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Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders

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In any systematic consideration of church autonomy, the judicial role in resolving disputes between religious institutions and their leaders is inevitably a central topic. Thus far, the constitutional debate over the rules to guide such disputes has revealed a number of conventional starting places. The obvious location in which to begin is the Free Exercise Clause of the First Amendment. The choice of leaders for religious organizations quite obviously represents the exercise of religion, and one would expect that arguments designed to insulate such organizations from regulation, potential liabilities, or other potentially coercive state policies with respect to these leaders would find their locus in that provision of the First Amendment.2

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[2] One prominent early work taking this position was Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514 (1979); see also Frederick Mark Gedicks, Toward A Constitutional Jurisprudence of Religious Group Rights, 1989 Wis. L. Rev. 99; Angela Carmella, Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review, 36 Vill. L. Rev. 401 (1991). A more recent incarnation of this argument can be found in Kathleen Brady, Religious Organizations and Free Exercise: The Surprising Lessons of *Smith*, 2004 B.Y.U. L. Rev.1633, and Joshua Dunlap, Note: When Big Brother Plays

The second common reference point in this conversation is the concept of "excessive entanglement" in the "internal affairs" of religious organizations. Courts have rested the concern about constitutionally impermissible entanglement on both the Free Exercise Clause and the Establishment Clause.3 Commentators, typically emphasizing the Establishment Clause, have developed various accounts of a special privilege or freedom for religious entities.4

We think that the emphasis on the Establishment Clause, and the focus on entanglement, represent a step in the right direction. The conceptual focus of anti-entanglement arguments is on the role of the state in its regulatory capacity, rather than on the status of religious entities as

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God: The Religion Clauses, Title VII, and the Ministerial Exception, 82 Notre Dame L. Rev. 2005 (2007).

[3] See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Rayburn v. General Conference of Seventh Day Adventists, 772 F. 2d 1164 (4th Circuit 1985).

[4] Douglas Laycock, Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981); Gregory Kalscheur, Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church, ___ W & M Bill of Rts. J. ___ (forthcoming 2008); Carl H. Esbeck, Establishment Clause Limits on Governmental Interference with Religious Organizations, 41 Wash. & Lee L. Rev. 347 (1984); Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (1998); Richard W. Garnett, The Freedom of the Church, 4 J. Cath. Soc. Thought 23 (2007); Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 Colum. L. Rev. 1843 (1998).

the holders of unique rights. For reasons we have begun to develop elsewhere5 and hope to refine further below, we believe that focus on the state side of the ledger is likely to prove far more fruitful than an inquiry that begins with the idea that religious entities have special rights. Although the Free Exercise Clause has a rights-bearing function,6 the Religion Clauses are primarily jurisdictional,7 limiting government to the secular and temporal, and foreclosing government from exercising authority over the spiritual domain. It is that very basic premise that both explains and limits the legal autonomy of religious institutions.

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[5] Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37 (2002); Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 Brigham Young University Law Review 1789.

[6] We plan to develop in future work the idea that the free exercise clause protects primarily the right to worship, proselytize, and associate for religious purposes. The expansion of the first amendment's freedoms of speech and association has tended to overlap with and perhaps crowd out these core concerns of the free exercise clause, and have pushed judges and others into the error of focusing on conduct exemptions as being a central mandate of the free exercise clause.

[7] We do not mean this in the federal-state sense advanced by Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (Oxford U. Press 1995) (arguing that the purpose of the Religion Clauses was to exclude the federal government from the subject of religion, thereby leaving it to the states). We tackle the problem of the Religion Clauses and federalism in Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 55 Emory L. Rev. 19 (2006).

The context of employment relations between religious entities and their leaders is an especially illuminating prism through which to perceive this jurisdictional understanding, and its implications for the autonomy of religious organizations. We begin with a question that has a well-developed answer in the positive law but an insufficiently theorized explanation. To what extent does the Constitution immunize religious entities from legal claims by their own clergy and other spokespersons for the faith?8 This question may appear in a wide variety of contexts. Those acting in the role of clergy or related roles have brought claims against their employers for acts of discrimination,9 defamation,10 violation of fair labor standards laws,11 breach of

[8] A number of scholars have criticized this immunity. See, e.g., Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham L. Rev. 1965 (2007); Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 Hastings Con. L. Q. 275 (1994); Jane Rutherford, Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion, 81 Corn. L. Rev. 1049 (1966). Others have defended it, See Bagni, note xx supra; Kalscheur, note xx supra; Notre Dame Note, note 2 supra.

[9] There are a great many decisions of this character. See, e.g., Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. Conn. 2008) (exemption from race discrimination claim); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. Md. 1985) (gender and race discrimination); Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. Tex. 1999) (pregnancy discrimination); Hankins v. Lyght, 441 F.3d 96 (2d Cir. N.Y. 2006) (age discrimination); Starkman v. Evans, 198 F.3d 173 (5th Cir. La. 1999) (disability discrimination); Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. Ill.

employment contract,12 and many other causes of action arising out of the employment relation. In some but not all of these situations, courts have held that the Constitution bars the asserted claims against religious organizations.13

The most common type of lawsuit brought by clergy against their employers involves statutory claims of discrimination. Although religious organizations are explicitly exempt from most statutory bans on religious discrimination in hiring,14 they are not similarly exempt by

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2003) (national origin discrimination).

[10] See, e.g., Kraft v. Rector, Churchwardens & Vestry of Grace Church, 2004 U.S. Dist. LEXIS 4234 (S.D.N.Y. Mar. 15, 2004); El-Farra v. Sayyed, 365 Ark. 209 (Ark. 2006).

[11] Schleicher v. The Salvation Army, __ F.3d __ (7th Cir. 2008) (rejecting minimum wage claim as barred by ministerial exception); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. Md. 2004), *rehearing en banc denied*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 369 F.3d 797 (4th Cir. 2004).

[12] See, e.g., Minker v. Baltimore Annual Conference of United Methodist Church, 282 U.S. App. D.C. 314 (D.C. Cir. 1990).

[13] Compare Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. Md. 1985) (finding that constitution immunizes religious entity against sex discrimination claim) with Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. Cal. 1999) (constitution does not immunize religious entity against sexual harassment claim).

[14] Section 702(a) of the 1964 Civil Rights Act (42 U.S.C. sec. 2000e-1(a)) expressly exempts religious organizations from the prohibition on religious discrimination in employment.

statute from prohibitions on discrimination based on race, sex, disability, or age.15 Beginning in 1972, however, and continuing since then, courts have held that such statutory prohibitions are subject to a "ministerial exception." Judges sometimes describe this exception as a rule of interpretation;16 more frequently, they characterize it as a constitutional rule.17 Although the Supreme Court has never addressed the questions raised by the "ministerial exception," every federal circuit court has embraced some version of it,18 and no court – federal or state – has ever

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Many state civil rights laws have comparable exemptions. For a collection of the state provisions, see Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: The State of the Law," The Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government, SUNY (December, 2002), Appendix B.

[15] If Congress adds sexual orientation to the grounds of discrimination forbidden by Title VII, an exemption for religious entities will probably be included. See H.R. xxxx, sec. 6.

[16] Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008).

[17] Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. Md. 1985).

[18] Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. P.R. 1989); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Cline v. Catholic Diocese, 206 F.3d 651 (6th Cir. 1999); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Werft v. Desert Southwest Annual Conf., 377 F.3d 1099 (9th Cir. 2004); Bryce v. Episcopal Church in the

explicitly rejected the exception.

In what follows, we offer a view of the "ministerial exception," and other doctrines relating to the employment of clergy, that focuses on why courts are excluded from adjudicating certain questions that frequently affect religious entities. Put most straightforwardly, our central premises are that the Constitution does not systematically protect the interests of certain classes of parties, defined by religious mission; rather, the Constitution disables civil courts from resolving certain classes of questions. This is an adjudicative disability,19 not a right of autonomy, and it rest on the Establishment Clause alone. Religious entities are the beneficiaries of such an adjudicative disability, but they are not the holders of primary rights to determine their own affairs in the face of contrary state interests. As we hope to convince the reader, this

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Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); EEOC v. Catholic Univ. of Am., 317 U.S. App. D.C. 343 (D.C. Cir. 1996).

[19] For reasons we unpack in Part III, infra, we think "disability" is the key term. We use it in the Hohfeldian sense; see Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16 (1913). Hohfeld's argued that "disability" and "immunity" are jural correlatives, in the same way as "duty" and "right" (that is, one implies the other). Id. at xxx. If (as we argue below) courts are disabled from adjudicating certain questions, those defendants who might have been found liable had those questions been answered are immune from such findings. So understood, immunity from adjudication with respect to an activity is not the same concept as a right to engage in a particular activity, at the expense of someone to whom the actor has a legal duty not to so behave.

theory is not simply a hot-house translation of existing law into fancy academic terms; the theory matters in the disposition of cases.

The paper proceeds as follows. Part I outlines the development of the ministerial exception in the courts, including the three, overlapping First Amendment stories on which courts have relied to justify the exception. Part II critiques the first two of those three theories -- institutional exemptions, and a party-based autonomy of churches over "internal affairs." Part II argues that a free exercise-based doctrine of institutional exemptions from regulation cannot justify the "ministerial exemption" in its present form, and that a sweeping theory of party-based autonomy for the "internal affairs" of religious entities cannot be persuasively defended. Part II concludes that neither the free exercise clause -- before or after *Employment Division v. Smith*[20] -- nor a general doctrine of church autonomy is a sound constitutional platform for the ministerial exception and related limitations on the adjudication of disputes between religious institutions and their leaders.

Part III turns to our own account of the ministerial exception. Our theory of question-based adjudicative disability focuses on the content of the relevant legal questions rather than the identity of the parties or the weight of respective state and private interests. Proceeding through a set of real and hypothetical cases -- including those which are easy calls for or against the exercise of civil jurisdiction, and others which involve close judgments -- we demonstrate the normative superiority of an account that emphasizes the state's limited jurisprudential competence rather than the unique rights of religious organizations.

I. The Ministerial Exception

[20] 494 U.S. 872 (1990).

It should come as no surprise that what is now known as the "ministerial exception" arose initially in the context of claims that religious organizations were discriminating on the basis of sex. Many orthodox Western faiths, including the oldest denominations of Christianity, Judaism, and Islam, have for centuries limited ordination of clergy to males. A judicial conclusion that the prohibition on sex discrimination in employment should apply in full force to these faiths would have seemed like a radical (and, for most lawmakers, unintended) consequence of the civil rights revolution.

What does come as a surprise to many when they first learn of the judge-made "ministerial exception" to civil rights laws is that no decisions on the subject have ever involved these orthodox, overt, and, explicit exclusions of females from the ranks of clergy.21 Instead, virtually every judicial ruling on the subject has involved jobs for which religious organizations have made the relevant protected class (women, racial minorities, etc.) formally eligible.

The germinal case for the "ministerial exception" is *McClure v. Salvation Army*,22 decided by the Fifth Circuit in 1972. As described by the Court of Appeals, Mrs. Billie McClure

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[21] Challenges to the gendered quality of the clergy in orthodox faiths have always come from within the faith, and tend to be based on theological, rather than legal, grounds. For example, although most discussions of current disputes within the Episcopal Church have tended to focus on homosexuality, the Anglican tradition continues to be divided on the question of women's ordination, and the 2006 election of Katharine Jefferts Schori as Presiding Bishop of the Episcopal Church in the U.S.A. has exacerbated those tensions. See Jason Byassee, Splitting Up: Anglican Angst, Christian Century, May 20, 2008.

[22] 460 F.2d 553 (5th Cir. 1972).

had been commissioned by the Salvation Army in 1967.23 The Army terminated her officer status after she held several assignments in the Southern Territory, and McClure then brought a civil action under section 703(a) of Title VII of the 1964 Civil Rights Act.24 McClure alleged that she had received less salary and benefits than her male counterparts, and that she had been fired for complaining to superiors and to the EEOC about these disparities.25

As framed by the Court of Appeals, McClure's suit raised the question whether "the application of . . . Title VII to the relationship between . . . a church and its minister violate either of the Religion Clauses of the First Amendment."26 The Court of Appeals invoked Supreme Court precedents under both the Establishment Clause and the Free Exercise Clause,27 and drew extensively on a line of decisions in which the Supreme Court had refused to intervene in

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[23] Id. at 555.

[24] 42 U.S.C. sec 2000e-2(a)(2000).

[25] The district court dismissed the action based on Section 702, 42 U.S.C. sec 2000e-1(a)(2000),which states that "this subchapter shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its religious activities." The court of appeals, after examining the legislative history of this section, concluded that it applied only to religious selectivity in hiring, and not to other prohibited grounds of discrimination, such as that based on sex, race, or national origin. Id. at 558.

[26] Id.

[27] Id. (citing, inter alia, Everson v. Bd of Education, 330 U.S. 1 (1947) and Sherbert v. Verner, 374 U.S. 398 (1963).

disputes involving church property and ecclesiastical personnel.28 After describing the relationship "between the organized church and its ministers" as "its lifeblood,"29 and noting that the "minister is the chief instrument by which the church seeks to fulfill its purpose,"30 the Court offered this analysis of the question presented:31

> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government.
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> Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.

The Court explicitly found that "the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which

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[28] The Court in McClure cited a series of cases in which the Supreme Court had delineated a posture of deference toward decisions made by ecclesiastical polities on ownership of property and control over personnel with religious duties. 460 F.2d at 559-60.

[29] Id. at 558.

[30] Id. at 559.

[31] Id. at 560.

it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[32] Nevertheless, resting on the principle that statutes should be construed to avoid constitutional questions, the Court concluded "that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister,"[33] and affirmed the dismissal of the case.

The decision in *McClure* purported to rest on an act of statutory interpretation, designed to avoid the constitutional question that would have been raised by a construction of the statute that made it applicable to sex discrimination in the employment relationship with clergy. Thirteen years later, in *Rayburn v. General Conference of Seventh Day Adventists*,[34] a panel opinion by Judge Wilkinson of the 4th Circuit fully constitutionalized the "ministerial exception."

The *Rayburn* opinion is by far the most carefully and elaborately reasoned of all the many Circuit Court decisions about the ministerial exception, and the most widely cited. Carole Rayburn had applied for a position as an Associate in Pastoral Care in the Seventh Day Adventist Church. That position did not require ordination, and was open only to women. When the Church's Potomac Conference denied Rayburn the position, she brought suit under Title VII, alleging that the Conference had engaged in sex discrimination as well as race-based discrimination against her because of her association with black people and her membership in "black-oriented religious organizations."[35]

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[32] Id. at 560.

[33] Id. at 560-61.

[34] 772 F. 2d 1164 (4th Circuit 1985).

[35] Id. at 1165.

Judge Wilkinson's panel opinion affirmed a grant of summary judgment for the Conference. The opinion first explained in detail why the exemption in section 702, for religious hiring by religious organizations did not apply to this case, in which the allegations involved sex and race discrimination.36

Judge Wilkinson then turned directly to the constitutional questions raised by the collision between the First Amendment and the application of Title VII to employment decisions relating to the clergy. Like the *McClure* panel, the *Rayburn* panel rested its constitutional concern on three, related strands of Religion Clause doctrine – respect for the affairs of religious entities "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law;"37 the then-controlling Free Exercise Clause requirement that burdens on religious freedom be balanced against relevant state interests;38 and the Establishment Clause-based concern for "excessive government entanglement" with religious institutions.39

In light of the duties of the Associate's position, which included "teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at [various] churches, and other evangelical, liturgical, and counseling responsibilities,"40 Judge Wilkinson concluded that application of Title VII to the Conference would constitute a violation of the First Amendment. The Associate's duties were highly "significant in the expression and realization of Seventh Day

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[36] Id. at 1166-67.

[37] Id. at 1167, quoting Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

[38] Id. at 1168-69.

[39] Id. at 1169-72.

[40] Id. at 1165.

Adventist beliefs."41 Accordingly, regulation of the choice of an Associate intruded on matters of church teaching, and entangled the state in a decision at the heart of ecclesiastical concern. On the question of interest-balancing under the Free Exercise Clause, the panel concluded that while "an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs. The balance of values thus weighs against Rayburn's suggestion that the government may question the decision of the Seventh-day Adventist Church to hire another candidate as an associate in pastoral care."42

In the quarter-century since *Rayburn*, the "ministerial exception" has caught on throughout the American legal world. Almost every circuit has adopted it,43 as have a number of states. Although a number of courts have refused to extend the "ministerial exception" to cases of sexual harassment,44 and questions of which positions fall under the exception frequently arise,45 no court has ever rejected or repudiated the basic doctrine of the "ministerial

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[41] Id. at 1168.

[42] Id. at 1169.

[43] See cases cited note 18 supra (missing only the 10th Cir).

[44] See, e.g., Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. Cal. 1999); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. Wash. 2004); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991); McKelvey v. Pierce, 173 N.J. 26 (N.J. 2002).

[45] See, e.g., Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. Ill. 2003) (Hispanic communications director is minister for some job functions); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. N.C. 2000) (music director fits within exemption);

exception." The exception has spread beyond civil rights laws to statutes regulating wages and hours46 as well as to common law causes of action that may arise out of the employment relation between clergy and religious entities. Although some judges still prefer to describe the exception as a rule of statutory interpretation,47 many continue to cite *Rayburn* and invoke a constitutional basis for the exception.

Despite this widespread adoption of the exception, and its expansion into positions beyond that of ordained clergy,48 unanswered questions remain about its constitutional provenance. Recall that virtually every case raising claims of sex, race, age, or disability discrimination involves assertions of covert discrimination, rather than the explicit and overt

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Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174 (E.D. Wis. 2001) (music director); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802 (N.D. Ill. 1992) (education director at religious school is not a "minister"); Patsakis v. Greek Orthodox Archdiocese of Am., 339 F. Supp. 2d 689 (W.D. Pa. 2004) (record keeper is not a minister); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) (theology teacher at Catholic high school qualifies as minister); Archdiocese v. Moersen, 399 Md. 637 (Md. 2007) (church organist not a minister).

[46] Schleicher v. The Salvation Army, 518 F.3d 472 (7th Cir. 2008); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004).

[47] Schleicher v. The Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) (Posner, J., describing the ministerial exception as a "rule of interpretation.")

[48] See cases cited note xx, supra.

variety practiced by various orthodox faiths with respect to the role of women in the clergy. In cases of overt discrimination, a defendant would no doubt assert both longstanding tradition and theological justification for the refusal to ordain females.

In contrast, in cases involving claims of covert discrimination, the plaintiff typically claims that her race, sex, age, or disability is the true explanation for the adverse job treatment. The defendant – which holds itself out as an equal opportunity employer for the relevant position --typically denies that, and asserts that permissible reasons (which may or may not be disclosed) justify the adverse treatment. The plaintiff then typically asserts that such reasons are a pretext for forbidden discrimination. The function of the "ministerial exception," which kicks in once the court has made a determination that the exception covers the position in question, is to cut off the possibility of adjudication of such pretext claims – that is, to block the judicial appraisal of whether the defendant had sufficient, nondiscriminatory reasons to justify the challenged job action.49

Describing the operation of the "ministerial exception" highlights its curious character. In the absence of any asserted religious reason for the challenged job action, why should religious entities be free from a judicial inquiry into whether their asserted non-religious reasons are pretextual? Secular nonprofit organizations and for-profit businesses are subject to such an inquiry, and it remains to be explained why religious organizations alone are immune from this sort of appraisal of their reasons for action.50

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[49] The mechanics of Title VII adjudication, including various kinds of pretext claims and relevant defenses, are described in detail in Corbin, note xx supra, at 2010-2022.

[50] Id. at 2010-2028 (critiquing the treatment of pretext claims in ministerial exception

II. Justifying the Ministerial Exception -- Two False Starts

As described in the Introduction, and highlighted in cases like *McClure* and *Rayburn*, the standard account of the ministerial exception includes references to interest-balancing under the Free Exercise Clause, and a concern for "excessive governmental entanglement" in the internal affairs of religious entities. In this part, we explain the problems associated with both of those standard accounts.

A. Conventional Free Exercise Norms

1. Pre-*Employment Division v. Smith*. At the time that the ministerial exception flowered, the law included a seemingly robust regime of free exercise exemptions. Both *McClure* (1972) and *Rayburn* (1985) were decided in the period between *Sherbert v. Verner*,[51] which midwifed that regime, and *Employment Division v. Smith*,[52] which announced its demise.

As subtly revealed and more subtly hidden in Judge Wilkinson's opinion in *Rayburn*, the doctrine of free exercise exemptions was actually a threat to the "ministerial exception," because the relevant standards required interest-balancing at the margin of the respective interests. That is, unlike an Establishment Clause-anchored doctrine of ministerial exemption, which would admit of no interest-balancing whatsoever, a free exercise exemption could be overcome by application of a law that is narrowly tailored to very important state interests.[53]

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cases). Corbin's critique is the most extended and effective in the literature to date.

[51] 374 U.S. 398 (1963).

[52] 494 U.S. 872 (1990).

[53] The most straightforward statement of the standard is probably in Wisconsin v. Yoder, 406 U.S. 205, 2xx (1972).

In the case of application of Title VII anti-discrimination norms to allegations of covert (as distinguished from overt) sex discrimination in the employment of clergy, it is not at all obvious that religious institutions should prevail.54 The impact on the employment process might in many cases be quite trivial; if the inquiry into pretext quickly and easily flushed out forbidden discrimination rather than performance-related reasons for the adverse job action, the consequence would be reinstatement of an otherwise qualified member of the clergy, and deterrence of future like episodes.55 For those religious denominations that hold themselves out as willing to hire on an equal opportunity basis, forcing them to fully internalize their own, self-proclaimed anti-discrimination norms would reinforce their pre-commitments about hiring in a spirit of equality.

Moreover, clergy frequently are role models for youth and others, and leaders within their communities. Hence, on the state's side of the equation, the interest in maintaining equal opportunity in a profession as prestigious as the clergy seems especially strong. Thus, a full and honest application of pre-*Smith* standards in this context does not lead to inevitable victory for religious institutions.

2. Post-*Employment Division v. Smith*. Whether or not the courts acted correctly in their

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[54] In the case of those faiths that openly exclude females from roles in the clergy, the balancing at the margin might well come out differently, because the impact of the tradition and experience of the faith would be much greater in cases where a legal ruling for the plaintiff would effectively cause gender integration of the clergy where none had existed before.

[55] For development of this argument in a variety of contexts, see Corbin, note xx supra, at 2010-2022.

application of the doctrine of free exercise exemptions to ministerial exception cases, the 1990 decision in *Employment Division v. Smith56* ripped the pegs out from under any general theory of free exercise exemptions. The emphasis in *Smith* was administrability – that is, whether courts could apply in a principled way the doctrine of exemptions, in which they had to weigh the burden on the claimant's religious freedom against the costs to the state of maintaining an exemption from an otherwise general rule.57

The problems presented by the pre-*Smith* exemption doctrine were even greater for religious institutions than religious individuals. First and foremost, literally everything that such institutions do constitutes an "exercise of religion."58 Accordingly, any state regulation that adds expense or inconvenience to these tasks would burden religion in a way that might be cognizable under the Free Exercise Clause. Some of these burdens barely touch religious experience, if they touch it at all – for example, requiring certain methods of trash disposal in circumstances in which the denomination has no religious scruples about such matters.59 Other

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[56] 494 U.S. 872 (1990).

[57] Id. at 8xx.

[58] Douglas Laycock, Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1398 (1981) (arguing that the right of church autonomy extends to every aspect of church operations). Professor Laycock has since retreated from this broad view. See [contribution to this Symposium] For contemporary defenses of a broad "freedom of the church," see Kalscheur, note 4, supra; Garnett, note 4 supra.

[59] That sort of regulation does not directly burden religious practice or belief, but it may

burdens on religious experience, such as that which might have been required if Title VII norms applied to overt sex discrimination in clergy selection by orthodox faiths, would have been quite significant. Were courts to be forced to apply pre-*Smith* free exercise norms to the enormously wide variety of institutional decisions and policies, the problems of even-handed administration would have been even greater than they had proven to be in the case of individuals. Moreover, when judicial administration of free exercise norms strays from even-handedness, the risk of favoritism for mainstream or otherwise socially acceptable faiths is considerable.

The Court in *Smith*, surveying the wide landscape of exemption claims denied in the time since *Sherbert v. Verner*,60 concluded that principled adjudication in cases where religious scruples had to be balanced against state concerns was indeed unlikely, and therefore jettisoned the doctrine of exemptions in all but a few special circumstances.61 The decision in *Smith* did

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add to the cost of running the institution, and thereby take away resources that otherwise could be devoted to religious practice.

[60] For a survey of this landscape, and the general failure of free exercise claims in the Supreme Court between 1963 and 1990, see Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 178-185 (1995).

[61] The Court in *Smith* suggested that religion-friendly free exercise decisions like *Wisconsin v. Yoder* and *Cantwell v. Connecticut* could be explained through a theory of "hybrid rights;" that is, as cases in which free exercise interest combined favorably with other constitutional claims. In EEOC v. Catholic Univ. of America, 83 F.3d 455, 467 (D.C. Cir. 1996), a panel of the D.C. Circuit argued that "ministerial exception" cases survived Smith because they involved hybrid rights derived from the Establishment Clause and the Free Exercise

not lead, however, to the demise of the ministerial exception. Instead, courts fell back on the line of decisions, pre-dating and post-dating *Sherbert* and *Yoder*, concerning non-intervention in the internal affairs of religious entities.62 On the surface, that account does not require interest-balancing, and so may not be vulnerable to the same criticism that can be leveled against application of the doctrine of free exercise exemptions. But a defense of the "ministerial exception" based on a concept of deference to a religious entity's handling of its own internal affairs raises its own, still larger questions about the concept of church autonomy.

B. "Excessive entanglement" in the internal affairs of religious institutions.

Dating back to soon after the Civil War, and well before the Supreme Court held the Religion Clauses of the First Amendment applicable to the state, the Court began to apply a common law rule of deference to the decisions of religious bodies. Starting with *Watson v.*

Clause. To our knowledge, no other court has picked up on this theory, probably because a) the theory of "hybrid rights' is deeply problematic, and has never caught on in the lower courts, and b) the "ministerial exception" has not collapsed in the wake of *Smith*, and thus did not need rehabilitation by way of the theory of "hybrid rights."

[62] See EEOC v. Catholic Univ. of America, 83 F.3d 455, 62-63 (D.C. Cir. 1996) (arguing that the Supreme Court in *Smith* was focused on free exercise claims of individuals, not institutions, and did not intend to cast any doubt its prior decisions about non-intervention in matters of church property and personnel). See also Kathleen Brady, note xx supra, at 1636 ("read carefully, Smith supports a broad right of church autonomy that extends to all aspects of church affairs, the most religiously sensitive as well as the more mundane.")

Jones63 in 1871, and continuing through *Serbian Eastern Orthodox Diocese v. Milojevich64* in 1976, the Court has consistently deferred to authoritative religious bodies and tribunals in cases involving disputes over the ownership of real property and control over religious personnel.

This line of decisions does not, however, stand for any general proposition of the autonomy of churches over their "internal affairs." The decisions that concern ownership and control of real property typically involve intra-denominational factions, competing in the civil courts over title to the land and buildings of the church.65 The decisions that concern personnel involve attempts by disappointed applicants or holders of clergy positions to use the civil courts to correct a church decision that has gone against them.66

These decisions are complex, and we cannot rehearse here all of the details of this

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[63] 80 U.S. (13 Wall.) 679 (1871).

[64] 426 U.S. 696 (1976).

[65] See, e.g., Watson v. Jones,80 U.S. (13 Wall.) 679 (1871); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1952). For a good account of the property disputes, see Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 Colum. L. Rev. 1843 (1998).

[66] Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). See also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (reading National Labor Relations Act narrowly so as to avoid constitutional concern about government entanglement in the personnel policies of religious schools).

complex body of law. The essential characteristic of this entire line of decision, however, is its repeated insistence that civil courts are disabled from answering ecclesiastical questions, whether they are questions of fidelity to religious teaching, appropriate criteria for appointment to ecclesiastical office, or proper ecclesiastical decision procedures. When the answers to such questions are essential to the resolution of a dispute, the teaching of these cases is that courts must find the locus of decisional authority within the church and defer to the exercise of that authority.67

When *Smith* is read in conjunction with these decisions about deference on ecclesiastical matters, it seems staggeringly overbroad to characterize these latter cases as insulating from the exercise of state power the "internal affairs" of churches. Wholly "internal" affairs of churches – e.g., the color of the robes worn by clergy -- or any other organization are never the state's concern. It is only and always the existence or likelihood of negative externalities that provokes legal interest in any organizational conduct or transaction. If churches breach their contracts, even with members of their own faith, the delivery of goods or the provision of labor may go uncompensated, with corresponding economic loss. If religious entities, acting through their agents, behave tortiously, someone is the victim.68 If religious employers violate labor laws,

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[67] Brady, note xx supra, and Laycock, note xx supra, both take a much broader view of these decisions, finding in them (along with others) an expansive right of church autonomy.

[68] We discuss the complex connection between the decisions about ecclesiastical matters and application of principles of tort law to religious entities in Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 Brigham Young University Law Review 1789 (arguing for a qualified first amendment privilege for religious entities in cases involving

and policies designed to protect employment security, safety, or opportunity are thereby breached, the well-being of employees is undermined.

Any attempt to reason from the Supreme Court's decisions on church property or personnel to a more general theory of the autonomy of religious entities cannot be sustained. As Doug Laycock said in this Symposium -- remarking on his own influential article on church autonomy, published in 198169 – the general theory simply covers far too much to be credible, and thus collapses into an inevitably inconsistent balancing of state interests against the interests of religious entities.70 While there are good reasons, explored below, to keep the state's adjudicatory machinery away from many questions related to the employment of clergy, the case for across-the-board judicial abstention in matters that affect personnel, such as workplace safety or retirement security, is considerably weaker. Many of the questions that arise from the employment relations of religious entities may be quite identical to analogous matters that appear in the behavior of any non-profit entity. An interest-balancing approach to church autonomy thus always reduces to an inquiry questions of the degree of intrusion into church affairs, and the marginal efficacy of such intrusion in advancing state policy. The questions of measurement and even-handedness raised under such an approach are virtually identical to those raised by the methodology once employed – but now abandoned -- in free exercise exemption cases.

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claims of negligent supervision of clergy).

[69] Douglas Laycock, Toward A General Theory of the Establishment Clause: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981).

[70] Douglas Laycock [article for this Symposium, or transcript if he is not publishing his remarks].

Moreover, the standard Establishment Clause account of the Court's decisions about the property and personnel of religious entities as involving "excessive government entanglement" with religious entities is insufficiently explanatory of the norms underlying those decisions. An approach centered on "entanglement" suffers from many of the same defects as a general theory of church autonomy. Application of the doctrine requires attention to exactly which affairs of a religious entity are implicated in state regulation. Why should it be even a little troublesome, for example, for the state to be heavily involved in the regulation of safety and security of children at a church-run day care center?

Moreover, the question of what degree of state interaction is "excessive" inevitably involves questions of degree that can only be resolved in light of respective governmental and private interests. An inquiry into whether the reasons for an adverse job action against a clergyman are pretextual are highly likely to entangle the church and the state – after all, the church is the defendant, the adjudicator is an arm of the state, and the substantive question is whether legally impermissible factors influenced the adverse job action.71 But the question remains -- by what combination of qualitative and quantitative measures is it to be determined that such interaction is constitutionally excessive?

In our view, the theory of free exercise exemptions for religious entities, and the still broader, companion theory requiring autonomy for the "internal affairs" of such entities, suffer from similar flaws. They both appear to sweep far too broadly, presumptively insulating from regulation those matters in which religious organizations are quite indistinct from their

[71] Corbin, note xx supra, argues that courts can decide many such cases without crossing into constitutionally dangerous territory. Id. at 2010-2022.

secular counterparts. Whether or not legislatures are free to permissively accommodate religious organizations by relaxing the state's regulatory grip, judicial mandates that government deregulate religious entities seem quite excessive as a matter of constitutional principle. Such mandates would privilege religious over secular institutions in ways that cannot be justified by norms of religious freedom, and that may well violate norms of associational equality. The "ministerial exception" and other restrictions, discussed below, on the judicial resolution of disputes between religious entities and their leaders can be persuasively defended only from narrower ground.

III. Adjudicative Disability as a Theory of Ministerial Exception

Despite its widespread acceptance in the lower courts, the ministerial exception is a doctrine in search of a new and more precise theory of justification. Such a theory is especially important as the exception gets pressed in new and different circumstances, and limitations on it appear.72

A. Adjudicative Disability and the Theory of "Neutral Principles"

The seeds from which such a theory might germinate are to be found most recently and

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[72] The cases involving claims of sexual harassment of clergy have generated the most significant limitations to date on the ministerial exception. See, e.g., Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. Cal. 1999); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. Wash. 2004); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991); McKelvey v. Pierce, 173 N.J. 26 (N.J. 2002).

straightforwardly in the Supreme Court's 1979 decision in *Jones v. Wolf*.73 The case involved a conflict between factions of a Presbyterian church in Macon, Georgia, over whether or not to remain affiliated with the Presbyterian Church of the United States (PCUS).74 A majority of the congregation voted to sever ties with PCUS, and the question litigated in the case was whether the minority that wished to remain in PCUS had a right to exclusive possession and use of the property of the local church.75 Rather than deferring to the decision of the hierarchical body within PCUS, which had backed the minority faction in the dispute over the property, the Georgia state courts had applied various principles of state law and had ruled in favor of the majority faction.76

A narrowly divided U.S. Supreme Court ruled that the Georgia state courts were constitutionally free to apply the relevant state law on the relevant subjects of trusts, real property, and construction of the charter of nonprofit organizations, and were not obliged to defer to the decision of the body with ecclesiastical authority within the church. The key precondition to the exercise of this jurisprudential freedom, which state courts were not bound to exercise, was that the relevant principles of state law were "neutral." By "neutral, "the Court explained, it meant principles that kept the courts away from the decision of questions of religious doctrine, organization, or practice.77

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[73] 443 U.S. 595 (1979).

[74] Id. at 597-99.

[75] Id. at 602.

[76] Id. at 599-601.

[77] Id. at 602-606. Justice Blackmun wrote the opinion for a majority that included

Given our reliance on the decision's constitutional approach, it is worth quoting at length the crucial passage from the opinion in *Jones v. Wolf*:[78]

> It is . . . clear . . . that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." . . .Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. . . . As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. . . Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.
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> At least in general outline, we think the "neutral principles of law" approach is consistent with the [relevant] . . . constitutional principles. . . .The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective,

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Justices Brennan, Marshall, Rehnquist, and Stevens. Justice Powell, joined by Justices Stewart, White, and Chief Justice Burger, dissented.

[78] Id. at 602-03 (citations omitted).

well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

This defense of what the *Jones* opinion calls "neutral principles" is a straightforward statement of the adjudicative disability imposed by the Establishment Clause on the civil courts (and, by necessary implication, legislatures and administrative agencies). This disability, and the correlative immunity from processes of adjudication, attaches to questions put for decision, not to the character of the dispute (e.g., land use) or the parties to the dispute (e.g., clergy, religious entities, or squabbling factions thereof).

The disabling effect of the necessity to decide certain questions is jurisdictional in the strong sense – that is, it cannot be waived, or conferred by consent of the parties. For example, in *EEOC v. Catholic University of America*,79 the DC Circuit affirmed a decision by a trial court judge to dismiss a civil rights claim by a faculty member, Sister Elizabeth McDonough, who alleged that she had been the victim of sex discrimination in the University's denial of her tenure in the Department of Canon Law. A central question in the dispute concerned the quality of Sister McDonough's scholarship in canon law. The parties had been willing to litigate the merits of the case, but the district court found that "it is neither reasonably possible nor legally permissible for a lay trier of fact to evaluate these competing opinions on religious subjects."80 The appeals court agreed that the ministerial exception covered the case, because the plaintiff was engaged in training priests with instruction devoted to religious subjects.

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[79] 83 F. 3d 455 (D.C. Cir. 1996

[80] Id. at 465.

Contrary to what courts typically say about such cases, however, the crucial constitutional concern in the case was not the title of nor the general functions assigned to the position; rather, the court was disabled from adjudication by the presence of questions that focused on the quality of writing on subjects of ecclesiastical significance. Had Sister McDonough been denied tenure for the asserted reason that she had assaulted a colleague, and the facts of the relevant incident were in dispute, a court would have been free to review the tenure denial.81

The doctrine of *Jones v. Wolf* is not always easy to apply, as the disposition of *Jones v. Wolf* itself revealed.82 Cases about ownership and control of real property have been among the most difficult in which to apply the concept of "neutral principles," because questions of religious organization and practice may frequently be interwoven with seemingly neutral principles of property or trust law. The private ordering associated with those bodies of law facilitates the exercise control of property by religious organizations, but also invites the

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[81] In such circumstances, the relevant claim might be for breach of employment contract, not sex discrimination. Moreover, the question of the appropriateness of specific performance – in this case, reinstatement as a professor of canon law in a university under Vatican control because its mission included training Catholic priests – as a remedy raises its own separate, constitutional concerns. See the discussion, infra, of sexual harassment cases and the reinstatement remedy in disputes involving religious employers and their leaders.

[82] The majority in Jones vacated and remanded the decision of the Georgia Supreme Court in favor of the local majority, because the state courts had not been clear on the precise content of the relevant "neutral principle" of state law. 443 U.S. at 606-610.

possibility of latent ambiguity with respect to the religious reference points reflected in that private ordering.

In the years since *Jones v. Wolf*, however, the lower courts have been quite busily applying its doctrine in other contexts, including the law of torts. For example, in cases involving the liability of religious entities for negligent supervision of clergy, courts have quite commonly invoked the idea of neutral principles of tort law to justify adjudicating tort liability.[83] And, closer to the precise subject of this article, the search for relevant and controlling "neutral principles" has also animated the effort to mark the boundary between employment disputes that courts may adjudicate and those that are beyond their jurisdiction. As explained below, the cases involving sexual harassment claims by clergy are at the cutting edge of this boundary quest.

The jurisdictional focus of *Jones v. Wolf*, and the limited adjudicative disability it reaffirms, resonates with broader themes in Establishment Clause theory. As we have argued elsewhere,[84] the Clause represents a key element in the idea of limited government. Like the realm of sexuality and reproduction - worldly matters that are constitutionally off-limits -- the

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[83] Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 Brigham Young University Law Review 1789, 1851 & n. 243 (citing a number of decisions from various jurisdictions holding "that the tort of negligent employment rests upon a 'neutral principle[] of law," applicable to religious institutions even if the dispute involves questions of religious documents or practices.")

[84] Ira C. Lupu & Robert W. Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37 (2002).

realm of the spirit is reserved for private decision.85 Marking out regulatory zones from which government is excluded constitutes a central element in a strategy of ensuring the anti-totalitarian quality of governance.86

Working out the details of the restriction on government speaking in a spiritual voice is of course quite difficult, as illustrated by decisions on government-sponsored display of the Ten Commandments87 and the symbols of religious holidays.88 The courts have at times permitted such displays, when the government has been able to make the case that it is not endorsing a theological position nor speaking in ways that reasonable observers will so perceive. A long and unbroken history of government acknowledgment – though not veneration or worship -- of a generic, nondenominational God has its claims.89 But the underlying principle against

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[85] Id. at 83-84.

[86] Id..

[87] Van Orden v. Perry, 545 U.S. 677 (2005); McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

[88] Lynch v. Donnelly, 465 U.S. 668 (1984); Allegheny County v. ACLU, 492 U.S. 573 (1989).

[89] We develop our own normative approach to the question of when government may acknowledge the religious beliefs reflected in national history or popular culture in Ira C. Lupu & Robert W. Tuttle, The Cross at College: Accommodation and Acknowledgment of Religion at Public Universities, 16 Wm. & Mary Bill Rts. J. 939, 980-993 (2008) (defending the constitutionality of historical and cultural, but not reverential, acknowledgment, and noting the difficulties that may arise in distinguishing among the three types).

government bodies, including courts, adopting a view on spiritual questions remains important and intact, especially in contexts where what is at stake is denominational or sectarian disagreements.

Whether the adjudicative disability imposed by the Establishment Clause extends to claims of pretext in the context of anti-discrimination suits involving clergy, or to any other particular context of dispute between religious institutions and their leaders, remains to be teased out. The teasing must be done, however, against the backdrop of a broader principle that the Clause should operate to exclude government from a certain class of messages and decisions. In what follows, we apply this principle, and the adjudicative disability that we think follows from it, to a variety of contexts, including that of discrimination claims in employment relations with clergy.

B. The Theory of Adjudicative Disability Applied

To explore the contours of this theory of adjudicative disability, we will first describe and analyze a set of hypothetical claims that courts should find non-justiciable under the theory. We will then suggest a set of claims that, under the same theory, should be justiciable. Finally, we will explore a set of hard cases that test and illuminate the boundaries between the first two types of claims.

1. Non-justiciable claims

The first set of examples involves causes of action that courts should not adjudicate. As we argue, resolution of each of these claims would require courts to answer questions that the state is not competent to address.

Example A: Overt discrimination. A congregation advertises an opening for the

position of youth pastor, and Anne applies. She meets the educational requirements and work experience listed in the advertisement, but the congregation rejects her application. In a letter, the congregation explains that "under our governing documents, women are not eligible to serve in pastoral positions." Anne files a lawsuit alleging gender discrimination in employment, and the congregation moves to dismiss, invoking the ministerial exception.[90]

Very few lawsuits raise the issue of overt, doctrinally-based employment discrimination,[91] although the issue stands at the core of the ministerial exception. If the exception validly covers any claims, it should protect religious traditions such as Roman Catholicism or Orthodox Judaism that exclude women from ordained ministry.

The strongest constitutional defense of overt discrimination in the employment of clergy, however, may not come from the Religion Clauses. Instead, such openly exclusionary policies may rest most strongly on a generic principle of associational freedom. In *Boy Scouts of America v. Dale*,[92] the Supreme Court held that the Boy Scouts were free to exclude gays from

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[90] In our examples, we ignore procedural requirements that impose preconditions, such as exhaustion of administrative remedies, for filing discrimination claims or similar actions. See, e.g., U.S. Equal Opportunity Commission, "Filing a Charge of Employment Discrimination," available at: http://www.eeoc.gov/charge/overview_charge_filing.html.

[91] But see Klouda v. Southwestern Baptist Theol. Seminary, 2008 U.S. Dist. LEXIS 22157 (N.D. Tex. Mar. 19, 2008) (seminary professor discharged after school decided to conform its hiring of faculty to the denomination's prohibition on women serving as ministers).

[92] 530 U.S. 640 (2000).

leadership positions, notwithstanding a state statute that prohibited discrimination based on sexual orientation. The case arose when the Boy Scouts revoked the membership of James Dale, an adult leader in the group, because of Dale's open avowal of his homosexuality.[93] Dale sued under state law prohibiting discrimination based on sexual orientation, but the Supreme Court held that the application of the anti-discrimination law to Dale's membership violated the Boy Scouts' First Amendment right to communicate its message through its choice of leaders.[94]

A religious group's policy of not ordaining women is indistinguishable from the Boy Scouts' policy of excluding those who are openly gay from leadership positions. Both policies reflect explicit choices about the group's identity and message. Compliance with anti-discrimination norms would require the group to promote a message – the fitness of certain classes for leadership – to which the group is opposed.

Although religion-neutral protection for expressive association offers a strong defense for the practice of overt discrimination in the employment of clergy, defenders of the practice can also appeal to a principle embedded deep in the history of constitutional protections for religious liberty. Many in the founding generation, including James Madison, expressed grave concern about government licensing of clergy.[95] Under licensing schemes, clergy were required to obtain

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[93] Id. at 644-45.

[94] Id. at 653-61.

[95] James H. Hutson, Church and State in America: The First Two Centuries 87-93 (Cambridge, 2008); John T. Noonan, The Lustre of Our Country: The American Experience of Religious Freedom 67 (1998) (discussing James Madison's opposition to the Crown's licensing of ministers in Virginia); Steven Waldman, Founding Faith: Providence, Politics, and the Birth

official permission before preaching, proselytizing, or leading worship. To Madison and others, these licensing schemes restrained free speech, discriminated against disfavored religious groups, and reflected a belief that civil government was competent – in substance and authority – to rule on religious matters.[96]

Of course, employment discrimination rules can be distinguished from clergy licensing. Most importantly, anti-discrimination norms apply equally to all employers, but licensing schemes were targeted only at religious groups, and were typically driven by the hostility of established faiths to newer religious movements.[97] In other respects, however, the imposition of employment discrimination norms on clergy employment closely resembles the practice of clergy licensing. Most importantly, employment discrimination rules establish official criteria of eligibility for employment as clergy, and do so in a way that differs little from standards of educational achievement or technical competence. A ban on discrimination in the selection of clergy, just like a rule that clergy must have an advanced academic degree or complete a course

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of Religious Freedom on America 100-06 (Random House, 2008); Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. and Mary L. Rev. 2105, 2119-20 (2003).

[96] Hutson, supra note XX, at 124-25.

[97] In this respect, schemes of clergy licensing may find a closer modern parallel in some jurisdictions' land use restrictions, which can make it very difficult for new religious organizations find sites for houses of worship. See, e.g., Islamic Center of Mississippi v. City of Starkville, 840 F.2d 293 (5th Cir. 1988); Church of Jesus Christ of Latter-day Saints v. Jefferson County, 741 F. Supp. 1522 (N.D. Ala. 1990).

in pastoral counseling, implies that government can decide who is fit to serve as a priest, rabbi or other religious leader.[98] By requiring that all faiths must be open to hiring women for the role of clergy, the government official expresses the view that women are capable of performing that role – which encompasses, for some traditions, the power of representing the divine.[99] Through such a determination, the government would be asserting its authority over highly contested theological and ecclesiastical questions, from the character of worship to the nature of the holy.

Exemption from government-mandated eligibility requirements, however, does not mean that religious institutions enjoy complete legal immunity for their hiring decisions.[100] For

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[98] The military's eligibility requirements for chaplains do not raise the same concerns as a scheme of clergy licensing. See U.S. Dep't of Defense, Instr. 1304.28, Guidance for the Appointment of Chaplains in the Military Departments (11 Jun. 2004). The military commissions chaplains as officers, and expects them to perform a number of roles in addition to the direct provision of religious services. The educational requirements for chaplains are based on that full range of duties, and thus reflect a legitimate governmental interest. See generally, Ira C. Lupu and Robert W. Tuttle, Instruments of Accommodation: The Military Chaplaincy and the Establishment Constitution, 110 W.Va. L. Rev. 89 (2007).

[99] See John Paul II, Apostolic letter, Ordinatio Sacerdotalis: On Reserving Priestly Ordination To Men Alone (May 22, 1994), available at: http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html

[100] To take a somewhat different example, consider a religious community that recognizes a child as its leader. A community should be free to select a minor as its religious

example, a child injured by a pastor's abusive conduct may sue the congregation for negligent selection or retention of the pastor,[101] even though that cause of action may have a chilling effect on employment decisions by religious bodies.[102] The negligent selection tort does not directly regulate who is qualified to serve as clergy;[103] instead, it ensures that employers take

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leader, but the state may nonetheless impose restrictions on the conditions of that minor's employment. Although such a leader may be limited in the number of hours each week she can work, the choice of leader still belongs to the religious community. Prince v Massachusetts, 321 U.S. 158 (1944) (upholding enforcement of state child labor laws against parents who used children to distribute religious literature; the parents had argued that the children were ministers of the faith, but the court ruled that child labor laws could be enforced without regard to the children's religious status).

[101] Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1847-49.

[102] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 795-97 (9th Cir. 2005) (Kozinski, J., concurring in denial of rehearing en banc) (criticizing analysis of ministerial exception as protection of religious hiring from potential chilling effects of civil litigation).

[103] In a sexual harassment case involving a minister, Judge Kozinski wrote:

> But letting Elvig recover damages for harassment does not regulate employment directly; at most, it may have a collateral effect on employment by changing the employer's incentives to retain or remove the accused employee. As such, damages suits by employees for sexual harassment are no more intrusive than parishioners' negligent supervision lawsuits based on molestation by priests.

responsibility for the foreseeable risks that their decisions impose on others.[104] If a congregation wishes to employ a pastor who has previously been convicted of child abuse, the congregation is legally free to do so,[105] although the result of a mistaken judgment about future conduct is likely to be devastating – for any injured child as well as the congregation.[106]

Thus, there is a constitutional distinction between official criteria for employment of clergy and tort liability for negligent selection. Official criteria for clergy employment, even if imposed through the formally religion-neutral standards of anti-discrimination law, directly control a congregation's expression of its message, as personified in the role of pastoral leadership. Put differently, the plaintiff-cleric's alleged injury is inseparable from the congregation's choice of its leader. Any remedy for the plaintiff's injury would inevitably limit

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Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 796 (9th Cir. 2005) (Kozinski, J., concurring in denial of rehearing en banc).

[104] We have suggested procedural modifications in this cause of action to protect legitimate interests of religious institutions. Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1860-67 (arguing that courts should adopt heightened standard of proof for claims of negligent employment).

[105] The pastor may be barred, by previous identification as a sex offender, from taking the position, but rules on child protection do not prohibit congregations from hiring sex offenders as clergy.

[106] See, e.g., Doe v. Liberatore, 478 F. Supp. 2d 742 (M.D. Pa. 2007) (discussing potential theories under which diocese could be held liable in connection with priest's sexual abuse of minors).

the congregation's choice. In contrast, the negligent selection tort imposes only an indirect constraint on a congregation's pastoral options. If a congregation faces liability arising from its negligent selection of a minister, the underlying injury must involve something other than the congregation's mere choice of that cleric. Instead, the congregation's choice must have put the minister in a position that enabled the minister to cause injury to a third party.[107] The tort of negligent selection addresses the injury that results from the minister's conduct, not the congregation's selection of the cleric per se.

Example B: Covert discrimination. A rabbi has been employed by a synagogue for three years. During the first two years, the rabbi's performance was rated as excellent on performance reviews, and he enjoyed a good relationship with lay leaders in the congregation. But a year ago the rabbi was in an auto accident that injured his leg; although he returned to work after a month, his relationship with leaders has suffered, and he has received a highly negative performance review. The leaders contend that the rabbi no longer performs as many hospital or home visits as he did before the accident. The rabbi contends that this deterioration has been caused by the congregation's unwillingness to accommodate his continuing physical disability. After months of growing discord, the congregation discharges the rabbi; in response, he brings an action under the Americans with Disabilities Act.[108]

Example B represents the most common type of case in which the ministerial exception is

[107] Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1847-48 (discussing elements for tort of negligent employment).

[108] Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011 (N.D. Iowa 2007).

raised. A congregation claims that it complies with non-discrimination norms, or at least fails to assert a doctrinal basis for opposition to the norms, but the congregation rejects official enforcement of the norms in an action brought by clergy.[109] Unlike the overt discrimination claims addressed in Example A, however, covert discrimination claims do not directly raise the issue of religious justification for the allegedly wrongful conduct. If the congregation had to defend on the merits, it would deny that its conduct was wrongful, and offer a legitimate basis for the discharge. The plaintiff would then assert that the congregation's offered justification was only a pretext for impermissible discrimination, and the court would have to decide whether the congregation's justification was legitimate.[110]

In cases of covert discrimination, the ministerial exception cuts off inquiry before a court must analyze the legitimacy of a congregation's motives in acting toward its cleric. If the court determines that the plaintiff is a "ministerial employee," the defendant is a religious entity, and the dispute focuses on the defendant's employment relationship with the plaintiff, then the ministerial exception is likely to end the matter. The cleric does not get the opportunity to have the court test the adequacy, or even the good faith basis, of the congregation's explanations for its conduct in the employment relationship.[111] Indeed, the congregation is not required to offer any reason for its conduct.

At first glance, this ban on judicial consideration of assertions of pretext suggests that the

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[109] See, e.g., Starkman v. Evans, 198 F.3d 173, 175 & n.1 (5th Cir. 1999).

[110] Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991).

[111] Williams v. Episcopal Diocese of Mass., 436 Mass. 574, 578-80 (Mass. 2002)

limit on the court's authority derives from the categorical immunity or autonomy of the defendant religious institution. In other words, the relationship between congregation and clergy stands wholly outside the court's jurisdiction, and solely within the religious entity's sphere of autonomy.[112] Litigation of these disputes ends once the court determines that the claim arises out of that relationship.

On close inspection, however, a better way of understanding covert discrimination claims, and the resulting barrier to adjudication of pretext claims, is by analogy to the settled law regarding "clergy malpractice" claims. In a variety of cases, plaintiffs have tried to assert the liability of clergy or congregations for the tort of clergy malpractice, defined as the failure to exercise reasonable care in the performance of professional duties.[113] Courts have uniformly rejected clergy malpractice claims because the claims depend on establishment of a standard of

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[112] See, e.g., Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000).

[113] Nally v. Grace Community Church, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948 (1988), cert. den. 490 US 1007 (1989). See Destefano v. Grabrian, 763 P.2d 275, 283-86 (Colo. 1988) (permitting a breach of fiduciary duty claim in a suit over sexual misconduct of a pastoral counselor, but rejecting plaintiff's claim of malpractice in counseling). See also Schmidt v. Bishop, 779 F. Supp. 321, 326-28 (S.D.N.Y. 1991); Roppolo v. Moore, 644 So. 2d 206, 208-10 (La. Ct. App. 1994); Strock v. Pressnell, 527 N.E.2d 1235, 1239 (Ohio 1988). See generally Mark A. Weitz, Clergy Malpractice in America: Nally v. Grace Community Church of the Valley (Univ. Press of Kansas, 2001); Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1816, 1822-23 (discussing claims of clergy malpractice).

care for the "reasonable cleric."[114] The difficulties with such a standard are obvious. Religious traditions differ dramatically in their understandings of the authority and role of clergy, along with the preparation necessary for the position. To decide on a standard for a "reasonable minister," a court would need to adopt some vision of the clergy – perhaps from one or a combination of traditions – as the norm, and essentially require the clergy of all traditions to conform to that role.[115] In the alternative, a court could particularize the duty of "reasonable cleric" for each tradition, but that simply shifts disputes to intra-denominational differences over the office of ministry. The standard of "reasonable Orthodox rabbi," for example, is just as fraught with theological controversy as the standard of "reasonable minister."

Thus, courts are disabled from deciding a clergy malpractice claim because of the specific question that adjudication of the claim requires courts to answer, rather than because such a claim seeks to hold clergy or their employers liable for torts. To establish a standard of care for clergy malpractice, the court would have to decide what constitutes normal performance of the ministerial role. And that is precisely the question typically at issue in ministers' claims of covert discrimination. In order to demonstrate that he was fired for an impermissible reason, the plaintiff minister must assert that he suffered adverse employment action notwithstanding his effective – or at least adequate – performance of the pastoral role.[116] The court then must assess

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[114] Nally, 763 P.2d at 960.

[115] Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1823.

[116] EEOC v. Catholic University, 83 F.3d 455, 465-66 (D.C. Cir. 1996); Miller v. Bay View United Methodist Church, 141 F.Supp. 2d 1174, 1184 (E.D. Wisc. 2001).

the quality of the plaintiff's job performance, and such a determination requires the court to adopt a standard of reasonable performance within that role.[117]

A plaintiff, such as the one in our example, may attempt to evade the analogy with clergy malpractice claims by pointing to a pattern of positive job evaluations by the congregation.[118] But past evaluations do not resolve the issue of plaintiff's current performance. The court would still need to decide whether the plaintiff's work remained of adequate quality, and whether the previous evaluations considered all of the elements relevant to the congregation's judgment about the cleric's work.

The same reasoning applies to discrimination claims raised at the hiring stage. The candidate's past performance in the position might be irrelevant, but a disappointed candidate would still need to show that she was qualified for the position, and that the congregation's purported justification for denying her the position was a pretext for discrimination.[119] Assessment of her qualification would involve the constitutionally problematic inquiry identified in Example A, and scrutiny of the congregation's allegedly pretextual justification would involve the court in the same difficulties faced by a clergy malpractice claim. Courts cannot decide whether a congregation has engaged in discriminatory conduct toward a ministerial employee without first determining a set of qualifications for holding the role, or a standard of performance within the role, and then measuring the employee's conduct against these standards. Such acts of

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[117] Catholic University, 83 F.2d at 465-66; Miller, 141 F. Supp. 2d at 1184.

[118] [CITE NEEDED]

[119] Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357-58 (D.C. Cir. 1990).

measurement are beyond the state's adjudicative competence.

Example C: Breach of Contract. A congregation hires a pastor under a three-year contract, which provides that the pastor will only be removed from office for immoral conduct or a departure from church doctrine. After a series of disagreements between the pastor and lay leaders, the congregation votes to terminate the pastor's call. The pastor alleges that the termination breached his employment contract because the congregation did not prove that he committed immoral conduct or advanced unorthodox teachings. The congregation alleged "unchristian behavior" as its reason for ending the call, but offered no specific grounds for that allegation. The pastor asks the court for reinstatement in the call or damages for the loss of his salary through the end of the contract term.[120]

Example C raises the question of whether a congregation's voluntary agreement with a pastor changes the constitutional analysis outlined in discussing the first two examples. In one of the leading decisions on the ministerial exception, *Minker v. Baltimore Annual Conference of the United Methodist Church*,[121] the U.S. Court of Appeals for the D.C. Circuit said that "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully

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[120] Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993); Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. Ct. App. 1996); see also Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200 (D. Conn. 2000) (priest, serving as faculty member of religious college, claimed breach of contract because dismissal, on grounds of his sexual orientation, violated provision of implied contract with faculty members).

[121] 894 F.2d 1354 (D.C. Cir. 1990).

enforceable in civil court."[122] Although it dismissed the minister's claims of employment discrimination, the court permitted the minister to proceed with a contract-based claim against his denomination, reasoning that:

> . . . the issue of breach of contract can be adduced by a fairly direct inquiry into whether appellant's superintendent promised him a more suitable congregation, whether appellant gave consideration in exchange for that promise, and whether such congregations became available but were not offered to Pastor Minker.[123]

The D.C. Circuit determined that Reverend Minker's breach of contract claim could proceed because a voluntary agreement entered into by the religious body has a different character than the compulsory standards of anti-discrimination law. Judicial enforcement of such an agreement imposes a standard that the religious organization has already accepted, and on which the plaintiff-minister has relied. That reasoning seems perfectly consistent with deriving the ministerial exception from the right to free exercise. If the exception is designed to protect the autonomy of religious organizations, then beneficiaries of that protection should have the power to waive its application.[124] Under such a rights-based theory, a religious organization should be free to submit its relationships with clergy to the standards and jurisdiction of civil law.

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[122] Id. at 1360. See also Petruska, 462 F.3d 294, 310 (quoting Minker); Rayburn, 772 F.2d at 1171.

[123] Minker, 894 F.2d at 1360.

[124] Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1041-42 (7th Cir. 2006), XX US XX cert. denied (2006).

An Establishment Clause-based theory of adjudicative disability points in a very different direction. Consent of the affected religious organization does not eliminate the constitutional problems identified in our discussion of the first two examples.[125] Whether the litigation involves a claim of discrimination or breach of contract, a court would be asked to resolve the same issue: is the plaintiff qualified to assume or remain in the role of cleric? The primary defect in adjudication of that question is the assertion of judicial competence itself, not the impact that the assertion might have on the religious body. There are undoubtedly risks that a court might reach an erroneous decision about a minister's performance, or that the decision might reflect judicial bias against some religious traditions, but such risks are subordinate to the more basic problem. Adjudication of a minister's role and performance implies that the government has authority over that subject matter, yet such an assertion violates the core Establishment Clause principle that limits civil government's jurisdiction over religious matters. Courts have long rejected the idea that they may resolve congregational property disputes by determining which side has been faithful to doctrine.[126] The Establishment Clause requires the same judicial abstention when a court is faced with a dispute over a minister's performance in office, whether that dispute arises from breach of contract or violation of statute.

Voluntary consent of the affected parties does not eliminate the Establishment Clause

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[125] Id.

[126] Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449-51 (1969) (holding unconstitutional Georgia courts' use of "departure-from-doctrine" as a standard for resolving church property disputes).

limits on government authority over religion.[127] For example, even if all of the parents in a public school district agreed to permit official prayers in the schools, the practice would still violate the Establishment Clause because the promotion of religious piety is not a constitutionally permissible object of civil government.[128] Similarly, a congregation's waiver of the ministerial exception should not vest a court with jurisdiction to decide on the quality of a minister's job performance. As the district court judged recognized *sua sponte* in *EEOC v. Catholic University*,[129] the Establishment Clause disables courts from deciding religious questions, and the parties may not vest the court with adjudicative authority by consent.

The D.C. Circuit's decision in *Minker* may appear to contradict this conclusion, but it is actually consistent with our reasoning. Although the court permitted Minker's contract claim to go forward, it added a caution:

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[127] McDonnell v. Episcopal Diocese of Ga., 191 Ga. App. 174, 175, 381 S.E.2d 126, 127 (Ga. Ct. App. 1989) (the jurisdictional limitation on adjudication of a clergy-denomination lawsuit applied even if the defendant did not invoke it).

[128] Johnson v. Sanders, 319 F. Supp. 421, 432 n.32 (D. Conn. 1970) (three judge court), aff'd, 403 U.S. 955 (1971) (Establishment Clause limitations are not subject to waiver). See also Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (1998); Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX, at 1815, 1895.

[129] EEOC v. Catholic Univ. of Am., 856 F. Supp. 1, 12-13 (D.D.C. 1994), aff'd, 83 F.3d 455 (D.C. Cir. 1996). See our discussion of the Catholic University case, supra notes XX-XX and accompanying text.

> It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy even as to his contract claim. Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion.[130]

If a court can resolve a contract dispute without adjudicating questions about the minister's performance in the role, then the Establishment Clause imposes no bar.[131] The necessary elements of Minker's contract claim, including his suitability for call and the availability of appropriate placements, certainly suggest that religious issues were likely to be raised in any subsequent litigation. Adjudication of those religious issues is not inevitable. In discovery, the religious body might have stipulated to Minker's suitability and the availability of placements. But if those issues were controverted, the court would have no authority to resolve the suit, and Minker's claim could not proceed.

2. Justiciable claims

The second set of examples involves issues to which adjudicate disability should not attach, even though the issues arise from disputes between congregations and their ministers.

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[130] Minker, 894 F.2d 1360.

[131] Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011, 1025-28 (N.D. Iowa 2007) (limited jurisdiction over clergy breach of contract claims does not extend to adjudication of issues of ministerial performance). See also El-Farra v. Sayyed, 365 Ark. 209 (Ark. 2006) (no jurisdiction over alleged breach of contract, where adjudication would involve assessment of plaintiff's role as religious leader).

Example D: Who is a minister? Defendant congregation hired the plaintiff as "Minister for Administration," with duties that included oversight of the church's property, supervision of custodial and secretarial staff, and general office management. After several disputes with the congregation council, plaintiff was fired. Plaintiff claimed that the firing breached his employment contract with the church, and also constituted age-based discrimination. Invoking the ministerial exception, the congregation moved to dismiss the lawsuit. Plaintiff denied that he was a ministerial employee, and the congregation argued that its determination of who is a minister is itself protected by the ministerial exception.[132]

On the surface, the decision about who is a minister seems little different from decisions about the qualifications for ministry or performance of the clerical role. All involve the religious community's definition of ministry. If the purpose of the ministerial exception were to protect the autonomy of religious organizations, there would be little reason for distinguishing among these decisions. Once a religious organization sincerely professed that a particular role was ministerial, courts acting on an autonomy-based theory would be precluded from scrutinizing employment disputes arising from that role.

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[132] The leading case on the definition of "minister" under the ministerial exception is EEOC v. Southwestern Baptist, 651 F.2d 277 (5th Cir. 1981). See also Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); Starkman v. Evans, 198 F.3d 173, 175-77 (5th Cir. 1999); Archdiocese of Washington v. Moersen, 399 Md. 637, 925 A.2d 659 (Md. Ct. App. 2007), cert. denied, 2008 U.S. LEXIS 1337 (U.S., Feb. 19, 2008).

If, however, the ministerial exception is grounded in Establishment Clause limits on government jurisdiction over particular questions, the decision about who is a minister turns out to be quite different from decisions about clergy qualifications or performance. Seen through the lens of the Establishment Clause, the ministerial exception insures that the government's power is not directly employed to promote or impede particular religious doctrines. Decisions about clergy qualifications or performance fall within that category; but decisions about which positions fall within the ministerial exception do not. This distinction may be counterintuitive, but it is important and illuminates core aspects of our Establishment Clause-based understanding of the ministerial exception.

By classifying a position as ministerial, the court is not deciding which roles deserve the religious title of "minister," or who is fit to be ordained, or how performance in the role of clergy should be measured.[133] Instead, the court's classification serves only the government's interest in avoiding impermissible judgments. From that perspective, the court asks which positions involve the kinds of assessments that courts should be forbidden to make.[134] If the position does not require the court to determine whether an employee has adequately promulgated the church's message, or is qualified to teach that message, then the ministerial exception should not apply. In other words, the court has general jurisdiction to decide whether it has particular jurisdiction with respect to questions raised in a dispute between congregations and their employees. The congregation's decision to label a position as "ministerial" or to limit the position to ordained

[133] Moersen, 925 A.2d 659, 668-69.

[134] Id. at 669-677 (reviewing case law distinguishing between functions of ministerial and non-ministerial employees).

candidates will be relevant to the court's determination, but the congregation's view should not preclude the court from making an independent judgment about the position at issue.

Moreover, permitting judicial determination of which positions are "ministerial" is conceptually no different from the official application of definitions of "religion" or "minister" found throughout the law, including the very definition of religion under the Religion Clauses. Federal tax law decides which organizations are "religious" and thus qualify for exemption,[135] and which religious leaders are "ministers of the gospel" and may thus exclude their housing allowance from earned income.[136] The law of evidence determines who may be considered clergy for purposes of the priest-penitent privileges.[137] Public school boards and courts must decide which courses or exercises are religious, and thus ineligible for official sponsorship in schools.[138] In each of these contexts, the government's definition is based on secular and

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[135] Church Of the Chosen People (North American Panarchate) v. The United States of America, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982). See also I.R.S. Gen. Couns. Mem. 36993 (Feb. 3, 1977).

[136] 26 USCS § 107. See also Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707 (2003).

[137] People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959 (1993).

[138] See, e.g., Doe v. Porter, 188 F. Supp. 2d 904 (E.D. Tenn. 2002), aff'd, 370 F.3d 558 333 (6th Cir. 2004) (holding that Bible classes conducted in public schools violated the Establishment Clause because content of instruction was devotional); Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426 (M.D. Fla. 1998) (partially granting an injunction based on an Establishment Clause challenge to curriculum of Bible history courses in public schools). See

functional concerns, which may differ among contexts, rather than a desire to promote a particular theological view. For example, the definition of clergy under the evidentiary privilege is designed to protect the reasonable expectations of those who communicate with religious leaders.[139] The definition of "religious" within the tax code is intended to protect against fraudulent efforts to avoid tax liability.[140]

In Example D, the court should reject the congregation's claim that its classification of the employee as a minister resolves the question. To invoke the ministerial exception, the congregation will need to show why adjudication of the employment claim would require the court to exercise authority over the congregation's religious message.[141] It is possible, of course, that the "Minister for Administration" has responsibility for promulgation of such a message. His duties may include substantive judgments about the content of worship or supervision of employees engaged in religious teaching. It is equally possible that his position involves no such duties, and the characterization of his job as "ministerial" results from the congregation's desire to elevate all positions of responsibility to equal status.[142] Although the congregation is free to

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generally, Lupu and Tuttle, The Cross at College, supra note XX, at XX.

[139] People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959 (1993).

[140] Church Of the Chosen People (North American Panarchate) v. The United States of America, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982). See also Church of Gospel Ministry, Inc. v. United States, 640 F. Supp. 96 (D.D.C. 1986), aff'd 830 F2d 1188 (D.C. Cir. 1987).

[141] Miller v. Bay View United Methodist Church, 141 F. Supp. 2d 1174, 1181-83 (W.D. Wisc. 2001).

[142] It is also possible that the congregation is trying to immunize all of its employment

confer titles and status as it chooses, those decisions do not mean that the Establishment Clause bars courts from deciding disputes that arise from performance of a particular role.[143] The ministerial exception limits adjudication of specific religious issues. If those issues do not arise with respect to a role, then courts should not classify the position as ministerial for purposes of this exception.

> *Example E: Who has authority to hire or fire a minister?* A pastor has been engaged in a long-running dispute with several of the congregation's elders, although she enjoys the support of many members of the congregation. The board of elders votes to terminate the pastor's employment. The pastor sues to enjoin enforcement of the board's decision. She argues that the board failed to follow proper procedures in terminating her employment. In particular, the board failed to provide her written notice of deficiencies in her performance, did not consult with the denominational body, and did not obtain the necessary two-thirds consent of the congregation before the termination. The board invokes the ministerial exception and asks the court to dismiss the pastor's claim.[144]

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relationships from legal scrutiny. The law of the ministerial exception should not permit, or create incentives for, congregations to adopt that strategy. See Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990) (Fair Labor Standards Act may be applied to nonministerial employees of religious entity); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2005).

[143] Moersen, 925 A.2d 659, 668-69.

[144] See Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651 (W.D. Va. 2006) (court has jurisdiction to decide whether congregational board had authority to terminate

The process-based claims in Example E pose a slightly different set of questions from those raised in the first four examples. In important respects, the inquiry reflected in this example comes closest to the congregational property disputes discussed earlier.[145] Judicial resolution of these claims would require scrutiny of congregational documents, including the corporate charter, constitution, bylaws, and perhaps even the employment manual and the pastor's contract. Because not all congregations would have such documents, or congregation leaders may be wholly unaware that such documents define the scope of powers and responsibilities within the congregation, judicial resolution of the claims might also require scrutiny of governance and employment practices within the congregation.

One might argue that scrutiny of congregational documents and practices threatens to entangle courts in congregations' relationships with clergy, so such scrutiny should be barred by the ministerial exception. But application of the ministerial exception depends on the specific questions that the court would be required to answer, not the extent to which the inquiry intrudes on the congregation. In this example, the plaintiff-pastor has asked the court to resolve two distinct issues: which body within the congregation had the authority to terminate her call, and what process she was entitled to receive prior to termination.

Both issues depend on judicial interpretation of the congregation's documents and practices, but that similarity masks an important difference. The first issue focuses on whether the congregation has acted; the second focuses on the quality of that action and, by extension, the character of the congregation's relationship with the pastor. To resolve the first question, the

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minister).

[145] See supra notes XX-XX and accompanying text.

court would need to decide how the religious body allocates decision-making authority.[146] That allocation is certainly thick with religious significance, and has driven schisms and even wars in the past.[147] Civil jurisdiction over the question, however, does not depend on a normative resolution by courts of contested religious positions. Instead, the court is asked to enforce only the allocation of power that the congregation has already adopted.[148] Rather than imposing a

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[146] Vann v. Guildfield Missionary Baptist Church, 452 F. Supp. 2d 651, 655-56 (W.D. Va. 2006).

[147] In Christianity, the split between congregational and hierarchical church governance generally reflects much deeper theological divisions about sources of authority, specifically the extent to which the church stands between the believer and God – and thus bears divine authority – or whether the believer and God are in immediate relationship, connected through scripture and prayer. In traditions that focus on the immediate relationship between God and believer, church polity tends to be congregational, with authority of the church derived from the consent of the believers. The struggle between Anglicans and Puritans in sixteenth and seventeenth century England provides a vivid example of the deep and violent conflicts that can arise over patterns of ecclesiastical authority. See generally Peter Lake, Anglicans and Puritans? Presbyterianism and English Conformist Thought from Whitgift to Hooker (London: Unwin Hyman, 1988); Joan Lockwood O'Donovan, Theology of Law and Authority in the English Reformation 109-53 (Atlanta: Scholars Press, 1991).

[148] Vann, 452 F. Supp. 2d at 656. Poesnecker v. Ricchio, 631 A.2d 1097, 1103-04 (Pa. Commw. 1993) (court has jurisdiction to decide whether removal of religious leader was the result of a legitimate decision by the religious body).

resolution on the congregation, the court's exercise of jurisdiction protects and implements the congregation's own polity. Failure to extend that protection would effectively consign religious bodies to anarchy, as the will of those who hold constitutional authority within a congregation could be thwarted by those who aggressively seized power and acted without lawful authority.[149]

Judicial enforcement of a congregation's allocation of authority can be distinguished from enforcement of contracts with ministers. We argued earlier that the voluntary consent of parties does not eliminate the Establishment Clause limits on civil jurisdiction.[150] Thus, the mere fact that a congregation has formally adopted a particular authority structure does not give the court power to enforce that structure. In a breach of contract case, the court lacks jurisdiction if resolving the claim would require it to assess the plaintiff's qualifications or performance as minister. The challenge to the board's authority in Example E requires no such assessment. The court would only need to decide whether the congregation's governing documents gave the board the power to terminate a pastor, or assigned that power to the congregation as a whole. If the court determined that the board lacked that power, the congregation would remain free thereafter to give that power to the board, or to terminate the pastor itself. Importantly, the court would not review the decision to terminate the pastor; it would only have jurisdiction to decide whether the board was the appropriate body to make that decision.

Justiciability of the second type of issue in Example E – requirements of denominational

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[149] Higgins v. Maher, 210 Cal.App.3d 1168, 1173 (1989) (quoting Laycock, Towards a General Theory of the Religion Clauses, 81 Colum. L. Rev. 1373, 1413 (1981)). See also Vann, 452 F. Supp. 2d at 656.

[150] Supra notes XX-XX and accompanying text.

consultation or written notice of deficiency – represents a more difficult question. Some procedures may be intertwined with the allocation of authority. For example, the congregation's constitution may require particular forms and timing of notice for a congregational meeting, and failure to provide the required notice would seriously undermine the validity of decisions reached at such a meeting.[151] Lack of notice is likely to mean that "the congregation" was not given an adequate opportunity to exercise its authority at that meeting.

However, the notice and consultation procedures invoked by the pastor in Example E involve the quality of decision-making, not the allocation of decision-making authority. The congregation's employment procedures, such as the duty to provide the pastor with written notice of any deficiencies, are not readily separable from the congregation's evaluation of the pastor's performance.[152] A requirement of written notice implies a notice adequate to inform the

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[151] Vincent v. Raglin, 114 Mich. App. 242; 318 N.W.2d 629 (1982); Org. for Preserving the Constitution of Zion Lutheran Church v. Mason, 49 Wn. App. 441, 445, 743 P.2d 848 (1987) (court has jurisdiction to decide legitimacy of congregational vote to hire pastor).

[152] Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (courts may not review alleged arbitrariness of church decisions regarding ecclesiastical officials). See also Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Knuth v. Lutheran Church Missouri Synod, 643 F. Supp. 444 (D. Kan. 1986); Jacobs v. Mallard Creek Presbyterian Church, Inc., 214 F. Supp. 2d 552 (W.D.N.C. 2002); Baker v. African Methodist Episcopal Church, 2002 U.S. Dist. LEXIS 13429 (N.D. Tex. July 23, 2002) (court may not adjudicate claim that church failed to follow internal procedures in termination of pastor).

pastor of the relevant concerns and, perhaps, to permit her to respond. Similarly, a requirement of consultation with the denominational body implies adequate consultation – that is, a flow of information and judgment sufficient to fulfill the purposes to be served by the consultation requirement. Judicial appraisal of the adequacy of the notice to the pastor or the sufficiency of the consultation with the denominational body, however, may force the reviewing court to decide questions of religious significance. Thus for the same reasons that the court lacks jurisdiction to review the substance of the decision, the court would also lack jurisdiction to review the process by which that decision is reached.[153] As long as the appropriate body makes the decision, the court should not look behind that body's judgment.

Example F: Breach of contract - unpaid wages. An imam was hired as religious leader of a mosque. The imam's employment contract provides a salary that is paid at the end of each month. The arrangement went well for several years, but a serious disagreement arose last month. At the end of the month, the mosque's board of directors informed the imam that it would not pay his salary for the past month because of weaknesses in his leadership and teaching. The board has not discharged the imam, and he continues to perform his duties. But the imam files a lawsuit, seeking payment for his services over the past month.[154]

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[153] Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25(1976).

[154] Goodman v. Temple Shir Ami, 712 So. 2d 775 (Fla. Dist. Ct. App. 3d Dist. 1998) (court permitted rabbi to assert his claim for back wages, but dismissed his claims of defamation and breach of contract). See also Jenkins v. Trinity Lutheran Church, 356 Ill. App. 3d 504 (Ill. App. Ct. 2005).

This example involves an issue similar to the breach of contract claim addressed in Example C. In both, the religious body claims to have taken action against a ministerial employee based on evaluation of the employee's performance. We argued that the ministerial exception should bar adjudication of the claim in Example C, but we think the claim in Example F merits different treatment.

As with the previous examples, application of the ministerial exception depends on the specific issue that the court is asked to resolve. In a claim for back wages, the court would not be required to second-guess the board's evaluation of the imam's performance. Under ordinary employment law standards, an employee is entitled to wages for time worked even if the employee has performed poorly during that time period.[155] Unless the employment contract

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[155] See, e.g., Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184 (2nd Cir. 2003); E. H. Crump Company of Georgia, Inc. et al. v. Millar, 194 Ga. App. 687, 391 S.E.2d 775 (Ga. Ct. App. 1990); Cameco, Inc. v. Gedicke, 157 N.J. 504, 724 A.2d 783 (1999). The amount owed by the employer would also include benefits, such as severance pay or accumulated leave, that are attributable to time already worked by the employee. See Gipe v. Superior Court of Orange County, 124 Cal. App. 3d 617, 177 Cal. Rptr. 590 (1981) (severance pay); Pearson v. Church of God, 325 S.C. 45, 478 S.E.2d 849 (1996) (pension benefits). This would also encompass a contractual obligation to provide the plaintiff with a period of notice before termination. If the congregation did not provide that notice, a court would not order the plaintiff reinstated for that period, but the court could require the congregation to pay the plaintiff's wages during that period. See Salzgaber v. First Christian Church, 65 Ohio App. 3d 368, 583 N.E.2d 1361 (Ohio Ct. App., Ross County 1989).

makes payment expressly contingent on a particular quality of performance, the employer's remedies for poor performance do not include denial or reduction of past wages.[156] The employer may discipline or discharge the employee, or offer future employment at a different salary, but the employer may not unilaterally withhold pay.[157]

The sole exception to this rule excuses employers from paying "faithless servants," defined as employees who have breached their duty of loyalty to the employer.[158] While that category would encompass a minister who embezzled congregational funds, it does not cover disagreements about the quality of services performed.

Therefore, the ministerial exception does not bar the imam from establishing a claim for back wages. To prevail, he must prove that he was entitled to receive a specific wage for the

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[156] Williams v. Crane, 153 Mich. 89; 116 N.W. 554 (1908) (former employee has right to recover compensation for services performed, even if employee fails to work for entire contract term). See also Michigan Law and Practice, Employment, Ch. 3, § 15 (2007) (deductions and forfeitures of employees' back wages). If a minister's employment contract provided for benefits payable at the end of the minister's service, but such benefits were conditioned on the minister's performance, a court would not have jurisdiction to evaluate the congregation's decision not to pay such benefits. See Kraft v. Rector, Churchwardens & Vestry of Grace Church, 2004 U.S. Dist. LEXIS 4234, *19-*20 (S.D.N.Y. Mar. 15, 2004).

[157] Mary Babb Morris, Compensation of employee rightfully discharged, 27 Am Jur 2d Employment Relationship § 72 (2008).

[158] Restatement 3d of Agency, § 8.01(d)(2). See also Tory A. Weigand, Employee Duty of Loyalty and the Doctrine of Forfeiture, 42 Boston Bar J. 6, 21-22 (1998).

period, that he actually performed the duties expected under his contract, and that the wage was not paid.[159] None of those elements requires the court to determine a normative standard for the ministerial office. Even the imam's proof of performance avoids a constitutionally prohibited inquiry because it focuses only on the factual question of whether the imam carried out the required tasks. It does not require assessment of how well he performed. We recognize that any list of a cleric's duties may be contested, but questions about denial of back pay should turn on the different and likely much simpler question of whether the cleric was working on behalf of the congregation. If the work includes tasks that are appropriate, the cleric deserves to be paid. Only if the cleric was not working on behalf of the congregation should the congregation be free to withhold that portion of his wages. Of course, the employer may correct the proportion of time an employee spends on particular tasks, and discipline or discharge an employee for improper allocation of time.

Jurisdiction to adjudicate back pay disputes does not imply jurisdiction over all wage claims by ministerial employees. Courts have uniformly and correctly dismissed attempts by ministers to invoke the protections of wage and hour legislation.[160] Such legislation imposes

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[159] Dobrota v. Free Serbian Orthodox Church, 191 Ariz. 120, 126 (Ariz. Ct. App. 1998); Gipe v. Superior Court of Orange County, 124 Cal. App. 3d 617, 177 Cal. Rptr. 590 (1981); Houseman v. Summit Christian Sch., 762 So. 2d 979, 980 (Fla. Dist. Ct. App. 4th Dist. 2000) (retirement benefits); Jenkins v. Trinity Lutheran Church, 356 Ill. App. 3d 504 (Ill. App. Ct. 2005).

[160] Schleicher v. Salvation Army, 518 F.3d 472 (7th Cir. 2008); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004), rehearing en banc denied by

minimum wage and overtime pay requirements,[161] and the Supreme Court has held that religious entities may be required to comply with such restrictions in the employment of non-ministerial workers.[162] However, application of those standards to the relationship between a religious body and its minister implicates the core concerns of the ministerial exception. The Fair Labor Standards Act and similar state legislation define the minimum terms of any covered employment relationship. But the ministerial exception limits the power of the state to specify the content of the clerical office or the relationship between cleric and congregation. Even something as apparently innocuous as a minimum wage requirement would reshape the relationship between a congregation and a cleric who is bound by a vow of poverty.[163] Wage and hour standards impose a normative vision on the ministerial relationship, however modest that vision might be. By contrast, enforcement of a back wage obligation only requires the congregation to honor its agreement to pay for work that it has already received.[164]

Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 369 F.3d 797 (4th Cir. 2004).

[161] Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

[162] Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985). See also Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802 (N.D. Ill. 1992).

[163] Schleicher v. Salvation Army, 518 F.3d 472, 476-77.

[164] Bodewes v. Zuroweste, 15 Ill. App. 3d 101, 103-04 (Ill. App. Ct. 5th Dist. 1973). See also McManus v. Taylor, 521 So. 2d 449, 451 (La. App. 4th Cir. 1988) (former pastor may proceed with claim that he provided uncompensated labor and materials for construction of church property).

3. Hard cases

Compared to the first two sets of examples, the final set involves more complicated and less certain applications of the ministerial exception.

Example G: Defamation. The minister of a congregation had a long history of personal animosity with the bishop of that congregation's regional body. The bishop received an anonymous allegation of sexual misconduct by the minister, and confronted the pastor with the allegation. The pastor denied that he committed the alleged acts, but the bishop still launched an investigation, as the rules of that denomination permit. The bishop met with the congregation and informed them of the allegation, and asked members to tell him whether any of them had witnessed similar acts of misconduct by the minister. Following his investigation, the bishop wrote a memorandum to the congregation's board of elders, in which he concluded that "your minister has been sexually promiscuous, unfaithful to his wife, and has abused his authority within the church." The bishop recommended that the congregation terminate the minister's employment, and he also stated that he would bring disciplinary action under the denomination's rules. The board of elders mailed the bishop's report to all members of the congregation. Despite the minister's claim of innocence and offer to present evidence to support that claim, the congregation terminated the pastor without conducting an independent investigation or review of the bishop's conclusions. The bishop distributed a report of the congregation's decision to other bishops in that denomination, and thus the minister has been effectively barred from receiving another position within the denomination. The bishop did not bring disciplinary charges within the denomination, so

the minister has not been allowed an opportunity to respond to the charges. The minister has sued his former congregation, the bishop, and the national denomination for defamation; the defendants have all invoked the ministerial exception.[165]

The minister's claims of defamation generate a series of interlocked hard cases under the ministerial exception because the claims provoke two contrary intuitions. From one perspective, the ministers claims seem to be a collateral attack on a decision that is otherwise solidly protected by the ministerial exception. By challenging the veracity of allegations made in the process of evaluating and then terminating his appointment, the minister is asking the court to review the merits of the congregation's decision. Such claims typically do not involve disputes over questions of publicly verifiable fact, such as whether a minister has been convicted of a criminal offense. Instead, the allegedly defamatory statements usually incorporate some implied conclusion drawn from facts.[166] For example, if a pastor is accused of "sexual misconduct," the accusation incorporates not merely an assertion about a particular act, such as extra-marital intercourse, but also the religious community's normative understanding of sexuality.[167]

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[165] Hiles v. Episcopal Diocese of Mass., 437 Mass. 505, 773 N.E.2d 929 (Mass. 2002).

[166] Horne v. Andrews, 264 Ga. App. 145, 146-47, 589 S.E.2d 719, 721-22 (Ga. Ct. App. 2003).

[167] Van Tran v. Fiorenza, 934 S.W.2d 740 (Tex. App. Houston 1st Dist. 1996) (court could not determine whether plaintiff had been excommunicated); Jeambey v. Synod of Lakes & Prairies, Presbyterian Church, 1995 Minn. App. LEXIS 1310 (Minn. Ct. App. Oct. 24, 1995). See also Downs v. Roman Catholic Archbishop, 683 A.2d 808, 624 (Md. Ct. Spec. App. 1996) ("Questions of truth, falsity, malice, and the various privileges that exist often take on a different

But not all tort claims by ministers would constitute a collateral attack on an adverse job action. For example, the ministerial exception would not deprive a minister of the right to sue for assault simply because the assault occurred during the course of his employment. For one who has been defamed, the injury to reputation and dignity can cause just as much suffering as the physical injury that results from an assault. Malicious statements can deprive someone of their livelihood and family, and leave no opportunity to reclaim personal dignity other than civil litigation. When a remedy for that harm would not inevitably lead a court into impermissible inquiries, the court should be receptive to the claim.

Nearly all courts that have considered the question have ruled that the ministerial exception bars adjudication of defamation cases involving clergy and their congregations.[168] But most of these decisions emphasized the congregation's autonomy under the Free Exercise Clause, and stressed the importance of the religious body's interest in unfettered choice of a

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hue when examined in the light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church").

[168] Black v. Snyder, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991); Klouda v. Southwestern Baptist Theol. Seminary, 2008 U.S. Dist. LEXIS 22157 (N.D. Tex. Mar. 19, 2008); Jae-Woo Cha v. Korean Presbyterian Church, 262 Va. 604 (Va. 2001); Nevius v. Afr. Inland Mission Int'l, 511 F. Supp. 2d 114 (D.D.C. 2007); Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in Am., 860 F. Supp. 1194 (W.D. Ky. 1994); Trice v. Burress, 2006 OK CIV APP 79, 137 P.3d 1253 (Okla. Ct. App. 2006); but see Marshall v. Munro, 845 P.2d 424 (Alaska 1993) (pastor can proceed with defamation claim against church official)

minister.[169]

Despite the general agreement among these decisions, the free exercise calculus is questionable. Like all other employers, religious organizations would be able to invoke important legal privileges and defenses in response to a minister's defamation claim.[170] Given those protections, potential liability for ministerial defamation claims may not represent a "substantial burden" on a religious organization. Although the possibility of civil litigation is certainly burdensome, courts have not considered that risk sufficient by itself to constitute a substantial burden on religious exercise. If liability for ministerial defamation does impose such a burden, it must be found in the defendant's obligation to show that the challenged statement is truthful or otherwise privileged. But judicial scrutiny of a particular statement's veracity need not be especially burdensome. The court would only need to ask whether a statement was, in fact, made, and if so, whether the statement was truthful.[171] By requiring that publication of facts must be done in good faith, the inquiry might chill a religious group's communication about its leadership, but the chilling of malicious statements in any context is unlikely to be regarded as a net social loss.

An approach grounded in the Establishment Clause provides a clearer understanding of the problem with adjudicating ministerial defamation cases. By focusing on the court's role in adjudication rather than the burden that judicial scrutiny imposes on the congregation, the Establishment Clause inquiry directs attention to the main concern of the ministerial exception:

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[169] [CITE NEEDED]

[170] [CITE NEEDED]

[171] Marshall v. Munro, 845 P.2d 424, 428 (Alaska 1993).

whether the government action effectively asserts control over the qualifications for or performance of ministry. Using this approach, defamation claims should be divided into two components, the alleged act of defamation and the injury caused by that act. Jurisdiction in ministerial defamation cases depends on the plaintiff's ability to show that both the defamatory act and the resulting injury can be disentangled from the religious body's evaluation of ministerial performance.[172] If both act and injury can be separated from the religious body's evaluative process, then and only to that extent, the defamation claim should be justiciable.

Two decided cases help to clarify this understanding of ministerial defamation claims. In *Farley v. Wisconsin Evangelical Lutheran Synod*,[173] a denomination had employed a minister to develop a new congregation. The denomination later determined that the congregation was not viable and the minister lacked the skills necessary to succeed in that context, so the denomination ended its funding for the project and thus terminated the minister's employment.[174] The minister

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[172] See Hiles v. Episcopal Diocese of Mass., 437 Mass. 505, 512-15 (Mass. 2002) (adjudication of defamation claim by minister requires assessment of context in which statement was made and remedy that plaintiff seeks for the alleged injury). See also Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 715-17 (Mass. 2004) (defamation claim may proceed for statements that may have occurred outside the context of evaluating minister's performance, but not for statements made within that context); Jackson v. Presbytery of Susquehanna Valley, 179 Misc. 2d 704 (N.Y. Sup. Ct. 1999) (defamation claim barred because it was intertwined with evaluation of plaintiff's fitness for ministry).

[173] 821 F.Supp. 1286 (D. Minn. 1993).

[174] Id. at 1287.

alleged that the denomination's statements about his competence were defamatory. The minister claimed that he was capable of performing the work of starting a new congregation, and the denomination's statements to the contrary were false and malicious.[175] Invoking the ministerial exception, the court granted defendant's motion for summary judgment.[176] The court concluded that adjudication of the claim would require it to scrutinize the denomination's process and standard for evaluating the plaintiff's performance.[177]

In terms of the approach outlined above, the minister's defamation claim must be barred because both the alleged defamatory act and the injury resulting from that act are completely intertwined with the denomination's assessment of its minister. The minister challenged the statements of denominational officials in their reports about the progress of the new congregation, and the minister claimed that he suffered loss of professional reputation and opportunities as a result of those statements.[178]

By contrast, in *Ogle v. Hocker*, [179] the U.S. Court of Appeals for the Sixth Circuit permitted a former evangelist to proceed with a defamation claim against an active minister in the same denomination. In his complaint, the plaintiff alleged that he and the minister traveled together on a "ministry trip." After the minister's return from the trip, the minister claimed that

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[175] Id.

[176] Id. at 1287-88, 1290.

[177] Id. at 1290.

[178] Id. at 1287.

[179] 2008 U.S. App. LEXIS 12043 (6th Cir., May 29, 2008).

the plaintiff had made several overt homosexual advances to him.[180] The minister allegedly made this claim in a number of contexts, including a letter to the presiding bishop of the church body to which he and the plaintiff-evangelist both belonged; several different sermons that he preached soon after his return from the trip; and conversations with several other people who appear not to have been involved in church governance.[181] The defendant minister invoked the ministerial exception, but the court held that the exception did not preclude further adjudication of the case.[182] The court reasoned that the minister had no protected interest in disseminating the information to those outside the church governance process.[183] Indeed, even the statements made in the sermons might be actionable if the statements about the plaintiff were intended to provide a "personal life example of deception," rather than a judgment about the plaintiff's fitness for ministry.[184]

As with *Farley*, our approach to ministerial defamation cases helps to clarify the constitutional issues raised in *Ogle*. In *Ogle*, the allegedly defamatory acts included defendant's statements to church leadership, his sermon references to plaintiff, and comments to other

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[180] Id. at *2-*5.

[181] Id. at *4-*5, *12-*14.

[182] Id. at *14. The plaintiff's action against the religious denomination was dismissed on ministerial exception grounds. Ogle v. Church of God, 2004 U.S. Dist. LEXIS 25592 (E.D. Tenn. Sept. 9, 2004), affirmed, Ogle v. Church of God, 153 Fed. Appx. 371 (6th Cir. 2005).

[183] Ogle, 2008 U.S. App. LEXIS 12043, at *12-*14 (6th Cir., May 29, 2008).

[184] Id. at *13.

individuals.[185] The ministerial exception would bar adjudication of the defamatory character of statements to church leaders, but would not prevent adjudication of statements to those outside the church, for whom the information bears no relationship to questions of a minister's fitness.[186] The defendant's statements in his sermons are more difficult to categorize, but the court rightly suggests that scrutiny of those statements must focus on the defendant's intentions.[187] If the defendant intended to inform the congregation about plaintiff's qualifications as a minister, then the ministerial exception should apply.[188] But if the speaker had a different intent, the message does not implicate relevant constitutional concerns.

To prevail, the plaintiff in *Ogle* would also need to show that his alleged injury can be disentangled from the denomination's evaluative process.[189] The Sixth Circuit's opinion does not address this issue, but the problem is likely to arise in further adjudication of the case. The

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[185] Id. at *3-*5.

[186] See also Ausley v. Shaw, 193 S.W.3d 892 (Tenn. Ct. App. 2005) (former minister's defamation claim against congregation leaders can proceed because challenged statements occurred outside church setting).

[187] Ogle, 2008 U.S. App. LEXIS 12043, at *11-*14.

[188] See, e.g., Bourne v. Ctr. on Children, Inc., 154 Md. App. 42 (Md. Ct. Spec. App. 2003) (court lacked jurisdiction to decide case involving denomination's assessment of candidate's fitness for ordination).

[189] Jae-Woo Cha v. Korean Presbyterian Church, 262 Va. 604, 615 (Va. 2001), Ausley v. Shaw, 193 S.W.3d 892, 895. See also State ex rel. Gaydos v. Blaeuer, 81 S.W.3d 186, 196-98 (Mo. Ct. App. 2002).

defendant's statements apparently cost the plaintiff his employment and clerical status within the church, but that injury would not be justiciable under our view of the ministerial exception. If, however, the plaintiff could show mental anguish from public humiliation that was traceable to the statements, or injury to personal relationships, those injuries should be justiciable.

In Example G, plaintiff would allege that he was defamed by the bishop's statements to the congregation, the bishop's letter to other denominational bishops, and the congregation board of elder's letter to congregation members. He would claim injury from his loss of employment and professional opportunities, and perhaps also mental anguish and harm to his marital relationship. The defendants should prevail under the ministerial exception, because each of the allegedly defamatory statements occurred within the religious body's process for supervision of clergy.[190] Even if the statements were false, or the bishop failed to follow proper procedures in investigating the claim, judicial scrutiny of the statements would inevitably require a court to establish normative criteria for evaluation of clergy. For example, if the plaintiff alleged that he did not commit "sexual misconduct" as alleged by the bishop, the court could only resolve the dispute by making a determination of the denomination's view of inappropriate and appropriate

[190] On this analysis, Marshall v. Munro was wrongly decided. The case involved a pastor's claim that a church official defamed him by communicating false information to a congregation. Although the information at issue – his marital status and past disciplinary record – was not religious in character, it was allegedly communicated as part of the church official's responsibilities, and the minister's injuries were inseparable from his professional employment. Marshall v. Munro, 845 P.2d 424 (Alaska 1993).

sexual conduct.[191] In the context of pastoral evaluation, individual facts cannot be isolated from the religious body's interpretation of those facts. The plaintiff might be able to show that some aspects of the harm – such as damage to his marital relationship – are disconnected from evaluation of his pastoral fitness, but adjudication of the claim requires that both the allegedly wrongful act and the injury must be separable from such evaluation.

> *Example H: Sexual Harassment*. A (male) and B (female) are employed as rabbis on the staff of the same synagogue. B accuses A, her supervisor, of making sexual advances and then giving her a negative performance evaluation when she refused those advances. Based on Rabbi A's negative performance evaluations, the synagogue terminates Rabbi B's employment. She files suit against Rabbi A and the congregation, alleging sexual harassment and retaliation; the defendants invoke the ministerial exception.[192]

In sharp contrast to courts' assessment of defamation claims brought by clergy, nearly all courts that have considered sexual harassment claims by clergy have found the claims justiciable.[193] Two reasons explain courts' refusal to apply the ministerial exception to sexual

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[191] See Hiles v. Episcopal Diocese of Mass., 437 Mass. 505 (Mass. 2002).

[192] Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991).

[193] Alcazar v. Corp. of Catholic Archbishop of Seattle, 2006 U.S. Dist. LEXIS 92708 (W.D. Wash. Dec. 21, 2006); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991); Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999); Dolquist v. Heartland Presbytery, 342 F.Supp.2d 996 (D. Kan. 2004); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004) McKelvey v. Pierce, 173 N.J. 26, 800 A.2d 840 (N.J. 2002);

harassment cases. First, as with most cases involving the ministerial exception, courts have tended to approach the problem as a conflict between the religious body's free exercise interest in autonomy and the minister's interest in protection against the alleged injury.[194] Using that analysis, the balance in a sexual harassment action tilts heavily toward the minister. As these courts invariably determine, receptivity to sexual advances is not an element of any religious body's criteria for ministry.[195] Congregations have no legitimate interest in preserving a zone of autonomy for sexual harassment. Moreover, the minister's interest in avoiding sexual harassment is greater than employees' ordinary interest in protection against adverse employment decisions. Sexual harassment threatens an employee's sense of privacy and perhaps even bodily integrity.[196] Considering the respective interests of congregations and clergy, courts' rejection of the autonomy-based ministerial exception is unsurprising.

Ogugua v. Archdiocese of Omaha, 2008 U.S. Dist. LEXIS 23193 (D. Neb. Mar. 24, 2008). Weaver v. African Methodist Episcopal Church, 54 S.W.3d 575 (Mo. Ct. App. 2001). Compared to claims alleging defamation, there is a much smaller universe of claims by ministers alleging sexual harassment.

[194] See, e.g., Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 945-47 (9th Cir. 1999) (applying Free Exercise Clause to sexual harassment claim by ministerial candidate).

[195] Bollard, 196 F.3d 940, 947. But see Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002) (sexual harassment claim dismissed because allegedly wrongful conduct was inseparable from doctrinal views about sexuality)

[196] Bollard, 196 F.3d 940, 948.

Second, most of the sexual harassment cases involving clergy have arisen during an era of intense public and legal attention to sexual abuse in religious organizations.[197] Courts have increasingly rejected constitutional defenses asserted by religious bodies to abuse-related claims, and jurisdictions have imposed new duties on clergy and congregations to prevent or respond to sexual abuse.[198] That trend seems to have influenced courts' dismissive attitude toward the ministerial exception in sexual harassment cases. Like sexual abuse litigation, sexual harassment cases typically involve allegations of a religious body's indifference to injury caused by the sexual misconduct of its agents.[199] Under those circumstances, claims of the religious organization's autonomy will find little support.

Although these two reasons make sense, they ignore a crucial aspect of sexual harassment claims. Conceptually, sexual harassment is sex-based employment discrimination, not an assault.[200] The wrongdoer subjects the victim to different terms or conditions of employment,

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[197] See, e.g., McKelvey v. Pierce, 173 N.J. 26, 49-50, 800 A.2d 840, 854-55 (N.J. 2002) (comparing seminarian's sexual harassment claim to litigation over sexual misconduct by church leaders). See Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX at 1790-91.

[198] See generally, Lupu and Tuttle, Sexual Misconduct and Ecclesiastical Immunity, supra note XX (describing decline of immunity for religious organizations with respect to claims arising from clergy sexual abuse.

[199] See, e.g., Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953-54 (9th Cir. 2004).

[200] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

and does so for sexual rather than legitimate job-related reasons.[201] Seen in that light, sexual harassment and covert discrimination claims raise identical concerns for the ministerial exception. In both, the religious body disavows the discriminatory conduct at issue, and generally provides a permissible non-discriminatory justification for any adverse employment action suffered by the plaintiff.[202] The plaintiff then alleges that the defendant's justification is a pretext for discrimination, and the court must scrutinize the defendant's justification.[203] But if assessments of pretext are generally impermissible in adjudication of ministers' covert discrimination claims, why should the same inquiry be permitted simply because the plaintiff alleges discrimination based on sexual harassment?

Thus far, courts have avoided a direct answer to that question because of the procedural posture of the clergy sexual harassment cases. All of the reported decisions involve adjudication of claims at an early stage in the litigation, with nearly all coming in response to defendants' motions to dismiss.[204] As with the D.C. Circuit's analysis of the breach of contract claims in *Minker*,[205] the decisions on sexual harassment claims involving clergy resolve only the question

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[201] Id.

[202] See, e.g., Black v. Snyder, 471 N.W.2d 715, 717 (Minn. Ct. App. 1991) (congregation claimed that discharge was justified by minister's deficient performance).

[203] [NEED CITE]

[204] See, e.g., Bollard., 196 F.3d 940, 944-45; Dolquist v. Heartland Presbytery, 342 F.Supp.2d 996 D. Kan. 2004); Ogugua v. Archdiocese of Omaha, 2008 U.S. Dist. LEXIS 23193 (D. Neb. Mar. 24, 2008)

[205] Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354,

of whether ministerial employees are categorically barred from bringing that cause of action. Further adjudication of the claim must confront the same issues raised by other actions related to clergy employment.[206]

In addressing those issues, courts are not likely to receive much help from an understanding of the ministerial exception based on a theory of church autonomy. That approach will lead only to a balancing of respective interests, or a judgment about whether the necessary scrutiny will "excessively entangle" the court in the religious affairs of the organization. Efforts at interest balancing and inquiries into entanglement, however, fail to capture the real constitutional concerns at issue in clergy employment litigation. To protect the Establishment Clause values we outlined above, adjudication of sexual harassment claims must avoid judicial imposition of normative standards for the qualification or performance of clergy.[207]

In Example H, the plaintiff would need to show that the injury attributable to sexual harassment can be separated from the defendants' evaluation of her performance and termination

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1360-61 (D.C. Cir. 1990).

[206] Ogugua v. Archdiocese of Omaha, 2008 U.S. Dist. LEXIS 23193 (D. Neb. Mar. 24, 2008) (further adjudication In one sexual harassment claim brought by a minister, Elvig v. Ackles, the Court of Appeals of Washington granted summary judgment for defendants. Although the U.S. Court of Appeals for the Ninth Circuit, in a case involving the same facts, had denied defendants' motion to dismiss, the Washington state court ruled that development of the evidence in the case made clear that further adjudication of the minister's claim would involve the interests protected by the ministerial exception. 123 Wn. App. 491; 98 P.3d 524 (2004).

[207] McKelvey v. Pierce, 173 N.J. 26, 51-52, 800 A.2d 840, 856 (N.J. 2002).

of her position.[208] Even if sex-based discrimination motivated the synagogue's judgments, the ministerial exception should bar courts from scrutinizing the quality of a cleric's job performance. Rabbi B's sexual harassment claim would need to focus on injuries directly caused by the harassment, such as psychological distress or interference with her marital relationship.[209] Injuries attributable to her negative evaluation and termination, including lost wages and damage to future professional opportunities, would not be compensable.[210] Rabbi B's retaliation claim should also be subjected to the same analysis. If the retaliation by Rabbi A can be distinguished from his performance evaluation, then Rabbi B may be able to recover for injury attributable to that retaliation. For example, Rabbi A may have retaliated by directing verbal abuse toward Rabbi B, but done so in a manner unrelated to performance of her office. However, if the retaliation involved only the negative evaluation, the ministerial exception should bar adjudication of that claim.

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[208] Bollard, 196 F.3d 940, 947 (job performance of plaintiff not at issue in case).

[209] See, e.g., McKelvey, 173 N.J. at 56-57, 800 A.2d at 859. In McKelvey, the court permitted the plaintiff's claim could proceed, but ruled that the potential remedies could not include his losses from the denial of future employment in the church:

> However, McKelvey might, without offending First Amendment principles, seek money damages for the benefit defendants received from his free or reduced cost labor as an "intern" in various diocesan churches and, based on Auxiliary Bishop Schad's letter, seek an order prohibiting defendants from attempting to recoup the $69,000 tuition, book and fee costs. Id.

[210] Id. See also, Black v. Snyder, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991);

The inquiry we have outlined is consistent with the approach taken by courts that have considered clergy sexual harassment claims. No court has ruled that a minister may claim sexual harassment in challenging an adverse employment decision. But the decided cases involving sexual harassment, like many other applications of the ministerial exception, provide inadequate explanations of why the court's jurisdiction should be limited and how that limit should be implemented. By focusing on the questions that the state may not answer – questions about ministerial qualifications and performance – courts would be better able to guide adjudication of the claims that should go forward, and avoid litigation of claims that should be barred. If ministers can disentangle their injury claims from the congregation's evaluation of their performance, those claims should be justiciable.

Conclusion

Our approach to adjudicating claims by clergy against religious entities is no doubt counterintuitive to many lawyers and judges. The substance of adjudication, including constitutional adjudication, ordinarily is focused on rights, duties, and interests of the dueling parties. Responding to deep concerns about serious injury to clergy plaintiffs, and balancing those concerns against the hazard of troublesome intrusion on religious entity defendants, somehow seems to be the substantive path along which such adjudication should proceed. Quite understandably, many courts and commentators have proceeded precisely along such a path.

As with so much else in free exercise adjudication, however, that path leads primarily to arbitrary judgment, ad hoc interest balancing, and a decision pattern without true coherence. What we propose is quite different, although the results will at times overlap with those obtained

under other methodologies. We follow the time-honored tradition in American legal thought of recognizing that questions about the role of courts are at the center of our political and legal experiment. In particular, what we have prescribed in the pages above is designed to place courts firmly within the "new order for the ages" that distinguished the American constitutional design from its Old World predecessors.

The state's authority – to legislate, to execute the laws, and to adjudicate disputes – is limited to secular and temporal concerns. When adjudication between clergy and their employers can be limited to such concerns, the courts may perform their prescribed role. When, by contrast, the evaluation of contested acts, injuries, or remedies pushes the courts into appraisal of who may act as the spiritual agent of others, constitutional boundaries have been crossed. That the task of defining and guarding those boundaries may be more subtle in this context than in those involving the other branches does not alter its essential character or purpose.