOC. SCI.* 395, 396 (2017) (arguing that modern scholars “have not systematically analyzed why, when, or how the Catholic Church wields power” in international law and politics).
 14. Minnerath, *supra* note 6, at 468.
 15. *The Amount [sic] of Treaties with the Holy See*, PONTIFICIA UNIVERSITÀ GREGORIANA, https://www.iuscangreg.it/accordi_numeri.php?lang=EN [<https://perma.cc/4LE4-GU5U>]; *Treaties in Force, According to the Decade in Which They Were Made*, PONTIFICIA UNIVERSITÀ GREGORIANA, https://www.iuscangreg.it/accordi_statistica.php?lang=EN [<https://perma.cc/WG78-GH8N>].

Part II examines the contemporary entrenchment of Church doctrine in the domestic law of Italy, Poland, and Malta. If concordats are negotiated settlements in which the Church fights for civic space, this Part shows the consequences of the Church's victories for LGBTQ people today. Divided into three Sections covering antidiscrimination law, marriage, and education, this Part provides insight into why concordatarian states can have such divergent pathways.

Part III explores ways to challenge and circumvent the existing concordatarian regime. Over four Sections—covering interpretation, litigation, withdrawal and renegotiation, and countermeasures—this Part delineates increasingly powerful actions available to individuals and states under international law. This structure serves two goals. It recognizes that, as delicate peace agreements, concordats demand caution from their challengers, who should adopt more drastic measures only as less severe interventions fail. Second, the sliding scale of Part III captures the importance of retaining the fundamental principle of international law, *pacta sunt servanda*—agreements must be honored—as the normative baseline in all efforts to confront the concordats. Each measure examined in Part III places greater strain on the principle. And while some degree of strain is necessary for legal reform, too much pressure can bend the rule too far.

I. VIOLENT ORIGINS: THE CREATION OF THE MODERN CONCORDAT

This Part tells the story of the modern concordat's birth. The histories of Italy's, Poland's, and Malta's concordats prove that these agreements were not exchanges of diplomatic niceties. Rather, they were peace treaties—negotiated settlements—ending decades of instability and broken promises. Due to the Church-state tensions they aimed to resolve, these treaties constituted deeply consequential, binding legal documents that provided the state with Church legitimacy and the Church with far-reaching state concessions. If the Church's treaties were just formalities signed between friendly actors, they would not have the impact this Note explores in Part II, nor be as difficult to challenge as this Note highlights in Part III.

Understanding where the concordats come from shows that far from boilerplate statements of mutual admiration and collaboration, the concordats often play a far more instrumental role in drawing legal boundary lines between realms of Church and state control. Ultimately, this story of contestation counsels modern observers against painting either the Holy See or the states with which it concluded its treaties as solely responsible for the vast concordatarian regime that exists today. Both Church and state were guilty of overreach into each other's affairs, and the concordats were anxious, bidirectional efforts to keep the other at bay.

A. Contracting with the Church: An Overview

Concordats had long been a way for states to exact power over the Church, not vice versa.¹⁶ Early concordats gave away Church power to appoint bishops to states, such as with France in 1516, Spain in 1753, Portugal in 1857, and the new Latin American republics between 1851 and 1887.¹⁷ But during the first half of the twentieth century, the Church began to use these documents to its own advantage, too, as a way to assert its “primary right to legislate” – its authority to impose its “social and moral teachings” – in Catholic-majority states.¹⁸ In turn, the twentieth century would see the proliferation of concordatarian arrangements across the globe, a phenomenon that continues to this day.¹⁹ Currently, sixty-four countries have treaties with the Holy See.²⁰

Forty-four countries, including Italy and Poland, have bilateral general treaties with the Church that cover a wide array of issue areas.²¹ For instance, the Dominican Republic’s far-reaching agreement recognizes Catholicism as the state religion, gives the Church the power to approve and revise public-school textbooks,²² and permits the Church to teach Catholic doctrine in public

16. See Minnerath, *supra* note 6, at 469; cf. Boyle et al., *supra* note 13, at 397 (noting that the waning of the Church’s legal privileges, property, and social influence between 1648 and World War I coincided with increasing authority for nation-states).

17. Minnerath, *supra* note 6, at 469.

18. See *id.* at 470.

19. See *infra* Section I.B.

20. *The States Which Have Concluded Treaties with the Holy See*, PONTIFICIA UNIVERSITÀ GREGORIANA, https://www.iuscangreg.it/accordi_stati.php [<https://perma.cc/7H54-W58R>]. It should be noted that countries like Italy have agreements with other religious communities, such as the Confederation of Methodist and Waldensian Churches, Seventh-day Adventists, Jews, Baptists, and Lutherans. *Italy Religious Freedom Report*, *supra* note 9, at [5]. There are crucial differences between these agreements and those with the Catholic Church. Namely, the Italian government concludes these treaties *unilaterally* with religious communities through codification by its own parliament and signature by its prime minister, rather than *bilaterally* with an independent legal personality under international law like the Holy See. See *id.* Thus, Italy can – notwithstanding the country’s other international legal obligations – repeal these agreements by a simple act of its own parliament. See *id.* Still, this Note does not argue that these agreements are any less important to study than the concordats: it is entirely plausible that accords with other religious communities can operate as yet another discriminatory bar to LGBTQ equality, for example. Further analysis of these agreements, however, is beyond the scope of this Note.

21. *The States Which Have Concluded Treaties with the Holy See*, *supra* note 20.

22. *Dominican Republic Religious Freedom Report*, *supra* note 8, at [2]-[3].

orphanages.²³ Fifteen other countries have more limited single-issue treaties with the Church,²⁴ such as the Philippines's treaty on protecting Catholic cultural heritage.²⁵ The remaining five states, one of which is Malta, have a patchwork of bilateral treaties with the Church that collectively amount to the equivalent of a general treaty in terms of the breadth of issues they cover.²⁶

These treaties are all equally binding on signatory states, which are subject to the core principle of international law known as *pacta sunt servanda*: agreements must be honored.²⁷ However, states approach their international-treaty obligations differently as a domestic matter: some countries allow treaties to have immediate domestic effect upon ratification,²⁸ while others, such as Italy,²⁹ Poland,³⁰ and Malta,³¹ require implementing legislation on top of ratification to codify treaties under domestic law.³² In the concordatarian context, Italy and

-
23. Concordat Between the Holy See and the Dominican Republic, Dom. Rep.-Holy See, art. 19, June 16, 1954, 46 A.A.S. 433, <https://www.vatican.va/archive/aas/documents/AAS-46-1954-ocr.pdf> [<https://perma.cc/P7GK-FUWA>]. The Dominican agreement was signed in 1954 between the Church and infamous dictator Rafael Trujillo. *Id.*
 24. *The States Which Have Concluded Treaties with the Holy See*, *supra* note 20.
 25. Agreement Between the Holy See and the Republic of the Philippines on the Cultural Heritage of the Catholic Church, Holy See-Phil., Apr. 17, 2007, 101 A.A.S. 1062, <https://www.vatican.va/archive/aas/documents/2009/dicembre%202009.pdf> [<https://perma.cc/DNC5-RGHV>].
 26. *The States Which Have Concluded Treaties with the Holy See*, *supra* note 20 (identifying these five states as Croatia, Hungary, Lithuania, Malta, and Spain).
 27. Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 782 (1959) (defining the principle as protecting the "sanctity of contracts" and arguing that without it, "international law would be deprived of a decisive foundation and a society of states would no[] longer be possible"); Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").
 28. Dana Zartner, *Internalization of International Law*, OXFORD RSCH. ENCYC. OF INT'L STUD. 10 (Sept. 28, 2020), <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-225?print=pdf> [<https://perma.cc/5276-NPUB>].
 29. Giuseppe Cataldi, *Italy*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION 328, 346 (Dinah Shelton ed., 2011).
 30. Łukasz Kułaga, *The Implementation of International Agreements in the Polish Legal System. The Selected Aspects of Practice in Recent Two Decades*, 9 POLISH REV. INT'L & EUR. L. 125, 129-30 (2020).
 31. Ratification of Treaties Act, 1983 (Act. No V/1983) (Malta) ("No provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament.").
 32. See Patrick Butchard, *Principles of International Law: A Brief Guide*, HOUSE OF COMMONS LIBR. 3 (Sept. 21, 2020), <https://researchbriefings.files.parliament.uk/documents/CBP-9010>

Poland have gone a step further than most countries: they have embedded their concordats in their national constitutions.³³

But the rich diversity of the concordats should not obscure the striking similarities that exist among them. Quite the opposite: that the Church would employ the same language on freedom of expression – the key phrase *piena libertà*, or “full freedom”³⁴ – in its 1937 agreement with Ecuador,³⁵ its revised 1984 agreement with Italy,³⁶ and its recent 2012 agreement with Equatorial Guinea³⁷ indicates that there are important consistencies worth exploring.

The following Sections compare three concordatarian states: Italy, Poland, and Malta. Focusing on these three case studies not only illuminates core themes that exist across concordatarian arrangements but also brings into clearer view the divergent paths of signatory states. Despite sharing baseline characteristics as Catholic-majority European countries, Italy, Poland, and Malta have followed vastly different trajectories under the concordatarian system. While a country like Malta has given its Church agreements statutory authority,³⁸ Italy’s and

/CBP-9010.pdf [https://perma.cc/P66L-4NKQ] (explaining the distinction between monist systems that incorporate treaty law within the domestic-law system and dualist systems like the United Kingdom that require legislative enactments to give treaties domestic effect).

33. Art. 7 COSTITUZIONE [COST.] (It.); KONSTYTUCJA [CONSTITUTION] Apr. 2, 1997, art. 25.4 (Pol.). Most states, however, do not constitutionalize their concordatarian commitments. *See, e.g.,* CONSTITUCIÓN [CONSTITUTION] Dec. 31, 1993, art. 50 (Peru), *translated in* Compar. Consts. Project, *Peru’s Constitution of 1993 with Amendments Through 2021*, CONSTITUTE PROJECT 17 (2021), https://www.constituteproject.org/constitution/Peru_2021.pdf [https://perma.cc/748C-HZYM] (recognizing the Catholic Church as “an important element in the historical, cultural, and moral formation of Peru” but not codifying its concordat as a constitutional matter).
34. For a more thorough analysis of this recurrent phrase in the Church’s treaties, see *infra* Section III.A.
35. “Modus vivendi” de 24 de julio 1937 [“Modus vivendi” of July 24, 1937], Convenio adicional [Additional Convention], Ecuador-Holy See, art. 1, July 24, 1937, *reprinted in* ACUERDOS ENTRE LA SANTA SEDE Y LOS ESTADOS 336, 339 (José Luis Santos Díez & Carlos Corral Salvador eds., 2006) (describing the “plena e incontestable libertad,” the full and uncontested freedom, of the Church to teach its dogma in Ecuador).
36. Accordo tra la Santa Sede e la Repubblica Italiana che Apporta Modificazioni al Concordato Lateranense [Agreement Between the Holy See and the Italian Republic to Amend the Lateran Concordat], Holy See-It., art. 2(1), Feb. 18, 1984, 77 A.A.S. 521 [hereinafter 1984 Italian Concordat], *translated in* MARIA ELISABETTA DE FRANCISCIS, ITALY AND THE VATICAN: THE 1984 CONCORDAT BETWEEN CHURCH AND STATE 225, 226 (1989).
37. Accordo tra la Santa Sede e la Repubblica Di Guinea Equatoriale Sulle Relazioni tra la Chiesa Cattolica e lo Stato [Agreement Between the Republic of Equatorial Guinea and the Holy See on Relations Between the Catholic Church and the State], Eq. Guinea-Holy See, art. 2, Oct. 13, 2012, 105 A.A.S. 987, <https://www.vatican.va/archive/aas/documents/2013/acta-novembre2013.pdf> [https://perma.cc/CLS8-H5DR].
38. *See, e.g.,* Marriage (Amendment) Act, 1995 (Act No. I/1995) (Malta) (codifying Malta’s marriage concordat by statute).

Poland's concordats have superior legal status as national constitutional law. This has made the process of amending Malta's concordats less difficult than in the latter two states.³⁹

B. Italy

The Lateran Pacts inaugurated the modern concordatarian regime and determined how concordats would function throughout the twentieth century and until today.⁴⁰ Emerging from an existential struggle between Church and state, the Pacts began a new era in which the Holy See would have the independence and power under international law to proliferate its agreements across the globe.

Sixty years before the Pacts, the Pope had lost his historical seat of power to the Italian state.⁴¹ The newly established Kingdom of Italy had seized Rome in 1870.⁴² Reconciliation between Church and state was "unthinkable" during the years that followed.⁴³ The Pope, whose predecessors ruled as sovereigns over the Papal States for a thousand years,⁴⁴ became a self-styled "prisoner" within the Vatican walls, a martyr for all of Christendom.⁴⁵

1. Rivals at War: Mussolini and Pope Pius XI

Tensions between Church and state only worsened in 1922 as two men rose to power who would dominate Italy for the next two decades.⁴⁶ The highly conservative Pope Pius XI was coronated in the same year that Benito Mussolini

39. See *infra* Section III.B.1.

40. See Philip Bernardini, *The Lateran Concordat with Italy*, 16 CATH. HIST. REV. 19, 23 (1930) (arguing that until the Lateran Pacts, the Holy See's "full rights under international law" were in question, with many states asserting that its lack of "territory and subjects constituted the greatest obstacle in the way of full and complete recognition"); see also Minnerath, *supra* note 6, at 470 (describing the Lateran Pacts as "creating the Vatican State and giving to the Holy See the territorial independence it needed to guarantee its specific sovereignty in Church matters" within nation-states like Italy).

41. Stuart E. Knee, *The Strange Alliance: Mussolini, Pope Pius XI, and the Lateran Treaty*, 5 MEDITERRANEAN HIST. REV. 183, 184 (1990) (describing Italy's seizure of Rome in 1870 and the papacy's ensuing decades-long refusal to regularize relations).

42. *Id.*

43. DAVID I. KERTZER, *THE POPE AND MUSSOLINI: THE SECRET HISTORY OF PIUS XI AND THE RISE OF FASCISM IN EUROPE* 111 (2014).

44. Joseph M. Woods, *The Rise of the Papal States Up to Charlemagne's Coronation*, 7 CATH. HIST. REV. 44, 45 (1921).

45. Knee, *supra* note 41, at 184.

46. *Id.* at 185.

staged his successful coup d'état.⁴⁷ Mussolini was "violently anticlerical" and aimed to subordinate the Church, along with all of Italy's institutions, to centralized Fascist control.⁴⁸ Pius XI had other ideas, demanding Church autonomy through cession of territory and a concordat to protect ecclesiastical authority.⁴⁹

Having two intransigent authoritarians at the helm of Italian politics was a recipe for disaster. The situation boiled into violence in 1925, with the Fascists pillaging the headquarters of the influential Church lay organization Catholic Action.⁵⁰ Mussolini encouraged Fascist youth groups to attack the Catholic Boy Scouts and approved a plan to abolish all youth organizations under Catholic Action to hobble the Church's influence.⁵¹ The situation looked bleak for the Holy See, but Pope Pius XI was also aware that as much as Mussolini had tried to back him into a corner, the dictator also desperately needed the Pope's approval to gain support from the Italian masses and earn credibility on the international stage.⁵²

Pope Pius XI therefore saw in Mussolini an opportunity as well as a threat.⁵³ Both men were fond of authoritarianism,⁵⁴ and Pius XI hoped to use peace with Italy to establish his own control over the country's laws of expression, marriage, and education, bringing them in line with his antipathy toward liberal democracy and individual liberty.⁵⁵ Each needed something from the other, so the two leaders sent their negotiators to meet in August 1926.⁵⁶ Threats and counter-threats resulted in two and a half years of arduous negotiating, with a final draft of an agreement emerging only in February 1929.⁵⁷

47. *Id.*

48. *Id.*

49. *Id.* at 186.

50. KERTZER, *supra* note 43, at 101.

51. Albert C. O'Brien, *Benito Mussolini, Catholic Youth, and the Origins of the Lateran Treaties*, 23 J. CHURCH & STATE 117, 118, 123 (1981).

52. See Richard Drake, *Julius Evola, Radical Fascism, and the Lateran Accords*, 74 CATH. HIST. REV. 403, 414 (1988) (stating that Mussolini recognized "that the Church was an ineradicable part of Italian life" that "could never be permanently defeated, but . . . might be used"); Kneec, *supra* note 41, at 193.

53. See Kneec, *supra* note 41, at 187-88 ("[T]he Pope was in political harmony with Mussolini, but had no sympathy for fascism and its anticlerical creed.").

54. *Id.*

55. *Id.*

56. O'Brien, *supra* note 51, at 117.

57. *Id.* at 117, 128-29.

2. *Peace at the Lateran Palace: A Concordat Emerges*

On February 11, 1929, Secretary of State of the Roman Curia Pietro Gasparri and Mussolini met at the Lateran Palace to sign the Lateran Pacts.⁵⁸ The Pacts were no courteous communiqué. They were a set of binding peace treaties between warring parties.⁵⁹ Spanning three separate sections and seventy-five articles, the Pacts contained a “Conciliation Treaty” that declared the end of the seventy-year “dissent” between Italy and the Church.⁶⁰ Under this treaty, Pope Pius XI became sovereign ruler over 108.7 square miles of territory surrounding St. Peter’s Basilica, a much smaller area than Pius XI had originally wanted.⁶¹ Italy agreed in turn to provide the new state—Vatican City—with water, radio, connection to state railways, and a telegraphic system, among other public services.⁶² The second document was a financial convention,⁶³ which functioned as a reparation plan for the loss of Church lands to the Italian state and included a lump sum of 750 million Italian lire and one billion lire in state bonds.⁶⁴

In return for peace, legitimacy, and the relinquishment of the papacy’s claims to its former territory, Pope Pius XI demanded major concessions from Mussolini.⁶⁵ The Conciliation Treaty made Catholicism the “sole religion of the State.”⁶⁶ And the third document—titled “The Concordat”—safeguarded the “free exercise of [the Holy See’s] spiritual power.”⁶⁷ This document recognized the civil effect of religious marriages and gave ecclesiastical courts full jurisdiction over those marriages.⁶⁸ The Concordat also protected the Church’s control over education and youth, declaring that Catholic tradition was the “crown of public instruction” and mandating that all public primary and secondary schools

58. Bernardini, *supra* note 40, at 19; Stephen E. Young & Alison Shea, *Separating State from Church: A Research Guide to the Law of the Vatican City State*, 99 LAW LIBR. J. 589, 590 (2007).

59. Treaty of the Lateran art. 1, *supra* note 4, at 42.

60. *Id.*

61. See Knee, *supra* note 41, at 189.

62. Treaty of the Lateran art. 6, *supra* note 4, at 44.

63. Young & Shea, *supra* note 58, at 590.

64. Treaty of the Lateran, Financial Convention art. 1, *supra* note 4, at 51; KERTZER, *supra* note 43, at 107 (calculating the total amount to be equivalent to roughly one billion 2013 U.S. dollars).

65. Knee, *supra* note 41, at 187–91.

66. Treaty of the Lateran art. 1, *supra* note 4, at 42–43.

67. Concordat, Holy See–It., art. 1, Feb. 11, 1929, translated in WILLIAMSON, *supra* note 4, at 52, 52.

68. Daniela Saresella, *The Battle for Divorce in Italy and Opposition from the Catholic World (1861–1974)*, 42 J. FAM. HIST. 401, 403 (2017).

have religious teaching.⁶⁹ The Church was given authority over this teaching's instructors, curricula, and even textbooks.⁷⁰

3. *An International-Treaty Regime Takes Shape*

The Lateran Pacts set the stage for the Holy See's future relations not only with Italy but also with the world. The Church's status under the modern international legal system had previously been in question, and many believed that the Holy See had only limited diplomatic prerogatives such as deploying *nuncios*, or papal ambassadors.⁷¹ With the Lateran Pacts, the Holy See achieved "full and complete recognition" as an equal to states in treaty negotiation and matters of sovereignty.⁷²

This was not because the Holy See *itself* became a state, as the Church can occupy no "temporal location."⁷³ Rather – quite uniquely in international law – the Holy See would be considered the "legal personality" of Vatican City, making treaties in its own name with the Vatican as its sovereign anchor in the state-based system of international law.⁷⁴ The Pacts thus recognized both a sovereign state, Vatican City, and a government over that state, the Holy See.

The Lateran Pacts created the conditions for the proliferation of concordat arrangements throughout the twentieth century. The Pacts would arm Pope Pius XI with the power to conclude binding agreements under international law.⁷⁵ In his revulsion at democracy, Pius XI preferred that Church authority be consolidated in the papacy and sacerdotal hierarchy rather than in lay leaders and Catholic political parties.⁷⁶ The concordat was the perfect way to make that possible.⁷⁷ In total, Pius XI would conclude twenty-four concordats during his seventeen-year reign, more than in the previous 120 years of the Church, including with France, Austria, Ecuador, and – most infamously – Nazi

69. Concordat art. 36, *supra* note 67, at 64.

70. *Id.*

71. Bernardini, *supra* note 40, at 23.

72. *Id.* at 23; *see also* Knee, *supra* note 41, at 189-90 ("The territory ceded by the Italian government to the Holy See was recognized as a state under international law with full rights of diplomatic communication with foreign nations in war and in peace.").

73. Young & Shea, *supra* note 58, at 595.

74. *Id.* (emphasis omitted).

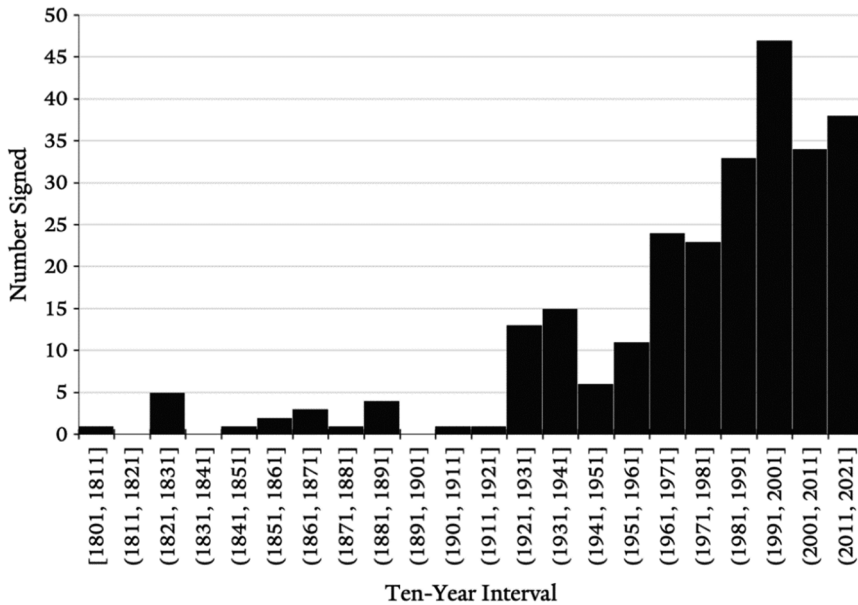
75. *See* Knee, *supra* note 41, at 188-90.

76. *Id.* at 187-88 (noting that Pius "had great faith in old-fashioned religious treaties, and wanted to eliminate the democratic undercurrents of the Catholic [political] parties" in Italy).

77. *See id.*

Germany in 1933.⁷⁸ As Figure 1 shows, the Church would never turn back.⁷⁹ Since the 1920s, the concordat has become one of the main instruments for the Church to carry out its global diplomacy.⁸⁰

-
78. *Bilateral Treaties of the Holy See*, PONTIFICIA UNIVERSITÀ GREGORIANA, https://www.iuscangreg.it/accordi_santa_sede.php [<https://perma.cc/WX6K-ENNZ>]. I used this database to calculate these numbers. Pope Pius XI reigned from his election on February 6, 1922 until his death just over seventeen years later on February 10, 1939. R.E. Balfour, *The Policy of Pius XI*, 38 THEOLOGY 406, 406, 416 (1939). Though the treaty with the Third Reich was signed during his reign, scholars have noted Pius XI's vigorous opposition to the Nazi regime. See Peter C. Kent, *A Tale of Two Popes: Pius XI, Pius XII, and the Rome-Berlin Access*, 23 J. CONTEMP. HIST. 589, 589 (1988) ("Pius XI denounced Hitler and the [N]azi regime at every opportunity").
79. See *infra* Figure 1 (plotting the concordat data from *Bilateral Treaties of the Holy See*, *supra* note 78). There was a large increase in the number of states over this period as well, but that did not require the Church to *relate* to those states through a treaty regime. This was a choice the Church made.
80. Salvatore Cernuzio, *Holy See Diplomacy: 'A Field Hospital Amid a Battle,'* VATICAN NEWS (Nov. 12, 2024), <https://www.vaticannews.va/en/vatican-city/news/2024-11/gallagher-lecture-lublin-university-holy-see-diplomacy.html> [<https://perma.cc/SH9H-3UMK>] (describing a recent speech by the Holy See's Secretary for Relations with States and International Organizations, Paul Richard Gallagher, where he stated that concordats are "fundamental" to the Church's contemporary diplomacy alongside other mechanisms like papal visits and international dispute resolution).

FIGURE 1. NUMBER OF CONCORDATS SIGNED, BY TEN-YEAR INTERVAL (1801-2021)

Pope Pius XI was right that, in international law, it paid to be equal to states. When Mussolini again went on the offensive in a four-hour tirade in May 1929 – declaring that the Church was “not sovereign, and . . . not even free” – Pius XI responded later that month in a letter, which was made public, pointing to the Pacts to warn Mussolini not to break his promises.⁸¹ No longer was the Church governed by legislation that could be amended or revoked at the whim of the state.⁸² The Holy See, sovereign and equal under international law, had the parties’ *bilateral* commitments in writing.⁸³

Even as Mussolini and the Pope continued to spar, the binding treaties between them maintained a tenuous peace.⁸⁴ For Mussolini, the Church had given him unprecedented prestige and would now largely stay out of his way as he

81. Drake, *supra* note 52, at 418; see Knee, *supra* note 41, at 194-96.

82. See Knee, *supra* note 41, at 187-88. The so-called “Law of Guarantees” passed in 1871 had previously governed Church-state relations, and because it could be withdrawn by the state unilaterally, it was the subject of Pius XI’s ire. *Id.* at 184-88.

83. *Id.* at 195-96.

84. *Id.* at 199-200.

helped plunge Europe into darkness.⁸⁵ For the Church, there was not only globally respected sovereignty – which both the Nazis and Allies would honor as each swept through Italy⁸⁶ – but also a blueprint for embedding Church influence in modern nation-states. Indeed, the Pacts had an “amazing power of survival,” long outliving Pius XI and Mussolini and becoming enshrined in the Italian Constitution in 1947.⁸⁷

C. Poland: Communist Rule and Church-State Peace

Italy was not the only country whose concordat ended decades of strife. In Poland, the concordat was the negotiated settlement that emerged after years of Communist state repression. The Polish Church long held a prized position in Polish society, viewed as “the guardian of Polish national identity” during times of foreign occupation.⁸⁸ But when the Communist regime solidified control over Poland in 1947, it treated the Church as a “hostile political force.”⁸⁹ The regime scrapped the Church’s 1925 concordat with Poland (signed by Pope Pius XI), censored Catholic publications, and confiscated Church property.⁹⁰ It also nationalized Church-run schools and abolished religious instruction.⁹¹ The Church came to represent refuge from and opposition to the regime, backing 1968 student protests and calling for an independent judiciary, free elections, and a free press.⁹²

Everything changed for Poland when Karol Wojtyła, who would take the name John Paul, was elected Pope on October 16, 1978, making him the first Polish Pope in history.⁹³ Pope John Paul II’s visit to Poland in June 1979 galvanized the public, doubling the number of seminary applications the following year and, more importantly, encouraging Polish workers to begin striking in the

85. *Id.* But see Kent, *supra* note 78, at 592-93 (describing Pope Pius XI’s efforts in the years preceding the onset of World War II to push Mussolini away from his alliance with Nazi Germany as a way to safeguard the Church’s recent peace with Mussolini).

86. Robert Culhane, *The Lateran Agreement*, 5 *FURROW* 280, 285 (1954).

87. Knee, *supra* note 41, at 203.

88. Mirella W. Eberts, *The Roman Catholic Church and Democracy in Poland*, 50 *EUR.-ASIA STUD.* 817, 818 (1998).

89. SABRINA P. RAMET, *THE CATHOLIC CHURCH IN POLISH HISTORY: FROM 966 TO THE PRESENT* 3, 6 (2017).

90. *Id.* at 6, 157; Suzanne Hruby, *The Church in Poland and Its Political Influence*, 36 *J. INT’L AFFS.* 317, 319-20 (1982).

91. RAMET, *supra* note 89, at 158, 162.

92. *Id.* at 93-94.

93. *Id.* at 171.

summer of 1980.⁹⁴ But something had changed for the Church, too. Once clearly at odds with the ruling party, the Church now positioned itself as a mediator between the ascendant workers' movement – led by the trade union, Solidarity – and the government.⁹⁵ Unsurprisingly, after decades of state repression, the Church was wary of all political actors – careful not to tie itself too closely to either side.⁹⁶

In Communist Poland, as in Fascist Italy, the Church's goal was to guard itself vigorously against state encroachment.⁹⁷ But, in practical terms, the line between defense and offense was thin. As the Communist regime buckled in 1989 under pressure from Solidarity, the Church embarked on a campaign to solidify its position in Polish society.⁹⁸

Just months after a transitional government took over and with the support of Pope John Paul II, the Polish Church demanded the return of Catholic instruction to all schools, restrictions on media expression about “Christian values,” and an abortion ban.⁹⁹ One of the greatest Church victories, however, would be a concordat. Drafted through a governmental-ecclesiastical commission in Warsaw, one such concordat was negotiated hastily under Church pressure.¹⁰⁰ The Holy See rejected an initial draft and returned a more far-reaching version that conflicted with at least sixteen existing Polish laws, including those on marriage and on liberty of conscience.¹⁰¹

The 1993 concordat signed by the Polish Prime Minister gave the Church unprecedented power.¹⁰² Every parent had a right to Catholic education for their children,¹⁰³ with the Church having sole control over teachers, curricula, and textbooks.¹⁰⁴ And religious weddings were given immediate civil effect equal to

94. *Id.* at 172-73; Hruby, *supra* note 90, at 324.

95. RAMET, *supra* note 89, at 4.

96. Hruby, *supra* note 90, at 324-25 (explaining that while the Church developed a mutually supportive relationship with Solidarity, it charted “an independent course for itself in political matters” and was “careful to keep certain distance from the workers’ movement”).

97. RAMET, *supra* note 89, at 192.

98. Adam A. Hetnal, *The Polish Catholic Church in Pre- and Post-1989 Poland: An Evaluation*, 32 E. EUR. Q. 503, 512-13 (1999).

99. RAMET, *supra* note 89, at 4, 182-83, 192.

100. Eberts, *supra* note 88, at 832; RAMET, *supra* note 89, at 195.

101. RAMET, *supra* note 89, at 195.

102. Jacqueline Heinen & Stéphane Portet, *Reproductive Rights in Poland: When Politicians Fear the Wrath of the Church*, 31 THIRD WORLD Q. 1007, 1009 (2010).

103. Heinen & Portet, *supra* note 102, at 1009.

104. Eberts, *supra* note 88, at 833.

secular marriages.¹⁰⁵ The 1993 concordat thus reflected the “inclusion of Christian values in the axiological base” of Poland’s new legal system.¹⁰⁶ After much debate, Poland ratified the agreement in January 1998.¹⁰⁷ The concordat not only became a binding treaty for Poland under international law but also was incorporated into Polish law by Article 25.4 of the Polish Constitution of 1997.¹⁰⁸

D. Malta: The “Schools War” and a Patchwork of Treaties

As in Poland, Malta’s concordatarian regime – comprising nine issue-specific agreements – emerged out of decades of war between Church and state.¹⁰⁹ That even this small, Catholic-majority island nation, under neither fascism nor communism, experienced the same arc of struggle as its European counterparts further illustrates the concordat’s function as a Church-state peace treaty.

Like in Italy, the conflict in Malta centered around two domineering characters in national politics: Dominic Mintoff, leader of the Malta Labour Party (MLP), and Michael Gonzi, the Archbishop of Malta, who both rose to power in the 1940s.¹¹⁰ Gonzi labeled Mintoff a left-wing extremist as Mintoff tried to pry the Church off of Maltese society.¹¹¹ Relations between the two men turned “poisonous,” even petty, with Mintoff refusing to return two Caravaggio paintings to Gonzi after they were restored in Rome.¹¹² Gonzi, in kind, ensured that churches would loudly ring their bells to disrupt MLP speakers.¹¹³ In 1961, the Archbishop issued an interdict—a Church censure prohibiting participation in

105. Krystyna Daniel, *The Church-State Situation in Poland After the Collapse of Communism*, 1995 *BYU L. REV.* 401, 412.

106. *Id.* at 410, 412.

107. Eberts, *supra* note 88, at 833.

108. KONSTITUCJA [CONSTITUTION] Apr. 2, 1997, art. 25.4 (Pol.).

109. Simon C. Smith, *Priests and Politicians: Archbishop Michael Gonzi, Dom Mintoff, and the End of Empire in Malta*, 23 *J. MEDITERRANEAN STUD.* 113, 113 (2014).

110. *Id.* at 114-15.

111. *Id.*; Sergio Grech, *Contextualising the 1961 Interdict in Malta*, 18 *MELITA HISTORICA* 66, 68 (2020).

112. Smith, *supra* note 109, at 118.

113. *Id.* at 119.

the sacraments – against all MLP leadership and declared it a mortal sin to vote for Labour.¹¹⁴ Predictably, MLP lost the 1962 elections.¹¹⁵

After nearly a decade, citizens grew weary of the Church's politicking, and MLP won the 1971 elections.¹¹⁶ Mintoff swiftly moved to legalize contraceptives, decriminalize homosexuality, and introduce civil-marriage legislation.¹¹⁷ But like the Church, Mintoff pressed too hard, closing down Church hospitals and cutting off state funding to Church-affiliated private schools with demands that the Church's hospitals and schools become free.¹¹⁸ When a 1984 law required Church schools to get yearly licenses from the Minister of Education, the new Archbishop and Gonzi's successor, Joseph Mercieca, responded by shutting down all Catholic schools, forcing a third of Maltese students to remain at home.¹¹⁹ A group of Mintoff supporters then descended on Valletta and ransacked the Archbishop's headquarters in early October 1984.¹²⁰ The *New York Times* reported that the Church-state conflict in Malta had gotten worse than it had in Communist Poland.¹²¹

Pope John Paul II intervened to support the Maltese Church, and – facing widespread discontent and the threat of a mass labor strike – Mintoff decided it was time to put the violent confrontation to rest.¹²² Peace talks between Mintoff and Church officials began in Rome in late October,¹²³ and an interim deal allowed Church schools to reopen in November.¹²⁴ Mintoff's successor concluded

114. Dominic Fenech, *Divorced from Political Reality: The New Limits of Ecclesiastical Power in Malta*, 101 *ROUND TABLE* 221, 228-29 (2012) (noting that before the 1962 elections, the Church “interdicted the members of the party executive, declared it a mortal sin to have anything to do with the party newspapers, denied party supporters absolution at confession, organised mass rallies, disrupted Labour rallies with the ringing of church bells, mobilised a federation of Catholic lay organisations, and marshalled the other political parties into an anti-Labour phalange nicknamed the ‘umbrella’”).

115. *Id.*

116. Smith, *supra* note 109, at 122.

117. Fenech, *supra* note 114, at 229.

118. *Id.* (explaining that the government under Mintoff sought these changes because it believed “that the Church was rich enough”); John Vinocur, *Malta and Vatican Locked in Tussle over Schools*, *N.Y. TIMES*, Oct. 15, 1984, at A8, A8.

119. Vinocur, *supra* note 118, at A8; H. Vassallo & M.J. Mallia, *The Church Schools Issue in Malta*, 51 *RIVISTA DI STUDI POLITICI INTERNAZIONALI* 563, 563, 572 (1984).

120. *Malta's Leader Visits Vatican for Talks on School Dispute*, *N.Y. TIMES*, Oct. 5, 1984, at A10, A10; Adrianus Koster, *Malta's Relations with the Holy See in Postcolonial Times (Since 1964)*, 11 *MELITA HISTORICA* 311, 320 (1994).

121. Vinocur, *supra* note 118, at A8.

122. *Id.*; *Malta's Leader Visits Vatican for Talks on School Dispute*, *supra* note 120, at A10.

123. *Malta's Leader Visits Vatican for Talks on School Dispute*, *supra* note 120, at A10.

124. Koster, *supra* note 120, at 321.

Malta's first concordat in April 1985.¹²⁵ The agreement provided for the “gradual introduction” of free education in Church schools in return for resumed state funding.¹²⁶

But like in Italy and Poland, the Church wanted deeper concessions – and it wanted them in writing. The 1985 concordat made way for six more agreements over the next ten years.¹²⁷ As the Maltese public yearned for peace, the Church saw an opportunity.¹²⁸ A 1989 accord brought Catholic instruction to all state schools, and a 1993 concordat made ecclesiastical courts superior to state courts in matters of religious marriage.¹²⁹ The state wanted to heal decades of bitter wounds but did so at a high price, ceding vast legal territory to the Holy See.¹³⁰

The histories of Italy, Poland, and Malta demonstrate that the Church's treaties are not mere formalities exchanged between diplomatic friends. They are often vigorously negotiated, hard-won legal documents that include steep concessions to the Holy See, integrating Church authority and doctrine into signatory states' legal systems.

II. CONTEMPORARY CONCORDATS: NEGOTIATED SETTLEMENTS IN ACTION

Historically, many concordats are negotiated settlements in which states relinquish portions of civic space and control to the Church. This Part analyzes the contemporary effects of those agreements on domestic legal systems. I argue that the concordatarian regimes in Italy, Poland, and Malta have integrated Church influence and doctrine into secular law at the expense of LGBTQ people and their rights. By examining antidiscrimination, marriage, and education law in

125. *Id.*

126. *Id.*

127. *Malta's Testing Time*, 43 *WORLD TODAY* 15, 15, 17 (1987); Fenech, *supra* note 114, at 230-31.

128. Fenech, *supra* note 114, at 229-30.

129. *Id.* at 230-31; Roderick Pace, *Growing Secularisation in a Catholic Society: The Divorce Referendum of 28 May 2011 in Malta*, 17 *S. EUR. SOC'Y & POL.* 573, 574 (2012). The other agreements signed during this period covered a wide array of issues, including returning the Faculty of Theology to the University of Malta after Mintoff had expelled it from the University during the 1977-1978 academic year. See Fenech, *supra* note 114, at 230; Vassallo & Mallia, *supra* note 119, at 596. Yet another agreement aimed to resolve remaining property disputes between the Church and the Maltese state. For the details of this agreement, see generally Convention on the Temporal Goods of the Church, Holy See-Malta, Nov. 28, 1991, 85 *A.A.S.* 569, <https://www.vatican.va/archive/aas/documents/AAS-85-1993-ocr.pdf> [<https://perma.cc/B6R8-QZA4>].

130. Raphael Vassallo, *Knocking on Heaven's Door...*, *MALTA TODAY* (June 24, 2013, 12:00 AM), <https://www.maltatoday.com.mt/news/national/27815/knocking-on-heaven-s-door-20130624> [<https://perma.cc/XA72-L6LA>].

Italy, Poland, and Malta, I show that concordats operate today as an international legal obstacle to LGBTQ advancement and inclusion. The path toward full LGBTQ equality thus runs headlong into the Church's bilateral treaties. Ultimately, this Part shows that Malta, partly due to its concordatarian regime's unique structure, has made the greatest strides in creating legal space for LGBTQ people.

I do not contend that Italy's and Poland's concordats are the only reason for the predicaments of the LGBTQ communities in Italy and Poland. I also do not suggest that the only reason for Malta's divergent path is its weaker Church treaties; political will, shifting public opinion, and vigorous activism are clearly also at play.¹³¹ Instead, I aim to demonstrate how the Church's more powerful treaties *contribute* to holding back states, such as Italy and Poland, while its more limited agreements mean that there is greater space for LGBTQ reform.

A. Antidiscrimination

Perhaps nowhere is the legal barrier Church treaties pose to LGBTQ rights starker than in the context of antidiscrimination. Italy's recent struggle to pass a landmark antidiscrimination bill is a case in point. Comparing the Zan bill with Polish and Maltese efforts to pass similar legislation brings into clear relief how Church treaties can hinder LGBTQ reform.

1. *Italy: The Zan Bill and the Return of the Lateran Pacts*

Despite having hundreds of anti-LGBTQ hate crimes each year,¹³² Italy has never adopted an antidiscrimination law protecting LGBTQ people against such violence.¹³³ In 2018, center-left Member of Parliament Alessandro Zan introduced a bill that would have added five new categories—sex, gender, sexual orientation, gender identity, and disability—to Italy's existing laws criminalizing

131. Video Interview with Robert Attard, Cmty. & Outreach Officer, Malta LGBTIQ Rts. Movement (Mar. 21, 2024) (describing how Malta has changed over the last two decades, becoming a more hospitable place for LGBTQ people).

132. *Italy: Parliament Must Legislate Against Homophobic and Transphobic Hate Crimes*, AMNESTY INT'L 1 (July 25, 2013), <https://www.amnesty.org/fr/wp-content/uploads/2021/06/eur300072013en.pdf> [<https://perma.cc/49FP-JFGD>].

133. Christoph Knill & Caroline Preidel, *Institutional Opportunity Structures and the Catholic Church: Explaining Variation in the Regulation of Same-Sex Partnerships in Ireland and Italy*, 22 J. EUR. PUB. POL'Y 374, 381 (2015).

hate crimes and hate speech.¹³⁴ Under the proposed law, violent crimes would incur four years of incarceration.¹³⁵ The bill also would have established an annual International Day Against Homophobia, Biphobia, and Transphobia in Italian public schools.¹³⁶

Importantly, the Zan bill's Article 4 clarified that the law would not affect all freedom of expression.¹³⁷ Rather than targeting particular viewpoints, the bill would only criminalize statements that incite a "*clear and present danger* of discriminatory or violent acts."¹³⁸ This is a category of expression already restricted under Italian constitutional and statutory law.¹³⁹

While the bill passed Italy's lower house of Parliament in November 2020, it stalled in the Senate.¹⁴⁰ One reason for the impasse was that on June 17, 2021, the Roman Curia's Secretary of State publicly sent a *nota verbale* to the Italian Ambassador to the Holy See.¹⁴¹ The Church argued that the bill violated the Italian concordat, as amended in 1984.¹⁴² Namely, the note quoted Article 2(1) of the revised concordat, which provided the Church "full freedom . . . in carrying out

134. Andrea Carlo, 'I'm Tired of Feeling Invisible': LGBT Anger After Italian Bill to Fight Homophobia Is Rejected, EURONEWS (Feb. 11, 2021, 6:59 PM GMT+1), <https://www.euronews.com/my-europe/2021/11/02/i-m-tired-of-feeling-invisible-italian-bill-s-rejection-leaves-lgbt-community-in-anger> [<https://perma.cc/6YWP-6SL2>].

135. *Id.*

136. Andrea Carlo, *How a Bill to Fight Homophobia Has Polarised Italy and Sparked a Culture War*, EURONEWS (Sept. 8, 2021, 6:59 PM GMT+2), <https://www.euronews.com/my-europe/2021/08/09/how-a-bill-to-fight-homophobia-has-polarised-italy-and-sparked-a-culture-war> [<https://perma.cc/5QJ2-HR3>]. The bill proposed May 17 as the Day's date. *Id.*

137. Chico Harlan & Stefano Pitrelli, *Italy Is Debating an LGBT Anti-Hate Law. The Vatican Just Took a Rare Step to Protest It.*, WASH. POST (June 22, 2021, 12:37 PM EDT), https://www.washingtonpost.com/world/europe/vatican-gay-lgbt-hate-crime/2021/06/22/8dbb405a-d36a-11eb-b39f-05a2d776b1f4_story.html [<https://perma.cc/AA3T-QRLS>].

138. Angelo Schillaci, *Back at It. Italy's Struggle for a Law Against Homophobia and Transphobia: Freedom of Expression Versus Equal Dignity?*, 1 ITALIAN REV. INT'L & COMPAR. L. 454, 459 (2021) (emphasis added) (providing Schillaci's translation of Article 4).

139. *Cf. id.* at 459-60 ("[T]he current formulation of Article 4 follows the balance already set by the case law regarding the existing legal framework on punishment of hate speech, as well as the case law of the Constitutional Court." (footnote omitted)).

140. Carlo, *supra* note 134.

141. John L. Allen, Jr., *Vatican Invokes Sovereign Status to Protest Anti-Homophobia Bill*, CRUX (June 22, 2021), <https://cruxnow.com/vatican/2021/06/vatican-invokes-sovereign-status-to-protest-anti-homophobia-bill> [<https://perma.cc/97GF-CNE4>]; *Testo Integrale Della Nota Verbale* [Full Text of the Note Verbale], VATICAN NEWS (June 24, 2021, 2:30 PM), <https://www.vaticannews.va/it/vaticano/news/2021-06/testo-integrale-nota-verbale-segreteria-stato-ddl-zan.html> [<https://perma.cc/JL8C-6TXB>].

142. *Testo Integrale Della Nota Verbale*, *supra* note 141.

its pastoral, educational, and charitable mission.”¹⁴³ Article 2(3) of the agreement, the note continued, promised Italian Catholics “[f]ull freedom of . . . expression . . . by word of mouth, in writing, and by any other means of dissemination.”¹⁴⁴ The objection, then, was that the law would prevent the Holy See from expressing hostility to LGBTQ identity and inclusion, as well as criminalize similar expression by lay Italian Catholics. In October 2021, the Senate blocked the bill by a narrow vote of 154 to 131,¹⁴⁵ with those lawmakers opposing the legislation explicitly pointing to the Holy See’s position on the matter as a reason for their disapproval.¹⁴⁶ The far-right, ultranationalist leader of the Lega Party, Matteo Salvini, called the bill “censorship,” explaining that “[w]e must not . . . invent new crimes of opinion.”¹⁴⁷ And Giorgia Meloni, then-leader of the opposition party and current Italian prime minister, stated, “Until the controversy between the Holy See and the Italian state is over, the debate on the adoption of the bill . . . must be suspended.”¹⁴⁸ Polls indicated that sixty percent of the Italian public supported the Zan bill.¹⁴⁹

There are strong reasons to doubt the Holy See’s interpretation of the Italian concordat as conflicting with the Zan bill, a topic I explore later in this Note.¹⁵⁰ And yet, the Church was correct in one respect. Under Italian law, a statute that conflicts with a ratified and implemented international treaty such as the Italian concordat is domestically unenforceable.¹⁵¹ This is especially the case for the Lateran Pacts, which are codified in the Italian Constitution, and thus have “clear supremacy” over ordinary national laws.¹⁵²

The Church’s intervention was thus no polite request. It was an appeal both to the special position of the Lateran Pacts within Italian domestic law *and* to a

143. 1984 Italian Concordat art. 2(1), *supra* note 36, at 226.

144. *Id.* art. 2(3).

145. Lily Wakefield, *Italy Blocks Hate Crime Bill After Unprecedented Opposition from Vatican and Far Right* (Oct. 27, 2021), PINKNEWS, <https://www.thepinknews.com/2021/10/27/italy-lgbt-rights-zan-bill-hate-crime> [<https://perma.cc/96JY-WFSC>].

146. Anne Le Nir, *Vatican Seeks Changes in Italy’s Proposed Law on Homophobia*, LA CROIX INT’L (June 25, 2021, 5:35 PM), <https://international.la-croix.com/news/politics/vatican-seeks-changes-in-italys-proposed-law-on-homophobia/14533> [<https://perma.cc/5HDF-QB4V>].

147. *Id.*

148. *Id.*

149. *Id.*

150. See *infra* Section III.A.

151. See Cataldi, *supra* note 29, at 349 (explaining that in Italy, “if a domestic court finds a conflict between an international treaty and a national law . . . it cannot apply the national law if it violates the treaty”).

152. *Id.* at 329. For more information on the relative hierarchy of domestic and international law in Italy and the constitutional status of the Lateran Pacts, see *infra* Section III.B.1.

fundamental rule of international law: *pacta sunt servanda*.¹⁵³ The Holy See intervened in its capacity as a legal actor equal to a sovereign state under international law, invoking the Pacts that gave the Church this status.¹⁵⁴ And while the Church's bottom-up moral and political influence over LGBTQ reforms in Italy was undeniably at play,¹⁵⁵ there was another variable in the equation: the Holy See was able to advance a legal argument – and an effective one at that – because it had codified its position by treaty.

2. Poland: The Concordatarian Barrier

Few queer communities in Europe need antidiscrimination legislation as desperately as those in Poland. In this Section, I analyze Poland's treaty with the Holy See to show how it parallels and, in some instances, goes beyond the Italian concordat to obstruct potential LGBTQ antidiscrimination laws.

The Polish Church has directly targeted the LGBTQ community for years, successfully advocating against LGBTQ antidiscrimination provisions in the 1997 constitution.¹⁵⁶ Polish homophobic and transphobic narratives have long cast LGBTQ people as inherently foreign and un-Polish.¹⁵⁷ The Church has facilitated this rhetoric: in August 2019, the Krakow Archbishop likened LGBTQ people in Poland to Soviet invaders.¹⁵⁸ Despite the abuse that LGBTQ Poles face, Poland has some of the weakest LGBTQ antidiscrimination laws in Europe, lacking specialized hate-crime or hate-speech legislation.¹⁵⁹

With an actively anti-LGBTQ national Church and an expansive concordat on the books, Poland offers the perfect environment for a “Zan fiasco 2.0.” The Italian and Polish concordats have striking similarities. As Table 1 shows, both

153. See I.I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 513 (1989).

154. See Harlan & Pitrelli, *supra* note 137.

155. See Knill & Preidel, *supra* note 133, at 383-84.

156. Cf. Jonathan Luxmoore, *Church in Poland Continues Confrontation with the LGBTQ Community*, NAT'L CATH. REP. (Aug. 19, 2019), <https://www.ncronline.org/news/church-poland-continues-confrontation-lgbtq-community> [<https://perma.cc/J4XG-E6WA>] (describing general resistance by Catholic leaders in Poland against pro-LGBTQ reforms); KONSTYTUCJA [CONSTITUTION] Apr. 2, 1997 (Pol.) (containing no reference to sexual orientation).

157. Elżbieta Korolczuk, *The Fight Against 'Gender' and 'LGBT Ideology': New Developments in Poland*, 3 EUR. J. POL. & GENDER 165, 166 (2020).

158. See Luxmoore, *supra* note 156.

159. See Piotr Godzisz & Dorota Pudzianowska, *Do Some Identities Deserve More Protection than Others? The Case of Anti-LGB Hate Crime Laws in Poland*, in THE GLOBALIZATION OF HATE: INTERNATIONALIZING HATE CRIME? 174, 174-75, 179 (Jennifer Scheppe & Mark Austin Walters eds., 2016).

documents contain a pair of provisions guaranteeing broad religious freedom and protecting all methods of Catholic expression.¹⁶⁰ These were the twin provisions the Holy See invoked in its *nota verbale* in Italy. Perhaps most concerning is that neither concordat delineates any exceptions to these dual guarantees.¹⁶¹

TABLE 1. CONCORDATARIAN FREE-EXPRESSION PROVISIONS

Italian Concordat, 1984	Polish Concordat, 1998
<p>Article 2(1): “The Italian Republic recognizes the full freedom of the Catholic Church in carrying out its pastoral, educational, and charitable mission . . .”</p> <p>Article 2(3): “Full freedom of reunion and expression of opinion by word of mouth, in writing, and by any other means of dissemination are guaranteed to Catholics and their associations and organizations.”</p>	<p>Article 5: “. . . the State shall allow the Catholic Church . . . to carry out its mission freely and publicly . . .”</p> <p>Article 20(1): “The Catholic Church shall have the right to print, publish and disseminate all manner of publications related to its mission.”</p>

While a formal diplomatic collision has yet to occur, what I outline above is not wholly preemptive. The Church in Poland has already drawn on the seemingly unbounded free-expression rights in the concordat to defend its vilification of LGBTQ people. According to Chris Hann of the Max Planck Institute, the Polish concordat has granted the Church “privileged access to the media” with the most “intolerant” and influential force being the far-right station *Radio Maryja*.¹⁶² Run by notorious Catholic priest Tadeusz Rydzyk, *Radio Maryja* has millions of listeners and regularly spreads homophobic and antisemitic hate speech.¹⁶³ While the radio station is not an official instrument of the Holy See, members of the Polish Episcopate sit on its supervisory council and numerous

160. See *infra* Table 1 (quoting 1984 Italian Concordat arts. 2(1) & 2(3), *supra* note 36, at 226; Polish Concordat arts. 5 & 20(1), *supra* note 8).

161. See 1984 Italian Concordat arts. 2(1) & 2(3), *supra* note 36, at 226; Polish Concordat arts. 5 & 20(1), *supra* note 8.

162. Chris Hann, *Problems with the (De)privatization of Religion*, ANTHROPOLOGY TODAY, Dec. 2000, at 14, 16.

163. Donald Snyder, *Poland’s Radio Maryja Known for Its Bigotry, and Its Influence*, FORWARD (Feb. 5, 2010), <https://forward.com/news/125079/poland-s-radio-maryja-known-for-its-bigotry-and> [https://perma.cc/4Y94-5ZS6].

bishops have made it their political home.¹⁶⁴ In this respect, despite Poland otherwise criminalizing “incitement to hatred” under Article 256(1) of the Polish Penal Code,¹⁶⁵ the Polish concordat provides a legal counterweight to any potential limitations on hate speech by Church officials.

The concordatarian barrier in Poland is not imaginary. As a matter of law, the concordat is an international legal instrument that Poland has not only ratified but also integrated into its constitution, affording it higher domestic legal status than any ordinary statute.¹⁶⁶ Especially because Poland has already considered—as in April 2024¹⁶⁷—and rejected multiple LGBTQ antidiscrimination bills due to freedom-of-speech and freedom-of-religion concerns,¹⁶⁸ the concordat is a glaring liability for any efforts at reform.

3. *Malta: An LGBTQ Revolution, with No Concordat to Stop It*

None of Malta's nine concordats has a free-expression provision parallel to those of the Italian and Polish agreements. Given this, Malta provides an example of how *far* LGBTQ antidiscrimination legislation can go in a country found in a 2021 census to be more than eighty-two percent Catholic¹⁶⁹—a figure higher than in Italy and slightly lower than in Poland¹⁷⁰—absent a concordatarian barrier.

While Poland is at the bottom of the European Union (EU) in terms of its LGBTQ policies, Malta is now one of the most progressive countries in the EU

164. See Barbara B. Balsler & Abraham H. Foxman, *Poland: Democracy and the Challenges of Extremism*, ANTI-DEFAMATION LEAGUE 16 (2006), <https://www.adl.org/sites/default/files/polanddemocracyandextremism.pdf> [<https://perma.cc/ZNP6-SQEA>].

165. KODEKS KARNY [PENAL CODE] art. 256(1) (Pol.); Godzisz & Pudzianowska, *supra* note 159, at 179 (describing Article 256(1) of the Polish Penal Code and its criminalization of “incitement to hatred”).

166. KONSTITUCJA [CONSTITUTION] Apr. 2, 1997, art. 25.4 (Pol.).

167. Michal Kranz, *Poland Pushes Ahead with Hardline Hate Speech Law*, UNHERD (Apr. 9, 2024, 4:30 PM), <https://unherd.com/newsroom/poland-pushes-ahead-with-hardline-hate-speech-law> [<https://perma.cc/LQ7P-RLRK>].

168. Piotr Godzisz & Paweł Knut, *LGBTI Rights in Poland*, LAMBDA WARSAW & CAMPAIGN AGAINST HOMOPHOBIA 31-32 (2018), https://tgeu.org/files/uploads/2023/11/COE-Report-Oct18-poland_1.pdf [<https://perma.cc/6V5Y-7GKF>].

169. Sansone, *supra* note 9.

170. *Poland Religious Freedom Report*, *supra* note 9, at 3 (stating that 85% of the population of Poland identifies as Catholic); *Italy Religious Freedom Report*, *supra* note 9, at 3 (stating that about 74.5% of the population of Italy identifies as Catholic).

on LGBTQ rights.¹⁷¹ When Malta joined the EU in 2004, it immediately passed Legal Notice 461, which implemented EU Directive 2000/78 barring discrimination on the basis of sexual orientation in employment.¹⁷² After LGBTQ rights in Malta began to accelerate in 2011, Malta's patchwork of concordats provided no direct legal impediment to the introduction of antidiscrimination statutes. By June 2012, the Maltese Parliament for the first time passed comprehensive LGBTQ hate-crime legislation.¹⁷³ Two years later, Malta's Proposal 99 prevailed, protecting LGBTQ people from discrimination under the country's constitution.¹⁷⁴ Without "[f]ull freedom . . . of expression" guaranteed to the Church, as in Italy,¹⁷⁵ Malta had no concordat available for the Church to stymie these landmark developments.

B. Marriage

Church treaties have long integrated canon law into states' marriage law. Signing bilateral agreements with Colombia in 1973, Portugal in 1975, Spain in 1979, Italy in 1984 (updating the Lateran Pact), and Poland and Malta in 1993, among others, the Church ensured that Catholic marriages would have immediate civil effect in all of these countries.¹⁷⁶ Under this legal structure, the vast ecclesiastical court system – comprising tribunals in more than 2,000 dioceses worldwide, courts of appeal on the archdiocese level, and the Roman Rota in the Vatican – can issue marriage rulings with civil enforceability.¹⁷⁷ In this respect,

-
171. Connie Agius, *Malta Rapidly Expands Progressive LGBTIQ Laws but Society Struggles to Keep Up*, AUSTL. BROAD. CORP. (Jan. 7, 2016), <https://www.abc.net.au/news/2016-01-08/malta-lgbtqi-action-plan-to-expand-ivf-to-same-sex-couples/7074288> [https://perma.cc/BA53-8YZ6].
172. *The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Malta*, DANISH INST. FOR HUM. RTS. 9 (2009), https://fra.europa.eu/sites/default/files/fra_uploads/385-fra-hdgs0-part2-nr_mt.pdf [https://perma.cc/8WQN-D9AK].
173. Criminal Code (Amendment) Act, 2012 (Act No. VIII/2012) (Malta); Stephen Gray, *Malta: Gender Identity and Sexual Orientation Included in Hate Crime Laws*, PINKNEWS (June 21, 2012), <https://www.thepinknews.com/2012/06/21/malta-gender-identity-and-sexual-orientation-included-in-hate-crime-laws> [https://perma.cc/GA9J-A4XP].
174. See Constitution of Malta (Amendment) Act, 2014 (Act No. X/2014) (Malta); Sarah Carabott, *PN Presents Bill on Sexual Discrimination*, TIMES MALTA (June 20, 2013), <https://timesof-malta.com/article/PN-presents-Bill-on-sexual-discrimination.474732> [https://perma.cc/S8ZZ-FBGY].
175. 1984 Italian Concordat art. 2(3), *supra* note 36, at 226.
176. Jan Zabłocki, *The Civil Law Effects of a Concordat Marriage*, 17 ZESZYTY PRAWNICZE 217, 217-19 (2017).
177. Video Interview with Ulrich Rhode, *supra* note 6.

the Rota is an international legal tribunal unto its own, issuing decisions that countries across the globe enforce.

In this Section, I argue that this system of so-called “*matrimonio concordatario*” (“concordatarian marriage”) has weakened LGBTQ marriage rights in three primary ways. First, in countries like Italy, it has empowered the Church to block legislative attempts to expand the legal meaning of marriage. Second, in countries like Poland with no civil recognition of LGBTQ couples, giving religious marriage civil legal effect operates as a “double discrimination” against LGBTQ couples.¹⁷⁸ Under Polish law, LGBTQ couples are excluded from *both* forms of straight marriage and have to resort to alternative ceremonies doubly unrecognized by the state. And third, even in states like Malta where concordat renegotiation has paved the way for civil gay marriage, concordatarian marriage still functions as a state stamp of approval for a Church system that excludes queer Catholics.

1. Italy: Concordatarian Marriage and Church Interventionism

In Italy, the Lateran Pacts have normalized Church interventionism in domestic debates about marriage, always at the exclusion of LGBTQ couples. By giving Church marriages civil legal effect and Church courts jurisdiction over those marriages, the concordat “recogniz[ed] the Church’s supremacy in regulating . . . matrimony”¹⁷⁹ and thus constituted the “birth of modern family law in Italy.”¹⁸⁰ Still today, Italian family lawyers acquire degrees in canon law to navigate an integrated civil-religious marriage system.¹⁸¹

One of the starkest examples of Church interventionism in Italian marriage arose when Italian lawmakers tried to introduce divorce under civil law in October 1965.¹⁸² Foreshadowing the Zan affair, the Church sent Italy a *nota verbale* declaring that legalizing divorce would breach the concordat.¹⁸³ On February 11, 1970, the forty-first anniversary of the Lateran Pacts’ signing, Pope Paul VI declared that divorce legislation would be a “*vulnus*”—a wound—against the

178. I use the term “LGBTQ couples” in this Section to be inclusive while primarily referring to same-sex couples, as opposite-sex couples that identify as “queer” or “bisexual” would still have marriage rights in Poland.

179. Saresella, *supra* note 68, at 403.

180. Federica Giardini, *Filiation Inside and Outside Marriage in Italy: The Principle of Equality in Family Relations from a Historical and Comparative Legal Perspective*, 4 INT’L J. JURIS. FAM. 259, 259 (2013).

181. Video Interview with Pius Pietrzyk, *supra* note 6.

182. Saresella, *supra* note 68, at 405-06.

183. *Id.* at 406.

concordat.¹⁸⁴ Italy pressed ahead and enacted the law in December 1970.¹⁸⁵ After all, Article 34 of the concordat preserved the institution of civil marriage,¹⁸⁶ so the Church's argument that civil divorce violated the treaty was relatively weak. And in a 1974 referendum on the topic, divorce advocates won a landslide victory, with approximately nineteen million Italians voting in favor and approximately thirteen million voting against.¹⁸⁷

Empowered by its concordat, the Holy See has since 1965 developed a practice of intervening directly in legislative debates over marriage.¹⁸⁸ In contracting with the Holy See, Italy "delegated to the Catholic Church the authority on morality and the ethical education of the country," contributing to the Church having "considerable influence on lawmaking" in matters of sexuality.¹⁸⁹ From 1988 to 2010, there were more than *eighty* policy proposals relating to same-sex partnerships under Italian civil law.¹⁹⁰ All of them failed, in part because of relentless Church opposition.¹⁹¹ When a same-sex civil-union bill came before Parliament in 2007, Pope Benedict XVI himself intervened to defeat it.¹⁹² Scholars suggest that Italy was only able to pass such a law in 2016 in part because Pope Francis did not intervene as directly as had Benedict XVI.¹⁹³

Under ongoing Church opposition, Italy has yet to legalize gay marriage, and the far-right government of Italian Premier Giorgia Meloni is unlikely to do

184. *Id.*

185. *Id.* at 407.

186. Concordat art. 34, *supra* note 4, at 63-64.

187. Saresella, *supra* note 68, at 410.

188. See Alessia Donà, *Somewhere over the Rainbow: Italy and the Regulation of Same-Sex Unions*, 26 MOD. IT. 261, 263, 267-68 (2021).

189. Diego Lasio & Francesco Serri, *The Italian Public Debate on Same-Sex Civil Unions and Gay and Lesbian Parenting*, 22 SEXUALITIES 691, 694 (2019).

190. Knill & Preidel, *supra* note 133, at 379.

191. See Donà, *supra* note 188, at 267.

192. *Id.* at 268.

193. See *id.* at 270-71 (arguing that one of the reasons that the 2016 law passed while earlier same-sex-union laws did not was because "this time the Catholic Church was less active and cohesive in influencing [same-sex-union] policymaking," with Pope Francis "refrain[ing] from interfering directly in the Italian debate"); Anthony Faiola, *Italy Could Finally Allow Civil Unions—But What Will the Pope Say?*, WASH. POST (Jan. 28, 2016, 2:21 PM EST), https://www.washingtonpost.com/world/europe/italy-could-finally-allow-civil-unions--but-what-will-the-pope-say/2016/01/27/731e7f6c-c42c-11e5-b933-31c93021392a_story.html [https://perma.cc/6XK2-8KUD] ("One thing is certain. Francis's approach differs radically from that of Benedict, his predecessor, who helped thwart the 2007 measure on civil unions in Italy. Back then, the Vatican aggressively lobbied Italian officials to stop the bill . . .").

so.¹⁹⁴ Inside civil court and in the halls of Parliament, the Church has a major say over who can marry – not just because of its moral influence but also because the concordat has given it the legal legitimacy to do so.

2. Poland: *The Double Discrimination of Straight Marriage*

In Poland, as in Italy, LGBTQ couples cannot get married. But without even the option for same-sex civil unions,¹⁹⁵ Polish LGBTQ people face an even clearer case of what I call “double discrimination.” Not only are LGBTQ couples barred from civil marriage, but they are in equal measure discriminated against through Poland’s official endorsement of exclusively heterosexual religious marriage. By giving Church marriages – only available to straight couples – civil legal effect, the Polish state *doubly* discriminates against queer people in both civil and religious marriage.

As with free expression, the Polish concordat shares a great deal with the Italian document in the context of marriage. Both treaties provide for the civil effect of Church marriages¹⁹⁶ but place civil courts above ecclesiastical courts, permitting civil review of Church decisions and civil-divorce rulings even when the Church has refused an annulment.¹⁹⁷ The countries also share demographic characteristics, with about sixty percent of couples choosing religious over civil marriage in both Italy and Poland.¹⁹⁸

The key similarity between Italy and Poland, however, is that both countries doubly discriminate against LGBTQ couples. As a matter of civil law, neither country provides a right to gay marriage. But on top of this, the Polish and Italian states give civil legal effect to a religious marriage system that excludes LGBTQ people, thus affording a legal right to straight couples – an additional avenue to marriage – that LGBTQ couples do not have.

Doubly excluded from Poland’s integrated civil-religious marriage structure, many LGBTQ couples in Poland have resorted to so-called “humanist” weddings – individualized, secular ceremonies that eschew both civil and religious

194. Colleen Barry, *Italian Government Limits Parental Rights of Gay Couples*, AP NEWS (Mar. 14, 2023, 5:22 PM EDT), <https://apnews.com/article/gay-parents-parental-rights-italy-meloni-e56f3c3216ee72842729eeced2ef31ef> [<https://perma.cc/C39A-L93T>].

195. Godzisz & Knut, *supra* note 168, at 3.

196. Polish Concordat art. 10, *supra* note 8.

197. See Zabłocki, *supra* note 176, at 232.

198. Giovanna Dell’Orto, *Nearly 80% of Italians Say They Are Catholic. But Few Regularly Go to Church*, AP NEWS (Oct. 5, 2023), <https://apnews.com/article/italy-religion-catholic-church-secular-032f2e49ba1a7149407ad25a62b481ab> [<https://perma.cc/GQ4P-L45U>]; Agata Rejowska, *Humanist Weddings in Poland: The Various Motivations of Couples*, 82 SOCIO. RELIGION 281, 283 (2021).

marital traditions.¹⁹⁹ While the recent rise in such ceremonies reflects an effort by LGBTQ couples to do what they can to overcome deep inequities, queer humanist marriages have no legal force and thus offer none of the economic and social benefits that Polish law guarantees to straight couples.²⁰⁰

3. *Malta: Renegotiating the Concordat and the Meaning of Marriage*

On the issue of marriage, Malta again has had a different trajectory than Poland and Italy. While facially similar to the other countries in terms of its current concordatarian marriage system, Malta opened the door for reimagining the state's definition of marriage by renegotiating its concordat. In Malta, the 2011 introduction of civil divorce – the right of straight people to exit marriage – set the stage for marriage equality – the right of gay people to enter marriage.

In 1993, during the Church-state reconciliation period, Malta signed a concordat recognizing the civil effects of Catholic marriage and, unlike Italy and Poland, giving ecclesiastical courts *supremacy* over civil tribunals.²⁰¹ In other words, Maltese civil courts could not review the merits of a Church ruling – and had no jurisdiction over a religious-marriage case if even just one spouse wanted to adjudicate the dispute in the Church.²⁰² This made the 1993 agreement distinct from any other concordat in the world.²⁰³

While Church supremacy over civil courts may seem odd, it was perfectly sensible for a system in which there was no civil divorce.²⁰⁴ Since the only way

199. See Rejowska, *supra* note 198, at 283–84, 297–99.

200. *Id.* at 284; see also Elżbieta Kuźelewska & Marta Michalczyk-Wlizio, *Same-Sex Marriage and the Catholic Church: A Comparative European Perspective*, 3 PRZEGLĄD PRAWA KONSTYTUCYJNEGO 373, 380–82 (2022) (describing jurisdictions that have not yet legally recognized same-sex marriage).

201. See Agreement Between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals About the Same Marriages, Holy See-Malta, art. 4, Feb. 3, 1993, 89 A.A.S. 679, <https://www.vatican.va/archive/aas/documents/AAS-89-1997-ocr.pdf> [<https://perma.cc/CWA2-L6KL>] (granting sole jurisdiction to ecclesiastical courts to decide petitions for annulment); *id.* Second Additional Protocol, 89 A.A.S. at 692 (granting ecclesiastical courts' judgments on marriage immunity from review); Andrea Bettetini, *Religion and the Secular State in Malta*, in RELIGION AND THE SECULAR STATE: NATIONAL REPORTS 494, 500–01 (Javier Martinez-Torrón & W. Cole Durham, Jr. eds., 2010).

202. Ibtisam Sadegh, *Religious Courts, Tribunals and Councils in Predominantly Secular States: Their Role in Malta, and England and Wales* 94, 98 (June 2013) (LL.D. thesis, University of Malta), <https://www.um.edu.mt/library/oar/bitstream/123456789/7849/1/13LLD084.pdf> [<https://perma.cc/JD39-M7RB>].

203. Bettetini, *supra* note 201, at 501.

204. See Sadegh, *supra* note 202, at 90–91.

to get out of a marriage in 1993 was through a civil or Church annulment, both of which were based on the legal principles of canon law,²⁰⁵ it makes sense that Malta agreed to a treaty formalizing the higher status of ecclesiastical courts, which are expert in canonical jurisprudence.

The power dynamic reversed when Malta voted by referendum in 2011 to introduce civil divorce over Church opposition, “a watershed in Maltese history.”²⁰⁶ While the reform was within the scope of the concordat’s text,²⁰⁷ the 1993 concordatarian structure no longer worked: civil courts needed the independence to deem couples unmarried even when the Church ruled otherwise.²⁰⁸ The newly elected Labour government in 2013 immediately sent the Church a *note verbale* demanding renegotiation of the treaty.²⁰⁹ The resulting 2014 concordat inverted the existing hierarchy, giving Maltese courts the ability to review Church rulings.²¹⁰ The rapid divorce reform was made smoother by the fact that Malta’s marriage concordats, while implemented via parliamentary legislation,²¹¹ were *not* codified in the constitution and so could be overridden by

205. *Id.* at 92-93.

206. Angele Deguara, *Secularisation and Intimate Relationships in a Catholic Community: Is Malta a Resistant Niche?*, 67 SOC. COMPASS 372, 375 (2020).

207. See generally Agreement Between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals About the Same Marriages, *supra* note 201 (discussing the civil legal effect of canonical marriages in Malta but never mentioning divorce, let alone actively prohibiting the state from instituting divorce).

208. Deguara, *supra* note 206, at 375.

209. Miriam Dalli, *Agreement Reached on Church-State Concordat on Civil Marriage*, MALTATODAY (Jan. 25, 2014, 12:00 AM), <https://www.maltatoday.com.mt/news/national/36122/agreement-reached-on-church-state-concordat-on-civil-marriage-20140125> [https://perma.cc/34BS-8FEX].

210. Third Additional Protocol to the Agreement Between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals About the Same Marriages, Holy See-Malta, art. 2, Jan. 27, 2014, 106 A.A.S. 726, 727, <https://www.vatican.va/archive/aas/documents/2014/acta-settembre2014.pdf> [https://perma.cc/P9QV-NZDF]; *id.* art. 4, 106 A.A.S. at 728; Deguara, *supra* note 206, at 375.

211. See, e.g., Marriage (Amendment) Act, 1995 (Act No. I/1995) (Malta).

statute.²¹² Malta gives certain international legal instruments precedence over domestic law,²¹³ but the concordats have no such status.

But what does straight divorce have to do with gay marriage? In Malta, the radical realignment on divorce and the renegotiation of the treaty “pulled the carpet from underneath the Church,” claimed Christopher Vella, coordinator of Malta’s Catholic LGBTQ group Drachma.²¹⁴ Because marriage is the “lynchpin of the family” in Malta, introducing divorce meant opening the legal doors for marriage equality.²¹⁵ Indeed, because civil courts had long been referring to and applying *canon law* to civil annulments, the civil system absorbed the Church’s “unitary understanding of . . . marriage.”²¹⁶ This fixed both civil and canon law in place, “preventing either of the relevant adjudicative bodies from developing new interpretations of the law.”²¹⁷ The introduction of divorce helped free the civil legal system from a definition of marriage rooted in canon law, making space for new notions – queer notions – of marriage to develop.²¹⁸ Under a year after the new concordat was negotiated, Malta passed the Civil Unions Act, allowing same-sex civil unions.²¹⁹ By June 2017, Malta had legalized gay marriage over Church protest.²²⁰

Malta stands in contrast to Italy, where the introduction of divorce as described in Section II.B.1 came in the 1970s, long before gay marriage was a global

212. Marriage (Amendment) Act, 2014 (Act No. XXI/2014) (Malta). Technically, Italy also does not need to undertake a constitutional-amendment process to alter its concordats. Although the constitutional stature of its concordat ensures that the agreement supersedes Italian statutory law, Article 7 of the Italian Constitution reads: “Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.” Art. 7 COSTITUZIONE [COST.] (It.). Poland has no such provision. See KONSTITUCJA [CONSTITUTION] Apr. 2, 1997, art. 25.4 (Pol.).

213. Ivan Sammut, *EU Law and Maltese Law – An Integration or Legal Irritants*, in THE IMPLEMENTATION AND ENFORCEMENT OF EUROPEAN UNION LAW IN SMALL MEMBER STATES: A CASE STUDY OF MALTA 11, 22 (Ivan Sammut & Jelena Agranovska eds., 2021) (describing the supremacy of EU law within the Maltese legal system).

214. Video Interview with Christopher Vella, Coordinator, Drachma LGBTI (Mar. 19, 2024).

215. *Id.*

216. Sadegh, *supra* note 202, at 101.

217. *Id.*

218. *Id.* at 128; see also Video Interview with Christopher Vella, *supra* note 214 (describing the impact of the divorce referendum on Maltese notions of the family); Video Interview with Louisa Grech, Coordinator, Drachma Parents (Mar. 19, 2024) (explaining how the divorce referendum was one of the factors leading to greater openness to gay marriage in Malta).

219. Civil Unions Act, 2014 (Act No. IX/2014) (Malta); *Catholic Malta Legalizes Gay Marriage over Church Objection*, NBC (July 12, 2017, 9:39 AM EDT), <https://www.nbcnews.com/feature/nbc-out/catholic-malta-legalizes-gay-marriage-over-church-objection-n782101> [<https://perma.cc/LDN9-FBLX>].

220. *Catholic Malta Legalizes Gay Marriage over Church Objection*, *supra* note 219.

policy option.²²¹ Thus, while the divorce referendum in Italy had an energizing effect on the country's LGBTQ-rights movement like it did in Malta, the country was in no position in the 1970s to embrace the kinds of far-reaching reforms that Malta would decades later on the heels of its own divorce referendum.²²² For this and other important reasons, including ongoing anti-LGBTQ hostility at the highest level of Italian politics, the country remains one of the only countries in Western Europe not to have legalized gay marriage.²²³

Malta provides a useful example of how to end the double discrimination against LGBTQ people in concordatarian countries. But even in concordatarian states that have legalized gay marriage, state-sanctioned discrimination in the realm of religious marriage remains. In Malta, many queer people remain Catholic and want to be married in the Church.²²⁴ Malta is still “decidedly unsecular,” and many of its LGBTQ people feel “a strong pull towards Catholic symbolism, rituals, and community.”²²⁵ Mr. Vella explained that in his view, “[o]ne can be gay and Catholic at the same time. . . . To me, my marriage is sacramental.”²²⁶ Even for a country like Malta that has made immense strides toward LGBTQ equality outside the Church, the concordat provides state approval for the discrimination that still exists inside the Church. In recognizing the civil legal effect of only heterosexual Church marriages, the Maltese state sanctions a discriminatory religious marriage system under secular law.

221. See Adam Taylor, *What Was the First Country to Legalize Gay Marriage?*, WASH. POST (June 26, 2015, 12:51 PM EDT), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/26/what-was-the-first-country-to-legalize-gay-marriage> [<https://perma.cc/4CYW-CS37>] (explaining that the Netherlands was the first country to legalize gay marriage in 2001).

222. See Pierpaolo Mudu, *Repressive Tolerance: The Gay Movement and the Vatican in Rome*, 58 GEO-JOURNAL 189, 191 (2002) (<https://www.jstor.org/stable/2645442>) (describing how the feminist movement in Italy in the 1970s that helped bring about the introduction of divorce “became a model” for the emergent LGBTQ movement); *id.* at 192 (explaining that despite the emergence of an organized gay-rights movement in Italy in the 1970s, the Catholic Church was still able to entrench a “heterosexual” definition of marriage within Italian society).

223. David Broder, *Giorgia Meloni's Government Declares War on Same-Sex Parents*, NATION (Apr. 12, 2023), <https://www.thenation.com/article/world/giorgia-melonis-government-declares-war-on-same-sex-parents> [<https://perma.cc/7VGT-MXJT>] (“While almost all Western European countries have recognized same-sex marriage and adoption, Italy remained an outlier even before [Giorgia] Meloni became prime minister [in October 2022].”).

224. See Deguara, *supra* note 206, at 382–83.

225. *Id.* at 382, 384.

226. Video Interview with Christopher Vella, *supra* note 214.

C. Education

Education is a third area where the concordats of Italy, Poland, and Malta integrate Church influence and doctrine into domestic legal systems. As shown in Part I, children and schools have often been at the center of concordat negotiations, especially in countries like Italy and Malta. The contemporary result of these agreements, however, is tremendous Church control over the education of Italian, Polish, and Maltese children.

1. Italy: Church Control over Schools and Curricula

The Zan bill—in addition to limiting LGBTQ hate—aimed to improve LGBTQ awareness among schoolchildren through a yearly International Day Against Homophobia, Biphobia, and Transphobia.²²⁷ The bill was responding to the bullying epidemic in Italian schools: in 2011, ninety-five percent of boys and seventy-nine percent of girls surveyed in Italy reported having witnessed verbal aggression based on sexual orientation.²²⁸ Just as the Church had objected to the Zan bill's reactive, hate-speech-focused provisions, the Church objected to the Zan bill's proactive, educational aims with reference to its concordat. Specifically, the Church argued that the Day would violate the educational autonomy that the Pacts guaranteed.²²⁹ On education, too, the concordat thus provided legal grounds for the Church to defeat the Zan bill.

The Holy See was not incorrect that the Italian concordat, as amended in 1984, provides it with immense educational powers. Article 9(1) gives the Church “full freedom” over its private schools, and Article 9(2) guarantees that the state will “ensure within the limits of school aims the teaching of Catholic religion in public schools of any order and level.”²³⁰ While Italian parents can technically opt their children out of the weekly “*ora di religione*” (religion hour)

227. Carlo, *supra* note 134; Pierluigi Consorti, *Holy See vs. Italy and Gender Discrimination: An Example of Diplomatic Meddling*, 8 *SOFT POWER* 287, 292 (2021).

228. Salvatore Ioverno, Nicola Nardelli, Roberto Baiocco, Isabella Orfano & Vittorio Lingiardi, *Homophobia, Schooling, and the Italian Context*, in *SEXUAL ORIENTATION, GENDER IDENTITY, AND SCHOOLING: THE NEXUS OF RESEARCH, PRACTICE, AND POLICY* 354, 355 (Stephen T. Russell & Stacey S. Horn eds., 2016).

229. Consorti, *supra* note 227, at 292; *Italian PM Rebuffs Vatican Protest over Proposed Homophobia Law*, BBC (June 23, 2021), <https://www.bbc.com/news/world-europe-57570471> [<https://perma.cc/HE2U-KCM6>].

230. 1984 Italian Concordat arts. 9(1) & 9(2), *supra* note 36, at 230.

in public schools, 88.9% of students remained in attendance in the 2012-2013 school year.²³¹

Because Italian authorities have also interpreted the concordat to require consideration of the Church's views before making changes to sexual-education curricula, the resulting classes are deeply uninformative and often fail to acknowledge LGBTQ people.²³² A 2022 study assessing sex education in Italy over the previous fifteen years found that two-thirds of surveyed sex-education programs in Southern Italy made no mention of LGBTQ issues at all.²³³

Still, it is hard to argue that a day devoted to anti-LGBTQ bullying would violate the concordat's educational provisions, especially because the Zan bill would merely have added the day to the national calendar, not forced private Catholic schools to recognize it.²³⁴ In this respect, the concordat lent a legal veneer to the Church's critiques, even those that went far beyond the four corners of the agreement. Indeed, the Church prevailed in its opposition to the bill, and many queer students in Italian public schools today are left without antibullying programming as they attend weekly Church classes that ignore and degrade LGBTQ people.

2. Poland: A Stronger Concordat, a Stronger Church

In Poland, a stronger concordat has generated even greater Church involvement in the school system than in Italy. This poses a major challenge for LGBTQ students and teachers, who already face widespread discrimination and violence.²³⁵ A staggering 69.4% of LGBTQ students in Poland report suicidal thoughts.²³⁶

231. Maria Chiara Giorda, *Religious Diversity in Italy and the Impact on Education: The History of a Failure*, 17 *NEW DIVERSITIES* 77, 80-81 (2015) (finding 88.9% of students attended "insegnamento della religione cattolica" (Catholic religious instruction) in the 2012-2013 school year).

232. See Giuseppina Lo Moro, Fabrizio Bert, Toni Cappelletti, Heba Safwat Mhmoued Abdo Elhadidy, Giacomo Scaioli & Robert Siliquini, *Sex Education in Italy: An Overview of 15 Years of Projects in Primary and Secondary Schools*, 52 *ARCHIVES SEXUAL BEHAV.* 1653, 1654, 1657 (2023).

233. See *id.* at 1657.

234. Harlan & Pitrelli, *supra* note 137; Francesca Feo, *Legislative Reforms to Fight Discrimination and Violence Against LGBTQ+: The Failure of the Zan Bill in Italy*, 5 *EUR. J. POL. & GENDER* 149, 149 (2022).

235. Godzisz & Knut, *supra* note 168, at 92-96.

236. *Id.* at 94. For comparison, in 2023, thirty-nine percent of the general student population in Poland reported suicidal thoughts. *Survey of 185,000 Polish School Pupils Finds Suicidal Thoughts Widespread*, *NOTES FROM POL.* (Apr. 17, 2023), <https://notesfrompoland.com/2023/04/17/survey-of-180000-polish-school-pupils-finds-suicidal-thoughts-widespread> [<https://perma.cc/4E86-K9PX>].

Like in Italy, the Church has codified the concordatarian requirement that the state provide Church-approved religion classes in Polish public schools,²³⁷ which around ninety percent of students attend.²³⁸ According to Article 12(2), the Church also has full authority over the selection of curricular materials for its public-school instruction,²³⁹ and state authorities possess no “supervisory or approving” role as they now do in Italy.²⁴⁰ This concordatarian structure grants the Church direct, unregulated control over the content of what students learn in public-school religion classes. This is a power that the Church has exercised to marginalize LGBTQ students, with one human-rights report describing the curriculum that the Church has developed as “homophobic by design.”²⁴¹ The report identified the Church’s 2017 textbook, misleadingly titled “Living to Believe and Love,” as especially hostile to LGBTQ students.²⁴²

Greater Church control over school curricula in Poland is especially important in light of the fact that no Polish student under eighteen can opt out of Church instruction without parental consent.²⁴³ Italy, by contrast, removes the parental-consent requirement by the time children reach secondary school.²⁴⁴ In practice, then, Polish LGBTQ students – should their parents desire – must attend religion classes that demean and degrade them but can be denied access to school programming seeking to dignify and protect them.

Polish parents have power over their children’s education in other ways, too. The Polish concordat recognizes “the right of parents to the religious education of their children,”²⁴⁵ in keeping with the Polish Constitution’s guarantee that

237. Polish Concordat art. 12(1), *supra* note 8.

238. See Agnieszka Wądołowska, *Private Education Booms in Poland amid Impact of Politics and Pandemic on Public Schools*, NOTES FROM POL. (June 6, 2022), <https://notesfrompoland.com/2022/06/06/private-education-booms-in-poland-amid-impact-of-politics-and-pandemic-on-public-schools> [https://perma.cc/3STJ-Q7NX].

239. Polish Concordat art. 12(2), *supra* note 8.

240. Piotr Roszak & Weronika Kudła, *Faith-Based Education in Polish Public Schools – From Battleground to Common Ground*, 99 INT’L J. ECON. DEV. art. no. 102773, at 4 (2023).

241. Michał Tęcza, *The Condition of Human Rights in Poland*, in *The Contemporary Human Rights Situation in Central and Eastern Europe*, NOVUM INST. AND FRIEDRICH NAUMANN FOUND. 105, 114 (Anna Ayvazyan & Sebastjan Pikel eds., 2023), https://humanrights21.eu/wp-content/uploads/2023/08/Publication_FNF-Novum_HumanRights_Final.pdf [https://perma.cc/JKD7-LGZB].

242. *Id.*

243. *Withdrawing from Religious Education at School*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (2017), <https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/withdrawing-religious-education-school> [https://perma.cc/U86F-3TZJ].

244. *Id.*

245. Polish Concordat art. 12(1), *supra* note 8.

“[p]arents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions.”²⁴⁶ The affirmative right of Polish parents to their children’s religious education means that a public school must immediately organize Church instruction if even one student’s parents request it.²⁴⁷ As part of this broad right to religious education, Polish parents also have the right to be informed in advance if schools organize events about sex education, homophobia, or gender identity, and they can make written declarations to the school demanding their children not be included in such programming.²⁴⁸ In this respect, the Polish concordat affords parents who send their children to public schools the power to opt their children out of school programming designed to address the very homophobia and discrimination that the concordat otherwise invites into public-school spaces.

There is no doubt that many factors have led to the dire situation faced by LGBTQ students across Poland’s public schools. Deeply entrenched cultural conservatism and hostility from far-right officials are two culprits. In 2021, the Polish Minister of Education and Science proposed a law that would effectively ban sex education and subject teachers to firing if they openly supported LGBTQ students.²⁴⁹ While the bill failed, the situation in Poland is so severe that in January 2021, ten United Nations (U.N.) Special Rapporteurs excoriated Poland for the conditions LGBTQ students face at school.²⁵⁰ And yet, this Section shows that the concordat is an unavoidable part of this story, having real-world impact far beyond the four corners of its text. In December 2023, when the newly elected Polish government proposed major reforms to Polish Catholic education, the

246. KONSTYTUCJA [CONSTITUTION] Apr. 2, 1997, art. 53.3 (Pol.), translated in *The Constitution of the Republic of Poland of 2nd April, 1997*, SEJM, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> [<https://perma.cc/8NDG-XMAY>].

247. Roszak & Kudła, *supra* note 240, at 4.

248. *Id.* at 3.

249. Lily Wakefield, *Hateful Anti-LGBT+ Bill that Could Devastate a Generation Lands in Poland’s Parliament*, PINKNEWS (Jan. 12, 2022), <https://www.thepinknews.com/2022/01/12/poland-lgbt-lex-czarnek-education> [<https://perma.cc/F9BA-HAGU>]; *Poland: Veto Bill Targeting Sex Ed*, HUM. RTS. WATCH (Dec. 8, 2022, 8:00 PM EST), <https://www.hrw.org/news/2022/12/09/poland-veto-bill-targeting-sex-ed> [<https://perma.cc/LAF2-BXFQ>] (confirming that the Polish education minister “initiated” the 2021 bill).

250. Letter from Indep. Expert on Prot. Against Violence and Discrimination Based on Sexual Orientation and Gender Identity et al. to Andrzej Duda, Pres. of Pol. 1 (Jan. 20, 2021), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25444> [<https://perma.cc/SE97-FM8U>].

general secretary of the Polish Bishops' Conference, Artur Miziński, cited the Polish concordat to oppose the effort.²⁵¹

3. *Malta: Legislative Protections for LGBTQ People*

After decades of feuding over the school system, the Church and Malta share six concordats governing Maltese education.²⁵² Unsurprisingly, the agreements give significant power to the Church, promising the Holy See that Catholic education can be offered in Maltese public schools.²⁵³ They stipulate that the Church has approval rights over all religious instructors and that the Maltese Episcopal Conference not only selects curricular materials for Church instruction but also has the right to point out to the Minister of Education any teachings or subjects that are “at variance with the Catholic Church.”²⁵⁴ While students can opt out of Church instruction in public schools, they cannot do so without parental consent before age sixteen.²⁵⁵ More than ninety-five percent of public-school students remain in Church classes.²⁵⁶ As per the 1991 agreement, the Church also runs a third of Malta's schools privately.²⁵⁷ The Church has actively curtailed education about sex, sexuality, and queerness in both public and private schools.²⁵⁸

And yet, Malta again provides a different story than Italy and Poland. Malta's robust antidiscrimination laws mean LGBTQ students and teachers are not

251. *Catholic Church Calls for Dialogue with New Government on Proposed Changes to School Religion Classes*, NOTES FROM POL. (Dec. 15, 2023), <https://notesfrompoland.com/2023/12/15/catholic-church-calls-for-dialogue-with-new-government-on-proposed-changes-to-school-religion-classes> [https://perma.cc/MZF2-MQRJ].

252. *Bilateral Treaties of the Holy See*, *supra* note 78.

253. Agreement Between the Republic of Malta and the Holy See to Better Order Catholic Religious Instruction and Education in State Schools, Holy See-Malta, art. 1, Nov. 16, 1989, 90 A.A.S. 30, <https://www.vatican.va/archive/aas/documents/AAS-90-1998-ocr.pdf> [https://perma.cc/S3RE-2Z46].

254. *Id.* art. 2, 90 A.A.S. at 31; Modes of Regulation on Catholic Religious Instruction and Education in State Schools, Holy See-Malta, art. 1(6), Nov. 16, 1989, 90 A.A.S. 33, <https://www.vatican.va/archive/aas/documents/AAS-90-1998-ocr.pdf> [https://perma.cc/S3RE-2Z46].

255. Bureau of Democracy, Hum. Rts., & Lab., *Malta 2018 International Religious Freedom Report*, U.S. DEP'T OF STATE 3 (2018), <https://www.state.gov/wp-content/uploads/2019/05/MALTA-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [https://perma.cc/L9DJ-FNBV].

256. *Id.* at 4.

257. Agius, *supra* note 171.

258. Jonathan Borg, *The Narratives of Gay Male Teachers in Contemporary Catholic Malta* 19, 46 (Nov. 2015) (Ph.D. dissertation, University of Sheffield), <https://core.ac.uk/download/pdf/77022911.pdf> [https://perma.cc/H4NP-G349].

completely at the mercy of the concordatarian system. In 2007, after the Church tried to fire four gay and lesbian teachers from private Catholic schools, the Maltese teacher's union invoked Legal Notice 461—Malta's LGBTQ-employment-discrimination statute—to protect the educators from dismissal.²⁵⁹ Thus, while the 1991 concordat provides the Church with control over the hiring and firing of its teachers, Maltese advances in other areas of LGBTQ law play a mitigating role.

* * *

This Part has shown the immense consequences of the Church's treaties for LGBTQ life across Italy, Poland, and Malta. The legal and political conditions in Italy and Poland, including the strength of those states' concordats, have made the kinds of LGBTQ reforms reached in Malta harder to achieve. And yet, Malta's significant successes in advancing LGBTQ rights relative to Italy and Poland are informative, showing that more limited commitments to the Church in the fields of antidiscrimination, marriage, and education can enable more rapid, far-reaching victories.

III. CHALLENGING THE CONCORDATARIAN REGIME

The Church's treaties have not benefited LGBTQ people, but they have mended Church-state strife. Challenging the concordatarian regime, then, risks opening old wounds. This Part outlines how advocates and states can contest the Church's treaties, moving from the least to most drastic legal measures available. This sliding scale of escalation offers flexibility to activists and states in how they choose to confront the delicate concordatarian system. Moreover, it ensures that *pacta sunt servanda* remains the normative baseline—the legal anchor—in any reform efforts. Each escalation in this Part increasingly strains *pacta sunt servanda*. And while I show that stretching the principle is often essential to creating legal change, I ultimately highlight that even the most formidable legal principles can be rendered obsolete when stretched too far.

It is important to highlight that this Part is addressed to both individual advocates and to signatory states, as each holds their own place on the sliding scale. Actions by states will necessarily be more forceful than those of individuals. Section III.A describes the least invasive way for both individuals and states to confront a concordat: interpreting the agreements in ways that protect LGBTQ rights. Section III.B covers litigation and is directed at individual advocates who

259. *The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Malta*, *supra* note 172, at 9; *Malta Teachers Take on Roman Catholic Homophobia*, PINKNEWS (July 25, 2007), <https://www.thepinknews.com/2007/07/25/malta-teachers-take-on-roman-catholic-homophobia> [<https://perma.cc/ES6E-9FTH>].

can intensify pressure on the Church's treaties in courts and U.N. treaty bodies. At that stage, I shift to more confrontational actions that are only available to states: Section III.C discusses withdrawal and renegotiation, and Section III.D addresses countermeasures. These are some of the strongest actions that can be taken to target the concordatarian structure.

A. Interpretive Resistance

The first and least invasive way to challenge concordats is to do what one must do to abide by any treaty: interpret it. Advocates and concordatarian states are under no obligation to adopt the Church's interpretation of treaty provisions. When the Holy See sent its *nota verbale* to the Italian Parliament and pointed to the concordat's freedom-of-expression provisions, many Italian officials—including Prime Minister Mario Draghi—vocally disagreed with the Church's interpretation.²⁶⁰ They were correct in doing so.

This Section focuses on the freedom-of-expression clauses in Italy's agreement with the Church not only because they were so consequential in the Zan affair but also because they are some of the most ubiquitous clauses across concordats worldwide. From Bosnia-Herzegovina²⁶¹ to Colombia,²⁶² these clauses are as common as they are expansive, vague, and ripe for misinterpretation.

Under Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which is binding on both Italy and the Holy See as parties to the Convention,²⁶³ a treaty is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”²⁶⁴ None of these four indicia of interpretation—“ordinary meaning,” “context,” “object and purpose,” and “good faith”—support the Church's reading.

260. Italian PM Rebuffs Vatican Protest over Proposed Homophobia Law, *supra* note 229.

261. Basic Agreement Between the Holy See and Bosnia and Herzegovina, Bosn. & Herz.-Holy See, art. 13, Apr. 19, 2006, 99 A.A.S. 939, <https://www.vatican.va/archive/aas/documents/2007/novembre%202007.pdf> [<https://perma.cc/TA56-SHKV>] (“Bosnia and Herzegovina guarantees to Catholics and to their associations and institutions full freedom of action and of public activity, both in speech and in writing.”).

262. Concordato Entre La Republica de Colombia y La Santa Sede [Concordat Between the Republic of Colombia and the Holy See], Colom.-Holy See, art. 2, July 12, 1973, 67 A.A.S. 421, <https://www.vatican.va/archive/aas/documents/AAS-67-1975-ocr.pdf> [<https://perma.cc/P4ZW-S8ER>] (referring to the “full freedom”—“*piena libertà*” in Italian and “*plena libertad*” in Spanish—of the Church to exercise its mission).

263. Tiyanjana Maluwa, *The Treaty-Making Capacity of the Holy See in Theory and Practice: A Study of the Jus Tractum of a Non-State Entity*, 20 COMPAR. & INT'L L.J. S. AFR. 155, 160, 162 (1987).

264. VCLT art. 31(1), *supra* note 27, 1155 U.N.T.S. at 340.

Crucially, and in stark contrast to U.S. statutory interpretation, the interpretive indicia in the VCLT are *equal* to one another.²⁶⁵ Scholars of international law call this the “‘crucible’ approach”: each piece of the interpretive puzzle is “thrown into the crucible” to yield the proper meaning.²⁶⁶ If ambiguity remains, Article 32 of the VCLT permits interpreters to look to “supplementary” sources of meaning, including the circumstances of the treaty’s conclusion and preparatory sources, the *travaux préparatoires*.²⁶⁷ These sources, too, point away from the Church’s reading of the Italian concordat.

1. “Ordinary Meaning”

The ordinary meaning of Article 2(1) of the 1984 Italian concordat—granting the Church “full freedom . . . in carrying out its . . . mission”²⁶⁸—does not preclude enactment of LGBTQ hate-crime and hate-speech legislation. Scholars have long puzzled over the VCLT’s “ordinary meaning” doctrine and what exactly it requires of interpreters.²⁶⁹ Broadly speaking, however, ordinary meaning refers to “objective” meaning, based not on what Italy or the Holy See actually meant, but rather what a reasonable person would understand the words to mean.²⁷⁰

The ordinary meaning of the phrase “full freedom”—*piena libertà*—is not infinite freedom. A freedom can be “full” but not “limitless.” When a professor tells her student, “I give you full freedom in writing your paper,” she means, “Choose your subject, argument, and structure.” She does not mean that the student can plagiarize, write entirely in Spanish, or submit after the deadline. The Holy See thus overreads “full freedom” to contain no exception or limitation—even though Italian law has since 1993, and without Church protest, barred hate speech and incitement rooted in “racial, ethnic, national or religious” motives.²⁷¹

265. Brian G. Slocum & Jarrod Wong, *The Vienna Convention and Ordinary Meaning in International Law*, 46 *YALE J. INT’L L.* 191, 201 (2021).

266. *Id.* (quoting Int’l L. Comm’n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN.4/191, at 219–20 (1966)).

267. VCLT art. 32, *supra* note 27, 1155 U.N.T.S. at 340.

268. 1984 Italian Concordat art. 2(1), *supra* note 36, at 226.

269. See Slocum & Wong, *supra* note 265, at 202.

270. *Id.* at 203–05.

271. Carlo, *supra* note 134 (quoting Legge 25 giugno 1993, n.205, G.U. June 25, 1993, n.148 (It.)).

2. “Context”

“Context” in VCLT Article 31 mandates attention to immediately surrounding text, the treaty’s broader language and structure, and the parties’ subsequent agreements.²⁷² It does not refer to the surrounding circumstances of the treaty’s conclusion nor the intent of the parties.²⁷³ Rather, “context” functions as an “immediate qualifier” of ordinary meaning—a way to avoid “over-literal” readings of treaty text.²⁷⁴

The context of Article 2 of the 1984 concordat confirms that it refers to a *limited* freedom of the Church to pursue its mission.²⁷⁵ The immediately preceding article dictates that Italy and the Holy See, “each in its own order, are independent and sovereign, and pledge to fully respect such principle in their relations.”²⁷⁶ Indeed, Article 14 states that any “problems of interpretation” that arise are to be “entrust[ed]” to a “Joint Committee” appointed by the parties.²⁷⁷ The concordat’s legal scheme, especially in matters of controversy, thus centers on mutual collaboration and nonintervention. As strong as the language of “full freedom” may be, it does not provide the Church with a right to intervene unilaterally in Italy’s legislative process. The Church, by the terms of the treaty, should have requested a joint committee in light of interpretive disagreement instead of publicly denouncing pending legislation.

3. “Object and Purpose”

If context is about gaining direct insight into textual meaning, “object and purpose” is about the treaty’s overall intent: what were the parties trying to do?²⁷⁸ Scholars disagree about whether this is an objective or subjective standard.²⁷⁹ In light of this disagreement, I offer both an objective understanding of

272. VCLT art. 31(2)-(3), *supra* note 27, 1155 U.N.T.S. at 340; RICHARD GARDINER, *TREATY INTERPRETATION* 199-200, 202, 205, 223 (2d ed. 2015).

273. See GARDINER, *supra* note 272, at 197-98.

274. *Id.* at 197.

275. 1984 Italian Concordat art. 2(1), *supra* note 36, at 226.

276. *Id.* art.1, at 225.

277. *Id.* art. 14, at 232.

278. David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 *VAND. J. TRANSNAT’L L.* 565, 567 (2010).

279. See V. Crnic-Grotic, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, 7 *ASIAN Y.B. INT’L L.* 141, 158-160 (1997) (summarizing some of the arguments on either side of the academic debate).

purpose rooted in the text, in this Section, and a subjective understanding of purpose based on the actual intent of the parties, in Section III.A.5.

Objectively, the 1984 agreement was about rolling back the Lateran Pacts to reflect new public attitudes about the relationship between Church and state. The treaty lays out this intent in the preamble: “In consideration of the process of political and social changes recorded in Italy during the past decades,” the parties agree to the “following modifications of the Lateran Concordat.”²⁸⁰ The agreement proceeds to abrogate a number of key provisions in the original pact, asserting the primacy of civil courts over ecclesiastical tribunals and making Catholic education in public schools optional.²⁸¹ Finally, Article 1 of the Additional Protocol to the concordat clarifies: “The principle of the Catholic religion as the sole religion of the Italian State . . . is considered to be no longer in force.”²⁸²

The object and purpose of the 1984 agreement, then, cut against the Church’s interpretation of “full freedom” as an unbounded right. Though I showed in Part II that the 1984 treaty grants tremendous powers to the Church, it was still a *reduction* in the powers contained in the original Pacts. The goal was to *avoid* the Zan scenario, not invite it.

4. “Good Faith”

The legal meaning of the seemingly indeterminate concept of “good faith” is the requirement that states refrain from “the creation of new obligations” that are neither in the text of the treaty nor within the parties’ objective intent.²⁸³ “Full freedom” of expression, then, cannot be said to create *new* obligations for Italy, such as precluding the state from enacting protective antidiscrimination legislation. Nowhere in the treaty did Italy agree to never impose any limits on incitement to violence or discrimination. This is an additional obligation that the Holy See reads into the treaty and thus does not cohere with the legal meaning of good faith.

5. “Supplementary Means of Interpretation”

Even if these four indicia were insufficient, VCLT Article 32 directs interpreters to resolve remaining ambiguity by resorting to the circumstances of the

280. 1984 Italian Concordat pmb., *supra* note 36, at 225.

281. *Id.* art. 8, at 228-30; *id.* art. 9(2), at 230.

282. *Id.*, Additional Protocol art. 1, at 232-33.

283. Steven Reinhold, *Good Faith in International Law*, 2 UCL J.L. & JURIS. 40, 62 (2013).

treaty's conclusion and the *travaux préparatoires*.²⁸⁴ These sources offer conclusive evidence that the Holy See's reading of the concordat was incorrect.

The 1984 agreement, negotiated at the Villa Madama Accords, was the result of a near-twenty-year effort at renegotiation.²⁸⁵ The campaign began in 1965 after the Church invoked Article 1 of the original 1929 concordat, protecting the "sacred character" of the City of Rome, to successfully demand a national ban on Rolf Hochhuth's *The Deputy*,²⁸⁶ a controversial play indicting Pope Pius XII for failing to stop the Holocaust.²⁸⁷ The Italian public was furious about the Church's maneuver.²⁸⁸ By 1967, there were four parliamentary motions for revision, a full chamber vote in favor of the initiative, and an ad hoc committee to consult with the Holy See on a new draft.²⁸⁹

The seven drafts of the 1984 agreement clarify that Italy had clear intent to circumscribe existing Church freedoms. In 1976, the legislators leading the renegotiation declared by successful motion: "The Chamber of Deputies . . . believes the changes in the concordat with the Holy See to be dictated by the need to respect the evolution of [the] times."²⁹⁰ Indeed, each successive draft rolled back the Church's prerogatives more and more. The second draft in 1977 introduced the marriage and educational reforms.²⁹¹ The third draft in 1978 included the Article 1 language declaring the Church and state "independent and sovereign."²⁹² The history of the 1984 agreement provides yet another thumb on the scale for interpreting "full freedom" based on how Italians actually meant it: "full" within certain limits reflective of "the evolution of [the] times."

B. Litigation and Complaint

Interpretation is a powerful tool, but states and their political officials may be inclined to adopt readings of concordats hostile to LGBTQ advancement. An

²⁸⁴. VCLT art. 32, *supra* note 27, 1155 U.N.T.S. at 340.

²⁸⁵. See DE FRANCISCIS, *supra* note 36, at 76; ALESSANDRO FERRARI, RELIGIOUS FREEDOM IN ITALY: AN IMPOSSIBLE PARADIGM? 55 (John Francis Phillimore & Luca Palandri trans., De Gruyter 2024) (2013) (describing the Villa Madama Accords).

²⁸⁶. DE FRANCISCIS, *supra* note 36, at 56, 75-77.

²⁸⁷. Robert C. Doty, *'The Deputy' Is Here: Rolf Hochhuth's Controversial Play Has Had an Embattled History*, N.Y. TIMES, Feb. 23, 1964, at X1, X1.

²⁸⁸. DE FRANCISCIS, *supra* note 36, at 76.

²⁸⁹. *Id.* at 76-77.

²⁹⁰. *Id.* at 127 (quoting Camera dei Deputati, *Atti Parlamentari*, V Legislature, vol. 439, sitting of Apr. 7, 1971, at 27719).

²⁹¹. *Id.* at 129-30.

²⁹². *Id.* at 130.

additional, more adversarial tool available in challenging the concordatarian regime is litigation. In this Section, I explore the many ways advocates can use domestic and international courts to undercut Church treaty commitments. I examine the efficacy of litigation against concordatarian states, delineating the opportunities and roadblocks of domestic and international suits. I also analyze the potential efficacy of U.N. treaty bodies' complaint mechanisms for opposing concordats.²⁹³

In contrast to suits against concordatarian states, there are limited litigation opportunities against the Holy See itself. This is largely because the Holy See has not ratified many of the international treaties that could form the basis for a complaint against it and because, as of 2022, the Holy See enjoys sovereign immunity under international law.²⁹⁴

1. *Domestic Litigation*

Advocates can sue concordatarian states, such as Italy, Poland, and Malta, in domestic courts to argue that their treaty commitments are violative of the state's domestic law. This Section aims to give litigants an understanding of what such claims can achieve and what they cannot.

293. Filing complaints in these quasi-judicial bodies is not strictly litigation, but I include this strategy in this Section because it operates similarly to lawsuits.

294. Namely, the Holy See is not party to the European Convention on Human Rights, the EU treaties, or the International Covenant on Civil and Political Rights. And although the Holy See has ratified the Convention on the Rights of the Child, it is not a party to the agreement's Optional Protocol on a "communications procedure," which enables individuals to file complaints, or to any other individual-complaint mechanism in the United Nations. *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMM'R FOR HUM. RTS., <https://indicators.ohchr.org> [<https://perma.cc/BQ5R-Q2MH>]. As to sovereign immunity, in *J.C. and Others v. Belgium* in 2021, the European Court of Human Rights evaluated whether a Belgian court's decision to grant sovereign immunity to the Holy See and dismiss a suit from sexual-abuse survivors violated litigants' right to a fair trial under Article 6(1) of the European Convention. *Ash Stanley-Ran, J.C. and Others v. Belgium: The Delicate Balance of State Immunity and Human Dignity*, STRASBOURG OBSERVERS (Jan. 12, 2022), <https://strasbourgobservers.com/2022/01/12/j-c-and-others-v-belgium-the-delicate-balance-of-state-immunity-and-human-dignity> [<https://perma.cc/5C4K-V5G4>]. The court found no violation of the Convention, drawing from none other than the Lateran Pacts – and the fact that the Holy See engages in the signature and ratification of treaties – to support its decision that the Holy See was formally and functionally sovereign under international law. *J.C. & Others v. Belgium*, App. No. 11625/17, ¶¶ 56–57 (Oct. 12, 2021), <https://hudoc.echr.coe.int/eng?i=001-212635> [<https://perma.cc/9AY6-2MPY>]; Stanley-Ran, *supra*.

As a matter of international law, under VCLT Article 27, states remain bound by their treaties irrespective of what their domestic law has to say.²⁹⁵ That is, states cannot invoke their domestic law to refuse to abide by the treaties they ratify.²⁹⁶ This Note does not condone nor encourage violations of international law. On the contrary, I view challenges to concordats under domestic law as playing three roles. First, a court's finding that a concordat violates a state's domestic law would be a major blow to the agreement's legitimacy. Such a court decision could force states to renegotiate their treaties – both to harmonize their international agreements with domestic law and, crucially, to avoid the prospect of domestic liability. If a state's performance under a concordat violates citizens' domestic rights, the state would find itself in a situation in which it could be sued precisely because it complied with its international legal obligations. The only option, and a perfectly legal one under international law, would be renegotiation.

Second, domestic-court rulings on matters of domestic law can require states to exercise restraint in carrying out their concordatarian commitments. In other words, it can force states to limit the *extent* or *application* of the treaty, even as they uphold its central commitments. For instance, a domestic court could find that a particular Church lesson discriminated against or incited violence against LGBTQ students and thus could not be taught in public schools. The ruling would not mandate that a state disregard its concordatarian arrangement – the Church would still be guaranteed its right to educate in public schools – but would rein in what the concordatarian arrangement could look like in practice. And third, domestic litigation is often a prerequisite for accessing international fora due to the exhaustion requirements of the European Court of Human Rights (ECHR) and U.N. treaty bodies: litigants may need to lose first to win later.²⁹⁷

295. VCLT art. 27, *supra* note 27, 1155 U.N.T.S. at 339; Kirsten Schmalenbach, *Article 27: Internal Law and Observance of Treaties*, in *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 493, 493 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

296. Schmalenbach, *supra* note 295, at 493.

297. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 26, Nov. 4, 1950, 213 U.N.T.S. 238 (“The [ECHR] may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”); *Complaints Procedures Under the Human Rights Treaties*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties> [https://perma.cc/QRF4-2A9M] (“A cardinal principle governing the admissibility of a complaint is that you must, in general, have exhausted all remedies in your own State before bringing a claim to a [U.N. treaty body]. This usually includes pursuing your claim through the local court system . . .”).

In Italy, treaty obligations are enforceable under domestic law once they are codified by statute and supersede domestic law in the event of conflict.²⁹⁸ The Lateran Pacts are exceptional in this regard in that they are enshrined not in any ordinary statute, but in the Italian Constitution.²⁹⁹ This means that only other constitutional provisions or principles can prevail over the concordat in domestic law.³⁰⁰ Such an override is not an abstract possibility. In February 1982, the Italian Constitutional Court found that the Lateran Pacts' provisions on the automatic civil effect of nullity decisions—without substantive review by Italian courts—violated Article 24 of the Constitution, which guarantees the right to be heard in court.³⁰¹ The court reasoned that this fundamental constitutional principle trumped the concordat.³⁰² Of course, though the power of these provisions was voided as a domestic matter, Italy was still obligated under *international law* to abide by the treaty until it was formally revised two years later in 1984.

Other challenges to the concordat in Italy have succeeded by requiring the state to limit the extent of the concordat's *application*—restraining how far the concordatarian structure can go in regulating Italian citizens. In 1989, the Italian Constitutional Court found that requiring a public-school student who opted out of Catholic education to take an alternative class would infringe on his “constitutional freedom of religion.”³⁰³ The court held that the alternative to Catholic education was a state of “non-obligation” and that the concordat could not create a structure requiring additional class time for students not participating in Church instruction.³⁰⁴ Without mandating that Italy disregard its treaty commitments, the court imposed a new boundary on how far the concordat could go: it could not intrude on the baseline of nonobligation granted to every Italian citizen.

The Italian Constitutional Court could be a friendly forum for domestic litigation. In 2010, the court found that the constitution's guarantee of the “inviolable rights of man, both as an individual as well as in social groupings” extended to same-sex couples.³⁰⁵ And the court ruled in 2021 that the rights of children of

298. Cataldi, *supra* note 29, at 338, 349.

299. *Id.* at 329–30.

300. *See id.*

301. *Id.*

302. *Id.*

303. Corte cost., 11 aprile 1989, n. 203, ¶ 9 (It.).

304. *Id.*

305. Corte cost., 14 aprile 2010, n. 138, ¶ 8 (It.).

same-sex couples need to be protected.³⁰⁶ These cases provide openings for direct challenges to the concordat and its application.

Poland, on the other hand, provides a far less promising landscape for domestic litigation. Like in Italy, implementing legislation passed by Parliament makes international agreements domestically enforceable—and conflicts between domestic law and implemented international agreements are to be resolved in favor of the latter.³⁰⁷ Moreover, the concordat is codified in the Polish Constitution,³⁰⁸ meaning that a direct challenge to the agreement would have to emerge out of Poland’s constitutional law. While a ruling by the Constitutional Court that the concordat violates constitutional principles would require the treaty to be renegotiated—or the constitution amended—such constitutional review of treaties usually is supposed to occur *before* the treaty enters into force as a preventive measure to avoid conflicting laws.³⁰⁹ Perhaps most importantly, the current court is in no position to make such an intervention, as it is recovering from a decade-long takeover by the Polish far right, and the new government only announced a package of reforms to restore the independence of the body in March 2024.³¹⁰

Perhaps unsurprisingly, Malta provides a better opportunity for domestic litigation. Like Italy and Poland, Malta requires domestic implementing legislation to render international agreements enforceable under Maltese law.³¹¹ Accordingly, Malta has enacted portions of its concordatarian commitments by statute, including, for example, its marriage treaties with the Church.³¹² And yet, Malta

306. Corte cost., 28 gennaio 2021, n. 33, ¶ 5.7 (It.); *Italy Court Urges More Rights for Children of Gay Couples*, FRANCE 24 (Mar. 9, 2021), <https://www.france24.com/en/live-news/20210309-italy-court-urges-more-rights-for-children-of-gay-couples> [https://perma.cc/9MPU-CEWM]. It should be noted that despite this ruling, the Italian state has continued attacks against LGBTQ couples seeking to have children through surrogacy. See Maia Davies, *Italy Bans Couples from Travelling Abroad for Surrogacy*, BBC (Oct. 16, 2024), <https://www.bbc.com/news/articles/c62rmv630690> [https://perma.cc/999U-8DGG].

307. Kułaga, *supra* note 30, at 129-30.

308. KONSTYTUCJA [CONSTITUTION] Apr. 2, 1997, art. 25.4 (Pol.).

309. Anna Wyrozumska, *Poland*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS, *supra* note 29, at 468, 471.

310. See Daniel Tilles, *Polish Government Unveils Planned Overhaul of “Defective” Constitutional Court*, NOTES FROM POL. (Mar. 4, 2024), <https://notesfrompoland.com/2024/03/04/polish-government-unveils-planned-overhaul-of-defective-constitutional-court> [https://perma.cc/V7AN-59RM].

311. Ratification of Treaties Act, 1983 (Act No. V/1983), § 3(3) (“No provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament.”).

312. Marriage (Amendment) Act, 1995 (Act No. I/1995) (Malta); Marriage (Amendment) Act, 2014 (Act No. XXI/2014) (Malta).

has not codified its concordats in its constitution, with the exception of stating in Article 2 that Catholic teaching “shall be provided in all State schools.”³¹³ Moreover, Malta constitutionalized core LGBTQ rights in 2014, entitling LGBTQ citizens to fundamental rights and freedoms under Article 32 and explicit protection from discrimination under Article 45(3).³¹⁴ Thus, for those concordatarian commitments codified only by statute, LGBTQ protections have a higher domestic legal status, making domestic litigation all the more promising. Still, under VCLT Article 27, a finding that Malta’s concordats conflict with the constitution would not absolve the country of its international legal obligation to uphold its treaties.

2. *International Litigation*

International courts provide another crucial avenue for advocates to take states to task for their concordatarian commitments. Italy, Poland, and Malta are all parties to the European Convention on Human Rights as well as a constellation of EU treaties as EU member states.³¹⁵ These instruments provide enormous opportunities to advance LGBTQ rights. And yet, the Holy See is party to none of them.

Under Article 30(4)(b) of the VCLT, if one state is party to two treaties relating to the same subject matter – say, a concordat and the European Convention – while another state is party to only *one* of those treaties, as with the Holy See here, the treaty to which *both* states are parties prevails with respect to their “mutual rights and obligations.”³¹⁶ So, even if litigants successfully argue that a concordat violates the Convention or an EU treaty, the concordat would still govern a European state’s obligations *to the Holy See*.³¹⁷ The oddity of Article 30(4)(b), however, is that it “does not actually resolve the conflict”³¹⁸ – a European state would still be obligated *to parties to the Convention and EU treaties* to

313. KOSTITUZZJONI [CONSTITUTION], Sept. 21, 1964, art. 2 § 3 (Malta), *translated in Constitution of Malta*, RIFORMA KOSTITUZZJNALI 7, <https://riformakostituzzjonali.gov.mt/wp-content/uploads/2019/07/THE-MALTESE-CONSTITUTION.pdf> [<https://perma.cc/5FJM-PF85>].

314. *Id.* art. 32; *id.* art. 45 § 3; *Malta*, ILGA WORLD, <https://database.ilga.org/malta-lgbti> [<https://perma.cc/2BK5-2YCX>].

315. *See 46 Member States*, COUNCIL EUR., <https://www.coe.int/en/web/portal/46-members-states> [<https://perma.cc/ZP9U-2Y7P>]; *EU Countries*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/eu-countries_en [<https://perma.cc/CRR6-ACKR>].

316. VCLT, art. 30(4)(b), *supra* note 27, 1155 U.N.T.S. at 339.

317. *Id.*

318. Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 573, 618 (2005).

fulfill the commitments it made in those agreements.³¹⁹ The provision therefore has the effect of pushing states to choose “which treaty [they] would honor and which [they] would breach.”³²⁰ Thus the “practical result” would likely have to be renegotiation to bring the state’s treaty commitments into harmony with one another.³²¹

Ultimately, much like for domestic law, even though the European Convention and EU treaties cannot trump a concordat under international law *per se*, they can still be used to challenge its legitimacy and force renegotiation or limit its applicability and extent.

The ECHR in particular provides key opportunities to limit the reach of the Church in concordatarian states. In *Pellegrini v. Italy* in 2001, the court found that Italy’s application of the 1984 concordat to an Italian citizen violated Article 6(1) of the Convention, the right to a fair trial.³²² Maria Grazia Pellegrini was summoned before an ecclesiastical tribunal in 1987 without any notice that her husband had filed for an annulment, and thus she had no attorney.³²³ When the ecclesiastical court returned a judgment of nullity, the legal result was to deprive Pellegrini of the possibility of alimony, which she claimed was her only source of income.³²⁴ The Florence Court of Appeals affirmed the judgment of nullity in accordance with its authority under Article 8(2) of the 1984 concordat, and the ruling was affirmed on appeal to the highest Italian court, the Court of Cassation.³²⁵ The ECHR exercised its jurisdiction over the Italian courts’ rulings, indirectly attacking the judgments of the ecclesiastical tribunals by finding that Pellegrini’s “defence rights were . . . irremediably compromised” in violation of the Convention.³²⁶

In another landmark case, *Lautsi and Others v. Italy*, the ECHR found in 2009 that the display of a crucifix in an Italian public-school classroom violated the Convention, which guarantees “freedom of thought, conscience and religion” in Article 9 and the right to education (and parental control thereof) in Article 2 of

319. See *id.* (explaining how a state facing an Article 30(4)(b) scenario may still have conflicting obligations because, although its treaty with state *X* would govern its obligations with respect to state *X*, that would not eliminate its ongoing obligations to state *Y*); see also *id.* at 589 (noting that even though the interpretative rule *lex specialis*—the specific governs the general—is not used in the VCLT, it could be a way to resolve direct conflicts of this type).

320. *Id.* at 618.

321. *Id.*

322. *Pellegrini v. Italy*, App. No. 30882/96, ¶ 48 (Oct. 20, 2001), <https://hudoc.echr.coe.int/eng?i=001-59604> [<https://perma.cc/S6B3-GS3Z>].

323. *Id.* ¶¶ 14–15, 18.

324. *Id.* ¶ 21.

325. *Id.* ¶¶ 26–29, 31.

326. *Id.* ¶¶ 34, 36, 48.

Protocol No. 1.³²⁷ The court drew from the 1984 concordat to show that Italy had reduced its obligations under the Lateran Pacts, ultimately holding that “[s]chools should not be the arena for missionary activities or preaching.”³²⁸ In fulfilling its obligations under the concordat, the court held, Italy had to “take care that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner” and refrain from imposing beliefs in schools, “where persons . . . are particularly vulnerable.”³²⁹

While the ECHR faced backlash for its *Lautsi* decision,³³⁰ and ultimately reversed its earlier judgment,³³¹ the case is still a striking example of how the ECHR can be instrumental in efforts to limit the extent of concordats. The court can require states to operate within certain bounds as they carry out these agreements. Crucially, the ECHR has long served as a vessel for LGBTQ reform, especially in states where public acceptance is low.³³² In *Oliari and Others v. Italy* in 2015, the court found that Italy had a positive obligation to recognize same-sex unions under the Convention’s Article 8 right to privacy.³³³ Within a year, Italy enacted its same-sex civil-union legislation to comply with the ECHR’s order.³³⁴ ECHR rulings can set the groundwork for future litigation, can play an agenda-setting function, and have been shown to increase the likelihood that all parties to the Convention—not just parties to a given case—adopt pro-LGBTQ policies.³³⁵

Beyond the European Convention, Italy, Poland, and Malta are also party to EU treaties, which constitute binding EU primary law,³³⁶ even though Poland has refused to enforce some treaties as such due to domestic courts’ anti-LGBTQ

327. *Lautsi and Others v. Italy*, App. No. 30814/06, ¶¶ 27, 58 (Nov. 3, 2009), <https://hudoc.echr.coe.int/eng?i=001-95589> [<https://perma.cc/Q4FS-YMYA>].

328. *Id.* ¶¶ 23, 47.

329. *Id.* ¶¶ 47, 48.

330. Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT’L L. REV. 95, 98 (2011).

331. *Lautsi and Others v. Italy*, App. No. 30814/06, ¶¶ 71, 77-78, (Mar. 18, 2011), <https://hudoc.echr.coe.int/eng?i=001-104040> [<https://perma.cc/3D7V-27U2>].

332. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT’L ORG. 77, 80 (2014).

333. *Oliari and Others v. Italy*, App. Nos. 18766/11 & 36030/11, ¶¶ 3, 187-88 (Oct. 21, 2015), <https://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/Y59F-WLW3>].

334. Elisabetta Povoledo, *Italy Approves Same-Sex Civil Unions*, N.Y. TIMES (May 11, 2016), <https://www.nytimes.com/2016/05/12/world/europe/italy-gay-same-sex-unions.html> [<https://perma.cc/34TB-L3H5>].

335. See Helfer & Voeten, *supra* note 332, at 80-82.

336. *Types of EU Law*, EUR. COMM’N, https://commission.europa.eu/law/law-making-process/types-cu-law_en [<https://perma.cc/U2E5-M586>].

sentiment.³³⁷ EU law provides an array of protections for LGBTQ people. The Treaty on the European Union requires “respect for human dignity [and] freedom” and protection against “social exclusion and discrimination,”³³⁸ and the Treaty on the Functioning of the European Union and Charter of Fundamental Rights mandate that states “combat” and “prohibit,” respectively, discrimination on the basis of “sex” and “sexual orientation.”³³⁹ Member states are also bound by EU directives supporting LGBTQ people, including Directive 2000/78 protecting against discrimination in employment.³⁴⁰

EU law provides numerous ways to challenge state performance of concordat commitments, but it is harder for litigants to access the Court of Justice of the European Union (CJEU) than the ECHR. While individuals can lodge complaints in the ECHR against states party to the Convention, getting one’s case into the CJEU is more complicated. There are three main ways that states could be brought before the CJEU to answer for their concordats. First, a suit can be referred to the CJEU by a country’s national court.³⁴¹ Second, the European Commission – often on complaint from individual citizens – can launch infringement proceedings against states for alleged violations of EU law, with adjudication before the CJEU serving as the ultimate conclusion.³⁴² And finally, as of 1991, litigants have an individual cause of action for damages against EU member states that have violated EU law.³⁴³

Court referrals are a possible but unreliable mechanism for challenging a concordat’s compatibility with EU law. In 2023, on referral from a Polish court, the CJEU ruled in favor of a gay man whose contract was not renewed with a

337. See Andrew Higgins, Anatol Magdziarz & Monica Pronczuk, *Poland’s Top Court Rules Its Constitution Trumps E.U. Law*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/10/07/world/europe/poland-eu-law-constitution.html> [<https://perma.cc/SRZ6-JUUV>].

338. Consolidated Version of the Treaty on European Union arts. 2 & 3(3), June 7, 2016, 2016 O.J. (C 202) 17.

339. Consolidated Version of the Treaty on the Functioning of the European Union art. 10, June 7, 2016, 2016 O.J. (C 202) 53; Charter of Fundamental Rights of the European Union art. 21(1), Oct. 26, 2012, 2012 O.J. (C 326) 400.

340. Council Directive 2000/78, Nov. 27, 2000, 2000 O.J. (L 303) 16 (EC). Another directive specifically protects trans people against employment discrimination, extending the prohibition on sex discrimination to “discrimination arising from the gender reassignment of a person.” Council Directive 2006/54, July 5, 2006, 2006 O.J. (L 204) 23, 23 ¶ 3 (EC).

341. *Presentation*, CT. JUST. EUR. UNION, https://curia.europa.eu/jcms/jcms/J02_7024/en [<https://perma.cc/85YL-U73Z>].

342. Armin Cuyvers, *Judicial Protection Under EU Law: Direct Actions*, in EAST AFRICAN COMMUNITY LAW: INSTITUTIONAL, SUBSTANTIVE AND COMPARATIVE EU ASPECTS, 254, 260-62 (Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger & Armin Cuyvers eds., 2017).

343. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5403, ¶ 35.

national public broadcaster on the basis of his sexuality, finding there to be a violation of Directive 2000/78.³⁴⁴ But relying on such referrals is risky—domestic courts retain discretion about when to refer cases and may fail to do so if they are already hostile to LGBTQ rights.

Individual complaints to the European Commission are a better mechanism for bringing concordatarian states in front of the EU court. The strategy has been effective in countries like Poland: upon receiving over 400 complaints from LGBTQ individuals and organizations, the Commission initiated infringement proceedings against Poland for the more than 100 anti-LGBTQ resolutions passed by local governments since 2018.³⁴⁵ The complaints alleged violations of the Treaty on the European Union, the Charter of Fundamental Rights, and Directive 2000/78.³⁴⁶ The proceedings even led to suspension of some EU funding for the Polish localities that were the most egregious violators.³⁴⁷ While approximately half of the Commission's infringement proceedings result from individual or company complaints, discretion to press the case again remained outside of complainants' hands.³⁴⁸ In February 2023, the Commission ended its legal action against Poland without a referral to the CJEU—and with many anti-LGBTQ resolutions still in place.³⁴⁹

In light of the limits of both court referrals and infringement procedures, a third mechanism for challenging concordats may be preferable. In *Francovich and*

344. *ECJ Rules Against Polish Workplace LGBTQ Discrimination*, DEUTSCHE WELLE (Jan. 12, 2023), <https://www.dw.com/en/ecj-rules-against-polish-workplace-lgbtq-discrimination/a-64360606> [<https://perma.cc/4L4W-H3JY>].

345. *Poland Is Violating the Fundamental Rights of EU Citizens and Blatantly Disregarding EU Treaties and Standards*, ILGA-EUR. (Sept. 15, 2020), <https://www.ilga-europe.org/press-release/poland-is-violating-fundamental-rights-eu-citizens> [<https://perma.cc/2XRM-WAW9>]; European Commission Press Release IP/21/3668, EU Founding Values: Commission Starts Legal Action Against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People (July 15, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668 [<https://perma.cc/CR28-J68S>].

346. *Poland Is Violating the Fundamental Rights of EU Citizens and Blatantly Disregarding EU Treaties and Standards*, *supra* note 345.

347. Daniel Tilles, *EU Funds for Polish Anti-LGBT Regions “Put on Hold,”* NOTES FROM POL. (Sept. 5, 2021), <https://notesfrompoland.com/2021/09/05/eu-funds-for-polish-anti-lgbt-regions-put-on-hold> [<https://perma.cc/DA6L-NP28>].

348. Tobias Lock, *Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Francovich*, 49 COMMON MKT. L. REV. 1675, 1676-77 (2012) (explaining that the European Commission has “unlimited discretion” to decide which cases to bring before the ECJ, meaning that it can choose to abandon infringement proceedings regardless of what complainants want).

349. Daniel Tilles, *EU Ends Legal Action Against Poland over Anti-LGBT Zones*, NOTES FROM POL. (Feb. 16, 2023), <https://notesfrompoland.com/2023/02/16/eu-ends-legal-action-against-poland-over-anti-lgbt-zones> [<https://perma.cc/E6NX-ZLS7>].

Others v. Italy, the CJEU ruled that individual EU citizens have a private cause of action for damages against member states that have violated EU law.³⁵⁰ The CJEU has gradually expanded liability to all “serious breach[es] of EU law,” including breaches by national judiciaries “where the infringement of European Union law [i]s manifest.”³⁵¹ *Francovich* suits are difficult to win, and the majority of claims fail due to an inability to establish a sufficiently serious breach.³⁵² But the mechanism provides advocates with a flexible, creative tool for holding signatory states accountable, including by compelling those states to return to the negotiating table with the Holy See in order to avoid liability.

3. *United Nations Treaty Bodies*

The final way that advocates can hold signatory states accountable for their concordatarian commitments is through U.N. treaty bodies, particularly the Human Rights Committee (HRC) – which implements the International Covenant on Civil and Political Rights (ICCPR) – and the Committee on the Rights of the Child – which implements the Convention on the Rights of the Child (CRC).

Italy, Poland, and Malta have all ratified the ICCPR and CRC and are bound by those agreements’ extensive obligations under international law, including the constellation of protections they provide for LGBTQ people.³⁵³ Importantly, however, the Holy See has ratified only the CRC.³⁵⁴ Because the Holy See is neither party nor signatory to the ICCPR, that treaty binds state parties in much the same way as the European Convention and the EU treaties do under Article 30(4)(b) of the VCLT. That is, the ICCPR does not trump a concordat in the event of a conflict between them because the concordat is signed by *both* the Holy See and state parties and so “governs their mutual rights and obligations.”³⁵⁵

But the CRC requires a different analysis because that treaty, like the concordats, is one to which both the Holy See and states are party. Under VCLT Article 30(4)(a), such treaty conflicts are to be resolved according to the principle of *lex posterior* in Article 30(3), which states: “the earlier treaty applies *only to the extent that its provisions are compatible with those of the later treaty*.”³⁵⁶

350. Joined Cases C-6/90 & C-9/90, *Francovich v. Italy*, 1991 E.C.R. I-5403, ¶ 35.

351. Lock, *supra* note 348, at 1676.

352. *See id.* at 1688.

353. *Status of Ratification Interactive Dashboard*, *supra* note 294.

354. *Id.*

355. VCLT art. 30(4)(b), *supra* note 27, 1155 U.N.T.S. at 339.

356. *Id.* arts. 30(3) & 30(4)(a), 1155 U.N.T.S. at 339 (emphasis added); Kerstin von der Decken, *Article 30: Application of Successive Treaties Relating to the Same Subject Matter*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 295, at 539, 548-49.

I apply the principle of *lex posterior* in Table 2 below. The International Law Commission’s accepted date for *lex posterior* is adoption—an expression of consent to the text—not formal ratification.³⁵⁷ Hence, I use signature dates in my analysis. I find that of the three signatory states, only Italy signed the CRC after its concordat. This means that in Italy, the obligations of the CRC override the international legal obligations the country has under its concordat. In Poland and Malta, the CRC operates the same way as the ICCPR: that agreement does not trump the concordats but can be used to limit the concordat’s viability and application. In Italy, however, as a matter of international law, the commitments Italy made in the CRC take priority over its concordatarian commitments. To the extent advocates can prove that the CRC conflicts with the Lateran Pacts, Italy is acting in plain violation of international law.

TABLE 2. VCLT ART. 30(3)’S *LEX POSTERIOR* PRINCIPLE AS APPLIED TO THE CRC

Country	Concordat Signature Date	CRC Signature Date	CRC Supersession?
Italy	1984	1990	Yes
Poland	1993	1990	No
Malta	1991	1990	No

Indeed, both the ICCPR and CRC contain an array of provisions protective of LGBTQ people and potentially in direct conflict with Church treaties. In the 1994 case *Toonen v. Australia*, the HRC ruled that LGBTQ people are included within the term “sex” under Articles 2(1) and 26 of the ICCPR, guaranteeing them “equal protection of the law.”³⁵⁸ Article 17 of the ICCPR protects “privacy” and bars “unlawful attacks on . . . honour and reputation.”³⁵⁹ The CRC’s protections are even more extensive, including Article 2’s nondiscrimination provision, Article 3’s mandate on serving the child’s best interests, Article 7’s right to parental care, and Article 8’s requirement to respect a child’s right to identity without

357. See von der Decken, *supra* note 356, at 543-44.

358. U.N. Human Rights Committee, Communication No. 488/1992, ¶¶ 8.1, 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (“The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”); Kristie A. Bluett, *Marriage Equality Under the ICCPR: How the Human Rights Committee Got It Wrong and Why It’s Time to Get It Right*, 35 AM. U. INT’L L. REV. 605, 612-13 (2020).

359. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

unlawful interference.³⁶⁰ The CRC also recognizes the right to education “on the basis of equal opportunity” under Article 28³⁶¹ and mandates that education respect human rights and diversity under Article 29.³⁶² Indeed, the Committee on the Rights of the Child has become increasingly aware that its governing document mandates sweeping protections for LGBTQ children, and it mentioned LGBTQ issues to states in seventy-three of the 200 implementation reviews that it conducted between 2010 and 2020.³⁶³

What are advocates to do with all of this promising legal material? The IC-CPR and the CRC each have an “Optional Protocol” permitting complaint procedures against state parties, usually after exhaustion of domestic remedies.³⁶⁴ Italy, Poland, and Malta have all ratified the ICCPR’s Optional Protocol, so individual advocates may file complaints for violations under that instrument.³⁶⁵ Of these three states, only Italy has ratified the CRC’s Optional Protocol, but it is arguably the most important state of the three.³⁶⁶ A Committee decision that the CRC conflicts with Italy’s concordat would mean that, under international law, Italy *should* abide by the CRC over its agreements with the Church. The operative word is “should”: treaty-body decisions are nonbinding.³⁶⁷ Nevertheless, a finding that a concordat is violative of a core human-rights treaty could still have powerful political impact, forcing national officials to renegotiate.

-
360. Convention on the Rights of the Child arts. 2, 3, 7 & 8, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3; see Paula Gerber & Aaron Timoshanko, *Is the UN Committee on the Rights of the Child Doing Enough to Protect the Rights of LGBT Children and Children with Same-Sex Parents?*, 21 HUM. RTS. L. REV. 786, 793 (2021) (summarizing these and other provisions).
361. Convention on the Rights of the Child art. 28, *supra* note 360, 1577 U.N.T.S. at 53; see Gerber & Timoshanko, *supra* note 360, at 794.
362. Convention on the Rights of the Child art. 28, *supra* note 360, 1577 U.N.T.S. at 54; see Gerber & Timoshanko, *supra* note 360, at 794.
363. These reviews are known as “Concluding Observations.” Gerber & Timoshanko, *supra* note 360, at 794, 795.
364. The protocols refer to such complaints as “communications.” Optional Protocol to the International Covenant on Civil and Political Rights arts. 1 & 41, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); G.A. Res. 66/138, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure arts. 5 & 7 (Dec. 19, 2011); see *Complaints Procedures Under the Human Rights Treaties*, *supra* note 297; *CRC Complaints Mechanism Toolkit: Annex II Understanding OP3-CRC*, CHILD RTS. INT’L NETWORK 2, https://archive.crin.org/docs/FileManager/OP3CRC_Toolkit_Annex_II.pdf [<https://perma.cc/2KB3-86BN>].
365. *Status of Ratification Interactive Dashboard*, *supra* note 294.
366. *Id.* (showing that Italy ratified the Convention on the Rights of the Child’s (CRC’s) Optional Protocol for complaint procedures against state parties).
367. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. INT’L L. 905, 909 (2009) (explaining that “treaty bodies’ output is nonbinding”).

While the potential benefits of successful complaints are considerable, scholars have long questioned the efficacy of U.N. treaty bodies,³⁶⁸ mainly because their decisions are nonbinding.³⁶⁹ These fora also lack enforcement and monitoring mechanisms and often have multiyear delays due to resource constraints and burdensome procedures.³⁷⁰ The Committee on the Rights of the Child, for instance, has only provided thirty-three decisions on the merits to date.³⁷¹

C. *Withdrawal and Renegotiation*

Interpretation and litigation can only go so far, as they cannot on their own change the actual language contained in a treaty. This Section addresses the next rung on the ladder of confrontation: withdrawal and renegotiation—how states can exit or rewrite treaty obligations entirely. Against the firm backdrop of *pacta sunt servanda*, there are three main ways to exit a treaty: (1) through the treaty itself, if it provides a right to withdraw; (2) through the consent of the parties; or (3) by operation of law—that is, through the independent legal bases provided in the VCLT.³⁷² Below, I address each of these avenues for treaty exit.

Importantly, in the concordatarian context, the simplest exit route of an explicit withdrawal clause is not an option. This is because, with the exception of a vague withdrawal provision granting the parties the right to “take the appropriate legal measures” in the 1991 Maltese educational agreement,³⁷³ none of the concordats analyzed in this Note provides an explicit textual basis for exit.³⁷⁴ In light of this, I turn to the two other exit strategies: consent and operation of law.

368. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2008 (2002).

369. E.g., Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. COMPAR. & INT'L L. 153, 158 (2012).

370. See Hathaway, *supra* note 368, at 2008 (analyzing treaty bodies' limitations); *Complaints Procedures Under the Human Rights Treaties*, *supra* note 297 (outlining burdensome procedures).

371. Andreas J. Ullmann & Andreas von Staden, *A Room Full of 'Views': Introducing a New Dataset to Explore Compliance with the Decisions of the UN Human Rights Treaty Bodies' Individual Complaints Procedures*, 68 J. CONFLICT RESOL. 534, 538 (2024).

372. Lea Brilmayer & Isaias Yemane Tesfalidet, *Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J.F. 217, 218 (2011).

373. Agreement Between the Holy See and the Republic of Malta on Church Schools art. 15, Holy See-Malta, Nov. 28, 1991, 85 A.A.S. 558, <https://www.vatican.va/archive/aas/documents/AAS-85-1993-ocr.pdf> [<https://perma.cc/B6R8-QZA4>].

374. This leaves concordat interpreters with the so-called “problem of silence” in treaty law, whereby treaties that lack an express withdrawal provision can—under Article 56 of the

1. *Exit by Consent: Referenda and Strategic Legislation*

Consent-based exit is a less drastic measure than unilateral invocation of one of the VCLT's independent legal bases for withdrawal. The most effective way to induce consent-based abrogation of concordats is through referenda and strategic legislation. Divorce referenda in both Italy and Malta produced such a rupture in the existing concordatarian regime that political momentum drove state parties to the negotiating table.³⁷⁵ The divorce legislation enacted in those states made the supremacy of ecclesiastical courts legally untenable.³⁷⁶

Of course, strategic legislation and national referenda aimed at forcing renegotiation of treaties put yet greater pressure on *pacta sunt servanda*, which includes the requirement to perform treaties in "good faith."³⁷⁷ Undercutting a treaty—without violating it outright—by rendering ineffective the legal structures that it establishes is certainly an aggressive approach to a country's international legal obligations. And because the international law of treaties is only as strong as states' willingness to uphold and comply with it, domestic tactics designed to weaken treaty commitments can easily reduce interstate trust and do damage to the broader system.

For the reasons stated above, states should be cautious as they employ this strategy. In Italy, for instance, while the passage of the divorce law in 1970 was not violative of "the letter" of the concordat, the Church ceased negotiations on

VCLT—still provide an implied right of withdrawal. VCLT art. 56 § 1, *supra* note 27, 1155 U.N.T.S. at 345; see Thomas Giegerich, *Article 56: Denunciation of or Withdrawal from a Treaty Containing No Provision Regarding Termination, Denunciation or Withdrawal*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 295, at 1039, 1040. Such an implied right can emerge either from the intent of the parties or the "nature of the treaty." VCLT art. 56 § 1(a)-(b), *supra* note 27, 1155 U.N.T.S. at 345. This vague, indeterminate exit route has generated much controversy among scholars and states alike. See, e.g., Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 637-40 (Duncan B. Hollis ed., 2012). An implied withdrawal right may be a difficult exit strategy in the concordatarian context. The Church could argue that concordats in countries such as Italy and Poland have been codified within state constitutions, suggesting that the agreements were not intended to be temporary, nor are they temporary by their "nature." Still, states such as Italy and Malta could point to their past renegotiation of their concordats as evidence to the contrary and invoke Article 56 to induce further bilateral renegotiation in much the same way as they could with Article 62. See *infra* Section III.C.2.

375. See DE FRANCISCIS, *supra* note 36, at 79-81 (illustrating this point in the context of Italy); Video Interview with Christopher Vella, *supra* note 214 (demonstrating this point in the context of Malta).

376. See *supra* Section II.B.

377. VCLT art. 26, *supra* note 27, 1155 U.N.T.S. at 339.

the belief that it was.³⁷⁸ It was only over time and as a result of the decisive referendum in 1974 that the introduction of divorce made renegotiation a political inevitability.³⁷⁹ The referendum proved to both Italian politicians and the Holy See that the public was desperate for change.³⁸⁰

Indeed, Malta was more careful in its approach, holding its referendum *first* in May 2011 and only then voting a divorce bill into law in July of that year.³⁸¹ The Maltese government was careful not to reignite the very tensions with the Holy See that its concordats had put to rest and reassured the Church throughout the negotiation that only the divorce issue would be on the table.³⁸² In part for this reason, Malta was able to conclude a new treaty in three years whereas it took Italy nineteen,³⁸³ thus delivering a highly desirable political outcome for the Maltese public.

Ultimately, while they come with their dangers, state efforts at renegotiation are still a perfectly legitimate legal mechanism for bringing about reform. As highly effective tools and expressions of domestic priorities, legislative actions and referenda can serve as assertions of sovereign prerogatives and induce the evolution of international treaties in ways that benefit the people regulated by those agreements.

2. *Exit by Operation of Law: Change of Circumstance*

The third way out of a treaty is by operation of law. States often invoke the VCLT's legal bases for exit as a way to induce negotiations—that is, to achieve exit through mutual consent.³⁸⁴ In this sense, withdrawal by consent and withdrawal by operation of law are more distinct in theory than in practice. Concordatary states may choose to opt for negotiation over unilateral withdrawal to keep the peace.

The Italian renegotiation of the Lateran Pacts confirms the role that the VCLT's independent legal principles can play in consent-based withdrawal. Relying on growing evidence of secularization and national support for divorce,

378. Cf. DE FRANCISCIS, *supra* note 36, at 80 (noting the Church's view that the 1970 divorce law was "unconstitutional because it was in conflict with the letter of" Article 34 of the 1929 concordat in the Lateran Pacts, despite the Italian Constitutional Court's repeated validation of the law's constitutionality).

379. *See id.* at 98-99.

380. *Id.*

381. Pace, *supra* note 129, at 573, 587.

382. Vassallo, *supra* note 130.

383. *See supra* Sections II.B.1, II.B.3.

384. *See Helfer, supra* note 374, at 646.

Italy invoked the principle of *rebus sic stantibus* (literally, “things standing thus”) – codified in VCLT Article 62 as “fundamental change of circumstance” – to justify its desire to renegotiate.³⁸⁵

Rebus sic stantibus is a useful legal principle for concordatarian states in trying to exit their treaties. Circumstances in these countries are, indeed, constantly changing. The rapid global reordering around LGBTQ issues over the last twenty-five years makes this clear. Another value of *rebus sic stantibus* is that it is highly conducive to a consent-based rather than unilateral approach. Whereas a party’s invocations of fraud (Article 49) or coercion (Article 51) to invalidate a treaty are inherently adversarial and accusatory, a “change in circumstance” is, on its face, a neutral concept diagnosing a social (as here), financial, or even territorial change outside of the control of the parties.³⁸⁶ This coheres with how the original drafters of the VCLT envisioned the principle, writing in their commentary that “*rebus sic stantibus* could serve . . . as a lever to induce a spirit of compromise in the other party.”³⁸⁷

One of the main reasons to invoke a principle like *rebus sic stantibus* for a bilateral renegotiation rather than for a unilateral withdrawal is to preserve the integrity of *pacta sunt servanda* and the larger international legal framework that relies on it. States can easily use “change of circumstance” to corrode their treaty commitments. In 2013, Kenya’s National Assembly and Senate seemed to invoke the principle – simply because the country elected a new government – in an attempt to abandon its Rome Statute commitments, but the domestic effort ultimately failed.³⁸⁸ In a clearer and more alarming incident in 2016, Russia invoked *rebus sic stantibus* to abandon unilaterally its treaty obligations under the Plutonium Management and Disposition Agreement with the United States under which the parties agreed to dispose of portions of their weapons-grade plutonium.³⁸⁹ Russia contended that U.S. sanctions and NATO expansion constituted a “fundamental change of circumstances.”³⁹⁰ Such brazen invocations of *rebus sic*

385. DE FRANCISCIS, *supra* note 36, at 56; VCLT art. 62, *supra* note 27, 1155 U.N.T.S. at 347.

386. VCLT art. 49, *supra* note 27, 1155 U.N.T.S. at 344; *id.* art. 51, 1155 U.N.T.S. at 344.

387. U.N. Conference on the Law of Treaties, *Draft Articles on the Law of Treaties with Commentaries*, 1st sess., 64th mtg. at 376, U.N. Doc. A/CONF. 39/11 (May 10, 1968).

388. Julian Kulaga, *A Renaissance of the Doctrine of Rebus Sic Stantibus?*, 69 INT’L & COMPAR. L.Q. 477, 482–83 (2020). It remains a subject of debate whether the Kenyan legislature intended to use the language of “fundamental changes of circumstance” in its international legal sense, especially because Kenya had not ratified the VCLT. *Id.* at 482.

389. *Id.* at 486 (discussing Russia’s abandonment of the Agreement Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation).

390. *Id.*

stantibus render *pacta sunt servanda* a mere suggestion to states rather than a core mandate of international law.

D. Coercive Responses: Countermeasures

The international legal toolkit offers one final way for states to challenge the concordatarian regime: countermeasures, or the nonperformance of a state's international obligations to induce another state to cease its internationally wrongful acts.³⁹¹ Countermeasures are the last resort offered in this Note because, as with unilateral invocation of the VCLT's withdrawal provisions, they can threaten the principle of *pacta sunt servanda*. If any state can countermeasure another and suspend treaty obligations in response to perceived internationally wrongful acts, *pacta sunt servanda* can quickly unravel.

The benefit of countermeasures, however, is that they allow a country like Italy to suspend portions of its concordat in response to violations of *other* international obligations of the Holy See to Italy, such as those under the CRC. So long as they are proportional, countermeasures do not have to be in kind.³⁹² That is, countermeasures do not have to *mirror* the exact unlawful conduct that prompted them.³⁹³ The possibility of countermeasures raises the stakes of the Committee on the Rights of the Child finding the Holy See in violation of the CRC. While a treaty-body decision would not be binding, other states can effectively make it so through enforcement by countermeasures.

1. Violations of the Convention on the Rights of the Child

It is highly plausible that the Holy See, by running afoul of the LGBTQ-protective CRC provisions described in Section III.B.3, is in violation of its CRC obligations and can thus be subjected to countermeasures in response to this internationally wrongful act. In order to establish grounds for countermeasures, the Church's human-rights obligations must apply extraterritorially. The Holy See contests this proposition, arguing that the CRC applies only territorially to

391. *Report of the International Law Commission of Its Fifty-Third Session*, 56 U.N. GAOR Supp. No. 10, at 328, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

392. *Id.* at 331.

393. *Id.*

Vatican City and that priests and bishops around the world are not strictly officials of the Holy See.³⁹⁴

But extraterritorial application of international human-rights obligations is traditionally based on the “effective control” test, which refers to whether a state or international organization exercises sufficient control over territory or people.³⁹⁵ There should be little doubt that the Holy See exercises “effective control” over its clergy. The Committee on the Rights of the Child found as much in 2014, pointing to the fact that all clergy are “bound by obedience to the Pope,” who is supreme in his power.³⁹⁶ The Committee has explicitly insisted that CRC parties “have obligations in respect of children’s rights *beyond their territories*”³⁹⁷ and in 2022 adopted the expansive notion that CRC obligations extend to wherever a state causes harm across national boundaries.³⁹⁸

For countermeasures to be permissible, the clergy must have actually carried out internationally wrongful acts. The Committee has addressed this question, too, urging the Holy See to ensure its textbooks and curricula were in accord with the CRC³⁹⁹ and provide sex education in Catholic schools.⁴⁰⁰ The

394. William Thomas Worster, *The Human Rights Obligations of the Holy See Under the Convention on the Rights of the Child*, 31 DUKE J. COMPAR. & INT’L L. 351, 398, 410 (2021) (“[T]he Holy See accepts that acts by diplomatic personnel abroad could fall within its jurisdiction, although it expressly rejects that other Catholic personnel are within its jurisdiction.” (footnote omitted)).

395. See, e.g., *Al-Jedda v. United Kingdom*, App. No. 27021/08, ¶ 84 (July 7, 2011), <https://hudoc.echr.coe.int/fre?i=001-105612> [<https://perma.cc/79AX-KL43>] (stating that conduct is “attributable” to an international organization that “exercises effective control over that conduct”); Recent Case, *Sacchi v. Argentina*, No. CRC/C/88/D/104/2019 (Oct. 8, 2021), 135 HARV. L. REV. 1981, 1985 (2022) (stating that obligations apply where there is “control over persons or territory outside . . . national borders”).

396. U.N. Committee on the Rights of the Child, Concluding Observations on the Second Periodic Report of the Holy See, ¶ 8, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 25, 2014).

397. U.N. Committee on the Rights of the Child, Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No. 79/2019 and No. 109/2019, ¶ 8(5), U.N. Doc. CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 (Nov. 2, 2020) (emphasis added).

398. U.N. Committee on the Rights of the Child, Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019, ¶ 10(5), U.N. Doc. CRC/C/88/D/104/2019 (Nov. 11, 2021); see Yusra Suedi, *Litigating Climate Change Before the Committee on the Rights of the Child in Sacchi v. Argentina et al.: Breaking New Ground?*, 40 NORDIC J. HUM. RTS. 549, 550-52 (2022) (explaining how the U.N. Committee on the Rights of the Child has held that a state party’s obligations under the CRC apply extraterritorially to children across the globe).

399. U.N. Committee on the Rights of the Child, *supra* note 396, ¶ 28.

400. *Id.* ¶ 57(c).

Committee also highlighted its “concern[.]” that the Holy See “contribute[s] to the social stigmatization of and violence against [LGBTQ] adolescents.”⁴⁰¹

Crucially, countermeasures in response to Holy See violations of the CRC would still need to be proportional and temporary, aiming merely to “induc[e]” the Holy See’s compliance with its international obligations.⁴⁰² This means that Italy could not simply abandon its concordat altogether, which would not be a temporary measure. Italy could instead choose not to perform a particular portion of the agreement until the Holy See agreed to reform its curricula and abide by its CRC commitments.

2. *The Principle of Nonintervention*

Another basis for potential countermeasures could be that the Holy See’s intervention in the democratic legislative process of a sovereign state like Italy encroaches on the principle of nonintervention. Zan himself leveled this accusation, stating that “there can be no foreign interference in the prerogatives of a sovereign parliament,” and Prime Minister Draghi agreed that Parliament should be “free to debate” in a secular state.⁴⁰³

In its *Nicaragua v. United States* opinion, the International Court of Justice affirmed the status of the principle of nonintervention as customary international law and as extending beyond mere use of force.⁴⁰⁴ The VCLT’s preamble dictates that “non-interference in the domestic affairs of States” is a bedrock principle of the U.N. Charter.⁴⁰⁵ The exact content of the principle of nonintervention—namely what constitutes “coercion”—is a longstanding subject of intense debate in international law.⁴⁰⁶ But scholars often view the principle as

401. *Id.* ¶ 25.

402. *Report of the International Law Commission of Its Fifty-Third Session*, *supra* note 391, at 331.

403. *Italian PM Rebuffs Vatican Protest Over Proposed Homophobia Law*, *supra* note 229.

404. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 202, 205 (June 27) (“[T]he principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.”).

405. VCLT pmb., *supra* note 27, 1155 U.N.T.S. at 332.

406. See Marko Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117 AM. J. INT’L L. 601, 603 (“[T]he content of coercion below the use of force threshold has remained contested. This has especially been the case with measures of political and economic pressure . . .”).

safeguarding a state's "opportunity to exercise free political choice."⁴⁰⁷ By resorting to diplomatic intervention during the pendency of a legislative debate without Italian consent—especially because the treaty mandates that the Church form a joint committee with the state over interpretive disagreement—the Holy See may have encroached on the principle of nonintervention.

CONCLUSION

There are sixty-four different countries around the world that currently have treaties with the Holy See.⁴⁰⁸ While I focus here on three states that illuminate how concordats have emerged, how they function today, and how they can be challenged, both LGBTQ life and the Church's concordats extend across the globe. As the entire international-treaty regime of the Holy See remains deeply understudied, a single paper cannot fill a lacuna so large. My hope is that this Note offers future students of international law a helpful start in further deciphering this web of agreements and tracking its ongoing expansion.

But this Note is not just about a gap in the scholarship. It is also about the LGBTQ people, religious and nonreligious, Catholic and non-Catholic, who live in countries that have signed over great powers to the Holy See. For these individuals, whether denied protections against hate crimes in Italy or doubly denied marriage rights in Poland, there are ways to alter the international legal status quo. Doing so may require putting pressure on a core precept of international law—that agreements must be honored—as states reinterpret, litigate, and renegotiate their treaties. But such pressure is essential to the vitality of international law, whose "slow but steady evolution," wrote U.S. Secretary of State John W. Foster, "bring[s] the nations more and more to a higher standard of duty."⁴⁰⁹

407. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 6 (1989); see also Xuan W. Tay, *Reconstructing the Principle of Non-Intervention and Non-Interference: Electoral Disinformation, Nicaragua, and the Quilt-Work Approach*, 40 BERKELY J. INT'L L. 39, 40-41 (2022) (arguing that Nicaragua "defined intervention as the coercion of a State's sovereign choices").

408. *The States Which Have Concluded Treaties with the Holy See*, *supra* note 20.

409. John W. Foster, *The Evolution of International Law*, 18 YALE L.J. 149, 164 (1909).