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Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*

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I. INTRODUCTION

Churches[1] have a right to be free of government control. This includes the freedom to preach, teach, minister, select ministers and church leaders, and govern themselves according to their own religious principles. Failure to recognize and guarantee the freedom of churches from government control is a mark of an authoritarian society and inconsistent with the notion of a free people.[2] Religious freedom is not something government bestows or grants, but a right that inheres in a free people and in the church associations they form. A government must recognize this fundamental freedom if it is to govern legitimately. To refuse this freedom is a grave misuse of government power.

The right of churches to be free of government control—often referred to in shorthand as the right of church autonomy—is a constitutive part of the liberty protected by the First Amendment. As such, it ranks as one of our first freedoms.[3] Church autonomy is rooted in specific constitutional guarantees—freedom from establishment,[4] free exercise,[5] freedom of speech[6]—and in the right of association implicit in these explicit guarantees.[7] The First Amendment reflects a promise that a church may be distinctive; that a church may be different from secular entities and other churches; that the government may not impose upon a church criteria that define it; that a church may, free of government intrusion and interference, exercise and enjoy those characteristics that make it what it is—in short, a promise that *churches can be churches.*

While there is no exhaustive list of circumstances in which church autonomy is implicated, three types of cases are closely associated with the right of church autonomy: internal church disputes, labor and employment cases involving

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1. We use the term "church" to refer to all religious denominations and, unless otherwise noted, the organizations affiliated with them. *Cf.* WEBSTER'S NEW WORLD DICTIONARY (3d college ed. 1988) (defining "church" variously as "all Christians considered as a single body," "a particular sect or denomination of Christians," or more broadly as "a group of worshipers; congregation"). "Minister" refers to any person authorized to carry out or assist in the spiritual functions of a church, whether ordained, consecrated or lay. While recognizing that these terms have a different and more specialized theological meaning, we adopt them, as have courts and commentators, as a matter of convenience.

2. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 40 (2002) (noting that the First Amendment Religion Clauses, a principal source of the right of church autonomy, "are best understood as essential safeguards against a totalitarian state"); *see also* Catholic Charities of Sacramento v. Superior Court, 10 Cal. Rptr. 3d 283, 320-21 (Cal. 2004) (Brown, J., dissenting) (stating that failure to accord appropriate legal protection to religious organizations is to "impoverish our political discourse and imperil the foundations of liberal democracy."); Michael W. McConnell, *Why is Religious Liberty the "First Freedom"*?, 21 CARDOZO L. REV. 1243, 1244 (2000) (stating that "the division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of a civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas").

3. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

4. *See infra* Part II.A, notes 23-67.

5. *See infra* Part II.B, notes 68-117.

6. *See infra* Part II.C, notes 118-130.

7. *See infra* Part II.D, notes 131-140.

ministers, and clergy "malpractice" claims.[8] But, as we shall see,[9] the right of church autonomy cannot fairly be confined to these cases. Over the last half century, expanding and pervasive government regulation in the United States, particularly in the area of tort liability, workplace regulation, and civil rights, has exponentially broadened the potential for government encroachment upon church autonomy. The threat of encroachment is especially keen when churches, as part of their ministry, provide important and necessary services to the public, such as health care and educational and social services, areas of overlapping and mutual concern of both churches and the modern bureaucratic state. The threat is exacerbated even further in the United States by a litigation explosion and the creative pleading associated with it. Simply put, if sensitivity to and protection of church rights and liberties does not keep pace with these developments—that is, with burgeoning government regulation and new litigation theories—churches will be left with little or no room to exist and function as distinctive entities. Contrary to more than two centuries of history and constitutional tradition, government will then indeed triumph over the church—precisely the social and political condition that our colonial forebears fled and that the Framers sought to prevent.

The Religion Clauses,[10] Free Speech Clause,[11] and right of association[12] provide the basic framework for discussing and evaluating church autonomy claims.[13] Because church autonomy implicates both the free exercise and establishment prongs of the Religion Clauses, we begin with a brief review of the Supreme Court's treatment of each.[14] Articulating workable jurisprudential rules on church autonomy is admittedly made more difficult by confusion and inconsistency in the Court's past treatment of the Religion Clauses generally.[15]

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8. *See infra* Part III.

9. *See infra* Part V.

10. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I. The Religious Freedom Restoration Act, still valid as to the federal government, also protects religious exercise. *See infra* note 117 and accompanying text.

11. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST., amend. I.

12. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Roberts v. United States Jaycees, 468 U.S. 609 (1984). *See infra* Part II.D, notes 131-140.

13. Protection for religion, speech, and association may also be found in state constitutions and legislative enactments. While this article focuses on federal law, practitioners should not overlook comparable provisions in state law.

14. *See infra* Part II.A-B.

15. *Id.* Though often cited and discussed separately, the Religion Clauses have a common purpose. *See, e.g.,* Lee v. Weisman, 505 U.S. 577, 605 (1992) (Blackmun, J., concurring) (the Religion Clauses share "the common purpose of securing religious liberty"); Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in the judgment) (the Religion Clauses' "common purpose is to secure religious liberty"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring) (stating that the Religion Clauses are "coguarantor[s] . . . of religious liberty"); Everson v. Bd. of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting) (for Madison, establishment and free exercise represented "different facets of the single great and fundamental freedom" of religion). Both clauses guarantee religious freedom. *Id.*; *see also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[T]he Religion Clauses . . . specifically and firmly fixed the right to free exercise of religious beliefs, and

Historically the Establishment Clause cases have been notoriously difficult to reconcile with each other. Often there is tension in this area of law between what the Supreme Court says and what it does. Indeed, the rules the Court has crafted for deciding cases involving Establishment Clause claims often do not explain satisfactorily the disposition of the very case in which the rule is applied.[16] A different problem is presented by the Supreme Court's treatment of the Free Exercise Clause. In 1990, by eliminating any test for balancing individual conscientious objection against neutral laws of general application, the Court essentially predetermined the outcome of many, if not most, free exercise claims by lowering the standard of review and switching the burden of proof.[17] These problems notwithstanding, our task is to consider the constitutional text and court decisions interpreting that text as a starting point for further reflection about the right of church autonomy and its various applications. We also include a discussion of the constitutional rights of speech and association, which are intricately bound up with a church's freedom to exist and flourish and which are often overlooked as companion sources of the right of church autonomy.

We acknowledge the difficulty in getting a receptive ear for church autonomy claims in the current climate. Recent times have seen spectacular, recurring headlines about the molestation of minors by clergy. These are anguishing cases. No one questions or doubts the grave injury to victims and their families resulting from the sexual, physical, or psychological abuse of children, whoever the perpetrator. It cannot be claimed, nor do we claim, that a clerical collar is a defense to criminal or civil liability by anyone who molests a child. That the Constitution serves as no defense for the perpetrator of such abhorrent crimes, however, does not settle questions of whether and when churches themselves should be civilly responsible for crimes committed by their ministers. Nor, as we try to show, does it justify significant regulatory inroads into church operations and activities. The scandal over abuse makes the need for principled discussion and line-drawing all the more critical.[18] This article is an attempt to contribute to that discussion.

A second, more longstanding difficulty in getting a fair reception for church autonomy claims is a propensity to conceive of all liberty, including religious

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buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government.").

16. *See infra* Part II.A.

17. *See infra* Part II.B.

18. *See generally* Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125 (2003). Because sexual abuse is so abhorrent, there is a temptation to create remedies against "deep pocket" defendants. The adage that bad facts make bad law is apt in this context. As Robert Destro notes, however, bad lawyering makes it worse. Robert A. Destro, *Developments in Liability Theories and Defenses*, 37 CATH. LAW. 83, 108 (1996-1997).

liberty, as applying to individuals rather than the institutions they form.[19] The American imagination often pits the individual heroically against the state and other large, seemingly impersonal institutions.[20] It is evident in popular culture and political discourse. Much of the law and scholarship on the Religion Clauses has a similarly individualist bent.[21] Yet the religious freedom of our churches is as serious a component of our constitutional heritage as individual religious liberty because, without the former, the latter would have little meaning. What would remain of an individual's right to practice his or her faith if the faith community's rights to exist, worship, preach, teach, and minister to its members and to society were not guaranteed equally? How could religious faith continue to be exercised and passed along from generation to generation outside its communitarian context? A religious tradition is always learned and practiced in some community of faith and worship. The law's frequently anemic treatment of church autonomy as an independent value can put one in mind of the cobbler's unshod children—an important but neglected heir to a rich tradition.

Church autonomy is threatened today by creative litigation theories and invasive regulatory mandates. Our aim is to evaluate the strengths and weaknesses of both constitutional limits to various theories of liability and claims to accommodation from government regulation. Following the promised overview of case law on establishment, free exercise, speech, and association (Part II), we consider three particular types of cases in which the right of church autonomy has been consistently recognized (Part III). From the cases discussed in Parts II

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19. Individualist tendencies in culture and religion, coupled with the growth of government, place religious institutions in a precarious position:

> The successful decoupling of religious and civil institutions . . . has left religious institutions with an uncertain place in our polity. In part, this uncertainty can be attributed to religious and cultural developments. Over the past two centuries, the focus of religious life (particularly, but not exclusively, in Protestantism) has become increasingly inward, a matter of personal experience and sensation, rather than conformity to objective creeds or regulations. When joined with a deep cultural individualism, this religious orientation tends to displace the center of religious significance (if not activity) from the institutional to the personal. The place of religious institutions has also been complicated by the dramatic expansion of government during the last century. Where religious organizations once occupied much of the public square—as principal sites of education, charity and moral formation—the activist, post-New Deal state now dominates.

Lupu & Tuttle, *supra* note 2, at 39. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (noting the tendency to speak of rights in individualist terms).

20. Emphasis on the dignity of the individual is among the most laudable aspects, and a chief insight, of both the Western tradition and major world religions. But recognition of individual dignity is distinguishable from an exaggerated individualism that strips people of their relation with their community and churches. *See generally* ROBERT N. BELLAH ET AL., HABITS OF THE HEART (1985).

21. Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting) ("Religion is an individual experience."); Everson v. Bd. of Educ., 330 U.S. 1, 40, 57-58 (1947) (Rutledge, J., dissenting) ("The realm of religious training and belief remains, as the [First] Amendment made it, the kingdom of the individual man and his God."); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1609, 1741-42 (May 1987) (noting that "commentators usually focus on individual religious exercise and belief" and that "most courts . . . have continued to decide free exercise claims from an individualist perspective").

and III, we distill ten principles of church autonomy (Part IV). We apply those principles to various legal claims on which courts have diverged in their evaluation of constitutional defenses, and to recent regulatory initiatives which threaten the institutional integrity of churches (Part V). These new cases lie on the constitutional boundary between church and state.

A principal motivation for this article is our belief that there is insufficient dialogue among the cases, resulting in tension and often outright contradiction among courts faced with church autonomy claims. Once the cases are made to "talk" to each other, it becomes clearer, in our view, that the right of church autonomy, while not absolute, has broader applications than is often thought. In our conclusion (Part VI), we develop this point further, and counsel a principled use and recognition of the right of church autonomy. To be equally avoided are the two extremes of invoking the right either too often to fairly reflect its true purpose or too rarely to give churches the full protection to which they are constitutionally entitled.

The reader's patience may be tested unnecessarily if we to fail at the outset to state the principles of church autonomy developed more formally in Part IV. Some of the principles will be immediately familiar to most readers; others require the background that Part II and III provide. They are as follows:

1. The right of church autonomy is a constraint on all branches of federal, state, and local government.

2. The government may not single out all religions or churches, or a specific religion or church, for disadvantageous treatment.[22]

3. The government may not decide the meaning of religious doctrine or resolve disputes that in turn require the resolution of religious questions.

4. The government may not impose a standard of care upon churches or ministers as such, e.g., based on what a "reasonable church or minister" would do, or otherwise make judicial or other government decisions that call for a comparison among churches.

5. Religious duties are not civilly enforceable, and no redress may be sought in civil courts for a violation of religious beliefs or deviation from religious practices. Put another way, a religious or ecclesial right, duty or relationship cannot for that reason alone be the foundation for a legal right, duty, or relationship.

6. Not only final government action, but government processes that necessitate intrusive inquiry into a church's decision making and structure, can burden autonomy.

7. Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's right of

22. Whether the government may favor religion generally or a particular religion requires case by case adjudication. The question typically asked is whether a law or government practice is a constitutionally permissible (or even constitutionally mandated) accommodation or tilts instead toward an establishment of religion.

autonomy.

8. A law that burdens a church's functions, so as to infringe upon that church's religious self-understanding, infringes upon its autonomy and is not saved by virtue of its general applicability.

9. The government constitutionally may not interfere with church governance, e.g., by "reversing" or otherwise nullifying decisions a church makes about how to govern itself.

10. The government may not commandeer a church's treasury, e.g., by "reversing" decisions by a church as to what missionary or charitable work it will pursue and fund.

We begin with an overview of the sources of the right of church autonomy.

II. AN OVERVIEW OF THE CONSTITUTIONAL GUARANTEES OF RELIGION, ASSOCIATION AND SPEECH

A. The Establishment Clause

From its inception in *Everson v. Board of Education*,[23] the Supreme Court's modern Establishment Clause jurisprudence has been famous for the criticism regularly leveled against it by academics, jurists, and practitioners. The justices themselves are among the sharpest critics.[24] *Everson* gave currency to a metaphor—the "wall of separation"[25]—that has become an icon of American law

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23. 330 U.S. 1 (1947).

24. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (stating that the Court's Establishment Clause jurisprudence is "embarrassing" and lacks "any principled rationale" (quoting Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681 (1980))); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting that "[s]ubstantial revision of our Establishment Clause doctrine may be in order").

The prevailing Establishment Clause test (*Lemon*, discussed *infra* at notes 40-66 and accompanying text) has been criticized by most of the present Court, which, unable to agree on a replacement, nonetheless continues to apply it. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002) (applying *Lemon*'s "purpose" and "effect" prongs); Mitchell v. Helms, 530 U.S. 793, 808-09 (2000) (plurality) (same); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."); *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting "[p]ersuasive criticism of *Lemon*," and stating that he does "not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area"); Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring) (stating that the *Lemon* test "should be reexamined and refined . . . to make [it] more useful in achieving the underlying purpose of the First Amendment"); *id.* at 108-11 (Rehnquist, J., dissenting) (criticizing each prong of the *Lemon* test and highlighting its paradoxical results); Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (deriding "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*" (quoting *Lemon,* 403 U.S. at 614)). The criticism, while pervasive, has not resulted in wholesale revision of the *Lemon* test, but the Court has clarified it. Agostini v. Felton, 521 U.S. 203, 233 (1997) (modifying *Lemon* by folding the third prong of that test into the second).

25. The Court previously had used the phrase, originally coined by Thomas Jefferson in a letter to the Danbury Baptist Association, in a free exercise case. Reynolds v. United States, 98 U.S. 145, 164

and culture. Most Americans, we suspect, and perhaps many lawyers, are more familiar with the "wall of separation" metaphor than with the actual text of the First Amendment or the historical circumstances that inspired it.

The wall metaphor does contain a kernel of truth. The Establishment Clause "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from each other within its respective sphere."[26] That much can legitimately be said. By preventing the union of government and religion, the Establishment Clause benefits both.[27] Religion benefits because this arrangement "preserve[s] the autonomy and freedom of religious bodies,"[28] "keep[s] the states' hands out of religion"[29] and prevents the "corrosive secularism" of religion by government.[30] The government benefits because its citizens are left free to exercise their religions, preserving religious diversity in the private sector while eliminating religious controversy in civil government. Thus, the state may not delegate governmental functions to churches[31] any more than it can decide for churches how they should govern themselves.[32] The insistence upon separation is related to, if not partly rooted in, the fears of American colonists that the English Crown and established Anglican Church would combine to rob them of their liberties.[33]

(1879). In its original Jeffersonian context, the metaphor makes sense by insisting that government not interfere with religious exercise. *See* Robert S. Alley, *Symposium: How much God in Schools?: Public Education and the Public Good*, 4 WM. & MARY BILL OF RTS. J. 277, 313-14, n.232 (Summer 1995) (explaining that the Baptists, who initiated the correspondence, were facing severe persecution in Congregationalist Connecticut). For the full text of Jefferson's now-famous reply, see http://www.loc.gov/loc/lcib/9806/danpre.html (last visited Sept. 21, 2005).

26. Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

27. *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) ("[A] union of government and religion tends to destroy government and to degrade religion."); *Everson*, 330 U.S. at 15 ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority." (quoting Watson v. Jones, 80 U.S. 679, 730 (1872))).

28. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 672 (1970).

29. *Everson*, 330 U.S. at 26 (Jackson, J., dissenting).

30. Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)). *See generally* Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111 (2002).

31. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). In *Larkin*, the Court struck down what it considered a government attempt to delegate to churches the power to veto applications for a liquor license. Attempted delegations of government power to religious organizations are rare. *See* Mueller v. Allen, 463 U.S. 388, 400 (1983) (the "risk of significant religious or denominational control over our democratic processes" is today "remote" (quoting Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in the judgment in part, dissenting in part))).

32. *See generally infra* Part III.A.

33. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 96-101 (1992). John Adams believed that the "conjoining of 'temporal and spiritual tyranny'" was "an event totally 'calamitous to human liberty.'" *Id.* at 97. In his day, "'[p]opery,' the conjunction of the Church of Rome with aggressive civil authority, was felt to be the greatest threat, the classic threat; but 'popery' was only a special case . . . ." *Id.* at 98 n.3.

Separation of church and state as a rule of law is a historic innovation. *See, e.g.,* THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 9-11 (2001); John T. Noonan,

Depicting church-state separation as a "wall," however, creates a largely mistaken impression of church-state relations in the United States. A wall is a permanent barrier that permits no interaction or overlap between what it separates. *Everson* describes the wall precisely in such absolute and sweeping terms,[34] but it was not long after *Everson* that the justices themselves saw the metaphor's inadequacies. A "rule of law," one justice cryptically observed, "should not be drawn from a figure of speech."[35] The "wall" metaphor is not wholly accurate, for a "system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church."[36] A "hermetic separation" between church and state, the Court today acknowledges, is an "impossibility."[37] Some justices have urged that the metaphor be

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Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 567 (1992) (saying, of the First Amendment, that "[t]here had been nothing like it in history"). Religious and secular governance in ancient times had often merged in a single person or group. Even so, a Fifth Century pope, Gelasius, discussed separate spheres of church and state powers. WILFRID PARSONS, THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES, 85-87 (1948). In the thousand years or so that bridge ancient and modern times, the distinction between religious and secular governance becomes recognizable, but those medieval times often involved a contest between secular and religious leaders, with now one and now the other attempting to exercise both secular and religious authority. *Id*. at 87-88. The Founders recognized for the first time as a rule of law a legitimate distinction between government and religious authority. Because of that novel distinction, secular authorities under our constitutional order may not interfere with the governance of churches, a notion reflected in the right of church autonomy, and churches in turn may not exercise government power.

34. *See generally Everson* 330 U.S. at 18 (the wall "must be kept high and impregnable. We could not approve the slightest breach."); *see also* Zorach v. Clauson, 343 U.S. 306, 312 (1952) (church-state separation must be "complete and unequivocal"; the "prohibition is absolute"). *But see id.* at 312 ("The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State.").

35. Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting). Perhaps a better image would be that of a picket fence, high enough to preserve the boundary but low enough not to inhibit conversation and cooperation for the common good. "If church and state journeying together are to engage in friendly conversation, there cannot be a towering, impregnable wall between them. Although a clear line of demarcation between church and state is always needed, it should be one which will still allow their supporting hands to reach out to each other in times of need, which will still allow them to look at each other's faces . . . ." Anthony J. Bevilacqua, *Foreword: Church and State—Partners in Freedom*, 39 DEPAUL L. REV. 989, 991-92 (1990).

36. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 745 (1976) (plurality opinion); *see also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (the "wall" metaphor "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state"); Engel v. Vitale, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting) (decision-making is "not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution").

37. *Roemer*, 426 U.S. at 746; *see also* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Interaction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two."); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation."); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 670 (1970) ("No perfect or absolute separation is really possible."); Mark E. Chopko, *The Challenge of Liberty for Religions in the USA*, *in* RELIGIOUS LIBERTY & HUMAN RIGHTS 67, 75 (2002) (noting that government and religion intersect when they further their respective interests in promoting the public good).

abandoned,[38] but it continues to rear its head in the official reports, usually when a justice or judge wishes to press his or her view that the church-state line has been crossed.[39]

In *Lemon v. Kurtzman*, the Court announced a three-part test for deciding Establishment Clause claims, a test that suffers from the same rigidity as the "wall" metaphor.[40] Under the *Lemon* test, government action survives Establishment Clause scrutiny if it has a secular purpose, a primary effect that "neither advances nor inhibits religion," and does not excessively entangle the government with religion.[41] "State action violates the Establishment Clause," the Court would later reiterate, "if it fails to satisfy any of these prongs."[42]

Each of the *Lemon* prongs is problematic in its own way. The purpose prong, only occasionally used to strike down legislation,[43] seems unworkable because legislators rarely act with a single purpose. In addition, it is not evident how a bad motivation, even if one could be attributed to all members of a legislature, might render otherwise permissible legislation unconstitutional.[44] To say government may not "advance" religion (*Lemon*'s second prong) seems hard to square with the text of the First Amendment, which advances religion by protecting it from government interference and by often requiring governmental accommodation to religious interests.[45] The last prong of the *Lemon* test creates a paradox insofar as steps taken by government to avoid advancing religion have been held at times to entangle the government with religion.[46]

The frequent disclaimers that *Lemon*'s three prongs are only "guidelines"[47] or "helpful signposts,"[48] that they should not be taken too literally,[49]and that "no fixed, per se rule can be framed,"[50] are well known. Faced with long-accepted historic practices that are not easily assimilated under *Lemon*, the Court tends

38. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.").

39. *See, e.g.,* Zelman v. Simmon-Harris, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

40. 403 U.S. 602 (1971).

41. *See id.* at 612-13.

42. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

43. McCreary County v. ACLU, 125 S. Ct. 2722, 2733 n.9 (listing cases).

44. This criticism is made most pointedly by Justice Scalia. *Edwards*, 482 U.S. at 610, 612-19 (Scalia, J., dissenting). *See also* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968))).

45. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Follett v. Town of McCormick, 321 U.S. 573 (1944).

46. Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (noting the "Catch-22" and citing other opinions critical of the entanglement prong).

47. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 773 n.31 (1973) (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971) (plurality opinion)).

48. Hunt v. McNair, 413 U.S. 734, 741 (1973).

49. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

50. *Id.*

either not to apply *Lemon* at all[51] or to consider it only as an apparent afterthought.[52] More recently the Court has truncated *Lemon* by treating its third prong as merely one aspect of the second in cases involving government benefits.[53] Despite these emendations to the *Lemon* test, a chorus of critics on[54] and off[55] the bench has not led to *Lemon*'s formal abandonment.[56]

The seeming woodenness of the "wall" metaphor and *Lemon* test notwithstanding, Supreme Court decisions in the last two decades have re-emphasized that the Establishment Clause is a limitation on *government*, not private parties, and that neutral government programs do not advance religion just because organizations with a religious affiliation or viewpoint participate.[57] Recent emphasis is

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51. *See generally* Marsh v. Chambers, 463 U.S. 783 (1983).

52. *See, e.g.,* Larson v. Valente, 456 U.S. 228 (1982). *See also* Van Orden v. Perry, 125 S.Ct. 2854, 2861 (2005) (plurality opinion) (declining to apply *Lemon*, and noting the Court's failure to rely principally or at all upon *Lemon* in a number of previous cases); *id*. at 2868 (Breyer, J., concurring in the judgment) (declining to apply *Lemon*).

53. Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (plurality opinion); Agostini v. Felton, 521 U.S. 203, 233 (1997) (noting continued use of "inhibition" as entanglement).

54. County of Allegheny v. ACLU, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting pervasive and "[p]ersuasive" judicial criticism of *Lemon*); Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting).

55. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127-34 (1992); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986); *see generally* Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979).

56. In 1984, Justice O'Connor suggested a refinement to *Lemon*. In her view, government, as viewed by an objective or reasonable observer, may not "endorse" religion. Lynch v. Donnelly, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring). On the whole, aid, advancement, and endorsement all seem to be cut out of the same cloth, putting the question at the same level of generality. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766-67 (1995) (plurality) (rejecting application of endorsement test); County of Allegheny v. ACLU, 492 U.S. at 668 (Kennedy, J., concurring in the judgment in part, dissenting in part) (criticizing endorsement test). The endorsement test has not led to unanimity in application or result. Among other things, the justices have disagreed about how to define the objective or reasonable observer. *Compare Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment), *with id.* at 800 n.5 (Stevens, J., dissenting).

57. Mitchell v. Helms, 530 U.S. 793 (2000) (upholding government aid to schools for educational materials and equipment, as applied to parochial schools, against Establishment Clause challenge); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (government provision of interpreter for deaf child in religious high school does not violate Establishment Clause); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (permitting religious group to use public school property does not offend Establishment Clause); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (permitting proposed religious club to meet on public school grounds does not violate Establishment Clause); Bowen v. Kendrick, 487 U.S. 589 (1988) (grant of funds to religious organizations for services authorized by the Adolescent Family Life Act does not violate the Establishment Clause); Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) (provision of vocational rehabilitation assistance to visually impaired student at private religious college does not violate the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (allowing tax deduction for expenses for tuition, secular textbooks, and transportation for parents of children attending private elementary and secondary schools does not violate the Establishment Clause); Widmar v. Vincent, 454 U.S. 263 (1981) (giving religious group access to state university facilities does not violate the Establishment Clause); *see also* Everson v. Bd. of Educ., 330 U.S. 1 (1947) (providing public bus transportation for students attending religious schools does not violate Establishment Clause).

less on aid, advancement, or endorsement per se than on whether the challenged action can be properly attributed to government. These recent decisions recognize that *Lemon* and similar constructs are not self-defining and, taken too literally, would create a Procrustean bed that is far too begrudging of what the Establishment Clause actually permits. The clearest command of the Establishment Clause is that it does not allow government to favor (or denigrate) one religion over another.[58] Beyond that basic prohibition, the Court has said that there is considerable "room for play in the joints"[59] and that government does not establish religion by merely accommodating its exercise[60] or permitting religious organizations to participate in government-funded programs.[61]

Inasmuch as *Lemon* remains the law of the land, it continues to be an appropriate tool for measuring the lawfulness of government practices that undermine religious autonomy.[62] In institutional autonomy cases, each of *Lemon*'s prongs is relevant. For example, in challenging a California law mandating insurance coverage of contraceptives,[63] Catholic Charities of Sacramento and various amici pointed to a legislative history rife with comments about the Catholic Church, suggesting, they argued, an intent to *disfavor* institutions with a Catholic affiliation, the reverse image of an impermissible legislative intent to *promote* Catholicism. If the latter runs afoul of *Lemon*, so should the former. Denigration of one religion is just as offensive as favoritism; indeed, they are opposite sides of the same coin. Similarly, if legislative history is an appropriate engine for deciding challenges to government practices that purportedly benefit religion,[64] reference to legislative history would seem equally appropriate when religion is inhibited.[65] *Lemon* explicitly requires a primary effect that "neither advances *nor inhibits* religion."[66] Like the prohibition against excessive entanglement, this has obvious applicability to government practices that undermine church autonomy.

Not surprisingly, the Establishment Clause is today one of the vigorous

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58. Larson v. Valente, 456 U.S. 228, 244 (1982). The suggestion sometimes made that the Establishment Clause forbids government from favoring religion over non-religion cannot, viewed literally, be squared with the Religion Clauses, which obviously give religion legal protection not accorded non-religion.

59. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). *Locke v. Davey*, 540 U.S. 712 (2004), confirms the discretion of government to fund (or not) religious educational activities. In that case, the Court, by a 7-2 vote, upheld the authority of Washington State to refuse a scholarship to a divinity student while funding "religious studies" students. The majority also noted that the state could also validly have included the student in the program. *Id.* at 718-19.

60. *E.g.*, Zorach v. Clauson, 343 U.S. 306 (1952).

61. *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

62. *See infra* Part III.

63. *See infra* Part V.D.

64. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985).

65. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

66. *Lemon*, 403 U.S. at 612-13. *But see* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378-82 (1981) (arguing pre-*Smith* that government action that "inhibits" religion is properly considered under the Free Exercise Clause, not the Establishment Clause).

sources of the right of church autonomy.[67]

B. The Free Exercise Clause

The government may not regulate religious beliefs and opinions. Under the absolute protection these are said to enjoy under the Free Exercise Clause,[68] the government is forbidden, for example, to inquire into the truth or falsity of religious beliefs[69] or to require applicants for public office to take a religious oath.[70] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or other matters of opinion or force citizens to confess by word or act their faith therein."[71]

Religiously motivated conduct lacks the absolute protection that is accorded to religious belief. Conduct is subject to appropriate regulation.[72] Conduct affects others; beliefs, unexpressed, disturb only the bearer. However, simply recognizing the distinction between belief and conduct, as the Court did in its earliest free exercise cases,[73] begs the question of what conduct *is* protected. The Supreme Court has "rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause,"[74] as would seem to be required by constitutional text, which, after all, guarantees the free "exercise" of religion. The protection of conduct is, of course, essential to the religious adherent since a religious faith not expressed in conduct would be regarded as inauthentic in many religious traditions.[75]

As to conduct, the government may not impose special disabilities upon religious adherents or single out one or all religions for disadvantageous

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67. *See infra* Part III.

68. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (freedom to believe is "absolute"); Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("Compulsion by law of the acceptance of any creed . . . is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute."); Bowen v. Roy, 476 U.S. 693, 699 (1986) (freedom to believe is "absolute"). In sectarian strife, many martyrs were created by seeking to force a conversion. Given that history, the protection of beliefs by the Framers would not—to them—have been insignificant.

69. United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that questions regarding the truth or falsity of the defendant's religious beliefs were properly withheld from the jury).

70. *See* Torcaso v. Watkins, 367 U.S. 488 (1961); *cf.* U.S. CONST., art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399 (9th Cir. 1995) (recusal of judge based on his religious beliefs about abortion would conflict with Article VI's ban on religious tests).

71. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

72. *Cantwell*, 310 U.S. at 304.

73. *See, e.g.,* Reynolds v. United States, 98 U.S. 145 (1879).

74. Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972); *id.* at 247 (Douglas, J., dissenting) (the majority "rightly rejects the notion that actions . . . are always outside the protection of the Free Exercise Clause . . .").

75. *See, e.g., James* 2:14-17 ("What good is it . . . if someone says he has faith but does not have works? . . . [F]aith of itself, if it does not have works, is dead.").

treatment.[76] Thus, the state may not keep a religious group from preaching in a public park when it permits other religious groups to preach there,[77] bar ministers from serving as delegates to a state constitutional convention,[78] or forbid conduct simply because it is religiously motivated.[79] Nor may a religious group be excluded from a public forum or benefit because of the group's religious perspective.[80]

The extent to which the Constitution requires an exemption from generally applicable laws that incidentally burden religious exercise is the harder case. From 1940 until 1990, the Supreme Court permitted incidental burdens on religion only if the private actor's conduct was sufficiently harmful to state interests of sufficient seriousness to warrant the burden and the state adopted means narrowly tailored to advance its interests.[81] This standard, which involved balancing religious and governmental interests, was foreshadowed in opinions issued prior to 1940 in which the Court refused to grant religiously-based exemptions from laws banning polygamy[82] or policies mandating military education and training at a state university.[83] The Court considered the state's interest in protecting the institution of marriage[84] and ensuring military readiness[85] to be of paramount importance, and easily concluded that the Free Exercise Clause required no exemption from such laws or programs.[86]

What was implicit in the marriage and military cases became more explicit in 1940. That year the Court decided what is often cited as its first modern free exercise case, *Cantwell v. Connecticut*.[87] *Cantwell* involved a conviction for inciting a breach of the peace arising out of an altercation in a heavily Catholic neighborhood between a member of the Jehovah's Witnesses (Jesse Cantwell) and two local men who took offense at Cantwell's views on Catholicism. Judicial review of Cantwell's conviction, the Court wrote, "demands the weighing of two conflicting interests"—the interest in unabridged communication of

76. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993); McDaniel v. Paty, 435 U.S. 618 (1978) (plurality opinion); Fowler v. Rhode Island, 345 U.S. 67 (1953).

77. *Fowler*, 345 U.S. 67.

78. *McDaniel*, 435 U.S. 618.

79. *Church of Lukumi Babalu Aye*, 508 U.S. at 532.

80. *See* cases cited *infra* at note 123.

81. *See infra* notes 87-105 and accompanying text.

82. Reynolds v. United States, 98 U.S. 145 (1879).

83. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

84. The Court considered marriage to be among the social institutions upon which the nation, indeed all of Western civilization, was based, and essential to democratic government. *Reynolds*, 98 U.S. at 165-66 (stating that polygamy would "fetter[] the people in . . . despotism," that it would destroy marriage, an institution upon which "civilized nations" were built, and that polygamous practices had "always been odious" among Western people and banned in America from colonial times).

85. The Court considered military preparedness to be essential to the preservation of peace. *Hamilton*, 293 U.S. at 262 ("Government . . . owes a duty to the people . . . to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law.").

86. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (rejecting claimed religious exemption from child labor law).

87. 310 U.S. 296 (1940).

religious opinions and the interest in preserving peace and good order.[88] "We must determine whether the alleged protection of [the latter] . . . has been pressed, in this instance, to a point where it has come into fatal collision with the [former]."[89] The state could prevent "immediate threat[s]" to the preservation of "public safety, peace, [and] order . . . ."[90] Cantwell's conduct did not pose such a threat, and his conviction was therefore reversed. The case might have been decided differently, the Court intimated, had Cantwell engaged in conduct that was proscribed by a "statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State . . . ."[91] As initially conceived, therefore, the compelling interest standard had teeth.

Balancing (or weighing) the competing interests became the Supreme Court's modus operandi for deciding whether the Free Exercise Clause required religious exemptions to laws of general application. When, in 1960, the Court decided that Orthodox Jewish merchants were not entitled to an exemption from Sunday closing laws, it wrote that the government could, in the absence of regulatory alternatives, infringe upon religiously motivated conduct that violated "important social duties" or was "subversive of good order."[92] Precise formulations varied, but a rigorous balancing test was always articulated.

In 1963, the test for deciding free exercise challenges to laws of general application became settled in its formulation. That year the Court declared that government could not inhibit religious conduct except by a law necessary to advance a "compelling state interest."[93] A "compelling" interest was furthered only if the law prevented the "gravest abuses, endangering paramount interests."[94] A law was necessary only if "no alternative forms of regulation" remained to achieve the desired end.[95] Government could not refuse to permit an exemption unless it shouldered an especially heavy burden.[96]

The Court continued in later cases to apply the compelling interest or strict scrutiny test in evaluating free exercise claims. In *Wisconsin v. Yoder*, the Court held that Wisconsin could not constitutionally compel Amish schoolchildren to attend the last two years of high school over the religious objections of their parents.[97] "The essence of all that has been said and written on the subject [of

88. *Id*. at 307.
89. *Id*.
90. *Id*. at 308.
91. *Id.* at 311.
92. Braunfeld v. Brown, 366 U.S. 599, 603 (1961).
93. Sherbert v. Verner, 374 U.S. 398, 406 (1963).
94. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
95. *Id.* at 407.
96. This heavy burden mirrors Madison's view that government should not interfere in religion "beyond the necessity of preserving public order." JAMES MADISON, in IX THE WRITINGS OF JAMES MADISON 484, 487 (Gaillard Hunt, ed., 1901-1910) (quoted in Everson v. Bd. of Educ., 330 U.S. 1, 40 n.28 (1947) (Rutledge, J., dissenting)).
97. 406 U.S. 205, 207 (1972).

the Free Exercise Clause] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[98] Providing public education, the Court conceded, was "at the very apex of the function of a State."[99] Yet that interest, "however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests . . . specifically protected by the Free Exercise Clause . . . ."[100] The Wisconsin compulsory education law went too far, the Court concluded. An additional one or two years of formal high school education for Amish children would do little to serve the asserted interests of preparing citizens to participate in our political process and to be self-reliant.[101] The Amish were constitutionally entitled to an exemption.

There are good reasons why strong justifications should be required for government burdens on religious exercise. One reason is the nature of religion itself. Among other things that can be said of it, religion concerns an ultimate good (a personal God in most religions) that gives meaning and order to every other good, including those associated with life in political society. Religion therefore lies at the root of a purposeful life, and it is often through religion that one acquires the virtues associated with good citizenship. Unlike many other constitutional guarantees, which protect some particular aspect of political liberty or attach to particular government proceedings (e.g., freedom from self-incrimination, the right to jury trial, and so on), the Religion Clauses ensure a freedom that goes to the heart of what it means to be human and living in a free society. A state that radically refused such freedom would regard people not as good in themselves, but only insofar as they were useful to the state—a characteristic of totalitarian rather than free societies. Religious freedom, however, is not a concession that government makes to the governed. Rather, it belongs by right to the people, and a government that did not recognize that right would surrender its claim to legitimacy.

The Founders were aware of the dangerous consequences that flow from a denial of religious freedom, and they singled out religion for special protection precisely to avoid such consequences. For this reason, freedom of religion occupies a "preferred position" in our constitutional scheme.[102] Madison viewed it as "the fundamental freedom";[103] Jefferson regarded it as the "most inalien-

98. *Id.* at 215.

99. *Id.* at 213.

100. *Id.* at 214.

101. *Id.* at 221-22.

102. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *see generally* Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (recognizing the preferred position of First Amendment liberties although the Court upheld the challenged regulation).

103. *See* Everson v. Bd. of. Educ., 330 U.S. at 34 n.13 (Rutledge, J., dissenting) (quoting Brant, JAMES MADISON, THE VIRGINIA REVOLUTIONIST 243 (1941)). For more on Madison's views, see JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 61-91 (1998).

able and sacred of all human rights."[104] Mirroring this history, one justice in modern times has remarked that "no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than . . . religious liberty . . . ."[105] This preferential value, it was long maintained, can only be enforced by both preventing government from singling out one or all religions for unfavorable treatment, and by freeing religious exercise from those burdens for which government is unable to offer a compelling justification. This was the verdict of a half century of court decisions.

In 1990, however, the Supreme Court rejected use of the rigorous balancing test articulated in *Sherbert*—indeed, *any* balancing test—in evaluating incidental burdens on religion under the Free Exercise Clause. In *Employment Division v. Smith,* the Court went from requiring the strongest justification for government action that incidentally burdens religion to a low justification (some would say no justification)—a seismic jurisprudential shift.[106] Under *Smith*, religion and the religious objector generally lose, provided the government has not singled out religion for adverse treatment, favored or disfavored some religions over others, or taken sides in a controversy over religious authority or dogma.[107]

Perhaps wishing not to be seen as overruling a half century of precedent (though that is precisely what it did), the Court in *Smith* articulated two exceptions. Under the first exception, strict scrutiny is applied to claims involv-

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104. *See* Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 245 n.11 (1948) (Reed, J., dissenting) (quoting THE WRITINGS OF THOMAS JEFFERSON, 414-17 (Memorial ed., 1904)).

105. Sherbert v. Verner 374 U.S. 398, 413 (1963) (Stewart, J., concurring in the result).

106. 494 U.S. 872, 882-89 (1990). Some might argue that the shift is not so radical because religious objectors often "lost" under the compelling interest test. *Smith* itself makes that point. 494 U.S. at 881-85; *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 624 & App. (9th Cir. 1988) (Noonan, J., dissenting) (noting the win-loss record, but drawing a different conclusion). Indeed, religious adherents hardly had an unvarnished history of success on religious liberty claims prior to *Smith*. There are pre-*Smith* cases where the Court's treatment of the government's interest seems conclusory in light of the rigor that ordinarily attaches to the compelling interest test. *E.g*., Bob Jones Univ. v. United States, 461 U.S. 574 (1983). In addition, there are pre-*Smith* cases where the Court declined to apply the test altogether. *E.g.,* Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Free Exercise Clause does not forbid the government to permit timber harvesting in, or construction of a road through, a portion of a national forest used by three American Indian tribes for religious purposes); Bowen v. Roy, 476 U.S. 693 (1986) (Free Exercise Clause does not compel the government to accommodate a religiously-based objection to a statutory requirement that a Social Security number be provided by an applicant seeking certain welfare benefits); Goldman v. Weinberger, 475 U.S. 503 (1986) (military regulations forbidding service member to wear headwear may be applied to Orthodox Jew and ordained rabbi whose religious beliefs required him to wear a yarmulke).

Nevertheless, wholesale abandonment of the compelling interest test is, to our mind, a major methodological shift for deciding free exercise claims. That religious adherents had often lost prior to *Smith* does not seem a reason to abandon the test. *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) ("it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us"). Among other things, abandonment of any balancing test in evaluating incidental burdens on religious exercise creates a glaring problem in the construction of the Constitution because it seems to give the Free Exercise Clause no function beyond that already performed by the Equal Protection Clause. *Id.* at 894.

107. *Smith*, 494 U.S. at 877.

ing free exercise in conjunction with some other constitutional liberty.[108] The Court cited this "hybrid rights" exception to distinguish its earlier decisions in *Cantwell* and *Yoder*.[109] The Court did not explain why a single constitutional right should trigger less rigorous judicial scrutiny than two.[110] Under a second exception, the Court applies strict scrutiny to free exercise claims in contexts that lend themselves to individualized governmental decision making, an exception that the Court said explained its earlier unemployment compensation decisions.[111] Writing separately in *Smith*, Justice O'Connor charged the majority with having "dramatically depart[ed] from well-settled First Amendment jurisprudence"; the Court's decision, she said, was "incompatible with our Nation's fundamental commitment to individual religious liberty."[112]

Smith preserved church autonomy claims from its doctrinal revision. The Court cited with approval and distinguished earlier cases that recognize the right of church autonomy.[113] Lower courts have concluded that *Smith* does not overrule or undermine the right of church autonomy recognized in these earlier decisions.[114] Even were this not the case, burdens on church autonomy would arguably be subject to the compelling interest test under one or both of the exceptions carved out in *Smith*. Church autonomy generally implicates the Free Exercise, Establishment, and Speech Clauses, as well as the constitutional right of association, therefore qualifying for the hybrid rights exception.[115] In addition, tort law, to which much of our discussion will be devoted,[116] is the quintessential example of individualized government decision making.[117]

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108. *Id.* at 881.

109. *See generally* Cantwell v. Connecticut, 310 U.S. 296 (1940) (involving freedom of religion and speech); Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving freedom of religion and the right to direct the education of one's children).

110. Recognizing this, some courts reject the notion that hybrid claims are entitled to stricter scrutiny than single claims. *See, e.g.,* Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003); Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).

111. *Smith*, 494 U.S. at 884.

112. *Id.* at 891 (O'Connor, J., concurring in the judgment).

113. *Id.* at 877. The autonomy cases cited by *Smith* are discussed *infra* Part III.A.

114. *See* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 n.* (4th Cir. 2000); Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 347-50 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461-63 (D.C. Cir. 1996); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000).

Similarly, *Smith* dealt with claims for religious accommodation for individuals, not institutions. *E.g.*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); *id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability. . . .'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982))).

115. *See, e.g.,* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (EEOC's attempt to apply Title VII in case of canon law professor was a "hybrid" case under *Smith* because it implicated both Free Exercise and Establishment Clauses).

116. *See infra* Parts V.A-C.

117. The Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. §2000bb *et seq*. (1994), also requires use of the compelling interest test. Though it

C. The Speech Clause

Few things could be more critical to the proper functioning of a democratic society than uninhibited and robust speech. Freedom of speech is recognized as "one of the preeminent rights of Western democratic theory."[118] Just as it may not mandate or inhibit religious belief and practice, the government may not prohibit or burden speech, religious or otherwise.[119] Our national commitment to free speech "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[120] Thus, "no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein."[121] As the phrase "word or act" suggests, it is not only the spoken and written word that is protected from the reach of government, but expressive conduct as well.[122] The free speech guarantee also prevents the government from branding or blackballing religious speakers. It is constitutionally impermissible to exclude a speaker from a public benefit simply because his or her viewpoint happens to be religious.[123]

The right to speak includes the right not to speak.[124] The same system that "secures the right to proselytize religious, political, and ideological causes . . . also guarantee[s] the concomitant right to decline to foster such concepts."[125] Thus, the government may not require its citizens to disseminate or affirm their belief in ideological messages.[126] To require such affirmation would invade "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[127] Whether most people agree with the

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has been declared invalid as to the states, City of Boerne v. Flores, 521 U.S. 507 (1997), RFRA continues to be valid when the federal government substantially burdens religion. *See* Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 959-60 (10th Cir. 2001); Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 859-61 (8th Cir. 1998).

118. *See, e.g.,* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1143 (7th ed. 2004).

119. The difference is that government itself may speak, but may itself not engage in religious worship or practice.

120. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

121. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

122. *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505-07 (1969) (black armband worn by public school students to protest American policy in Vietnam is speech); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (sit-in by black students in "whites only" library is speech); *Barnette*, 319 U.S. at 632 (saluting the flag is speech).

123. *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

124. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

125. *Id.*

126. *See id.* (holding that individuals could not be required to display words "Live Free or Die" on their automobile license plates); *Barnette*, 319 U.S. 624 (holding school children cannot be required to salute the U.S. flag); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that organizers of a private parade cannot constitutionally be required to include speech with which they do not agree in the parade).

127. *Barnette*, 319 U.S. at 642.

government's message is irrelevant. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[128] No one can be forced to become a "courier" for ideas the state wishes to propagate.[129] The right not to be forced to propagate ideas applies to organizations as well as individuals.[130]

For many churches, their very mission is to preach. The churches' message is not always popular or well-received. Indeed, churches often understand themselves to be speaking prophetically, counter-culturally, and critically to the established majoritarian order. As a moral voice, the churches are a leaven for society, often challenging society and social conditions. Preservation of a robust right of religious speech is therefore of exceptional importance.

D. The Right of Association

Implicit in the right of free speech, religious exercise, and other First Amendment guarantees is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[131] The right of association "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[132] Thus, freedom of association, like the guarantees of religious freedom and free speech to which it is constitutional cousin, is a barrier to state-enforced uniformity and orthodoxy, a guarantee that government may not suppress diversity of thought and viewpoint.

"Government actions that may unconstitutionally burden this freedom [to associate] may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' . . . ."[133] Consider this example. A civil rights organization terminates an employee after learning that he is a member, and a public advocate for positions held by, a political party that advocates the superiority of one race over others. At a minimum, at stake are the speech and associational interests of (a) the employer, (b) the employee, and (c) the political party. Each has a constitutionally guaranteed right to speech and association. May the employer terminate the employee in the face of a civil rights law that bans adverse employment action based on membership in a political party?[134] Put another way, may the government require the employer to

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128. *Wooley*, 430 U.S. at 715.

129. *Id.* at 717.

130. *See Hurley*, 515 U.S. at 574; Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986).

131. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

132. Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000); *see also Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

133. *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

134. *See, e.g.,* D.C. CODE § 2-1402.11 (prohibiting employment discrimination on the basis of political affiliation).

associate with and retain within its ranks an employee who is devoted to causes antithetical to those of the employer? The question is especially problematic when the subject of the government intrusion is a church because, as discussed in the next section, such intrusion on a church implicates religious liberty and the rights of speech and association.

Silo v. CHW Medical Foundation is a close analogue to our hypothetical.[135] The question presented there was whether a church-affiliated hospital could terminate a non-ministerial employee for objectionable religious speech notwithstanding a constitutionally based policy against religious discrimination in employment. On appeal, the hospital prevailed. The California Supreme Court concluded that the Religion Clauses "give religious organizations some degree of latitude to choose their employees in order to define their religious mission."[136] As the United States Supreme Court recognized in *Corporation of Presiding Bishop v. Amos*,[137] exempting religious employers from religious discrimination claims was a "legitimate means of promoting the autonomy of religious organizations," an interest that the California court found to be implicit in the State and Federal Constitutions' Religion Clauses.[138] "Therefore, the public policy against religious discrimination in employment must be qualified by the public policy of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message."[139] That Silo was a non-ministerial employee in a religiously-affiliated hospital providing secular services did not alter the hospital's right to disassociate itself from an employee whose message it found objectionable.[140]

In the next section, we explore the historic development of the jurisprudence recognizing this right of church autonomy.

III. THE RIGHT OF CHURCH AUTONOMY

A. Disputes Involving Church Self-Governance

During the Civil War era, the Supreme Court recognized that decisions about church law, discipline, and faith are not subject to civil court review.[141] *Watson*

135. 45 P.3d 1162 (Cal. 2002).

136. *Id*. at 1169.

137. 483 U.S. 327 (1987).

138. *Silo,* 45 P.3d at 1169.

139. *Id*.

140. *Id*. at 1169-70. The court also found entanglement problems. *Id*. at 1170 ("[R]estricting the ability of a religiously affiliated employer to control religious speech at the workplace would not only potentially interfere with its mission, but could excessively entangle the courts in determining what kind of religious speech is appropriate in a religious organization's workplace.").

141. It was not the first time the Court had dealt with church-state issues or recognized the distinct position held by churches in the United States. "If cases that reach the Supreme Court are any indication, the predominant church-state concern in the antebellum period had to do with the organization and control of church institutions. The key to resolving those controversies was to define a private

v. Jones involved a schism in the Presbyterian Church following internal division over slavery.[142] Each of two local factions—one abolitionist, the other not—sought control of a Presbyterian church in Louisville.[143] The General Assembly, the highest body of the Presbyterian Church, decided which faction was the true church, but a civil court upset the decision.[144] The Supreme Court held that the General Assembly's decision about which was the true church entitled to use of the Louisville property, and similar questions involving ecclesial discipline, faith, and church law, are not subject to review by civil courts.[145] *Watson* is animated by two concerns. First, those who voluntarily join themselves to a church do so with the implied consent to its faith, discipline, law, and self-organization.[146] Second, in such matters civil judges are not as competent as the church, and therefore cannot substitute their judgment for that of the church.[147] The rule that religious disputes are non-justiciable was said to be "founded in a broad and sound view of the relations of church and state under our system of laws. . . ."[148]

A half century later, in *Gonzalez v. Roman Catholic Archbishop of Manila*, the Supreme Court cited *Watson* in holding that civil government may not prescribe the standards of church office.[149] *Gonzalez* involved an 1820 will that created a trust for the maintenance of a chaplaincy.[150] More than 100 years after the will was executed, the archbishop in whose diocese the chaplaincy had been created was asked to appoint as chaplain, and to assign income from the chaplaincy to, a ten-year-old descendent of the foundress.[151] The archbishop refused because the applicant, at the age of ten, lacked the qualifications of a chaplain under the church's canon law.[152] The heirs sued to enforce the trust literally or to recover the income, and lost their case. The Supreme Court held that the archbishop's decision could not be disturbed because "it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."[153]

Watson and *Gonzalez* were decided before the First Amendment was applied to states through the Fourteenth Amendment, but those decisions and the principles they stand for were elevated to constitutional status in *Kedroff v. St.*

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sphere, protected against state interference by the vested rights doctrine and the separation of church and state." Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 42 (2001).

142. 80 U.S. 679 (1872).
143. *Id.* at 690-93.
144. *Id.* at 693-94.
145. *Id.* at 733-34.
146. *Id.* at 728-29.
147. *Id.* at 729.
148. *Id.* at 727.
149. 280 U.S. 1, 16 (1929).
150. *Id.* at 11.
151. *Id.* at 12-13.
152. *Id.*
153. *Id.* at 16.

Nicholas Cathedral of Russian Orthodox Church.[154] Attempting to free the Russian Church in America from "infiltration of . . . atheistic or subversive influences" by the Russian government, and fearing that church pulpits would be used for political purposes, the New York Legislature had passed a law transferring complete control of Russian Orthodox churches from the hierarchy of the Russian Orthodox Church in Russia to the church's diocese in America.[155] In *Kedroff*, the Supreme Court struck the law down, holding that the Free Exercise Clause bars a state legislature from regulating "church administration, the operation of the churches, [or] the appointment of clergy . . ."[156] In *Kedroff*, title resided in the "dissident" faction. The "right to use" was disputed, and depended on whether the patriarch's appointment or the American election of the archbishop was valid.[157] *Kedroff* explained that the *Watson* decision, though not decided expressly on constitutional grounds, "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," freedom that "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."[158]

After *Kedroff* was decided, a New York court transferred control of the Russian Orthodox Church based on the common law. Citing its earlier decision in *Kedroff*, the Supreme Court in *Kreshik v. Saint Nicholas Cathedral* wrote: "[I]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."[159] *Kreshik* demonstrates that church autonomy can be as compromised by judicial as well as by legislative action, and that, when this occurs, both are constitutionally impermissible.[160]

The right of church autonomy was affirmed again in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[161] The highest ecclesiastical body of the Serbian Orthodox Church had defrocked the bishop of its American-Canadian Diocese.

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154. 344 U.S. 94 (1952). *See* Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church, 393 U.S. 440, 447 (1969) ("In *Kedroff* . . . the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule."); *see also* Church of Scientology Flag Servs., Inc. v. City of Clearwater, 2 F.3d 1514, 1538 n.24 (11th Cir. 1993) (explaining the basis of, and relationship among, *Watson*, *Gonzalez*, and *Kedroff*).

155. *Kedroff*, 344 U.S. at 109.

156. *See id*. at 107. *Kedroff* also cited the principle of church-state separation, a principle reflected in both Religion Clauses. *See id*. at 110 ("[T]ransfer . . . of control over churches. . . . violates our rule of separation between church and state."); *see also id.* at 119 (stating that the state, by transferring church authority from one administrator to another, "intrudes . . . the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.").

157. *Id*. at 96-97.

158. *Id.* at 116.

159. 363 U.S. 190, 191 (1960) (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958)).

160. *See also* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996) ("The limits placed by the First Amendment on the Government extend to its judicial as well as legislative branch.").

161. 426 U.S. 696 (1976).

Holding that the church had not followed its own constitution and laws, an Illinois court ordered reinstatement of the defrocked bishop. The Supreme Court reversed. The "right to organize voluntary religious associations," the Court wrote, "is unquestioned."[162] The First Amendment permits religious organizations "to establish their own rules and regulations for internal discipline and government . . . ."[163] Thus, civil courts must defer to the decisions of churches "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[164]

In each case—*Watson*, *Gonzalez*, *Kedroff*, *Kreshik*, and *Milivojevich*—interference with church governance was per se unlawful, and the Court made no attempt to apply a balancing test. An interest as compelling as the avoidance of Communist infiltration at the height of the Cold War made no difference to the Court's conclusion that New York had stepped out of constitutional bounds when it attempted to interpose itself in a church's organization and self-governance.[165]

Favorable references to church autonomy are sprinkled liberally throughout other Supreme Court decisions. Participation by the government "in the affairs of any religious organization[] or group[]" is included in *Everson*'s often-cited list of what the Establishment Clause forbids.[166] The Court has recognized the need to preserve "the autonomy and freedom of religious bodies . . . ."[167] "[R]eligious organizations," one justice wrote, "have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their

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162. *Id.* at 711 (quoting Watson v. Jones, 80 U.S. 679, 728-29).

163. 426 U.S. at 724. *See* Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church, 393 U.S. 440 (1969) (holding that it is constitutionally impermissible for civil courts to adjudicate a church dispute arising out of a church schism). The Court in *Presbyterian Church* cites the First Amendment with reference to both free exercise and establishment concerns. *See id*. at 441, 444 n.3, 449-51; *see also* Malicki v. Doe, 814 So.2d 347, 355 n.6 (Fla. 2002) ("It is apparent that the religious autonomy principle articulated by the United States Supreme Court may implicate both the Free Exercise Clause and the Establishment Clause.").

164. *Milivojevich*, 426 U.S. at 713. Among the constitutional infirmities noted by the Court was the expert testimony about church law and procedure taken by the Illinois Supreme Court. *Id*. at 718-20.

165. *Cf.* Church of Scientology Flag Servs., Inc. v. City of Clearwater, 2 F.3d 1514, 1539-40 (11th Cir. 1993) ("The criteria adopted in *Lemon* and elaborated in its progeny are absolute in themselves, and a law that fails to meet any of them is per se invalid . . . . The Establishment Clause prevents seemingly important justifications from becoming a shield to defend the subtle and incremental advance of government administration into the field of church activities."); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998) (the Establishment Clause is an affirmative restraint on government, depriving it of *any* power whatever to interfere with religion); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 194 (1986) ("Americans in 1789 . . . agreed that the federal government had no power in [religious] matters . . .").

166. Everson v. Bd. of. Educ., 330 U.S. 1, 16 (1947).

167. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 672 (1970), *quoted in* Wisconsin v. Yoder, 406 U.S. 205, 221 (1971).

own institutions."[168] It is constitutionally impermissible for governments to "insinuat[e] themselves in ecclesiastical affairs or disputes"[169] or to "penetrate[] deeply into the internal affairs" of a church.[170] "[E]xcessive entanglement with religious institutions, which may interfere with the independence of the institutions,"[171] violates the Establishment Clause, one purpose of which is "to keep the state from interfering in the essential autonomy of religious life . . . by unduly involving itself in the supervision of religious institutions or officials."[172] Thus, the government may not "obtrude itself in the internal affairs of any religious institution."[173] These various statements reinforce the same basic point made in *Watson* and its progeny, that government may not interfere with the faith, law, discipline, organization, or governance of churches.

B. The Church as a Working Institution

Courts and government agencies may not hear employment discrimination claims brought by, or on behalf of, ministers.[174] Put another way, ministers may not litigate the terms and conditions of their ministries in the civil courts. This rule, known as the "ministerial exception," also applies to employment-related claims by ministers that sound in contract or tort.[175] In the discrimination context:

> [t]he ministerial exception is judicial shorthand for two conclusions: the first is that the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion; the second, that the state's interest in eliminating employment discrimination is outweighed by a church's constitutional right of autonomy in its own domain.[176]

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168. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. at 341 (Brennan, J., concurring in the judgment) (internal quotation marks and citation omitted).

169. McDaniel v. Paty, 435 U.S. 618, 638 (1978) (Brennan, J., concurring in the judgment).

170. Larson v. Valente, 456 U.S. 228, 253 n.29 (1982).

171. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

172. Marsh v. Chambers, 463 U.S. 783, 803-04 (1983) (Brennan, J., dissenting).

173. Lee v. Weisman, 505 U.S. 577, 599 (1992) (Blackmun, J., concurring).

174. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974). *But see* Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004), *reh'g en banc denied*, 397 F.3d 790 (9th Cir. 2005); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

175. *See* Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986); s*ee also infra* notes 184-185, and accompanying text.

176. *Catholic Univ.*, 83 F.3d at 467.

More importantly, government interference in the church-minister relationship would allow the state, in effect, to dictate to some extent who ministers and, to a much greater extent, on what conditions. It would be analogous to a licensing regime.[177] The rule that has emerged is that civil courts may not entertain disputes over the terms and conditions of ministerial employment. That rule, like the autonomy cases on which it relies, finds support in both of the Religion Clauses.[178]

In *McClure v. Salvation Army*, the seminal case in this area, a minister sued the Salvation Army, claiming sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964.[179] Concluding that it lacked subject matter jurisdiction, a federal district court dismissed the case.[180] The Fifth Circuit affirmed, explaining:

> The relationship between an organized church and its ministers is its life-blood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[181]

Citing *Watson*, *Gonzalez*, and *Kedroff*, the Fifth Circuit found that application of Title VII to the employment relationship between a minister and church would "result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause," and on that basis the court declined to apply Title VII to the minister-church relationship.[182] Other courts agree that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."[183]

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177. *See infra* Parts III.C and V.

178. *E.g.*, *Catholic Univ.*, 83 F.3d 455 (relying on both the Free Exercise and Establishment Clauses).

179. 460 F.2d 553 (5th Cir. 1972).

180. *Id.* at 556.

181. *Id.* at 558-59.

182. *Id.* at 560-61. Strictly speaking, the court in *McClure* interpreted Title VII to avoid the constitutional problem that would have otherwise arisen. *Id.* Title VII expressly exempts churches from claims of discrimination based on religion, but not race, color, sex, or national origin. After *McClure*, courts observed that had Congress intended a broad exemption, it would have passed one. *See, e.g.,* Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985). Since then, all federal courts of appeals to consider the question, including the Fifth Circuit, have rejected application of Title VII to the church-minister relationship on constitutional, rather than statutory, grounds. *See* cases cited *supra* at note 174.

183. Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994) (quoting *Rayburn*, 772 F.2d at 1169).

The ministerial exception is not limited to discrimination claims. In one case, the exception barred a minister's claims for tortious interference with contract, intentional infliction of emotional distress, breach of the covenant of good faith and fair dealing, interference with prospective advantage, wrongful termination, and breach of a pledge.[184] In another case, the ministerial exception barred claims of defamation, intentional infliction of emotional distress, fraud, and breach of contract arising out of a minister's forced retirement.[185]

Nor is the ministerial exception confined to ordained clergy.[186] It applies to any person whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship,"[187] whether or not ordained. The exception has been applied, for example, to teachers of canon law[188] and church musicians.[189]

All courts to take up the question have held that the ministerial exception is unaffected by *Smith*. The leading opinion is *EEOC v. Catholic University*.[190] The D.C. Circuit began its analysis by noting that government can burden religion in two ways: "by interfering with a believer's ability to observe the commands or practices of his faith . . . and by encroaching on the ability of a church to manage its internal affairs."[191] As recounted by the D.C. Circuit, *Smith* was concerned with what it considered to be the adverse consequences of requiring constitutional exceptions for individual conscientious objectors. Requiring an exception, the *Smith* Court believed, would allow individuals to become a law unto themselves. Preserving a church's authority to select its own ministers does not have that effect, the D.C. Circuit reasoned, nor does it require judges to determine the "centrality" of the conscientious objector's religious beliefs (another concern animating *Smith*).[192] Furthermore, while some ministerial exception cases cite the compelling interest test,[193] "*all* of them rely on a long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church

184. Bell v. Presbyterian Church, 126 F.3d 328, 330 (4th Cir. 1997).

185. Hutchison v. Thomas, 789 F.2d 392, 393 (6th Cir. 1986). *See also* Higgins v. Maher, 258 Cal. Rptr. 757 (Cal. Ct. App. 1989) (priest could not sue his bishop for invasion of privacy, defamation, and intentional and negligent infliction of emotional distress based on actions arising out of bishop's administration of his ecclesiastical functions).

186. *E.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (applying ministerial exception to canon law professor); *Rayburn* 772 F.2d at 1168-69 (applying the ministerial exception to an unordained associate in pastoral care).

187. *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)); *see also Catholic Univ.*, 83 F.3d at 461; *Bell*, 126 F.3d at 332.

188. *Catholic Univ.*, 83 F.3d 455.

189. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000).

190. 83 F.3d 455 (D.C. Cir. 1996).

191. *Id.* at 460.

192. *Id.* at 462.

193. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972), *cited in Catholic Univ.*, 83 F.3d at 462.

government as well as those of faith and doctrine.'"[194] "[W]e cannot believe," the D.C. Circuit continued, "that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs."[195] Other courts have likewise rejected the argument that *Smith* undermines the ministerial exception.[196]

Most courts apply the ministerial exception automatically without weighing the church's right of autonomy against any competing interest. In other cases, courts hold that the right of autonomy outweighs the state's interest in eliminating discrimination in the workplace. One court confusingly wrote that elimination of employment discrimination is a "compelling" interest of the "highest order," but that "the interest in protecting the free exercise of religion embodied in the First Amendment . . . prevails over the interest in ending discrimination embodied in Title VII"[197] (suggesting a balancing or weighing approach), while declaring in the same breath that civil court review is per se forbidden (suggesting that the exemption is automatic).[198] Despite some courts' use of balancing, no court has held that the interest in ending discrimination trumps the right of church autonomy in the ministerial context.[199]

Courts lack subject matter jurisdiction to hear disputes to which the ministerial exception applies.[200] This is consistent with the teaching of *NLRB v.*

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194. *Catholic Univ.*, 83 F.3d at 462 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

195. *Id.* at 463 (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1397 (1981) ("noting that the Supreme Court had been willing to extend the right of church autonomy as far as necessary to include the cases before it.")).

196. Combs v. Cent. Tex. Annual Conf. of United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) ("We concur wholeheartedly with the D.C. Circuit's conclusion that *Smith*, which concerned individual free exercise, did not purport to overturn a century of precedent protecting the church against governmental interference in selecting its ministers."); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 n.* (4th Cir. 2000) ("All circuits to have addressed the question have recognized the continuing vitality of the [ministerial] exception after . . . [*Smith*]"), and cases cited therein.

197. Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994); *see also Combs*, 173 F.3d at 351 ("congressional mandate to eliminate discrimination in the workplace" must yield to "the constitutional mandate to preserve the separation of church and state."); *Catholic Univ.*, 83 F.3d at 460-61 ("constitutional right of a church to manage its own affairs free from governmental interference" trumps the "[g]overnment's interest in eradicating discrimination in employment").

198. *Young*, 21 F.3d at 187.

199. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999), though in our view wrongly decided, is not to the contrary. 196 F.3d at 947 ("[T]his is not a case about the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry."). *See* discussion *infra* note 207.

200. *Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (court lacks subject matter jurisdiction to hear Title VII discrimination claim); *Young*, 21 F.3d 184 (7th Cir. 1994) (same); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (same); Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997) (court lacks subject matter jurisdiction to hear various tort claims arising out of minister's termination); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986) (court lacks subject matter jurisdiction to hear suit challenging minister's forced retirement); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) (court lacks subject matter jurisdiction to hear suit challenging minister's removal as pastor); Hiles v.

Catholic Bishop of Chicago,[201] for it is not only a potential judgment that the First Amendment forbids, but the very inquiry into religious law and practice that adjudication of such a case would require.[202]

The ministerial exception applies even if the church's conduct is not based on, or motivated by, religious belief or doctrine.[203] Independent of its prohibition against "evaluating or interpreting religious doctrine," the First Amendment forbids the government from "intrud[ing] into church governance."[204] "This second concern alone is enough to bar the involvement of the civil courts" in deciding discrimination claims by ministers against their churches.[205] Thus, a church's actual motivation for its ministerial employment decisions is irrelevant.[206] Indeed, even if the church has a policy *against* discrimination based

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Episcopal Diocese of Mass., 773 N.E.2d 929 (Mass. 2002) (court lacks subject matter jurisdiction to hear claims involving church disciplinary proceedings).

In the alternative, some courts have disposed of these cases by granting motions to dismiss for failure to state a claim, e.g., Natal v. Christian & Missionary Alliance, 1988 WL 159169 (D. P.R. 1988), *aff'd*, 878 F.2d 1575 (1st Cir. 1989), but the same courts make clear that they lack authority to hear the case. *Natal*, 1988 WL 159169 at *3 ("civil courts have no jurisdiction" to decide ecclesiastical disputes), *aff'd*, 878 F.2d at 1576 (affirming substantially for the reasons given by the lower court, and noting that it is "beyond peradventure that civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice."); Dowd v. Soc'y of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988) ("It is well-settled that religious controversies are not the proper subject of civil court inquiry. Religious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith and doctrine.") (citations omitted).

201. 440 U.S. 490 (1979).

202. *Id.* at 502 ("It is not only the conclusions that may be reached by [the government] which may impinge on rights guaranteed by the Religion Clauses, but also *the very process of inquiry* leading to findings and conclusions") (emphasis added); *see Young*, 21 F.3d at 187 ("civil court review of ecclesiastical decisions . . . , particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment."); *Catholic Univ.*, 83 F.3d at 466-67 (EEOC's two-year investigation of canon law professor's Title VII claim, together with extensive pre-trial inquiries and trial, constituted an impermissible entanglement in violation of the Establishment Clause).

203. In *Combs v. Central Texas Annual Conference of the United Methodist Church*, the parties agreed that the minister's sex and pregnancy discrimination claims under Title VII "do not directly involve matters of religious dogma or ecclesiastical law." 173 F.3d 343, 345 n.1 (5th Cir. 1999). The Fifth Circuit expressly considered "whether the Free Exercise Clause . . . deprives a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy, *even when the church's challenged actions are not based on religious doctrine*." *Id.* at 345 (emphasis added) (footnote omitted). The court concluded that even in such a case there is no jurisdiction. *Id.* at 344.

204. *Id*. at 350.

205. *Id.*

206. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) (holding that the ministerial exception bars "any inquiry whatsoever into the reasons behind a church's ministerial employment decision."); *Catholic Univ.*, 83 F.3d at 461 ("[I]n excepting the employment of a minister from Title VII, '[w]e need not find that the factors relied upon by [a] Church [are] independently ecclesiastical in nature . . .'" (quoting Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990))); *Catholic Univ.*, 83 F.3d at 464-65 (fact that religious university did not assert religious basis for denying canon law professor tenure was irrelevant); Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("[T]he free exercise clause . . . protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal

on race, color, sex, or national origin, a court may not second guess the church's employment decisions with respect to ministers—so strong is the prohibition against the policing of the ecclesiastical structure and ministerial staffing of church organizations.[207]

The ministerial exception protects churches against the government, not just against aggrieved ministers. Hence, the Supreme Court has applied the right of church autonomy in employment contexts that did not involve ministers at all, but which nonetheless presented some threat of government encroachment into the ability of church organizations to constitute and govern themselves. In

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content."); Bell v. Presbyterian Church, 126 F.3d 328, 332-33 (4th Cir. 1997) (religious organization's decision to terminate minister, allegedly made for financial rather than religious reasons, was not subject to civil court review); Lupu & Tuttle, *supra* note 2, at 41-42 (The ministerial exception "also immunizes religious institutions that assert no theological claim to engage in gender discrimination. Indeed, it even protects religious institutions that assert their full compliance with and support for anti-discrimination norms.").

207. This is one reason *Bollard* was wrongly decided. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999). Bollard, a former seminarian, sued the Jesuits for sexual harassment and constructive discharge. The opinion, written by a three-judge panel of the Ninth Circuit, presumes that seminary formation is "employment" for Title VII purposes—hardly an obvious conclusion—and overlooks Ninth Circuit law requiring the complainant (Bollard) to prove subject matter jurisdiction. Trentacosta v. Frontier Pac. Aircraft Indust., 813 F.2d 1553, 1558 (9th Cir. 1987). With those oversights, the panel concluded that the ministerial exception did not apply because the religious order was not (a) "exercising its constitutionally protected prerogative to choose its ministers" or (b) "embracing the behavior at issue." *Bollard*, 196 F.3d at 944; *id.* at 947 (noting the "Jesuits' disavowal of the harassment" alleged by the plaintiff). Of course, as to the second reason offered by the panel, a church's non-objection—or even its objection—to discriminatory conduct (e.g., race discrimination) does not mean courts may adjudicate ministerial claims of discrimination against that church. Harassment, a type of discrimination, is barred like any other discrimination claim by a minister. As to the first reason offered by the panel, it is hard to see how a damages suit by a former seminarian will not impact how the Jesuits choose their ministers or other internal processes, involving as it does inquiry into the very relationship between that order and one of its seminarians. Under *Bollard*, a jury will be invited to make the entangling and impermissible inquiry whether church rules and discipline with respect to a seminarian were "reasonable."

Bollard has not met with universal acceptance in the Ninth Circuit. A spirited dissent by four judges from the denial of en banc rehearing took issue with the panel's conclusions. 211 F.3d 1331, 1331 (9th Cir. 2000). In a later case involving a Presbyterian minister, a different three-judge panel of the Ninth Circuit purported to follow *Bollard*, but one judge dissented on church-state entanglement grounds, and a second judge, concurring in the judgment based on his stated obligation to follow circuit precedent until altered by an en banc decision, expressed "misgivings whether *Bollard* was correctly decided . . ." Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 970 (9th Cir. 2004) (Gould, J., concurring); *id* at 970 (Trott, J., dissenting). The majority opinion, while a technical victory for the plaintiff, nonetheless forbids recovery for, or judicial inquiry into, the church's decision to terminate her ministry, reduce her duties, suspend her, or refuse permission to circulate her resume to other Presbyterian churches, thereby stripping away much of her case. *Id*. at 963 (majority opinion). The court also barred prospective and injunctive relief and noted limitations in discovery. *Id*. at 958, 967.

Subsequently, a different panel of the Ninth Circuit held that a minister's claim of hostile work environment based on disability was barred under the ministerial exception because it implicated the minister's "working conditions and the church's decision regarding whether or not to accommodate a minister's disability," matters that are "part of the minister's employment relationship with the church" and hence not a proper subject of judicial inquiry. Werft v. Desert Southwest Annual Conf. of the United Methodist Church, 377 F.3d 1099, 1103-04 (9th Cir. 2004). It is hard to see how Bollard's and Werft's harassment claims are conceptually distinct. Both implicate the minister's working conditions.

Catholic Bishop, the National Labor Relations Board asserted jurisdiction over secondary religious schools and certified a union representing lay teachers.[208] At the time, the Board's practice was to decline jurisdiction only if the employer was "completely religious, not just religiously associated."[209] The high schools taught secular and religious subjects, so the Board thought jurisdiction appropriate.

The Seventh Circuit disagreed, concluding that the distinction between "completely religious" and "merely religiously associated" was not a workable guide to the Board's exercise of discretion and that the First Amendment barred jurisdiction.[210] In a passage later recounted by the Supreme Court, the Seventh Circuit wrote: "The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition."[211] The Seventh Circuit "reasoned that from the initial act of certifying a union as the bargaining agent for lay teachers the Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion."[212] Unlike state or local laws requiring fire inspections or mandating attendance, exercise of Board jurisdiction here had the potential to interfere with "the bishops' control of the religious mission of the schools."[213]

Plainly sympathetic to these concerns, but in keeping with its prudential policy of avoiding constitutional questions when cases can be resolved on statutory grounds, the Supreme Court concluded that Congress itself did not intend to grant the Board jurisdiction in light of "serious constitutional questions" that would otherwise be raised and the absence of any clearly expressed, affirmative intention by Congress to cover the lay teachers.[214] Citing its earlier decisions forbidding aid to religious schools based on the risk of excessive entanglement, the Court noted that teachers played a key role in carrying out the religious mission of religious schools.[215] Thus, it concluded that the exercise of jurisdiction by the Board presented a "significant risk" that the First Amendment would be infringed.[216] In many cases, religious schools had responded to unfair labor practice charges by asserting that their actions were "mandated by their religious creeds."[217] Thus:

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208. *See Catholic Bishop*, 440 U.S. at 493-94.

209. *Id*. at 498.

210. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1118 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

211. *Id.* at 1118, *quoted in Catholic Bishop*, 440 U.S. at 495.

212. *Catholic Bishop*, 440 U.S. at 496 (characterizing the Seventh Circuit's opinion).

213. 559 F.2d at 1124, *quoted in* 440 U.S. at 496.

214. *Catholic Bishop*, 440 U.S. at 501-07.

215. *Id.* at 501-02 (citing Lemon v. Kurtzman, 403 U.S 602, 617 (1971)).

216. *Id.* at 502.

217. *Id.*

> The resolution of such [unfair labor practice] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators [of the school] and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[218]

The exercise of jurisdiction would have "at least one other impact on church-operated schools": the Board would be called upon to decide the "terms and conditions of employment" and therefore mandatory subjects of bargaining.[219] The Supreme Court quoted the observations of lower courts that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment,'"[220] and that the "introduction of . . . mandatory collective bargaining . . . necessarily represents an encroachment upon the former autonomous position of management."[221] "Inevitably," the Court concluded, "the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions."[222] The Court saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow."[223] In light of these constitutional difficulties, and finding no clearly expressed affirmative intention by Congress to cover such teachers, the Court concluded that the Board lacked jurisdiction.

Catholic Bishop reflects the idea that "[p]art of the freedom of a church to operate a school is its ability to deal with its agents in accordance with church doctrine, otherwise the church's strength and distinctiveness as a religious educator would be threatened."[224] The theme of preserving the strength and distinctiveness of religious institutions free from government intrusion resurfaces in *University of Great Falls v. NLRB*.[225] In that case, the National Labor Relations Board asserted jurisdiction over the faculty of a religious university on the ground that the university lacked a "*substantial* religious character,"[226] a

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218. *Id.* at 502.

219. *Id.* at 502-03.

220. *Id.* at 503 (quoting Springfield Education Ass'n v. Springfield School Dist. No. 19, 547 P.2d 647, 650 (Or. 1976)).

221. *Id*. at 503 (quoting Pa. Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262, 267 (Pa. 1975)).

222. *Id*. at 503; *see also* Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Law: Freedom From and Freedom For*, 49 VILL. L. REV. 77 (2004).

223. *Catholic Bishop*, 440 U.S. at 504.

224. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 28 (commenting specifically on the *Catholic Bishop* decision).

225. 278 F.3d 1335 (D.C. Cir. 2002).

226. *Id.* at 1337 (emphasis added).

dilution of the Board's earlier view that jurisdiction could be exercised over any school that was not "*completely* religious."[227] The Board concluded that the University of Great Falls, owned by a Catholic religious order, was not "substantially" religious because, among other things, the "propagation of a religious faith" was not the University's "primary purpose."[228] Other factors in determining that the University was not "substantially" religious included the Board's finding that (1) the curriculum did not require the Catholic faith to be emphasized, (2) the University's Board of Trustees was not required to establish policies consistent with the Catholic faith, (3) the University's president and other administrators were lay persons who need not be members of the Catholic faith, (4) faculty members were not required to be Catholic, to teach Catholic doctrine, or to support the Church or its teachings, (5) students could come from any religious background, and no preference was given to Catholic applicants, and (6) undergraduate students, though required to take one course in religious studies, were not required to take a course involving Catholicism.[229]

The D.C. Circuit concluded that the Board's inquiry into the religious character of the University was precisely the sort of "intrusive inquiry that *Catholic Bishop* sought to avoid" and held that the Board therefore lacked jurisdiction.[230] The court noted that "since *Catholic Bishop*, at least a plurality of the Supreme Court itself has rejected 'inquiry into . . . religious views' as 'not only unnecessary but also offensive,' declaring that . . . 'courts should refrain from trolling through a person's or institution's religious beliefs.'"[231] "Here too," the court wrote, "we have the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University."[232] The Board's inquiry boils down to whether the University is "*sufficiently* religious," a question that government has no right or place to ask.[233]

The court characterized the Board's position itself as a potential First Amendment violation:

> To limit the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board . . . , is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause—not to prefer some

227. *Catholic Bishop*, 440 U.S. at 498 (emphasis added).
228. *Univ. of Great Falls*, 278 F.3d at 1338.
229. *Id.* at 1340.
230. *Id.* at 1341.
231. *Id.* at 1341-42 (citation omitted) (quoting Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion)).
232. *Id*. at 1342.
233. *See id*. at 1343.

> religions (and thereby some approaches to indoctrinating religion) to others.[234]

The court concluded that Board jurisdiction is foreclosed where, as here, a university (a) holds itself out as providing a religious educational environment, (b) is organized as a nonprofit, and (c) is affiliated with, or owned, operated or controlled, directly or indirectly, by a religious organization or with an entity, membership of which is determined, at least in part, by reference to religion.[235] The court declined to decide whether the first two factors were sufficient to avoid Board jurisdiction; in this case, it was undisputed that the university was affiliated with a recognized religious organization.[236] This approach, the court decided, "avoids the constitutional infirmities of the NLRB's 'substantial religious character' test."[237]

The right of a church-affiliated organization to decide the constitution of its workforce, including non-ministerial employees, was again recognized in *Montrose Christian School Corp. v. Walsh*.[238] In that case, the Maryland Court of Appeals upheld the right of a church-affiliated school to insist on membership in the church as a condition of employment. Claiming they were terminated because they were not members of the church, three school employees—a teacher's aide, bookkeeper/secretary, and cafeteria worker—sued the school under a county human rights ordinance that forbade discrimination based on religion. The ordinance excepted from its prohibition against religious-based discrimination those persons employed by religious organizations to perform "purely religious functions."[239] Maryland's highest court held that the expressed limitation ("purely religious functions") violated the school's free exercise right to insist that only persons belonging to the church perform its work.[240] Finding the objectionable limitation to be severable from the rest of the ordinance, the court ordered judgment in favor of the school based on what remained of the ordinance's exemption for religious organizations.[241]

Together, *Catholic Bishop*, *University of Great Falls*, and *Montrose Christian School* demonstrate that government intrusion into religious organizations and their relationships with their workforce may sometimes infringe their autonomy even when the plaintiff in interest is not a minister, i.e., even when the ministerial exception per se does not apply. What these cases have in common with the ministerial exception cases, however, is their recognition of the distinctiveness of religious organizations and the constitutional right they enjoy to

234. *Id.* at 1346.
235. *Id.* at 1343, 1347.
236. *Id.* at 1343-44.
237. *Id.* at 1344.
238. 770 A.2d 111 (Md. 2001).
239. *Id*. at 114.
240. *Id*. at 122, 124.
241. *Id*. at 122, 129-30.

constitute and govern themselves free from government interference. The principle is important because, as we shall see,[242] the freedom it is meant to protect is increasingly threatened in new guises.

C. Clergy "Malpractice"

Courts have uniformly rejected claims of clergy "malpractice."[243] For government to impose special duties on persons simply by virtue of their ministerial or ecclesial status would amount to a special disability on religion, a targeting of religion for disadvantageous treatment, which is constitutionally impermissible.[244] Just as government cannot *establish* the qualifications of ministers,[245] it cannot *enforce* ministerial qualifications by providing a remedy when ministers fall short of them. It makes no difference whether the creation and enforcement of ecclesial or ministerial duties is attempted by a legislature or court, for the First Amendment operates as a limitation on government, not just one branch of government.[246]

One might object: should not the duties voluntarily undertaken by ministers or churches be as enforceable as those contracts into which private parties voluntarily enter? In the latter case, the law imposes no duty until one is undertaken. Hence, the objection goes, ministers and churches should likewise be liable for violating the duties they undertake.

The flaw in this argument lies in the different constitutional treatment accorded religious exercise as compared with ordinary civil contracts. The First Amendment does not bar courts from deciding contract questions, but it does prevent them from deciding religious ones.[247] What religious, moral, or ecclesial duties are undertaken by Catholic priests, Presbyterian clergy, Jewish

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242. *See infra* Part V.

243. *See, e.g.,* Richelle L. v. Roman Catholic Archbishop, 130 Cal. Rptr. 2d 601, 608 (Cal. Ct. App. 2003) ("[N]o state or federal court in the United States now recognizes a cause of action for clergy malpractice."); Destefano v. Grabrian, 763 P.2d 275, 285 (Colo. 1988) ("To date, no court has acknowledged the existence of . . . a tort [of clergy malpractice]"); Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994) ("To date, *no court* has acknowledged the existence of a separate cause of action for the malpractice of a clergy member while acting within a clerical capacity."); Greene v. Roy, 604 So. 2d 1359, 1362 (La. Ct. App. 1992) ("There are no jurisdictions in the United States that have established a cause of action for clerical malpractice."); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 911 (Neb. 1993) ("So far as we have been able to determine, no jurisdiction to date has recognized a claim for clergy malpractice."); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 204 (Utah 2001) ("[C]ourts throughout the United States have uniformly rejected claims of clergy malpractice under the First Amendment."); Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1112-13 (2003).

Not a controversial area of law, clergy "malpractice" receives treatment here because of the lessons that may be drawn from it.

244. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993); McDaniel v. Paty, 435 U.S. 618 (1978).

245. Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929). *See* discussion of the ministerial exception *supra* Part III.B.

246. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960). *See supra* notes 159-160 and accompanying text.

247. The *Watson* line of cases is applicable. *See* discussion *supra* Part III.A.

rabbis, and other ministers are ecclesial or religious questions that can be answered only by reference to church law and teaching, not civil authority.[248] If a minister or church enters into a contract to buy a car or guarantee a bank loan, a civil duty arises to the same extent as for any other person as a consequence of a freely made promise. The difference is that such a contractual duty is not defined by one's status as a minister or by church law, religious doctrine, or pastoral practice. By contrast, one cannot sue a minister for failing to discharge duties defined by church law, doctrine or practice, e.g., for bad sermons, poor counsel, badly-led worship, or a misinterpretation of Scripture because the criteria by which one judges a minister's sermon, counsel, liturgical skills, or Scriptural interpretation are decidedly religious and ecclesial, and hence outside the constitutional orbit of government.

Courts presented with a claim of clergy malpractice have rejected it because of the resulting entanglements with, and burden on, religion that would otherwise result. In a frequently cited opinion involving a claim of clergy malpractice against a Presbyterian minister and counselor, a federal district judge concluded that the encroachment on religious exercise presented by such a claim was:

> more than possible. It is real . . . . Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.[249]

The court distinguished other tort claims:

> Defendants concede, as they must, that tort claims can be maintained against clergy, for such behavior as negligent operation of the Sunday School van, and other misconduct not within the purview of the First Amendment, because [such behavior is] unrelated to the religious efforts of a cleric. Claims of [clergy] malpractice stand on a different footing. While the clergy of most denominations do provide counseling to youths and other members of their congregations, when they do so it is normally part of their religious activities; in so doing, they do not thereby become subject to the same standards of liability for professional malpractice which would apply, for example, to a state-licensed psychiatrist or a social worker.[250]

Schmidt's reference to entanglement points to an Establishment Clause prob-

248. *See id.*
249. Schmidt v. Bishop, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).
250. *Id.* at 327 (citations omitted).

lem, but other courts emphasize the free exercise problems that would arise were they to entertain claims of clergy malpractice. In another ministerial counseling case, a court writes:

> [T]he Free Exercise Clause . . . protects not only against the governmental prohibition of bona fide religious practices but also against the governmental secularization of such practices. Legislative or judicial recognition of the so-called tort of "clergy malpractice" would be fundamentally flawed on two counts. First, it would result in secularizing various forms of sectarian religious counseling that are entitled to constitutional protection. Second, it would undoubtedly result in deterring some ministers, priests, and rabbis from engaging in marriage counseling in order to avoid any potential liability for not conforming to standards applicable to licensed psychologists or licensed marriage therapists, or, at the very least, incline them to adjust their counseling method to standards applicable to secular licensed counselors. The resulting effect on the religious counselor's right to engage in bona fide religious marriage counseling, independently of secular standards applicable to licensed professionals, would be all too clear. Such a formidable obstacle to bona fide religious marriage counseling would fly directly in the face of the Free Exercise Clause . . . .[251]

IV. TEN GENERAL PRINCIPLES OF CHURCH AUTONOMY

As *Catholic Bishop*, *University of Great Falls*, and *Montrose Christian School* illustrate,[252] the right of church autonomy is not limited to some defined category of claims, such as intra-church disputes, "ministerial exception" cases, and clergy malpractice. Attempts by government to regulate the teaching, organization, and governance of churches implicate the right of church autonomy even outside those specific contexts.[253]

If protection of church autonomy requires more than just rote familiarity with three specific categories of cases, what general principles should guide courts and other branches of government in recognizing and applying the constitu-

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251. Destefano v. Grabrian, 763 P.2d 275, 290 (Colo. 1988) (Quinn, C.J., concurring) (citations omitted).

252. *See supra* notes 208-241 and accompanying text.

253. Church of Scientology Flag Servs., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993) is yet another example of the wide applicability of the right of church autonomy. The City of Clearwater had enacted an ordinance that would have required the Church of Scientology to disclose detailed financial and other information about itself to the public and to church members. The Eleventh Circuit held that it was constitutionally impermissible for the government to impose its own preferences concerning what information a church should disclose to its members. *Id.* at 1536-37. A civil mandate requiring disclosure of information to church members subtly, yet impermissibly, was held to shift the balance of power from church authorities to church members, an effect that was "as offensive to the Establishment Clause as the delegation of such authority to church leaders that was condemned in *Larkin* . . . ." *Id*. at 1536-37. The facts in *Church of Scientology* did not fall neatly into any one well-known legal category (*Watson*, ministerial exception, or clergy malpractice), but church autonomy nonetheless applied.

tional right of church autonomy? We believe that ten such principles can be derived from the cases we have discussed in Parts II and III.

1. The right of church autonomy is a constraint on all branches of federal, state, and local government. Because the First Amendment is a limitation on government, intrusion into churches is unconstitutional whether accomplished by statute, common law, regulation, executive order, or other means.[254] The Religion Clauses apply to states[255] as well as the federal government. They apply to all branches of government.[256]

2. The government may not single out all religions or churches, or a specific religion or church, for disadvantageous treatment. "In our Establishment Clauses cases," the Court writes, "we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[257] The non-discrimination principle is an unremarkable survivor of *Smith*.[258]

3. The government may not decide the meaning of religious doctrine or resolve disputes that in turn require the resolution of religious questions. This principle is asserted repeatedly in the autonomy cases.[259] On the other hand, numerous liability or property disputes involve churches, and therefore church law. We think the autonomy rules prohibit the courts from imposing on churches a structure, governance, or doctrine they do not accept or impose on themselves. The clearest violation of this rule would be a civil court deciding a hierarchical church is congregational and vice versa.[260] Giving a civil effect to the polity of a church by taking notice of its internal law and doctrine is also consistent with this rule.

4. The government may not impose a standard of care upon churches or ministers as such, e.g., based on what a "reasonable church or minister" would do, or otherwise make judicial or other government decisions that call for a comparison among churches. The government may not "impose special disabilities on the basis of religious views or religious status."[261] Similarly, it may not "regulate[] or prohibit[] conduct because it is undertaken for religious reasons."[262] Hence, ministers and churches per se are not an appropriate subject of government regulation. Attempted regulations of churches or ministers as such

254. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960). *See supra* notes 159-160 and accompanying text.

255. *See Everson*, 330 U.S. at 15 (incorporating Establishment Clause, and confirming decision in *Cantwell*); *Cantwell*, 310 U.S. at 303 (incorporating Free Exercise Clause).

256. *Kreshik*, 363 U.S. 190.

257. Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993), and cases cited therein.

258. *Id.*

259. *See supra* Parts III.A-B.

260. For an example of a decision that rejects an attempt to recharacterize a church's polity, see Concord Christian Ctr. v. Open Bible Standard Churches, 34 Cal. Rptr. 3d 412 (Cal. Ct. App. 2005).

261. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) and cases cited therein.

262. *Church of Lukumi Babalu Aye*, 508 U.S. at 532.

would violate all three prongs of the *Lemon* test[263] and would certainly not survive free exercise scrutiny. As noted above, the non-discrimination principle remains intact even after *Smith*.[264]

5. Religious duties are not civilly enforceable, and no redress may be sought in civil courts for a violation of religious beliefs or deviation from religious practices. Put another way, a religious or ecclesial right, duty, or relationship cannot for that reason alone be the foundation for a legal right, duty, or relationship. Religious beliefs and practices give rise to religious, not civil duties. That a bishop is regarded as a shepherd of his flock, for example, does not give rise to a civil duty (even if it gives rise to a religious or moral duty) to be a good shepherd.[265] Similarly, a church has no civil duty to supervise a priest's vow of celibacy.[266] Plainly government has no business creating or policing ecclesial duties, for that would be to establish a church.[267]

6. Not only final government action, but government processes that necessitate intrusive inquiry into a church's decision making and structure, can burden autonomy. "It is not only the conclusions that may be reached by [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[268] This has important implications because any proceeding against a church, including court-allowed discovery, may impinge upon the right of church autonomy.[269]

7. Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's right of autonomy. The ministerial exception cases are an example of this principle. A court may not interfere with the appointment of clergy, even if an appointment or failure to appoint violates church law, nor may a minister sue his church for

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263. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). It is hard to see what secular purpose would be served by clergy or church regulation, and such regulation would certainly inhibit—and entangle government with—religion.

264. *See supra* note 258. Indeed, a rule of law that imposed special duties upon churches and ministers as such would likely not survive scrutiny under the Equal Protection Clause. Religion itself is a prohibited basis for government classifications, one which triggers strict scrutiny. *See Employment Div. v. Smith*, 494 U.S. at 882; City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (religion is an "inherently suspect" classification). There is no reason, let alone a compelling one, to single out churches and ministers for special duties, and the protections of the Religion Clauses foreclose such attempts.

265. This is demonstrated by, e.g., the clergy "malpractice" cases. *See infra* Part III.C.

266. Roman Catholic Bishop v. Superior Court, 50 Cal. Rptr. 2d 399 (Cal. Ct. App. 1996).

267. Obviously religious and civil duties frequently mirror each other, e.g., the prohibition against killing.

268. NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979). *See supra* note 202 and accompanying text.

269. Of course, a religious organization, like any other, may specify what is to happen to its property through appropriate legal instruments. Jones v. Wolf, 443 U.S. 595, 603 (1979). A purely secular inquiry into a deed, corporate charter, and related documents to resolve a church property dispute is therefore permissible. *Id*. at 604. Courts, however, lack jurisdiction to decide property disputes that would require them to resolve doctrinal questions or scrutinize religious teaching. Thus, *Jones* does not overrule *Watson* and its progeny.

discrimination even if the church has a specific policy *against* discrimination of the sort alleged and the church claims to have relied upon non-religious grounds for its actions.[270] Thus, the absence of a burden on religious belief is not fatal to a church's claim of autonomy, though the presence of such a burden can make the church's claim more compelling.

8. A law that burdens a church's core functions, so as to infringe upon that church's religious self-understanding, infringes upon its autonomy and is not saved by virtue of its general applicability. Employment discrimination laws are an example. Though generally applicable, such laws do not pass constitutional muster as applied to ministers.[271]

9. The government constitutionally may not interfere with church governance, e.g., by "reversing" or otherwise nullifying decisions a church makes about how to govern itself. This follows from the line of autonomy cases beginning with *Watson*.

10. The government may not commandeer a church's treasury, e.g., by "reversing" decisions by a church as to what missionary or charitable work it will pursue and fund. Until the advent of legislative mandates to require coverage of contraceptives,[272] attempts by government to invade a church treasury by requiring the church to pay for specific programs or services inside its own institutions were virtually unprecedented. There is nothing to suggest that the Founders would have thought it permissible to force a church, as a condition of existing and serving its members and others, to pay for programs or services to which the church had a religious objection. If the issue did not arise it was only because government was thought to be limited and no government was considered to have the power to dictate religious choices to religious institutions. To permit such intrusions under formal neutrality would mean that states could meddle in areas where there are known and legitimate religious practices.[273]

A government attempt to control church property and the receipt and expenditure of church funds would violate the constitutional prohibition against establishment and interference with the free exercise of religion. In *People ex rel. Deukmejian v. Worldwide Church of God*,[274] the California Attorney General

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270. *See, e.g.,* Bell v. Presbyterian Church, 126 F.3d 328, 330-33 (4th Cir. 1997) (religious organization's decision to terminate minister, allegedly made for financial rather than religious reasons, was not subject to civil court review). *See supra* notes 203-207 and accompanying text.

271. *See supra* Part III.B.

272. *See infra* Part V.D.

273. *Compare* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (finding that the Establishment Clause does not prevent Congress from allowing a church to refuse to hire non-church members in a church-operated gymnasium), *and* Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 247 F. Supp. 2d 728 (D. Md. 2003) (upholding summary judgment against kosher food supervisor who claimed to be covered by the Fair Labor Standards Act while employed at Jewish elder care facility), *with* Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990) (holding that a private religious school established to provide a "Christian education" is covered by the Fair Labor Standards Act).

274. 178 Cal. Rptr. 913 (Cal. Ct. App. 1981).

sought the appointment of a receiver to, among other things, "insure that money contributed to the [Worldwide] Church [of God] was in fact used for 'God's work.'"[275] The Attorney General "asserted that the Church's property, assets and records were 'public' and that they were always and ultimately in the custody of and subject to the supervision of the courts . . . ."[276] The California Court of Appeal disagreed:

> To state the proposition is to expose its conflict with the constitutional prohibition against the governmental establishment or interference with the free exercise of religion. How the state, whether acting through the Attorney General or the courts, can control church property and the receipt and expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive.[277]

The California legislature's intervention brought the case to a halt,[278] but the proceedings illustrate the danger of making neutrality the linchpin on which autonomy claims rise or fall.

In the next section, we apply these principles to court claims and legislative initiatives that present serious challenges to the continued autonomy of churches.

V. DISPUTED APPLICATIONS OF THE RIGHT OF CHURCH AUTONOMY

A. Breach of Fiduciary Duty

"The term 'fiduciary,' derived from the Latin 'fiduciarius,' originally denoted a trustee"[279] for whom equity imputed a high degree of trust.[280] The notion of a fiduciary obligation, however, "spread from its original homeland in the law of trusts" to subject "a diverse variety of entrepreneurs—directors, partners, agents, employees—to its colonizing sway."[281] As a result of this expansion, fiduciary duty became "the law's blunt tool" for controlling delegated discretion in

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275. *Id.* at 915.

276. *Id.*

277. *Id.* Collection of a tax is distinguishable because it involves how the government spends it own money. *See* United States v. Lee, 455 U.S. 252 (1982). Such cases implicate the government's interest in maintaining the viability of the tax system. *Id.* at 257-60 (stating that the tax system "could not function" if people were allowed to opt out for religious reasons, and that uniform tax collection is "indispensable to the fiscal vitality" of the tax system); *accord* Employment Div. v. Smith, 494 U.S. at 880 (stating that the tax system "could not function" if exemptions were granted).

278. *See Deukmejian*, 178 Cal. Rptr. at 917-18 (noting the enactment of legislation depriving the Attorney General of enforcement authority).

279. ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP 1 (W. Heffer & Sons Ltd. 1995) (1932).

280. The classic formulation of this duty is Judge Cardozo's. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

281. Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 1 (1975); *see also* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1988) (noting that the notion of fiduciary duty operated as a "constraint on a party's discretion").

contexts involving corporate, commercial or property interests.[282] A classic example would be partners and corporate directors who, by virtue of their office, are delegated authority to act on behalf of the partnership and corporation, respectively. In more recent times, the law of fiduciaries has expanded still further to include professional relationships that are regulated by the government, such as physician-patient and lawyer-client, for these professionals, like trustees, are charged by the law with exercising their professional discretion on behalf of their principals.[283]

Obviously there are limits. While there is a tendency to describe fiduciary relationships in terms of "trust" and "confidence,"[284] not all relationships involving trust and confidence create fiduciary obligations.[285] If this were so, the fiduciary obligation would attach to virtually every conceivable familial, personal, and professional relationship, which plainly is not the case. As one commentator suggests, "[a]wareness of the central importance of the element of discretion and of the law's attempt to control this discretion may . . . provide a clue for determining who is and who is not a fiduciary."[286]

Courts frequently reject fiduciary duty claims against churches and ministers for non-constitutional reasons.[287] A slim majority of courts reaching the constitutional issue have concluded that application of fiduciary duty concepts in the church or ministerial context violates the Religion Clauses of the Constitution.[288] The reason typically given is that a fiduciary duty claim would require a

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282. Weinrib, *supra* note 281 at 4.

283. *See, e.g.,* Daly v. Metro. Life Ins. Co., 782 N.Y.S.2d 530, 534-35 (N.Y. Sup. Ct. 2004) (physicians); United States v. Morris, No. Crim.A. 2:03-00275, 2004 WL 1242736 (S.D.W.Va. June 4, 2004) (physicians); Reuben H. Donnelley Corp. v. Mark I Mktg. Corp., 893 F. Supp. 285, 289 (S.D.N.Y. 1995) (citing cases recognizing attorneys and physicians as fiduciaries).

284. *See, e.g., Black's Law Dictionary* (8th ed. 2004).

285. *See* Schmidt v. Bishop, 779 F. Supp. 321, 325 (S.D.N.Y. 1991) ("Despite [the] expansive characterization of the term ['fiduciary'], it is clear that not every confidential relationship . . . involves . . . a 'fiduciary' relationship."), and citations therein.

286. Weinrib, *supra* note 281 at 5.

287. Bryan R. v. Watchtower Bible & Tract Soc'y, 738 A.2d 839, 845-47 (Me. 1999) (rejecting claim of fiduciary duty because it was not fact-specific enough and the church had no "generalized fiduciary duty . . . to protect members of its congregation from other members."); Gray v. Ward, 950 S.W.2d 232, 234 (Mo. 1997) (rejecting claim of fiduciary duty as a recharacterization of other barred claims); L.C. v. R.P., 563 N.W.2d 799, 802-03 (N.D. 1997) (rejecting claim of fiduciary duty as lacking factual basis); Cherepski v. Walker, 913 S.W.2d 761, 767 (Ark. 1996) (rejecting claim of fiduciary duty where plaintiff did not allege that he had entrusted any matter to the alleged wrongdoer, and the claim was "nothing more than a [legislatively abolished] claim for alienation of affection in disguise."); Bladen v. First Presbyterian Church, 857 P.2d 789, 796 (Okla. 1993) (claim of breach of fiduciary duty was really one for injury to marital relationship, which was legislatively barred); Strock v. Pressnell, 527 N.E.2d 1235, 1243-44 (Ohio 1988) (fiduciary duty claim was a claim of alienation of affections in disguise, and "[t]here can be no redress for some claimed tortious act unless the party . . . sought to be charged was guilty of some act that the law regards as wrongful" (quoting STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS, 34, §1:10 (1903))).

288. Dausch v. Rykse, 52 F.3d 1425, 1428-29 (7th Cir. 1994); *Schmidt*, 779 F. Supp. at 326; Amato v. Greenquist, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997); Teadt v. Lutheran Church Mo. Synod, 603 N.W.2d 816, 822-23 (Mich. Ct. App. 1999); Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S.2d 661, 662 (N.Y. App. Div. 2000); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d

judge to define, and in turn measure, a minister's conduct against a standard of care applicable to ministers as such.[289] A breach of fiduciary duty can "only be construed as clergy malpractice, since it would clearly require a determination concerning [the minister's] duties as a member of the clergy," thereby requiring courts to "venture into forbidden ecclesiastical terrain."[290] In such cases, religion is not merely incidental to the plaintiff's relationship with the wrongdoer, but is the foundation for it.[291] The minister-counselee or pastor-parishioner relationship is "inescapably premised upon the cleric's status as an expert in theological and spiritual matters."[292] The fact that the wrongful conduct is not religiously motivated is irrelevant[293] because pastoral and spiritual responsibilities in such a case form the very basis for relief. This fact renders unconstitutional both the proceedings and the relief sought.

Here, most courts have not been, and no court should be, misled by the "fiduciary" label a plaintiff affixes to his or her claims. When a woman alleged that her minister, by engaging in sexual relations with her, had breached a fiduciary duty, a court emphasized that it would consider "the gravamen of plaintiff's . . . complaint, looking beyond the labels" she had used.[294] In reality, the court concluded, the claim was either for seduction, which was legislatively forbidden, or clergy malpractice, which was constitutionally barred.[295] The plaintiff claimed that her minister had misused his position "as *her pastor and counselor*," and that he had a duty to "practice his religious calling in a reasonable, legal and appropriate manner, . . . to refrain from any acts or omissions that would violate his ministerial trust, and to function . . . as appropriate to the role of pastor."[296] All of these allegations put the claim on a

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907, 912 (Neb. 1993); Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 205-06 (Utah 2001).

289. *E.g.*, *Dausch*, 52 F.3d at 1428-29 (affirming dismissal of breach of fiduciary duty claim); *id.* at 1438 (Ripple, J., concurring in part and dissenting in part in the judgment) ("If the court were to recognize such a breach of fiduciary duty, it would be required to define a reasonable duty standard and to evaluate [the minister's] conduct against that standard, an inquiry identical to that which Illinois has declined to undertake in the context of a clergy malpractice claim and one that is of doubtful validity under the Free Exercise Clause."); *id.* at 1429 (Coffey, J., concurring) (agreeing with Judge Ripple's analysis of the fiduciary duty claim); *Schmidt*, 779 F. Supp. at 326 ("[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence. . . . [A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the defendant grossly abused his pastoral role, that is, that he engaged in *malpractice*."); *Schieffer*, 508 N.W.2d at 912 (agreeing with the reasoning of *Schmidt*).

290. *Langford*, 705 N.Y.S.2d at 662; *Teadt*, 603 N.W.2d at 823.

291. *Amato*, 679 N.E.2d at 454.

292. *Id.*

293. *Id.* ("[W]e would consider unlikely the Pastor's ability to establish that his behavior in this case," namely, a sexual relationship with a counselee, "was religiously motivated," but the fiduciary duty claim was barred nonetheless).

294. *Teadt*, 603 N.W.2d at 821.

295. *Id.* at 821-23.

296. *Id.* at 822 (emphasis added).

par with clergy malpractice and, therefore, like clergy malpractice, it was constitutionally barred.[297]

In another case,[298] a child molested by a peer claimed that his minister and church owed the victim a fiduciary duty which the church defendants breached by advising him to "forgive and forget" and by referring him for counseling to someone who claimed to be, but was not, a psychologist. This fiduciary duty claim, an appeals court concluded, was "simply an elliptical way of alleging clergy malpractice."[299] "[B]ad advice" from a minister is not actionable.[300] The courts could not decide such claims

> without first ascertaining whether the [church] [d]efendants performed within the level of expertise expected of a similar professional, i.e., a reasonably prudent bishop, priest, rabbi, minister, or other cleric in this state. . . . Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics . . . which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions. . . . This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause.[301]

Defining a standard of care applicable to all ministers would require regulation of ministers simply by virtue of their ministerial status. To impose a fiduciary duty upon clergy based on ministerial status and ecclesial duties appears to be no different from imposing upon ministers professional duties breach of which will give rise to an action for malpractice.

Courts which have *allowed* fiduciary duty claims against ministers and churches usually do so because the wrongful conduct was not part of the defendants' religious beliefs or practices or does not require interpretation of religious doctrine.[302] Since fiduciary duty claims arise out of sexual or other misconduct between minister and counselee/parishioner, the conduct complained of is rarely, if ever, religiously motivated. If the absence of grounding in specific religious beliefs or practices were sufficient to permit a claim of fiduciary duty, those claims (and, indeed, many others) would not be barred. Claims for racial discrimination under Title VII or clergy malpractice would similarly be permissible, at least when no defense was predicated on religious

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297. *Id*. at 822-23.

298. Franco v. Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001).

299. *Id.* at 205 (quoting Dausch v. Rykse, 52 F.3d 1425, 1438 (7th Cir. 1994) (Ripple, J. concurring in part and dissenting in part)).

300. *Franco*, 21 P.3d at 205-06.

301. *Id.* at 205-06.

302. *See, e.g.,* Moses v. Diocese of Colo., 863 P.2d 310, 320-21 (Colo. 1993); Destefano v. Grabrian, 763 P.2d 275, 283-84 (Colo. 1988); C.B. v. Grammond, No. Civ. 01-1316-AS, 2002 WL 31441219 (D. Or. April 18, 2002).

belief or church doctrine. The fact that such claims are not permitted demonstrates, as reflected in principles discussed earlier,[303] that absence of religious motivation is not fatal to a constitutional defense of church autonomy. The possibility that such claims might be reviewed without interpreting religious doctrine does not overcome the constitutional hurdle. It follows that if fiduciary duty claims are *not* constitutionally barred, it must be for reasons *other* than those most often given by the courts.

Courts have generally suggested only one other reason for allowing fiduciary duty claims—namely, that the plaintiff *in fact* reposed trust in the minister and church.[304] Is this reason sufficient to permit a fiduciary duty claim and to overcome the constitutional objection? Careful consideration of two cases may help answer the question.

Moses concerned the case of a woman who had a sexual relationship with the Episcopal minister who was counseling her.[305] The counselee's husband disclosed the affair to the bishop and sought his intervention.[306] The bishop told him that he would resolve the problem, and told the counselee that she should keep the matter in confidence.[307] She later sued the minister and the bishop for breach of fiduciary duty.[308] The jury was instructed, without objection, to consider whether the plaintiff's repose of trust was "justified," whether the plaintiff was "relying on" the bishop "to look out for her interests," and whether the bishop "invited, accepted, or acquiesced in" her trust.[309] The jury returned a judgment in favor of the plaintiff and against the bishop. An appeals court affirmed, holding that the bishop "held a position of authority in the church and had the power to resolve conflicts in the church."[310] The bishop's role in meeting with the plaintiff, the appeals court concluded, was "as a counselor" to her.[311] The plaintiff believed that the bishop "had the power to decide if she would lose her salvation," and therefore felt constrained to follow his advice.[312] There was evidence, the court wrote, that the bishop undertook "to resolve the problems" the plaintiff presented to him.[313] "Once a member of the clergy accepts the parishioner's trust and accepts the role of counsellor," the court

303. Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's claim of autonomy. *See supra* note 270 and accompanying text.

304. *Moses*, 863 P.2d at 322-23.

305. *Id.* at 314.

306. *Id.* at 316-18.

307. *Id.* at 316.

308. *Id.* at 314.

309. *Id.* at 322 n.14.

310. *Id.* at 322.

311. *Id.*

312. *Id.*

313. *Id.* at 322-23.

concluded, "a duty exists to act with the utmost good faith for the benefit of the parishioner."[314]

In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*,[315] the plaintiff claimed that the diocese owed him a fiduciary duty to investigate reports of sexual abuse of other persons by a Father Laurence Brett, who had allegedly sexually abused the plaintiff, and to inform the plaintiff of his injuries, the memories of which he was said to have repressed. A federal appeals court upheld an award of damages against the diocese, concluding that the jury reasonably could have found that it owed the plaintiff a fiduciary duty based on the following evidence:

- The plaintiff attended a diocesan high school where he was taught by priests employed by the diocese.
- The plaintiff had been among a "small group of boys interested in liturgical reform in the Catholic Church," a group to which Brett had acted as "mentor and spiritual advisor," and thus had a "special and privileged relationship" with Brett.
- Plaintiff "was taught in grade school catechism classes and there-after to trust and respect the bishop of the diocese; he considered the bishop his caretaker and moral authority."
- Plaintiff's parents allowed him to participate with Brett "in church-sponsored and extracurricular activities because they trusted Brett inasmuch as he was a priest."
- Brett spent "more time" with the group of boys of which plaintiff was a part than with others, and this group and Brett went for "dinners, ice cream, and on walks, and rode around in his car together." These contacts, the court said, were known to the diocese.
- The diocese encouraged Brett to work with youth. His responsibility for "conducting the activities of the Diocese's Catholic Youth Organization, which sponsored weekly social and educational activities for high school parishioners, was widely known."
- The diocese knew Brett escorted boys on church field trips.
- The diocese received report of abuse involving other young victims which, upon investigation, it learned to be true.[316]

This was enough, the appeals court concluded, to support the jury's finding of

314. *Id.* at 323. *But see* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1838 (2004) (sharply critical of the *Moses* decisions on both the facts and the law, and noting that "it is . . . easy to see, if one is willing to look, that the bishop did not hold himself out as [the plaintiff's] counselor, nor did he represent that he was acting in her interest rather than the institutional interests of the church . . . .").

315. 196 F.3d 409 (2d Cir. 1999).

316. *Id.* at 429-30.

a fiduciary relationship between the plaintiff and diocese.[317] The court rejected the diocese's First Amendment objection because the jury had not been asked to consider the validity of any religious teaching or to enforce church law.[318] The jury had been asked, in the court's view, only to decide whether a relationship of trust and confidence existed between the plaintiff and the diocese.[319]

A close reading of *Moses* and *Martinelli* suggests that fiduciary duty claims against ministers and churches implicate at least two principles of church autonomy: that (1) a religious or ecclesial right, duty, or relationship cannot be the foundation for a legal right or duty, and (2) the government may not impose a standard of care upon churches or ministers as such. Moses's claim that the bishop owed her a fiduciary duty seems to arise wholly from his status as bishop and his representation that he would resolve the problem.[320] If episcopal status and representations of this type are sufficient to create a fiduciary duty on the part of a bishop, however, any bishop or religious superior will be a fiduciary simply by virtue of pastoral acts directed toward church members. This conclusion cannot be squared with the Constitution because it turns episcopal offices and standards into civil ones.[321]

Martinelli's claim appears to suffer from a more serious defect, as suggested by the evidence upon which the appeals court relied. The plaintiff (a) attended a Catholic high school, (b) had been part of a group of young persons interested in liturgical reform, a group headed by the alleged abuser, (c) had been taught to trust his bishop, and (d) had participated in church-sponsored social activities.[322] In essence, the plaintiff did what many of his co-religionists do: he participated seriously in the religious and social life of his church. In other words, though the appeals court claimed to avoid the question of whether the diocese owed a fiduciary duty to Catholics within its ecclesial borders, the court's finding of a fiduciary duty depended on the plaintiff's participation as an ordinary congregant in the life of his church.[323] The unremarkable facts upon which the court relied suggest that nothing more than the usual pastoral solicitude a church shows its members will create a fiduciary duty. If, however, the trust and confidence that church members place in their religious institutions by virtue of attending and participating in church services and activities were *civilly* enforceable, then courts could do what no branch of government can do, namely, turn moral, ecclesial and religious duties into civil ones.[324]

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317. *Id.* at 430.

318. As we have seen, this is an insufficient reason to reject a constitutional defense to a fiduciary duty or any other claim. *See supra* notes 270, 303 and accompanying text.

319. *See Martinelli*, 196 F.3d at 430-31.

320. *Moses*, 863 P.2d at 322-23.

321. In addition, use of fiduciary duty in this context has no secular counterpart and is therefore discriminatory. Lupu & Tuttle, *supra* note 314, at 1844.

322. *Martinelli*, 196 F.3d at 429-30.

323. *See* 196 F.3d at 429 (expressing no view on whether the diocese owed a fiduciary duty to "all of its parishioners").

324. *See supra* notes 265-267 and accompanying text.

The notion that ministers and religious leaders are fiduciaries for everyone in their denominational fold is not only contrary to the law of fiduciaries and constitutionally problematic, but also contradicts common sense.[325] Ministers and religious leaders generally do not choose the people who worship in their churches.[326] People are free to associate with and belong to any religious denomination they choose. There is no proposition of law that would make a minister a fiduciary of everyone who enters or becomes a member of his church, just as there is none that would make the head of a secular association a fiduciary of each and every member of the association.

Of course, a physician, lawyer, or other regulated professional cannot use ministerial status as a defense to fiduciary duty claims that are based on the physician-patient, lawyer-client, or other professional relationship that the government properly regulates.[327] But the minister who holds himself out *as a minister*, the bishop who holds himself out *as a bishop*, the rabbi who holds himself out *as a rabbi*—they do not assume civil duties by virtue of having assumed religious ones. Medicine and law are professions to which courts have imputed fiduciary obligations, but based on undertakings with patients and clients, not one's status as a professional. Moreover, as secular professions, the government can legitimately (and constitutionally) regulate them in the first place. As we saw in cases of clergy malpractice, this is not true of clergy and churches. To hold otherwise would give the government the power to define and enforce religious or ecclesial duties, which, constitutionally, it may not do.

In considering what it deemed evidence of a fiduciary relationship, the court in *Martinelli* seems remarkably unperturbed by reliance upon religious teachings that hold a bishop to be a "shepherd" of his flock.[328] The court likened its consideration of such teachings to rules of hearsay, in which a statement is admitted into evidence not for the truth of the assertion, but to prove some other fact.[329] What the analogy overlooks is that when the character of a religious

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325. Courts and commentators have rejected the notion that a church is a fiduciary of each member of its congregation. *See* Bryan R. v. Watchtower Bible and Tract Soc'y, 738 A.2d 839, 847 (Me. 1999) (church had no "generalized fiduciary duty . . . to protect members of its congregation from other members."); *see also* Lupu & Tuttle, *supra* note 314, at 1834-45.

326. *See* Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897, 1911 (2004) ("[B]ishops do not pick the members of their congregation . . . . Ordinarily it is the other way around; that is, people choose a church and may remain in a church short of conduct grave enough to cause the church affirmatively to excommunicate them, a rare penalty. A bishop cannot personally know and be a fiduciary for each and every member of his diocese, based solely on membership and participation in ceremonies.").

327. Here it is necessary to distinguish between personal and institutional liability. The two questions should not be conflated. *But see* Doe v. Evans, 814 So.2d 370, 375 (Fla. 2002) (conflating these two distinct questions). If the state regulates secular counselors, and a minister holds himself out as a secular counselor and causes an injury in connection with his counseling, the minister's undertaking does not necessarily reflect an undertaking on the part of the church with which he is affiliated or employed to perform ministerial duties. If, on the other hand, a church operates a medical, psychiatric, or legal clinic, the clinic can be held to the same professional standards as any other.

328. 196 F.3d at 430-31.

329. *Id.* at 431.

leader's office is admitted into evidence, the applicability of a *secular* standard is made to depend upon an *ecclesial* one. In this case, the evidence was whether the defendant invited, and the plaintiff reposed, trust in the bishop *as shepherd of his flock*. The bishop, after all, had not held himself out as an investment counselor or psychiatrist to a specific individual. He had held himself out as a bishop to a congregation through the rites and rituals of worship. Hence the reasonableness of his actions, the scope of his pastoral obligations, the reasonableness of the plaintiff's expectations—all of these were defined only by the bishop's and plaintiff's common faith. Other religions may define obligations and expectations for their own religious leaders differently. To hear evidence about the character of a religious office, and to impose and enforce civil duties upon religious leaders based on those characteristics, is an unconstitutional governmental interference in religion.

One might counter that religion is not being legally enforced, only the trust that flows from it. As we have seen, however, not every relationship of trust and confidence is a fiduciary relationship.[330] Apart from corporate, commercial and property contexts, only professions regulated by the government are generally subjected to fiduciary duties.[331] Religious ministry is not a profession that government may regulate, as demonstrated by the clergy malpractice cases. The trust placed in a minister because of his ministerial status is not something government may police. Holding clergy to a particular *civil* standard of care by virtue of the trust and confidence placed upon them *as clergy* would thus appear to be as constitutionally impermissible as the clergy malpractice claims to which they are akin.[332]

B. Negligent Hire

The tort of negligent hiring avoids the most obvious problem associated with fiduciary duty claims; it does not appear to elevate religious or moral duties to civil ones, or impose upon ministers and churches a civil duty by virtue of an ecclesial office or relationship. A claim of negligence in the selection of a minister poses a different problem. Such claims, based on civil standards of general application, require churches to apply and follow government criteria in the selection of their ministers. For those familiar with the ministerial exception[333] and the *Watson* line of cases,[334] that proposition immediately raises a red flag.

The criteria churches use to select ministers are not easily compared to the

330. *See supra* notes 284-286 and accompanying text.

331. *Id.*

332. One final error in *Martinelli* concerns the scope of the claimed fiduciary relationship. A fiduciary is only civilly responsible for matters he undertakes on behalf of his principal. He does not become an absolute guarantor of his principal's health and well-being. A lawyer, for example, is only responsible for the matters within the scope of his representation. A religious leader may invite trust precisely as a religious leader, but we question whether that "fiduciary" relationship extends to a generalized undertaking to protect people from criminal sexual conduct.

333. *See supra* Part III.B.

334. *See supra* Part III.A.

hiring criteria of commercial employers. In the Christian tradition, for example, ministry is a vocation or calling.[335] Though human agency is essential, most Christians believe a call to ministry or other vocation comes from God.[336] Strictly speaking, ministers are not "hired" as that term is usually understood. To speak of the hiring or negligent hiring of a minister is to use the language of civil law in a context to which it is ill-suited.

In secular terms, such pivotal figures in the life and faith of the Christian Church as Paul, who actively persecuted Christians before his conversion, would appear to be an irresponsible choice of apostle and missionary. Jesus' own selection of the Twelve Apostles defies secular convention.[337] One can only speculate about the consequences for the shape of the nascent Church had it been forced to conform to modern secular criteria in selecting its leaders and other ministers. Paul and others would never have survived the cut. Government licensing of clergy to fit secular criteria is something the First Amendment was intended to forbid.[338] Up to the time of the Founders, there had been historic conflicts between government and church, resulting in entire eras during which government leaders were actually choosing church leaders.[339] It was in this

335. Discernment of a vocation can involve not only the applicant, but varying levels of authority within a church and nuanced theological and prudential judgments about the applicant and his or her fitness for ministry. *See, e.g.,* Presbyterian Church USA, *A General Guide to the Facts About the PCUSA*, http://www.pcusa.org/101/101-minister.htm (last visited Dec. 5, 2005) ("A person who feels called by God to be a Presbyterian minister . . . begins by expressing that desire to a church's Session (governing board) . . . . If the Session agrees, the request proceeds to the Committee on Preparation for Ministry of the church's presbytery (regional governing body). There follows an 'inquiry' period, during which the person explores the implications of becoming a minister together with the Session and the presbytery committee. The inquiry phase normally lasts two years. Its purpose is to determine the person's suitability for ordination as a Minister . . . . [¶] At the end of this phase, the inquirer must demonstrate personal faith, a sense of self-understanding, an understanding of the Reformed tradition, what it means to be Presbyterian, and an understanding of the task of being a minister. If the presbytery is satisfied, the person becomes a 'candidate' for ministry. During this phase, full and intensive preparation occurs under scrutiny of the Session and the Committee on Preparation for Ministry. [¶] [C]andidates must pass national exams that demonstrate their competence in the fields of theology, Bible . . . , church polity, and worship and Sacraments. [¶] The candidate is examined by the Committee on Preparation for Ministry and, after presenting a personal statement of faith and preaching a sermon, by the presbytery itself. If the examination is sustained and the candidate receives a valid call to ministry, the presbytery ordains him or her to the office of Minister . . . .").

336. *E.g.*, *Acts* 1:15-26 (emphasizing God's role in the selection of Judas's successor).

337. The Twelve included a tax collector (and hence a collaborator with Roman authority). *See Mark* 2:14; *Matthew* 9:9. One of the Twelve betrayed Jesus for money. *See Matthew* 26:15. Another-6086μthe "rock" (*Matthew* 16:18)-6086μmisunderstood an essential aspect of his mission (*Mark* 8:32-35) and denied knowing him. *Mark* 14:66-72. At a crucial moment, his inner circle slept. *See Mark* 14:32-42. Upon his arrest, all fled. *See Mark* 14:50. Judged by human standards, this was not an impressive group and to demand that it be so would be perhaps to miss the point. *See, e.g., Luke* 5:32 (stating that Jesus came "to call . . . sinners."). Patrick Schiltz makes much the same point. Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 969 (2003) (noting that the likes of St. Augustine, as well as Martin Luther King, would be deemed unsuited for ministry if one adverts to their human flaws).

338. *See* Lupu & Tuttle, *supra* note 314, at 1847 (noting that "hostility to government licensing of clergy is an important part of the historical legacy of the Constitution's religion clauses").

339. *See supra* note 33.

context that the Founders decreed that church and government should operate within their respective spheres, each free of constraints imposed by the other.

With the distinction between a church's selection of ministers and a secular enterprise's hiring of employees firmly in mind, we can turn to the specific reasons modern courts give for allowing or disallowing negligent hiring claims against churches. Most courts allowing such claims against churches have done so for reasons that are demonstrably inadequate.

1. The most common reason given for concluding that judicial review of a church's hiring decisions is not barred is that the misconduct is not religiously motivated.[340] This is an insufficient reason to reject a constitutional defense. If lack of religious motivation were enough to defeat such a defense, courts could decide discrimination claims by ministers, or clergy malpractice claims by third parties, which constitutionally they may not.[341]

2. Some courts reason that the First Amendment does not grant religious organizations absolute immunity from tort liability, which is true but begs the question of when such organizations *are* immune from tort liability and whether liability is appropriate under the precise circumstances of the case under review.[342] We do not argue for blanket immunity.

3. Other courts employ the familiar *Reynolds* distinction[343] between belief and acts.[344] This begs the same question because it neither considers when conduct *is* constitutionally protected nor fairly distinguish those circumstances from others. A constitutional guarantee of free *exercise* of religion protects conduct against government intrusion. The belief/acts distinction only skirts the problem. It does not address when, how, and why conduct is subject to judicial scrutiny.

4. Still other courts reason that negligent hiring claims require no inquiry into religious beliefs.[345] If this were true, it would still be insufficient to prove justiciability.[346] Under such reasoning, many employment discrimination claims by ministers could be decided by courts, at least when the defending church *agrees* that it does not discriminate on the basis alleged by the plaintiff and/or

340. *See, e.g.,* Malicki v. Doe, 814 So. 2d 347, 354, 360-61 (Fla. 2002) (free exercise is not implicated unless conduct is "rooted in religious belief"); *Amato*, 679 N.E.2d at 450 (no free exercise burden because "the church defendant does not claim that the alleged sexual misconduct of its minister was part of its religious beliefs or practices or was in any way sanctioned by the church." (quoting Bivin v. Wright, 656 N.E.2d 1121, 1124 (Ill. App. Ct. 1995))); *Destefano*, 763 P.2d at 283-84 (free exercise applies only if the conduct was part of religious belief and practice).

341. *See* Parts III.B-C.

342. *See, e.g., Moses*, 863 P.2d at 319. The cases often fail to distinguish, for example, among types of employees (e.g., ministers versus non-ministerial employees). *See, e.g., Malicki*, 814 So.2d 347.

343. Reynolds v. United States, 98 U.S. 145 (1879). *See supra* note 73 and accompanying text.

344. *Moses*, 863 P.2d at 319.

345. Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323 (Colo. 1996).

346. Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's claim of autonomy. *See supra* note 270 and accompanying text.

asserts non-religious grounds for its decision. We know from our previous discussion[347] that this is not the case.

The claim that judicial review of negligent hiring claims requires no inquiry into religious beliefs or practices also seems questionable in the first instance. Whether a hire was negligent depends on whether an employer exercised a specified standard of care in hiring an employee. Applied to churches, that would seem to call for evidence of what various levels of authority within a church *actually* do when the church selects someone for ministry, and why. The process a church undertakes with respect to determining fitness for ministry will then be measured by a jury or other fact finder against a secular (in other words, court-imposed) standard. This cannot be done without trolling through a church's religious beliefs and practices.

Such power in the hands of a jury or judge is constitutionally suspect. If the government, through the mechanism of a jury or judge, can measure internal church processes by secular standards, it will in effect have substituted its own criteria for those of the church. Paul need not apply. Judged by secular standards, his past should have barred him from ministry. If "the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion,"[348] as we know to be true in the context of the ministerial exception and clergy malpractice,[349] how can it be said that government has the power through the tort system to impose its own standards on a church's selection of its own ministers?[350]

The notion that government has no business imposing civil standards in the selection of ministers gains greater credence when one considers the likely reaction if *other* (non-judicial) branches of government were to attempt the same thing. No one claims, for example, that a state legislature has the power to subject clergy per se to the jurisdiction of a licensing or regulatory board.[351] A government agency has no power to license people for ministry; it cannot require ministers and those preparing for ministry to undergo government tests or meet government criteria as a condition of engaging in ministerial work.[352]

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347. *See supra* notes 203-207 and accompanying text.

348. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996).

349. *See supra* Parts III.B-C.

350. This has grave implications for the church's ability to transmit its vision. *See* Lupu & Tuttle, *supra* note 314 at 1809 ("State interference with the selection of [church] leaders thus implicates the religious community's method of transmitting its vision and cannot help but alter the content of the vision itself.").

351. "Although the matter has never come up directly, no one would doubt that the First Amendment precludes the state from instituting a system of licensure for the clergy. To do so would, in effect, impose a prior restraint on those who preach and give the state control, through criteria of education, character, or otherwise, over those who would speak in the name of a religious community." *Id.* at 1809-10.

352. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943). By contrast, China regulates worship and punishes persons who engage in unauthorized religious worship. Li v. Gonzales, 420 F.3d 500, 505-06 (5th Cir. 2005), *opinion vacated,* 429 F.3d 1153 (5th Cir. 2005). However, "[p]rosecution for violating laws of general applicability does not constitute persecution, unless the punishment was motivated by

The tort system is nothing less than such a licensing scheme on a grander scale. Allowing judicial relief to be sought by private parties for violation of a tort standard is tantamount to imposing and enforcing a *government* standard, no different in principle from imposing and enforcing standards of a legislature or regulatory board. But, as we have seen, if one branch of government is constitutionally forbidden to erect such standards, so are the others.[353] Courts, no less than legislatures, are bound by more than a century of precedent which holds that the government may not decide the qualifications for religious office and ministry.[354]

There is no question that a person who wishes to practice psychology, social work, law, or medicine must satisfy criteria the government establishes for the practice of those professions. This is so even if the licensee happens to be a minister. However, the government may not require a minister to meet certain requirements to carry on ministry or determine who is or is not suitable for ministry. That is because, as the ministerial exception cases demonstrate, it is not the business of government to regulate the selection of ministers. And if the executive branch may not do that, neither may the courts, for they are subject to the same constitutional constraints as other branches of government.[355]

Unlike the selection of an employee by a secular enterprise, the act by which a person is chosen for ministry is not, strictly speaking, understood as an act of "hiring" but of discernment and judgment that draw deeply upon religious criteria. These criteria, in turn, vary from one denomination to another. For example, "Baptists teach that the local congregation should have the authority to choose and ordain its own ministers . . . ."[356] Similarly, in the United Church of Christ, local congregations decide for themselves whether to call a particular person to be a minister.[357] In the Quaker faith, the local congregation, called a "meeting," selects one of its members for any special service the congregation needs.[358] Decisions are not made by debate as in a business setting, but by expectant waiting together for the Spirit to reveal God's will.[359] In other

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[race, religion, nationality, membership in a particular social group, or political opinion] and the punishment was sufficiently serious or arbitrary." *Id.* at 508.

353. *See generally* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (forbidding the New York legislature from making laws to dispose of church property, and courts from ruling on who should have the right to use church property) and discussion *supra*, notes 159-160 and accompanying text.

354. *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929); Watson v. Jones, 80 U.S. 679, 728-29 (1872).

355. *See, e.g.,* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960).

356. William H. Brackney, *Doing Church Baptist Style: Documents for Faith and Witness*, www.baptisthistory.org/pamphlets/congregationalism.htm (last visited Dec. 7, 2005).

357. The Constitution and By-Laws of The United Church of Christ, art. 5, ¶ 18, *available at* http://www.ucc.org/aboutus/constitution.pdf ("Nothing in this Constitution . . . shall be construed as giving the General Synod . . . the power to abridge or impair the autonomy of any Local Church in the management of its affairs, which affairs include . . . the right to . . . call or dismiss its pastor or pastors by such procedure as it shall determine.").

358. *See, e.g.,* FAITH AND PRACTICE OF NEW ENGLAND YEARLY MEETING OF FRIENDS (1986).

359. *Id.* at 221.

denominations, such as the Roman Catholic faith, the selection of a pastor is made by a bishop, but church law contemplates consultation with others, including other priests and members of the laity.[360] Thus, there is little to distinguish a claim of negligent "hire" from a judicially barred claim of negligent "call" or "ordination."[361]

Any legal theory that sought to impose a standard of liability for "negligent hire" in the church context would have to face these denominational differences without favoring or disfavoring any particular denomination, without disfavoring religion generally, and without making it impossible for churches to select their own ministers by imposing a uniform secular model. In the case of the unincorporated church that followed a congregational model, for example, would each and every member of the church be personally liable for a "negligent hire?" In the case of a hierarchical church, would a bishop and everyone he consults be responsible for a "negligent" assignment of a pastor?

These difficulties surface in the opinions of a number of courts that have rejected negligent hiring claims against churches. Responding to the charge that a church had a "duty to admit only qualified candidates into the priesthood," one court concluded that the First Amendment "prevents the courts . . . from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices."[362] Another court wrote "[q]uestions of hiring . . . of clergy necessarily will require interpretation of church canons, and internal church policies and practices."[363] The court went on to state that, "any inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion."[364] Still another noted that "[q]uestions of hiring [and] ordaining . . . clergy . . . necessarily involve interpretation of religious doctrine, policy, and administration."[365]

On balance, the reasons for rejecting claims of negligent hire against churches are more persuasive and probing than the reasons some courts have given for allowing them. While legislatures, executive branch agencies, judges, and juries

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360. Codex Iuris Canonici c.524 (1983) ("A diocesan bishop is to entrust a vacant parish to the one whom he considers suited to fulfill its parochial care, after weighing all the circumstances and without any favoritism. To make the judgment about suitability, he is to hear the vicar forane and conduct appropriate investigations, having heard certain presbyters and lay members of the Christian faithful, if it is warranted.").

361. Hogan v. Roman Catholic Archbishop, No. 02-1296, slip op. at 15-16 (Mass. Super. Ct. Feb. 18, 2003) (Sweeney, Associate Justice). "The ordination of a man into the priesthood and his removal from it are purely ecclesiastical matters that are not subject to judicial scrutiny." *Id.* at 15. The "wrongful ordination" claim in *Hogan* was therefore dismissed for lack of subject matter jurisdiction. *Id.*

362. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 783, 790 (Wis. 1995).

363. Isely v. Capuchin Province, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995).

364. *Id.*

365. Gibson v. Brewer, 952 S.W.2d 239, 246-47 (Mo. 1997).

may not second guess a church's selection of a minister[366] or use secular criteria in making and evaluating ministerial selections, imposing liability for the negligent hire of a minister makes this kind of impermissible government interference virtually inevitable. Simply put, it is not the business of government to dictate who ministers. In the end, the principle of limited government and the constitutional guarantees of free exercise of religion, association and speech counsel rejection of the tort of negligent hiring as applied to churches and ministers.[367]

C. Supervision Claims

As the preceding section demonstrates, the selection of ministers is not a prerogative of government. May a church, then, be required to satisfy a government command that a church supervise its ministers in some prescribed manner? The question is difficult and the answer not obvious. Recognizing a claim of negligence in the supervision of a minister creates a risk of imposing upon the church, and upon the relationship between minister and church—what elsewhere has been called the lifeblood of an organized church[368]—a structure that may be inimical to it. One court has suggested that imposing secular duties and liabilities with respect to ministerial supervision would "infringe upon [the church's] right to determine the standards governing the relationship between the church, its bishop, and the parish priest."[369] On the other hand, when a minister has seriously harmed others, and the church knows of a continued and substantial risk that he or she will seriously harm others again, there are societal interests in allowing recovery against the church whose failure to prevent the known risk may have created an opportunity for additional harm.

There are, however, unique problems in imposing a "negligent supervision" template on churches. For one thing, it may be difficult in many cases to identify a "supervisor" in the strict sense of the word. Some churches are hierarchical in structure, others congregational. Is the congregation that calls a minister itself responsible for "supervising" him? If the congregation is unincorporated, do the pockets of each and every member of that congregation become subject to a lawsuit? If not, does this rule rest only on hierarchical churches?[370] Even in a hierarchical church structure, imposing any kind of "negligent supervision" standard risks imposing a secular duty for the kind of oversight

366. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929); Watson v. Jones, 80 U.S. 679, 728-29 (1872). *See* discussion *supra* notes 141-153 and accompanying text.

367. The same principles that counsel rejection of negligent "hire" claims involving ministers should also bar negligent "retention" claims. The latter is simply the flip side of the former, with the underlying issue (who may minister for a church) being the same.

368. McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972).

369. Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 445 (Me. 1997); *see also* Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005) (declining to overrule *Swanson*, but allowing negligent supervision claim against church on other grounds).

370. *Cf.* Larson v. Valente, 456 U.S. 228, 244 (1982) (the "clearest command" of the Establishment Clause is that one religious denomination not be preferred over another).

and day-to-day supervision that the law expects of supervisors in a commercial setting. The imposition of secular supervisory duties carries a risk of subtly (or not so subtly) altering a church's internal structure. A number of courts have concluded that even allowing such a deep probe into the allocation of power within a church would indeed violate the First Amendment.[371]

These problems are compounded when one considers what a claim of negligent supervision actually entails. Such claims traditionally require proof that an employer knew or "should have known" of a risk that an employee could cause harm in the conduct of the employer's work, and should have fired or better supervised the employee to avoid the risk. Given wide differences in church polity and discipline,[372] the constitutional problems with uniformly applying these principles to church leaders and church entities are manifold, running the serious risk of forcing churches to abandon what in many cases are centuries-old (indeed, many would say divinely ordained) ecclesial structures.

Confronted with the complex problems presented by negligent supervision claims against churches, courts often revert to a now-familiar recitation of reasons:

1. It is often said that such claims are not constitutionally barred because the minister's misconduct was not religiously motivated.[373] As we have seen,[374] this is an insufficient basis to reject a constitutional defense. Most churches do not engage in religiously motivated race discrimination, for example, but no minister has ever been allowed to sue his church based on a claim that it "fired"

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371. *Swanson*, 692 A.2d at 444 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976)); Gibson v. Brewer, 952 S.W.2d 239, 247-48 (Mo. 1997), and cases cited therein.

372. Just as there are denominational differences in the selection of ministers, *see* discussion *supra* notes 356-361 and accompanying text, there are significant differences with respect to ministerial oversight and supervision. In the Methodist Church, for example, a bishop has no authority for day-to-day supervision over clergy, who are deemed independent ministers under Methodist theology. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, ¶¶ 270-534 (1992). In the Roman Catholic faith, permanent removal from an ecclesiastical office requires the action of an ecclesiastical court. Codex Iuris Canonici c.192-95, 221, 1321, 1342, 1407, 1608, 1628-40, 1717-31, 1740-47.

Of course, these are not business decisions, but articles of faith. "It may be acceptable for courts to find that a business entity should have structured its business to provide more supervision or different supervision over its employees. It is another thing entirely for courts to hold that a group of people who have voluntarily associated with each other to exercise their common faith must adopt a supervisory model selected by a jury or be found liable for failing to do so." Brief for Bishop Joseph John Gerry as Amici Curiae Supporting Respondent at 11-12, Rees v. Watchtower Bible & Tract Society, No. CUM-98-531 (Me. Sup. Jud. Ct. Dec. 16, 1998).

Even to permit a jury to decide the extent of a defendant's authority presents serious constitutional problems. Such a determination would require a jury to evaluate conflicting testimony about the relationships within the church and decide how the church should interpret or apply its own teachings.

373. *E.g.*, Malicki v. Doe, 814 S.2d 347 (Fla. 2002) (allowing negligent supervision claim where religious organization did not allege that tortious conduct was undertaken to further a sincerely held religious belief); Bivin v. Wright, 656 N.E.2d 1121 (Ill. App. Ct. 1995) (allowing negligent supervision claim on ground that, among other things, "the church defendant does not claim that the alleged sexual misconduct of its minister was part of its religious beliefs or practices"); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (allowing negligent supervision claim and holding that free exercise applies only if the defendant can show its conduct was part of religious belief or practice).

374. *See* Part III.B. and discussion *supra* note 270 and accompanying text.

him because of his race. Government action need not burden a specific religious belief or practice, or require interpretation of church doctrine, to violate a church's right of autonomy.[375]

2. It is said that clergy cannot use the First Amendment as a shield from tort liability in all circumstances.[376] As noted in our discussion of negligent hiring,[377] this is true but begs the question of when religious organizations may be liable under the precise circumstances of the case under review.[378] We do not argue for blanket immunity.[379]

3. It is said that negligent supervision claims can be decided under "neutral principles."[380] This proves too much. Corporate, labor, and employment law are all "neutral" in some sense. Yet there are recognized constitutional limits in their application to churches.[381] Thus, the mere availability of neutral principles does not mean a case is justiciable.[382]

4. Some courts have intimated that exempting churches from negligent supervision claims would be an unconstitutional establishment of religion because it would put churches in a "preferred" position.[383] Government does not violate the Constitution by accommodating religious exercise, preserving the autonomy and freedom of churches, or by granting such an accommodation to religion alone.[384] The Constitution itself gives religion preferential treatment.[385] For these reasons, a religious exemption from claims of negligent supervision in particular cases comports with the Establishment Clause.[386]

5. It is said that negligent supervision claims can be decided without interpreting or weighing church doctrine.[387] It is not entirely clear that that is the case and, if it were the case, the lack of necessity for weighing church doctrine would not dispose of the constitutional question. In the first place, there is the

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375. *Id.*

376. *Destefano*, 763 P.2d at 284.

377. *See supra* Part V.B.

378. The cases often fail to distinguish, for example, among types of employees (e.g., ministers versus non-ministerial employees). *See, e.g.,* Malicki v. Doe, 814 So.2d 347 (Fl. 2002).

379. *See* Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897 (2004); *cf.* Lupu & Tuttle, *supra* note 314, at 1854-55, 1860-61.

380. *E.g.*, Moses v. Diocese of Colorado, 863 P.2d 310, 323 n.15 (Colo. 1993).

381. *See supra* Part III.

382. Reliance on "neutral principles" also seems to be a perversion of their original context. *See* Jones v. Wolf, 443 U.S. 595 (1979) (holding that courts may give effect to legal instruments in which religious organizations specify, consistent with their polity, what is to happen to their property upon the occurrence of some contingency). *Jones* allows courts to review church constitutions and other church documents in purely secular terms, but disputes over their meaning may preclude judicial review. *Id*. at 604.

383. Malicki v. Doe, 814 So.2d 347, 365 (Fla. 2002).

384. *E.g.*, Zorach v. Clauson, 343 U.S. 306 (1952) (public schools may constitutionally give students time off to attend religious instruction).

385. *See supra* note 102 and accompanying text.

386. Gibson v. Brewer, 952 S.W.2d 239, 246-47 (Mo. 1997).

387. *Moses*, 863 P.2d at 323 n.15.

matter of where within a church's particular polity the responsibility to "supervise" the individual minister resides, if indeed there can always be said to be a "supervisor" in the traditional sense. The question will almost surely require an interpretation of church organization, doctrine, and canon law. These ordinarily are not questions answerable by reference to secular, corporate documents.

Second, the precise character and scope of a religious authority's delegated responsibility can be ascertained only by reference to the church's own self-description and doctrine. If, for example, a bishop is responsible for ensuring that his priests "correctly fulfill the obligations proper to their state,"[388] does that translate into a *secular* duty to "supervise" his priests or to ensure that none of his priests ever cause harm to a third party? The question would seem to require some understanding of what a bishop is and what the church expects of him by virtue of its law and doctrine, which in turn involves entanglement with the church.

Even where there is no need to consider church doctrine, that alone would be insufficient ground to conclude that a claim is justiciable. A church that fired a minister for financial rather than religious reasons, for example, constitutionally may not be sued for employment discrimination even if, as would seem to be true, resolution of the case would not require interpretation of church doctrine.[389]

From our review of the various rationales given for allowing negligent supervision claims against churches, it follows that if such a claim may constitutionally be brought against a church, it must be for reasons more probing and persuasive than those most commonly recited by the courts. Perhaps one solution to the risk of unconstitutional interference with church processes is to limit recovery to those egregious cases in which a traditionally defined supervisor exists and the church *knows* that harm is certain or substantially certain to result. Something like this approach was suggested in *Gibson v. Brewer*.[390] In that case, the Missouri Supreme Court concluded that defining what a church "should" know would require "inquiry into religious doctrine," "create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision."[391] The problem is cured, the court concluded, by limiting recovery to cases of intentional failure to supervise clergy.[392] Such a claim is stated if (1) a supervisor exists, (2) the supervisor knew that harm was certain or substantially certain to result, (3) the supervisor disregarded this

388. Codex Iuris Canonici c.384.

389. Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997). A jury in such a case could rather easily determine whether the church's stated reasons (financial difficulty) were a mere pretext for unlawful discrimination. No resolution of doctrinal or religious questions would necessarily be implicated. Yet such claims are barred, proving that a claim of autonomy is not limited to those cases in which religious and doctrinal questions are presented.

390. 952 S.W.2d 239 (Mo. 1997).

391. *Id.* at 247.

392. *Id.* at 248.

known risk, (4) the supervisor's inaction caused damage, and (5) other requirements set out in section 317 of the Restatement (Second) of Torts are met.[393]

Gibson is a laudable attempt to strike a middle ground between, on the one hand, wholesale restructuring of a church's relationship between its leaders and ministers, and a rule of law that would leave known risks of serious harm unredressed. Two prominent church-state scholars have endorsed a rule of law similar to that adopted in *Gibson*.[394] They recommend that negligent supervision claims require knowledge or reckless disregard of information creating a high probability of risk and certain procedural safeguards, including vesting decisions on certain issues with judges rather than juries and requiring proof by a standard higher than that of a mere preponderance of the evidence.[395] Such proposals warrant serious consideration and, like *Gibson*, go far to strike a middle ground that avoids intrusion into constitutionally forbidden terrain while at the same time providing redress for injuries involving known risks.[396]

The importance of striking some middle ground cannot be overemphasized. To allow wholesale imposition of secular standards onto the bishop-priest or other internal church relationships is effectively to rewrite those relationships along secular lines. We believe such an attempt can and must be resisted on constitutional grounds.

D. Legislative Mandates

Up to this point, we have addressed how judicial inquiry into church processes may threaten the ability of churches to govern themselves. The threat to church autonomy, however, is not from the judicial branch alone. For at least the last half century, government at all levels has steadily expanded its reach to regulate more and more areas of the Nation's life, including social services historically provided almost exclusively by churches. Not surprisingly, regulatory expansion has resulted in greater potential (or actual) conflict with the religious belief and practice of those churches.

Some examples illustrate the problem. No one claims that a church-run soup kitchen, by virtue of its church affiliation, would be exempt from health and safety regulations. But what if the regulation undermines church teaching and detracts from the mission the church fulfills by offering those services? One can imagine a generally applicable law affecting the preparation and distribution of food that would, absent an accommodation, entail a breach of Jewish kosher regulations, thereby creating a conflict for the religiously-affiliated soup kitchen. Absent an accommodation, the synagogue would be forced to choose between

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393. *Id.* Section 317 of the Restatement sets out the general requirements of the tort of negligent supervision. *See id.* at 247.

394. Lupu & Tuttle, *supra* note 314.

395. *Id.*

396. For further assessment of the Lupu and Tuttle proposal, see Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. Rev. 1897 (2004).

performing an act of charity or complying with kosher regulations, each of which is motivated or even mandated by its faith. In this hypothetical it is impossible to fulfill the directives of both without running afoul of the law. A law that, without exception or accommodation, required a religiously-affiliated hospital to perform or pay for procedures morally repugnant to it would create a similar dilemma.

The Religion Clauses serve as a guarantee that a church may continue its work and not be forced to retreat into a socio-political ghetto to live out its religious commitments.[397] For many churches, such a retreat would directly contradict their religious mandate to serve and engage the world prophetically. An unbending command by government that all institutional actors conform to a single model in providing health and social services does not respect the distinctiveness of religion and threatens the ability of churches to participate fully in the life of the political community. To be a church is to be distinctive. The Religion Clauses are a guarantee that religious distinctiveness and diversity will be respected.

A recent case, *Catholic Charities of Sacramento, Inc. v. Superior Court*, illustrates both the threat to churches and the need for more rigorous enforcement of this constitutional guarantee.[398] The case involves a California statute that requires all employers who provide their employees with health insurance coverage for prescription drugs to include insurance coverage of prescription birth control. The state claimed the law was necessary to remedy gender discrimination in employment benefits.[399] Catholic Charities of Sacramento, a church-affiliated provider of social services, could not cover contraceptives because that would be to materially cooperate in what it considers an intrinsic evil in violation of its religious beliefs; it could not simply discontinue prescription drug coverage, because that would violate its religious beliefs concerning payment of just wages.[400] Faced with this Hobson's choice, Catholic Charities sought declaratory and injunctive relief permitting it to provide its employees with insurance coverage for prescription drugs but not contraceptives.[401]

A lower court denied Catholic Charities' request for relief, and the California Supreme Court, following an intermediate appeal, affirmed the lower court's judgment.[402] The high court rejected application of the church autonomy doctrine because none of the employees had ministerial duties and the legislature had not decided, and resolution of the case ostensibly did not require the court

397. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. at 344 (Brennan, J., concurring in the judgment) (warning of the risk of chilling the legitimate activities of religious organizations if insufficient breadth were given to the Religion Clauses, and noting that churches "often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster").

398. 10 Cal. Rptr. 3d 283 (Cal. 2004), *cert. denied*, 125 S.Ct. 53 (2004).

399. *Id.* at 291.

400. *Id.* at 292-93.

401. *Id.* at 293.

402. *Id.* at 293, 316.

to decide, a religious question.[403] No consideration was given to the fact that by virtue of this legislation that state had, contrary to principles of church autonomy, commandeered a church's treasury, making it pay for what its own teaching opposed.[404] "How the state . . . can control church property and the . . . expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive."[405]

The dissent in *Catholic Charities* criticized the majority for failing adequately to consider the values animating the church autonomy doctrine.[406] According to the dissent, the logic of the ministerial exception and *Watson* line of cases "suggests that the constitutionally protected space for religious organizations is actually broader than these obvious categories. In short, the ministerial exception and the church autonomy doctrine are ways of describing spheres of constitutionally required protection, but these categories are not exhaustive."[407]

The point is well taken. Apart from an outright ban on churches, a civil mandate that a church agency pay in its own workforce for what that church teaches to be sinful is one of the most serious invasions of church autonomy imaginable.[408] At issue in *Catholic Charities* is an attempt by the state to rewrite a church's self-definition—and effectively threaten its right to constitute and govern itself and to engage in public ministry in a manner consistent with its own religious teaching—by forbidding it in its own house to practice what it preaches. Such a mandate forces a church to act in a manner directly contrary to the message it espouses, effectively destroying its ability to constitute itself and frame its message.

Once allowed, there is little in principle to stop further destructive invasions into the self-governance and organization of churches, for if a church can be required in its own house to provide or pay for programs and services repugnant to its deeply held religious convictions, it would seem that no church or church body is safe from the ad hoc nullification of its religious practices and teaching at the hands of the state. Even the late Mother Teresa's Missionaries of Charity, whose work with the poor and destitute is internationally known and still carried on, could be forced out of existence as presently constituted by requiring the Missionaries, under force of law, to pay for contraceptives, assisted suicide (permitted as of this writing in at least one American jurisdiction, Oregon), or

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403. *Id.* at 294-97.

404. *See* discussion *supra* notes 272-278 and accompanying text.

405. People *ex rel.* Deukmejian v. Worldwide Church of God, 178 Cal. Rptr. 913, 915 (Cal. Ct. App. 1981).

406. *See Catholic Charities of Sacramento*, 10 Cal. Rptr. 3d at 319-32 (Brown, J., dissenting).

407. *Id*. at 322.

408. The contraceptive mandates appear to be the first of their kind. Susan Stabile writes: "I have found no prior instance where the legislature or judiciary has forced a religious institution to fund something to which it is morally opposed." Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J.L. & Pub. Pol'y 741, 743 n.13 (2005).

abortions, all squarely in contradiction of the Missionaries' identity and purpose.

Such cases are far removed from *Smith*'s embrace of neutrality.[409] *Smith* rejected an *individual's* claimed exemption against a criminal drug law. *Catholic Charities*, in contrast to *Smith*, involved a command by the state that *an agency of a church* itself, as a condition of conducting its ministry, pay for what the church explicitly and unqualifiedly holds to be evil.[410] Forcing religious organizations to subsidize the very thing they preach against strikes at the very heart of the church's ability simply to exist and to engage its members and society in the church's message and mission. Indeed, as we have noted, *Smith* distinguished and cited with approval cases that have recognized the right of church autonomy,[411] and all lower courts taking up the question have concluded that *Smith* does not overrule or undermine the principles announced in those cases.[412]

Catholic Charities implicates not only the Religion Clauses, but the constitutional guarantees of speech and association as well. There is no question that compulsory funding can violate those guarantees.[413] A mandate that an organization, in its own workplace, pay for a program or service that contradicts the organization's very *raison d'etre* is serious enough even when one sets aside the religious interests at stake in *Catholic Charities*. One can imagine how Planned Parenthood, a proponent of legislative mandates like the one at issue in *Catholic Charities*, might react if the political landscape were altered so that it was required to pay its own employees for services that directly contradicted its associational mission and message. Consider, for example, the likely reaction were a legislature to require all insurance plans that pay for abortion to pay for post-abortion trauma services and counseling based on a legislative finding that such trauma poses a significant public health risk. Planned Parenthood denies that women suffer trauma as a result of abortion,[414] just as the Catholic Church and its affiliated charities deny that contraceptives benefit people (by definition, immoral or sinful conduct is detrimental, not beneficial). Planned Parenthood

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409. Employment Div. v. Smith, 494 U.S. 872 (1990). *See* discussion *supra* notes 106-107.

410. *Catholic Charities of Sacramento*, 10 Cal. Rptr. 3d at 292-93.

411. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

412. *See* discussion *supra* note 114 and accompanying text. In any event, to uphold all generally applicable laws that violate church autonomy, even if this were the law, would be absurd. Under such a regime, the government could regulate selection of clergy by a neutral law forbidding discrimination based on sex, forbid the celebration of Mass by a neutral law forbidding possession and consumption of alcohol, and outlaw kosher slaughterhouses by neutral laws regulating food handling.

413. *See, e.g.,* Keller v. State Bar of Cal., 496 U.S. 1, 15-16 (1990) (holding that use of compulsory bar dues to finance ideological or political activities to which petitioners were opposed violated First Amendment); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (agency-shop dues of nonunion public employees may not be used to support political and ideological causes to which employees objected and which were unrelated to collective bargaining).

414. Planned Parenthood claims that there is "no scientific proof" for claims that "abortion often causes long-lasting emotional problems" or "post-abortion syndrome." *Choosing Abortion—Questions and Answers*, *available at* http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/pub-abortion-q-and-a.xml (follow "Can anyone help me decide if abortion is right for me?" hyperlink) (last visited Dec. 7, 2005).

would be required to notify its employees of available, insured services for post-abortion trauma, and pay for those services, all the while denying that such trauma exists. The same speech and associational interests Planned Parenthood would undoubtedly raise in such circumstances are enhanced when they involve the internal operations of a church, for the latter has a right to autonomy arising out of the Religion Clauses that Planned Parenthood, as a secular organization, does not.[415]

Church agencies employ people to further an explicitly religious mission, a mission known to their employees and tacitly agreed to by them.[416] Yet the church, in *Catholic Charities*, has been forced indirectly to pay, for these same employees, for services that directly contravene the religious teachings that identify Catholic Charities as Catholic. Such a result, representing a direct assault on the integrity of a church, cannot be constitutional.

Equally troubling in *Catholic Charities* was the state's crafting of a limited statutory exception from the contraceptives mandate that created a distinction between religious organizations that hire and serve their own co-religionists and those that do not. The distinction is consistent with, and drawn from, arguments made by abortion advocates that health care and other social services provided by churches are "secular" activities and therefore not subject to the same protections as, say, worship and preaching.[417] In the Christian tradition, this is a jarring distinction since religious faith is considered inauthentic if not expressed in conduct.[418] The idea that Catholic Charities can say one thing but must do another at the state's bidding severs the vital link between religious teaching and the living out of that teaching in church outreach. As *University of Great Falls* suggests,[419] the state constitutionally may not limit exemptions to "religious institutions with hard-nosed proselytizing."[420] It may not decree what areas of church

415. The example is not purely hypothetical. See Summit Med. Ctr. of Ala., Inc. v. Riley, 274 F. Supp. 2d 1262 (M.D. Ala. 2003), in which abortion providers brought a successful challenge to a statute requiring them to pay for, and distribute to their patients, information materials concerning alternatives to abortion. Of course, medicine is a legitimate subject of state regulation; a church is not, hence making the case for non-government interference all the stronger in the case of *Catholic Charities*.

416. *Cf.* Watson v. Jones, 80 U.S. 679, 729 (1872) ("All who unite themselves to . . . a [religious] body do so with an implied consent to this government, and are bound to submit to it.").

417. *See, e.g.,* ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 11 (2002), *available at* http://www.aclu.org/FilesPDF/ACF911.pdf ("When . . . religiously affiliated organizations move into secular pursuits—such as providing medical care or social services to the public or running a business—they should no longer be insulated from secular laws. In the public world, they should play by public rules."). *Cf.* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1408 (1981) ("The free exercise of religion includes the right to run large religious institutions—certainly churches, seminaries, and schools, and . . . hospitals, orphanages, and other charitable institutions as well.").

418. *See supra* note 75.

419. *See* discussion *supra* notes 225-237 and accompanying text.

420. Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002).

activity are "religious" and "not-religious" and then choose to protect only the former.[421]

The *Catholic Charities* case is not an isolated instance of pressure exerted upon religious institutions to conform to a secular, government-dictated model. In *Pedreira v. Kentucky Baptist Homes for Children,*[422] a church-affiliated home terminated an employee because it believed that her homosexual lifestyle was inconsistent with its religious values. The court rejected the employee's claim of employment discrimination on non-constitutional grounds, but the case illustrates the danger that inheres when a law of general application is used to try to force a religious organization to hire persons whose lifestyle fundamentally diverges from the tenets of that religion.[423]

That *Catholic Charities* and *Kentucky Baptist Homes* involve religious organizations means that religious liberty is at stake in those cases in a way that would likely not be true if one were dealing with secular organizations. On the other hand, these decisions implicate the freedom of association and thought and therefore have application beyond religious organizations:

> At stake here is a principle of common sense and a right of constitutional dimension. In today's society, it is generally accepted that companies can hire those who agree with the mission of the company. The American Civil Liberties Union (ACLU) would not be forced to retain a staffer who publicly rebuked efforts to promote civil liberties. An environmental protection group would not be required to retain a staffer who argued the Endangered Species Act was unnecessary and wasteful . . . . The ACLU, [and] other advocacy groups, . . . like other employers, are entitled to a work force that does not publicly discredit the institution based on their conduct.[424]

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421. Espinosa v. Rusk, 634 F.2d 477, 481 (10th Cir. 1980) (ordinance was constitutionally defective because it "involve[d] municipal officials in the definition of what is religious."), *aff'd*, 456 U.S. 951 (1982).

422. 186 F. Supp. 2d 757 (W.D. Ky. 2001).

423. *See also* Madsen v. Erwin, 481 N.E.2d 1160, 1165 (Mass. 1985) (religiously affiliated newspaper's "decision to fire [employee] because of her sexual preference can only be construed as a religious one, made by a Church as employer" which is unreviewable by the courts); Walker v. First Orthodox Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980) (concluding that if plaintiff "were allowed to collect damages from defendants because he was discharged for being gay, defendants would be penalized for their religious belief that homosexuality is a sin for which one must repent"); Lewis *ex rel.* Murphy v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979) (refusing to enforce against church pastor an ordinance forbidding employment discrimination based on sexual preference). As to this particular issue, one potential for conflict inheres in the fact that a number of jurisdictions forbid discrimination in employment based on sexual orientation. *See, e.g.,* CONN. GEN. STAT. § 46a-81c (2004); D.C. CODE § 2-1402.11 (2005); HAW. REV. STAT. § 378-2 (2005); MASS. GEN. LAWS ch. 151B, § 4 (2005); MINN. STAT. § 363A.08 (2005); N.J. REV. STAT. §§ 10:5-4, 10:5-12 (2005); R.I. GEN. LAWS §§ 28-5-2 to 28-5-7 (2005); VT. STAT. ANN. tit. 21 §§ 495, 1726 (2005); WIS. STAT. § 111.36 (2005). *Cf.* Catholic Charities of Me. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) (church-affiliated social service agency's religious objection to providing employment benefits to domestic partners does not trump city ordinance conditioning receipt of government funds on the provision of such benefits).

424. Chopko, *Shaping the Church*, *supra* note 18, at 137-38.

The impact of a legislative mandate upon a church can be no less startling. In a New York case similar to that of *Catholic Charities*, religious elementary and secondary schools, among others, are challenging a law that would force them to provide faculty health insurance coverage for services that the schools themselves, through their faculty, teach their students to be sinful.[425] Given the sensitivity of youth to any disparity between what their elders say and what they do, one can only imagine what message will be sent when students learn that their school is *paying* for, and the faculty are receiving, the very things they teach the students is immoral. In the same case, two orders of nuns face the prospect of having to pay in their own workforce for insurance coverage that contradicts the nuns' professed religious faith. Another plaintiff in the case, a crisis pregnancy center which works to prevent abortion, will be forced to pay for prescriptions it regards as abortifacient and therefore in direct contravention of its mission.

As *Boy Scouts of America v. Dale*[426] demonstrates, government may not, even in the interest of furthering such a prized social value as non-discrimination, command uniformity when it treads upon a private group's right to insist that its leaders and members reflect its mission and purpose. That the cases cited in this section involve *churches* makes the constitutional case all the more compelling.

VI. CONCLUSION

The genius of our legal system is that it can preserve important and time-honored values while keeping up with changing circumstances. The task continues of preserving our constitutional guarantees in the face of new situations not envisioned by the Founders. It is the role of all branches of government, but especially the courts, to ensure that those guarantees do not become a dead letter as a result of being overtaken by social and other innovations.

No one claims that the right of speech, press or assembly is limited to three or four historic applications. Those provisions, like others, must be given breathing room and applied to new situations if they are to continue to be viable and effective. The same can be said of the right of church autonomy. To enforce that right only if the facts can be fit into some prelabeled box such as "ministerial exception" or "clergy malpractice" is to miss the point and to risk diluting a freedom essential to our free society.

There is a relationship among, and a common value underlying, the various fact patterns in which the church autonomy doctrine has been applied. By engaging this underlying value, we believe these various cases can be made to "talk" to each other, and when that happens it becomes clearer that the right of

425. *See, e.g.,* Catholic Charities of Albany v. Serio, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003), *aff'd*, No. 96221 (N.Y. App. Div. Jan. 12, 2006). The plaintiffs include Catholic and Baptist elementary and high schools, the Carmelites, the Dominicans, and a Baptist crisis pregnancy center.

426. 530 U.S. 640 (2000). *See supra* Part II.D.

church autonomy, while not absolute, has far broader application than is often believed. It is not true, and no one argues, that churches are in any sense immune from all tort liability. That this is so, however, is not a reason for rejecting the application of the right of church autonomy in cases in which church teaching, governance and polity is otherwise likely to be redefined by the state. If, as has been famously stated, "it is proper to take alarm at the first experiment on our liberties,"[427] any inroad into the right of churches must be jealously resisted.

427. James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reproduced in* Everson v. Bd. of Educ., 330 U.S. 1, 41 n.29 (1947).