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THE CHURCH AUTONOMY DOCTRINE: WHERE TORT LAW SHOULD STEP ASIDE

*Victor E. Schwartz**† *& Christopher E. Appel***

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I. INTRODUCTION

In the aftermath of the shocking, headline-grabbing revelations of clergy sexual abuse within some religious institutions, the judiciary has examined a number of critical, previously unaddressed, issues in tort law.[1] These issues stem principally from the scope of duty, if any, owed by a church as an institution to its members, and the responsibility, if any, of the religious institution for the conduct of personnel within its ranks.[2] Courts, perhaps surprisingly, have declined to answer many of these basic questions through any hard rules, choosing instead to apply a more surgical approach[3] to precise duty issues or avoid the issue entirely. A major reason courts continue to tread so carefully is that the

1. *See generally* Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11 (2005).

2. *See infra* Part IV.

3. *See* Schwartz & Lorber, *supra* note 1, at 13.

First Amendment creates a zone of autonomy for religious institutions where the application of tort law, and particularly duty principles, must avoid abridging the free exercise of religion or entangling church and state.[4] This constitutional zone of freedom is embodied in what academics have called the doctrine of "church autonomy,"[5] the subject of this Article.

Over the past half century, the importance of church autonomy with respect to the application of tort law principles has increased substantially. Prior to this period, religious institutions were generally immune from tort liability, creating little need to probe the contours of tort law and draw duty lines for churches.[6] When this immunity was removed, it left a fresh canvas. One of the few guideposts for courts, both then and now, for fashioning clear, consistent, and fair liability rules is the notion that tort law should refrain from interfering in the practices or tenets of a religion, or "second-guessing" the faith-based decisions of religious institutions regarding internal ecclesiastical affairs.[7] While the criminal actions of a few errant clerics have brought the application of tort law to religious institutions into the public eye, and placed at stake potentially billions of dollars in liability,[8] that application affects a much broader range of interests, such as how religious institutions of any size will carry out their daily activities and core mission.

It is in this vein that this Article examines the application of the church autonomy doctrine to tort actions involving religious institutions. The Article serves as a guide for courts in developing clear liability rules for where tort law should step aside and not intrude upon what are ultimately faith-based practices, policies, and judgments.

Part II begins by analyzing the fundamental reasons why, from both a practical and constitutional standpoint, religious institutions are and should be treated differently under the law from other entities, such as a business. Part II further explains how these differences, protected by the First Amendment religion clauses, became embodied in the doctrine of church autonomy. Part III then examines how distinct liability rules

4. *See infra* Part II.

5. *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

6. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 661 n.1 (12th ed. 2010). Charitable immunity originated in England in 1846 and was followed in all but two or three American courts up until 1942. *See id.*

7. *See infra* Part II.B.

8. *See, e.g.*, Lara Takenaga, *Man Sues Seventh-Day Adventist Church for $5.25 Million, Alleges Sex Abuse*, THE OREGONIAN, Feb. 24, 2011; Rachel Zoll, *Sex Abuse Costs U.S. Catholic Church More Than $1 Billion*, CHI. SUN-TIMES, June 10, 2005, at 5; Adam Liptak, *Scandals in the Church: The Liability*, N.Y. TIMES, Apr. 23, 2002, at A20.

respecting church autonomy fit within the larger context of tort law and are analogous to other areas where tort law steps aside in favor of constitutional considerations. Finally, Part IV discusses the current intersection of the church autonomy doctrine and tort law, namely, tort claims that are clearly barred by the church autonomy doctrine, claims that should be barred but where application of the doctrine is less clear, how some claims can be adjudicated while respecting church autonomy, and newer claims that strike at the very heart of the church autonomy doctrine and where those claims may be headed in the future.

The Article concludes that the church autonomy doctrine is an essential element in the development of sound and consistent tort liability rules for religious institutions. It further suggests that the doctrine has been underutilized in helping resolve thorny legal issues under a variety of tort theories. The Article shows how the doctrine can and should be effectively employed by courts to reach constitutionally-permissible and consistent outcomes, and provide notice to religious institutions of the level and type of conduct that will result in tort liability.

II. THE COMPELLING IMPORTANCE OF PROTECTING CHURCH AUTONOMY

A. Why the Law Can, Does, and Should Treat Religious Institutions Differently

1. The Unique Nature, Purpose, and History of Religious Institutions in America

Tort law carefully focuses on the unique facts in each personal injury case—factual differences determine whether duties are owed and liability is proper. Any consideration of tort claims against a religious institution, therefore, must begin not only with the recognition that the First Amendment provides special protection to religion, but also with the understanding that, as a factual matter, churches and faith communities differ fundamentally from secular institutions. Churches and faith communities possess institutional histories, beliefs, traditions, and forms of internal governance that often predate the American Revolution.[9] They are distinctive too, in that religious conviction was a primary motivation for American colonization,[10] and early settlers

9. *See, e.g.*, DIARMAID MACCULLOCH, THE REFORMATION 3-153 (2003) (comparing 16th century Catholic theology and church governance with the then-emerging theology of Martin Luther).

10. *See* PERRY MILLER, ERRAND INTO THE WILDERNESS 115 (1956) ("When the English undertook to plant colonies in America, they commenced—whatever they ended with—not with propositions about the rights of man or with the gospel of wealth, but with absolute certainties

shared to a remarkable degree a view of America as "a special place in God's providential design."[11]

Faith communities are uniquely characterized by ultimate concerns and, typically, by organizations intended to be enduring.[12] Ultimate concerns include the meaning of life, death, sin, the significance of human relationships, and the reconciliation of individuals with God. Religious organizations make demands that shape the core of their members' lives. Observance of holy days, sacraments and ordinances, public worship, private devotion, the education of children, standards of personal cleanliness and morality, monetary obligations, and special diets—all of these may form the daily practices of people whose religious convictions so prompt them. That religion has to do with ultimate concerns explains why the First Amendment speaks of "religion," not "conscience" or "opinion" or "belief."[13]

Ultimate concerns distinguish religious organizations from other organizations, even those that perform the most admirable and useful services for humanity. Unlike government, businesses, social clubs, or charitable organizations, religious organizations hold the "capacity to transform mundane aspects of everyday secular existence, infusing them with meaning and transcendent significance."[14] Their unique access to the transcendent gives religious organizations different frames of reference. For them, understanding and judgment depend on individual faith and conscience, scripture, inspiration, tradition, or recognized leadership; secular logic and values frequently have less purchase than these elements, if they are viewed as persuasive on matters of religion at all.

Even the extent to which a religious organization's members interact with the larger world can be a matter of individual conviction or established tradition. Religious belief systems as disparate as

concerning the providence of God.").

11. J.H. ELLIOTT, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830, at 184 (2006); *see also* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 56 (2010) (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (explaining that at least one early historian viewed the Pilgrims who colonized Massachusetts as "the seed of a great people that God comes to set down with his own hands in a predestined land").

12. *See* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1082, 1087 (1978) (proposing a bifurcated definition of religion for the First Amendment that looks to "an ultimate concern . . . not limitable by official action" and "organization, theology, and attitudinal conformity" when interpreting the Establishment Clause).

13. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1496 (1990) ("The textual insistence on the special status of 'religion' is, moreover, rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment.").

14. W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 426 (1993).

Christianity and Buddhism have prompted the creation of hermetic clerical orders while supporting interaction of other members with each other and with outsiders. Interaction may be partial, as illustrated by the demand of intrafaith marriage in orthodox Jewish congregations and certain Christian and Islamic communities. Community service is also a significant requirement of some faiths. Soup kitchens, hospitals, adoption agencies, and other social services are provided by many religious groups, often at a substantial sacrifice[15]—a pattern of giving that has characterized American churches since colonial days.[16]

These outcomes—some life-defining to particular religious adherents, others producing profound social goods—are the product of organizations that are especially vulnerable to the coercive forces of law. Churches have an existence that transcends the law in the sense that they "preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed."[17] Preserving churches' institutional integrity, which is often calibrated to values not shared by the legal system or society generally, requires a sensitive appreciation of how legal requirements may affect them. Justices of the Supreme Court have noted, "religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[18] Autonomy for such communities to define themselves, their commitments, and their membership lies at the heart of what America knows as religious liberty.[19] At a minimum, religious organizations must retain the freedom to "'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'"[20] Litigation, actual or threatened, against a religious organization carries the possibility of

15. *See* Ram Cnaan, *Our Hidden Safety Net: Social Community Work*, 17 BROOKINGS REV. 50, 51, 53 (1999) (reporting that in a study of 113 religious organizations in Chicago, New York City, Indianapolis, Mobile, Philadelphia, and San Francisco each organization donated an average of $140,000 per year in money, goods, and services to programs designed to care for their communities' needs).

16. *See id.* at 50 ("From colonial times, religious congregations and religious organizations in the United States have been providing not only for the spiritual needs of their congregants and communities, but for their social welfare as well.").

17. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 55 (1998) (footnote omitted).

18. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (footnote omitted).

19. *See id.* ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.").

20. *Id.* at 341–42 (quoting Laycock, *supra* note 5, at 1389).

distorting a faith community's "process of self-definition," thereby posing "the danger of chilling religious activity."[21] To avoid that danger, "[r]eligious organizations need to be given space and sensitive protection if they are to make the generative and regenerative contribution to social life that they (and in many respects, they alone) can make."[22]

2. How the Law Has Long Treated Churches Differently

It should come as no surprise that a delicate touch is required when setting the bounds of tort law with respect to religious organizations. American law already affords religious organizations different treatment in a number of ways. Religious organizations, for instance, may be exempt from the national income tax[23] and may qualify for deductible donations.[24] Bankruptcy law affords special protection for debtors who make charitable donations to religious institutions.[25] Such institutions are also exempt from Title VII of the 1964 Civil Rights Act regarding claims of religious discrimination.[26] Courts have construed federal anti-discrimination laws to require a "ministerial exemption," under which the statute's anti-discrimination mandate does not apply to church employees who qualify as ministers.[27] Constitutional principles have likewise influenced courts and legislators to preclude the National Labor Relations Board from interfering with the internal management of religious schools;[28] to uphold statutory rules exempting religious

21. *Id.* at 343–44 (citation omitted).

22. Durham & Dushku, *supra* note 14, at 426.

23. *See* 26 U.S.C.A. § 501(c)(3) (West 2010).

24. *See* 26 U.S.C.A. § 170 (West 2010) (noting that section 126(c)(2)(B) speaks to election of certain cost-sharing payments, whereas section 170 speaks to charitable, contributions, gifts, etc.).

25. *See* 11 U.S.C.A. § 707 (West 2010) (prohibiting a court from considering on a motion to dismiss "whether a debtor has made, or continues to make, charitable contributions . . . to any qualified religious or charitable entity or organization . . . .").

26. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(a), 2000e-2(e)(2) (2006).

27. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (affirming that the First Amendment requires a ministerial exception to otherwise generally-applicable statutes and applying that exception to dismiss claims under the Americans with Disabilities Act by a "called" teacher of primarily secular subjects against her religious school); Petruska v. Gannon Univ., 462 F.3d 294, 307–08 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (dismissing a female chaplain's Title VII claims for gender discrimination and retaliation for opposing sexual harassment against a private Catholic university because the decision to restructure university leadership and demote her fell within the ministerial exception); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002) (noting the ministerial exception to Title VII employment discrimination cases arises from the constitutional principle of church autonomy: "The right to choose ministers is an important part of internal church governance and can be essential to the well-being of a church.").

28. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979).

organizations from state property taxes;[29] to exempt from military service clergy, theology students,[30] and those with religious-based objections to war;[31] and to approve release time for students to attend religious exercises off public school property.[32]

In addition, the U.S. Congress has enacted two statutes for the purpose of safeguarding religious freedom. The Religious Freedom Restoration Act of 1993 (RFRA)[33] subjects any federal law that burdens religious practice to heightened scrutiny, and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[34] imposes strict scrutiny in the context of land use regulations affecting houses of worship and regulations affecting the religious exercise of prisoners. These are but a few of the numerous special accommodations that the law affords religion.

One of American law's most singular differences in the treatment of religious organizations, however, is long gone. Charitable immunity, which protected religious institutions from tort claims for a century,[35] began to give way in the 1940s when courts determined that the greater availability of liability insurance provided a reasonable means for churches to make third parties whole from slip-and-fall injuries and other simple torts.[36] This end to charitable immunity was later enshrined in the "black letter" of the *Restatement (Second) of Torts*,[37] and there has been no argument among courts or legal scholars for the doctrine's return.

Charitable immunity reflected an era when religious organizations and other charities enjoyed greater public respect and private insurance was rare or difficult to acquire.[38] Its repeal was a sea change in the law that brought unanticipated consequences. Unconsidered at the time was whether and how religious organizations would face more complex tort claims, such as vicarious liability or breach of fiduciary duty claims for the wrongful acts of clergy or church members, and the effect such claims would have on a faith community's autonomy and religious exercise.

Today, such claims against religious organizations are increasingly

29. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

30. *See* Selective Draft Law Cases, 245 U.S. 366 (1918).

31. *See* Gillette v. United States, 401 U.S. 437 (1971).

32. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

33. 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

34. 42 U.S.C. § 2000cc.

35. *See supra* note 5.

36. *See, e.g.*, President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 823–24 (D.C. Cir. 1942); Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 603 (Mo. 1969).

37. *See* RESTATEMENT (SECOND) OF TORTS § 895E (1979).

38. *See* Schwartz & Lorber, *supra* note 1, at 14–18.

common.[39] Cultural trends associated with this increase include a diminished reluctance to bring litigation against religious institutions, "perhaps because churches and clergy no longer stand in the same revered position vis-à-vis parishioners or because the availability of insurance makes suing one's church a less unpalatable undertaking."[40] Another associated trend is the "seemingly disproportionate media attention given to alleged misconduct by clergy and their institutions."[41] Some have suggested that increased respect for tort victims, coupled with a diminished respect for established institutions, is particularly significant:

> We live, it would seem, in an era of heightened sensitivity to those who claim injury or some other victimlike status, and our chosen means of redress for alleged past harm is compensation, achieved by holding the tortfeasor monetarily liable. At the same time, we appear to live in an era in which many institutions—including religious institutions—command diminished respect and in which their authority is often greeted with skepticism. Together, these two cultural trends make it especially difficult for one to persuasively insist, on constitutional grounds or otherwise, that religious institutions ought to be effectively shielded from the claims of their tort victims.[42]

The net result of increased litigation is to "desensitize judges, juries, and other potential litigants to the acceptability of religious entities as defendants."[43] Associated cultural trends mean that "the public and the media appear generally to undervalue, if not altogether overlook, the First Amendment issues at stake in the adjudication of tort actions against religious defendants."[44] Properly adjudicating such actions requires a correct understanding of the constitutional issues inevitably at stake when a tort action is brought against a religious organization or its clergy. Accordingly, the next subpart will discuss the text and original understanding of the First Amendment religion clauses, including a discussion of the origins and contours of the church autonomy doctrine.

39. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 240–41 (2000).

40. *Id.* at 241 (footnotes omitted).

41. *Id.* at 241–42 (footnote omitted).

42. *Id.* at 242–43 (footnotes omitted).

43. *Id.* at 241.

44. *Id.* at 243.

B. Constitutional Limitations and the Doctrine of Church Autonomy

1. The Text and Original Understanding of the First Amendment Religion Clauses

The First Amendment religion clauses originated in the unique circumstances of America's founding generation.[45] The ideological battles of the American Revolution were fought, in important part, for religious liberty.[46] At the same time, established churches had been part of the American experience from colonial days. New England states other than Rhode Island had "a localized Puritan establishment," while the southern states had "an exclusive Anglican establishment."[47] Both models were coercive, sometimes resulting in the intense persecution of religious dissenters.[48] Following the Revolutionary War, Virginia was "the only state that squarely considered and rejected every form of support or official recognition of religion."[49] Official support for religion remained common throughout most states, but only in New England "did a system of compulsory financial support for religion actually survive the Revolution."[50] Massachusetts, for example, "reaffirmed its system of localized establishments" despite vigorous opposition from Baptists and other dissenters when it debated whether to ratify its constitution of 1780.[51] By the 1780s, however, "the official justification for governmental support for religion . . . ceased to have any real theological component" and relied instead on "the civic justification that belief in religion would preserve the peace and good

45. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 71 (2009) [hereinafter EMPIRE] ("[T]he American Bill of Rights of 1791 was less a creative document than a defensive one. It made no universal claims but was rooted solely in the Americans' particular history.").

46. *See, e.g.*, ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 49–50 (rev. & expanded ed. 2005) ("Although Americans entered the revolt against Britain in several ways, their religion proved important in all of them . . . because, more than anything else in America, religion shaped culture."); BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 268 (1967) (describing "the mutual reinforcement that took place in the Revolution between the struggles for civil and religious liberty"); *see also* DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 135, 136 (1992) (listing the Bible as the leading source of citation in American political writings between 1760–1805).

47. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115 (2003).

48. *See id.* at 2119, 2126. According to McConnell, "Baptist ministers [in Virginia] were still being horsewhipped and jailed as late as 1774 for preaching without a license" and "Anglican ministers who refused to violate their oaths [of allegiance to the British Crown during the Revolutionary War] were dunked, beaten, stripped, tarred and feathered, and driven from their pulpits." *Id.* (footnotes omitted).

49. *Id.* at 2156.

50. *Id.* at 2157.

51. *Id.* at 2158.

order of society by improving men's morals and restraining their vices."[52] And yet, "the history of the founding period shows that free exercise and disestablishment were supported politically by the same people, with the strongest support for disestablishment coming from the most evangelical denominations of Americans."[53]

The Constitution hammered out in Philadelphia contained only a single mention of religion, forbidding religious tests for federal office.[54] George Mason and others pointed to the absence of a bill of rights as a principal objection to ratification.[55] Crucial large states—Massachusetts, New York, and Virginia—agreed to ratify the Constitution only on the promise of amendment.[56] Proposed amendments specifically directed at protecting religious liberty were submitted by ratification conventions in eight states.[57]

To keep the bargain struck for ratification, and to persuade North Carolina and Rhode Island to join the Union,[58] James Madison led the fight in the first Congress to adopt the Bill of Rights.[59] His proposed amendments began with a guarantee of religious liberty: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."[60] Subsequent debate refined this language into the familiar words of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[61] Ratification occurred "slowly and without much enthusiasm"[62] in 1791.

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52. *Id.* at 2197.

53. *Id.* at 2207.

54. *See* U.S. CONST. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

55. *See* George Mason, *Objections to the Constitution of Government*, *reprinted in* 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637 (1937) ("There is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of rights in the separate States are no security.").

56. *See* DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE CONSTITUTION, 1776–1995, at 85 (1996).

57. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 11–13 (Neil H. Cogan ed. 1997) [hereinafter BILL OF RIGHTS].

58. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 447 (2010); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 59–62 (1993).

59. *See* EMPIRE, *supra* note 45, at 69 ("There is no question that it was Madison's personal prestige and his dogged persistence that saw the amendments through the Congress. There might have been a federal Constitution without Madison but certainly no Bill of Rights.").

60. James Madison, 1 *Congressional Register* 427, June 8, 1789, *reprinted in* BILL OF RIGHTS, *supra* note 57, at 1.

61. U.S. CONST. amend. I.

62. EMPIRE, *supra* note 45, at 72.

Scholars disagree over whether the Establishment Clause was originally understood to prevent the federal government from creating a national church and meddling in the churches established by the states[63] or, more generally, "to protect the liberty of conscience of religious dissenters from the coercive power of government."[64] The latter view has two signal defects. First, it disregards the institution-protecting language that bars Congress from making laws "respecting an establishment of religion." Second, it replaces the operative term religion with "conscience," thereby expanding the constitutional text beyond its fair meaning. The more convincing interpretation holds that the Establishment Clause reflects "a structural restraint on the government's power to act on certain matters pertaining to ('respecting') religion."[65] Conceiving of the Establishment Clause as a structural restraint is consistent with the eighteenth century understanding of government as being limited to secular matters.[66]

As a structural restraint, the Establishment Clause operated horizontally by ensuring that "Congress had no authority to set up a national church, or even to support financially the full spectrum of American religions on a nonpreferential basis,"[67] and vertically by ensuring that "Congress could not enact legislation operable at the *state* level on certain matters pertaining to ('respecting') religion."[68] The vertical restraint disappeared when the Establishment Clause was incorporated against the states. Its horizontal restraint remains, "as an exception to the Necessary and Proper Clause."[69]

In addition, scholars disagree over whether the Free Exercise Clause was originally understood to support generalized claims to religious exemptions from civil laws.[70] There is, however, consensus that the

63. *See* McConnell, *supra* note 47, at 2109 ("Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states. The First Amendment thus preserved the status quo.").

64. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002).

65. Esbeck, *supra* note 17, at 3–4 (footnote omitted).

66. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 17–18 (1965) [hereinafter GARDEN] ("[M]en of the eighteenth century who demanded a constitutional proscription of laws relating to religion did so because of the deep conviction that the realm of spirit lay beyond the reach of government.").

67. Esbeck, *supra* note 17, at 18 (footnote omitted).

68. *Id.* at 15 (footnotes omitted).

69. *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 137 (2005) ("The Establishment Clause qualified the Necessary and Proper Clause by interdicting certain means of executing enumerated powers, even if those means were otherwise necessary and proper.").

70. *Compare* McConnell, *supra* note 13, at 1511 ("[T]he record shows that exemptions on account of religious scruple should have been familiar to the framers and ratifiers of the free exercise

clause was based on the understanding civil laws governed a secular realm that was largely distinct and separate from the realm governed by religious authority and conviction.[71]

2. Growth of First Amendment Protections for Churches

The religion clauses received little judicial treatment during the first century after their ratification. Forty years passed before the U.S. Supreme Court held, in *Barron v. Baltimore*,[72] that the first ten amendments of the Constitution did not apply to the states. Chief Justice Marshall, writing for a unanimous Court, reasoned that the Framers did not direct the first ten amendments to the states, as contrasted with the prohibitions of Article I, Section 10, which begins with the words "No state shall . . . ."[73] The Court also pointed out that the Bill of Rights had been adopted in response to the state ratifying conventions' demands for "security against apprehended encroachments of the general government—not against those of the local governments."[74] Concluding that the Fifth Amendment Takings Clause was "intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States,"[75] the Court dismissed the case for lack of jurisdiction.

This limitation on the Bill of Rights was applied to the First Amendment in *Permoli v. New Orleans*.[76] The Court dismissed a religious free exercise claim brought by a Catholic priest who was fined by the city of New Orleans for performing funeral rites contrary to a city ordinance.[77] Echoing *Barron*, the Court held that "[t]he [federal]

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clause. There is no substantial evidence that such exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience."), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992) ("In eighteenth-century America, where varied Christian sects bickered with one another and thrived, a constitutional right to have different civil obligations on account of religious differences was precisely what dissenters did not demand.").

71. *See* Hamburger, *supra* note 70, at 936–37 ("One reason late eighteenth-century ideas about religious freedom did not seem to require a general religious exemption is that the jurisdiction of civil government and the authority of religion were frequently considered distinguishable."); McConnell, *supra* note 13, at 1512 ("[T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the 'universal sovereign' precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience.").

72. 32 U.S. 243 (1833).

73. U.S. CONST. art. I, § 10.

74. *Barron*, 32 U.S. at 250.

75. *Id.* at 250–51.

76. 44 U.S. 589 (1845).

77. *See id.* at 609, 590–91.

Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws."[78]

State constitutions and laws provided the only legal bulwark against state government infringements on religious liberty through much of the nineteenth century. Beginning with *Chicago, B. & Q. R .Co. v. Chicago*,[79] however, the Supreme Court slowly eroded *Barron* through the process of selective incorporation. Case by case, the Court reasoned that the Fourteenth Amendment Due Process Clause impliedly incorporated specific guarantees of the Bill of Rights against infringement by state and local governments.[80]

The First Amendment religion clauses were incorporated against the states in two seminal cases. The Free Exercise Clause was incorporated in *Cantwell v. Connecticut*.[81] There, the Court reversed the conviction of a Jehovah's Witness who was found guilty of violating a Connecticut statute that prohibited door-to-door solicitation without prior approval from a public official.[82] The Court disposed of the statute in unambiguous terms, stating that it "deprive[d] [plaintiffs] of their liberty without due process of law in contravention of the Fourteenth Amendment."[83] The Court went on to equate the guarantees furnished by the First Amendment religion clauses with the Fourteenth Amendment, holding that "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[84]

In *Everson v. Board of Education*,[85] the Court sustained a New Jersey statute authorizing the reimbursement of transportation costs for parents who sent their children to parochial schools.[86] The question of incorporating the Establishment Clause against the states was little more than an aside. Without discussion, the Court simply stated that "[t]he

78. *Id.* at 609.

79. 166 U.S. 226, 258, 230, 241 (1897) (affirming an Illinois Supreme Court judgment that a railroad was entitled to compensation for the loss of part of its right-of-way on the principle that a decision "whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is . . . wanting in the due process of law required by the [F]ourteenth [A]mendment . . . .").

80. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (explaining that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states") (footnote omitted).

81. 310 U.S. 296 (1940).

82. *See id.* at 302–03.

83. *Id.* at 303.

84. *Id.*

85. 330 U.S. 1 (1947).

86. *See id.* at 18.

First Amendment, as made applicable to the states by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'"[87] The Court's analysis of the constitutional challenge against the statute rested largely on an historical discussion of the purposes animating the First Amendment.[88]

a. Free Exercise Clause

Today, pure Free Exercise Clause claims are governed by two leading Supreme Court decisions, *Employment Division v. Smith*[89] and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[90] *Smith* decided that the Free Exercise Clause did not require a state to excuse religious believers from a religiously neutral law of general applicability, specifically a criminal prohibition on the use of controlled substances.[91] The law was challenged by two members of the Native American Church who were denied unemployment compensation after being fired for ingesting peyote (listed as a controlled substance) during a religious ritual.[92] The Court refused to subject this prohibition to the compelling interest test, finding it "critical"[93] that the state's condition on eligibility for unemployment benefits consisted of conduct prohibited by law. At the same time, it held that heightened scrutiny does apply to hybrid claims presenting "the Free Exercise Clause in conjunction with other constitutional protections . . . ."[94] Further, the Court recognized the continuing applicability of the compelling interest test in discretionary contexts such as unemployment compensation that are characterized by "individualized governmental assessment of the reasons for the relevant conduct."[95] The Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[96] The Court further explained that its limitation on the reach of the compelling interest test did not affect well-established guarantees under the Free Exercise Clause: "The government may not . . . impose special disabilities on the basis of religious views or religious status" or "lend

87. *Id.* at 8 (citing Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943)).
88. *See id.* at 8–16.
89. 494 U.S. 872 (1990).
90. 508 U.S. 520 (1993).
91. *See Smith*, 494 U.S. at 874, 890.
92. *See id.* at 874.
93. *Id.* at 876.
94. *Id.* at 881.
95. *Id.* at 884.
96. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

its power to one or the other side in controversies over religious authority or dogma."[97] The Court further underscored that the First Amendment is offended by government regulations that apply to acts or omissions "only when they are engaged in for religious reasons."[98]

Such a constitutional offense was squarely presented in *City of Hiahleah*. Here, the Court struck down a city ordinance that prohibited the ritualistic sacrifice of animals but not their slaughter for food, a law that apparently targeted the unpopular Santeria religion.[99] The Court reiterated that the compelling interest test applies to claims of religious persecution: "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[100] Based on that principle, the Court reaffirmed its obligation to "eliminate, as it were, religious gerrymanders,"[101] meaning any government action where "religious practice is being singled out for discriminatory treatment."[102] And the Court underscored "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[103]

Taken together, *Smith* and *City of Hiahleah* affirm that the Free Exercise Clause demands strict judicial scrutiny where: (1) laws or governmental actions burdening religion are not religiously neutral and generally applicable, especially where government targets a religion or religious practice for unfavorable treatment or special burdens, or creates religious gerrymanders; (2) laws or governmental actions that burden a "hybrid" right consisting of the right to free exercise of religion, coupled with some other constitutional right; or (3) application of the law and the availability of exemptions depends on a discretionary system involving individualized assessments of the reasons for particular conduct.

It bears note that these decisions are not the only word on legal protections for religious free exercise. Federal and state statutes passed in response to *Smith* revived the compelling interest test even when generally applicable laws burden religious practice. These include the federal RFRA[104] and RLUIPA,[105] and state RFRAs.[106]

97. *Id.* at 877 (citations omitted).

98. *Id.*

99. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hiahleah, 508 U.S. 520, 547 (1993).

100. *Id.* at 546.

101. *Id.* at 534 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

102. *Id.* at 538 (citations omitted).

103. *Id.* at 543.

104. *See* 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

105. *See* 42 U.S.C. § 2000cc (2006).

106. *See, e.g.*, 775 ILL. COMP. STAT. 35/1 to 35/99 (2010).

RFRA's central provision directs that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[107] RFRA was held to be an unconstitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment to the extent that it purported to regulate state and local governments[108] but remains fully applicable to the federal government.[109] RLUIPA specifically extends the compelling interest test to the context of local land use regulation and state prisons.[110]

b. Establishment Clause

Like the Free Exercise Clause, the Establishment Clause is designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[111] It forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity."[112] In addition, it requires neutrality, in that the government may not prefer one religion to another or religion to irreligion.[113]

The Supreme Court's leading test for determining violations of the Establishment Clause comes from *Lemon v. Kurtzman*.[114] The three-part *Lemon* test measures government action by whether: (1) it has "a secular legislative purpose"; (2) its chief effect "neither advances nor inhibits religion"; and (3) it "foster[s] an excessive government entanglement with religion."[115] Alternative tests have been proposed. Justice Kennedy has proffered "coercion" as another test for violations of the Establishment Clause.[116] Justice O'Connor long advocated an "endorsement" test, meaning that a law is invalid if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as an endorsement or

107. 42 U.S.C. § 2000bb-1(a)–(b) (punctuation modified).

108. *See* City of Boerne v. Flores, 521 U.S. 507, 532, 536 (1997).

109. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA to block application of the federal Controlled Substances Act to ban the sacramental use of a hallucinogenic tea).

110. *See* 42 U.S.C. § 2000cc(a)(1).

111. Lynch v. Donnelly, 465 U.S. 668, 672 (1984).

112. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

113. *See* Wallace v. Jaffree, 472 U.S. 38, 52–54 (1985).

114. 403 U.S. 602 (1971).

115. *Id.* at 612–13 (citations omitted).

116. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part); Lee v. Weisman, 505 U.S. 577 (1992).

disapproval.[117] While both tests remain viable touchstones, neither has displaced *Lemon*.

As applied to the internal operations of religious organizations, *Lemon*'s charge to avoid "excessive government entanglement"[118] has furnished a point of doctrinal constancy in First Amendment jurisprudence. While much Establishment Clause jurisprudence has focused on controversial issues like prayer in public schools and public displays of religious symbols, the Supreme Court has consistently and with little controversy prohibited civil court involvement in "purely ecclesiastical" matters to ensure that government does not encroach on the sacred precincts of religion. Scholars have dubbed this line of jurisprudence the "church autonomy doctrine" or the "ecclesiastical abstention doctrine." This bedrock principle that religious organizations must be preserved from the interference of civil government unites core concerns of both religion clauses as they were understood at the Founding.[119]

3. The Church Autonomy Doctrine

The Supreme Court first articulated what has become known as the church autonomy doctrine in *Watson v. Jones*.[120] There, a minority faction of the Presbyterian Church of the United States brought suit for control of the property of the local church based on a claim that the majority had strayed from the church's true doctrine by denouncing slavery.[121] The Court held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . ."[122] Questions of judicial competence also influenced the

117. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *Cnty. of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring); Bd. of Educ. v. Grumet, 512 U.S. 687, 712 (1994) (O'Connor, J., concurring).

118. *Lemon*, 403 U.S. at 613.

119. *See* Esbeck, *supra* note 17, at 3–4 (footnote omitted) (characterizing the Establishment Clause as "a structural restraint on the government's power to act on certain matters pertaining to religion"); Hamburger, *supra* note 70, at 936–37 ("One reason late eighteenth-century ideas about religious freedom did not seem to require a general religious exemption is that the jurisdiction of civil government and the authority of religion were frequently considered distinguishable."); *accord* GARDEN, *supra* note 66, at 17–18 ("[M]en of the eighteenth century who demanded a constitutional proscription of laws relating to religion did so because of the deep conviction that the realm of spirit lay beyond the reach of government.").

120. 80 U.S. 679 (1871).

121. *See id.* at 694–95.

122. *Id.* at 727.

Court.[123] The Court, therefore, deferred to the decision of the General Assembly of the Presbyterian Church, the denomination's highest governing body, and dismissed the suit for lack of subject matter jurisdiction as "strictly and purely ecclesiastical."[124] In sum, *Watson* held that civil courts have neither the subject matter jurisdiction nor the competence to adjudicate ecclesiastical matters. These are issues for the church, not the state.[125]

Watson was decided as a matter of federal common law before *Erie* and selective incorporation. But *Watson*'s doctrine of church autonomy received full constitutional status in *Kedroff v. St. Nicholas Cathedral*.[126] There, the Court struck down a New York law that shifted the right to appoint a Russian Orthodox archbishop, and thus the right to occupy and control a cathedral in New York, from the church's authorities in Moscow to authorities in the United States. The statute had emerged from legitimate concerns that the church's hierarchy in Moscow was controlled by the Communist regime.[127]

The Court reaffirmed *Watson* and imported its doctrine of church autonomy into the First Amendment. It reasoned that "[t]he opinion [in *Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—*in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine*."[128] The Court held that the right of a church to select its clergy "must now be said to have *federal constitutional protection* as a part of the free exercise of religion against state interference."[129] As the Court explained, "[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion."[130] The Court went on to state that such issues are "strictly a matter of

123. *See id.* at 729 ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.").

124. *Id.* at 733.

125. The principles elaborated in *Watson* later guided the Court's decision in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), involving a dispute over entitlement to a Roman Catholic chaplaincy and its attributable income. The Archbishop had refused to appoint the petitioner to the chaplaincy because under Catholic Canon Law he was unqualified. *See id.* at 12. In an opinion by Justice Brandeis, the Court rejected the civil court challenge and upheld the autonomy of the church "to determine what the essential qualifications of [clergy] are and whether the candidate possesses them." *Id.* at 19 (citing *Watson*, 80 U.S. at 727, 733).

126. 344 U.S. 94 (1952).

127. *See id.* at 106–07.

128. *Id.* at 116 (emphasis added).

129. *Id.* (emphasis added).

130. *Id.* at 107–08; *accord* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (extending *Kedroff* to cover judicial actions as well as legislative actions).

ecclesiastical government" and thus of no concern to the state.[131] While the Court recognized the state's legitimate interest in suppressing subversive activity, and acknowledged that such activity (if found) could be criminally punished,[132] the Court made clear that state intrusion into the ecclesiastical affairs of the church "violates [the] rule of separation between church and state"[133] and contravenes "the philosophy of ecclesiastical control of church administration and polity."[134]

The constitutional stature of the church autonomy doctrine was recognized again in *Presbyterian Church v. Mary Elizabeth Blue Hull Church*.[135] The Court held that civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine."[136] Such a process, the Court held, "can play *no* role in any . . . judicial proceedings" because it unconstitutionally "inject[s] the civil courts into substantive ecclesiastical matters."[137] Significantly, the Court also recognized that litigation against religious organizations could readily disrupt the delicate process by which religious beliefs and doctrines are generated.[138]

In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[139] the Court further held that the right of church autonomy "applies with equal force to church disputes over church polity and church administration."[140] Quoting *Watson*, the Court reiterated that the First Amendment dictates that "civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[141] The Court held that disgruntled clergy or church members cannot call on civil courts to challenge the decisions of church officials regarding such matters:

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or

131. *Kedroff*, 344 U.S. at 115.

132. *See id.* at 109.

133. *Id.* at 110.

134. *Id.* at 117.

135. 393 U.S. 440 (1969).

136. *Id.* at 451.

137. *Id.* at 450–51.

138. *See id.* at 449 (noting that when courts intrude into ecclesiastical matters "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

139. 426 U.S. 696 (1976).

140. *Id.* at 710.

141. *Id.* at 713–14 (quoting Watson v. Jones, 80 U.S. 679, 733–34 (1871)).

> impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.[142]

Milivojevich summed up the church autonomy doctrine by holding that "the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . ."[143]

Similar First Amendment concerns compelled the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*.[144] In this case, the NLRB attempted to apply neutral principles of labor law to two groups of Catholic high schools.[145] The Court rejected the attempt. Noting that many of the "challenged actions [of the schools] were mandated by their religious creeds,"[146] the Court interpreted the National Labor Relations Act narrowly so as to preclude the Board from interfering in the internal management of the schools,[147] holding:

> The resolution of [claims that certain decisions were religiously motivated], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board [in adjudicating such claims] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[148]

Any question about whether these church autonomy cases remain viable after *Smith* was definitively put to rest by the Supreme Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission*.[149] There, a "called" teacher at a religious school brought an action under the Americans with Disabilities Act (ADA) against the school and its sponsoring church claiming she was unlawfully terminated in retaliation for asserting her legal rights under the ADA. The federal district court granted summary judgment for the church on the ground that the teacher's claim fell within the ministerial exception.[150] The court of appeals acknowledged that the ministerial exception applies in certain circumstances but reversed on the ground that the *de minimis* nature of

142. *Id.* at 714–15.
143. *Id.* at 724.
144. 440 U.S. at 490.
145. *See id.* at 491–93.
146. *Id.* at 502.
147. *See id.* at 507.
148. *Id.* at 502.
149. 132 S. Ct. 694 (2012).
150. *See id.* at 701.

the teacher's religious duties placed her outside the scope of the exception.[151] Before the Supreme Court, the plaintiff and the Equal Employment Opportunity Commission (EEOC) argued that, notwithstanding forty years of unanimous precedent in the lower courts, the ministerial exception did not exist under the First Amendment religion clauses and, even assuming it did, that the plaintiff still would not qualify as a minister.[152]

The Supreme Court unanimously rejected the plaintiff's and EEOC's "extreme"[153] position, holding that the First Amendment requires the ministerial exception and that it barred the plaintiff's and EEOC's discrimination suit. The decision rested on broad principles of church autonomy over internal religious affairs—principles that the Court said arise from both the Establishment and Free Exercise Clauses.[154] Indeed, the Supreme Court expressly reaffirmed the continuing viability of the church autonomy line of cases, including *Watson*, *Kedroff*, and *Milivojevich*,[155] and the constitutional limits they impose on the power of government and courts to interfere with ecclesiastical matters. In doing so, the Court squarely rejected the argument—often advanced by plaintiffs suing churches—that the rule in *Employment Division v. Smith* precludes strong First Amendment defenses against legal claims interfering with a religious organization's internal affairs as long as such claims are based on laws that are generally applicable and facially neutral toward religion and religious practices.[156] The Court explained that "*Smith* involved government regulation of only *outward physical acts*. The present case, in contrast, concerns *government interference with an internal church decision that affects the faith and mission of the church itself*."[157] The church autonomy doctrine, in other words, falls outside the rule in *Smith*. The Supreme Court also rejected as "untenable" and "remarkable" the plaintiff's and the EEOC's argument that religious organizations should be treated no different than secular organizations with expressive rights, holding instead that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."[158] Nor did the Court accept the government's position that monetary compensation and damages—as opposed to injunctive relief—could be awarded to the plaintiff without

151. *See id.* at 701–702.
152. *See id.* at 706, 708–709.
153. *Id.* at 709.
154. *See id.* at 702.
155. *See id.* at 704–705.
156. *See id.* at 706–707.
157. *Id.* at 707 (emphasis added).
158. *Id.* at 706.

unconstitutionally trespassing on internal church affairs: "An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination."[159]

This line of decisions firmly settles the First Amendment right of churches and religious organizations to autonomy—that is, non-interference by civil authorities—in internal ecclesiastical matters. Rooted in both free exercise and non-establishment principles, the doctrine interposes a structural barrier between internal ecclesiastical affairs on the one hand and civil power on the other by guaranteeing a sphere of activity with "independence from secular control or manipulation,"[160] a sphere where "civil courts exercise no jurisdiction."[161] This constitutionally protected sphere includes questions of religious faith and doctrine; disputes calling for adjudication of ecclesiastical structure or polity; the relationship between a religious organization and its ministers and teachers of the faith; and the standards by which church members are admitted, guided, disciplined, and expelled.[162] In each of these areas, tort law doctrines of duty, breach, liability, and relief confront a constitutional barrier that often completely bars and, at the very least, substantially limits the types of claims brought.

Properly understanding how the church autonomy doctrine sets limits on tort law has significant constitutional and practical consequences. Legislative and adjudicative decisions that impose one-size-fits-all rules on religious organizations may unwittingly infringe upon deeply valued and long-established constitutional rights. The practical consequences are no less real. When courts view church autonomy as a longstanding First Amendment doctrine that limits the power of government to act upon religious organizations in their internal matters, it reduces the doctrinal confusion that often arises from treating churches as no different than secular organizations. Correctly understood, the church autonomy doctrine sets constitutional boundaries on the scope of tort law, thereby presenting threshold considerations for defining duty and liability when tort actions are brought against religious institutions. It is to these considerations that we now turn.

159. *Id.* at 709.

160. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

161. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713–14 (1976) (quoting Watson v. Jones, 80 U.S. 679, 733–34 (1871)).

162. *See* Esbeck, *supra* note 17, at 44–45.

III. APPLYING THE CHURCH AUTONOMY DOCTRINE TO LIMIT TORT LAW PROTECTS RELIGIOUS ORGANIZATIONS IN FAMILIAR WAYS

As a preliminary matter, an objection to the very notion of placing boundaries on the scope of tort law should be addressed. Some commentators argue that tort law must be applied uniformly to all defendants, that every injury requires a civil remedy, and that any departure from such uniformity for the benefit of churches and religious organizations is unjustified.[163] To be sure, this argument holds some superficial appeal. It squares with today's litigious zeitgeist, "an era of heightened sensitivity to those who claim injury or some other victim-like status," and the corresponding demand for "compensation, achieved by holding the tortfeasor monetarily liable."[164] Measured against these sensibilities, the idea that the church autonomy doctrine places boundaries on tort law may appear to be alien or unwelcome because it curbs the availability of monetary damages for those who claim injuries from religious organizations. Sacrificing relief for individual victims in the name of protecting churches from civil liability might be viewed as an unwarranted exception to our society's commitment to equal justice.

But this objection falters when considering how the law treats religious organizations outside of tort law and how tort law treats important social institutions besides religious organizations. Special rules exist, in and out of tort law, for special cases. The special protections for religious organizations discussed previously—such as RFRA and RLUIPA, exceptions from Title VII, procedural protections in bankruptcy, and other provisions that ensure separation of church and state—would fall if the availability of a remedy for every perceived wrong were erected into an absolute rule. Each of these provisions protects religious organizations from the unrestrained force of generally applicable legal rules for the sake of preserving the social and personal benefits such organizations provide. Put simply, the law recognizes that compensating an injured party, preventing discrimination, deferring to local land use bodies, making creditors whole, and so forth are not the only legal values worth preserving.

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163. *See, e.g.*, Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1116 (arguing that "religious entities be treated and regulated as any other entity in society" and that "[t]here can be no church autonomy in a society that values citizens equally"); Kelly W.G. Clark, Kristian Spencer Roggendorf & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481, 512–13 (2006) (arguing that the church autonomy doctrine "would be misapplied if used to shield the Church from civil tort liability in the priest abuse cases" and that applying the doctrine in the tort setting would mark a serious departure from the rule that "courts may exercise jurisdiction over religious bodies in secular matters, including tort cases").

164. Idleman, *supra* note 39, at 242–43 (footnote omitted).

Nor is compensating the injured an absolute principle even within tort law itself. Courts and legislatures have pursued a more moderate and context-sensitive approach that accords institutions special protection from the full reach of tort law as a means of advancing social values—including constitutional rights—deemed more important than an inflexible rule of affording a remedy for every injury. For instance, many courts consider a multitude of factors and public policies in determining whether a duty of care even exists in a particular circumstance, such as:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[165]

These policy considerations necessarily include First Amendment protections and sensitivities when churches and clergy are involved.[166]

The following examples demonstrate that limiting the scope of duties or carving out exceptions to protect certain interests, including those of religious organizations, is nothing new in tort law. Again, in tort law context matters.[167] Churches are not treated the same as commercial enterprises such as gas stations because, quite simply, they are not gas stations, but rather constitutionally-protected communities with purposes beyond mere commerce.

A. Tort Rules Crafted to Protect Institutions With Special Social or Constitutional Significance

Tort law recognizes what amounts to a "press autonomy doctrine" by imposing a heightened standard on certain plaintiffs that claim libel or defamation against the press. In *New York Times v. Sullivan*, the

165. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 212 n.5 (Cal. 1993), *abrogated by* Reid v. Google, Inc., 235 P.3d 988 (Cal. 2010) (citation omitted) (internal quotation marks omitted).

166. *See, e.g.*, Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 956–61 (1988) (holding that First Amendment concerns prevent courts from treating the religious relationship between a church and its congregants as the basis for a secular duty without holding that the First Amendment strictly bars such a duty).

167. It bears note that not only tort law but even criminal law sometimes takes a back seat to special protections for religion. The clergy-penitent privilege, for example, bars consideration of evidence of confession of crimes to clergy, even if the perpetrator of a murder ultimately goes free. *See, e.g.*, Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997) (reviewing history of clergy privilege and holding that seizure of jailhouse confession of triple murder violated right to confidentiality between priest and penitent).

Supreme Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[168] This rule arose from "a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation."[169] Importantly, this tension was not blithely resolved in favor of vindicating the right to recover for reputational damage as if no other legal value merits consideration in tort law. Instead, the Court found that the First Amendment guarantee of free speech required it to shield the press from the full force of libel law when the publication had to do with public officials.

The Court's most basic reason for adopting this heightened standard is that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ."[170] *NAACP v. Button*, on which the *New York Times* Court relied for this idea of constitutionally mandated breathing space, explained its reasoning:

> These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[171]

Tellingly, the *Button* Court cited *Cantwell*, a leading free exercise case, to support the need for such breathing space from the effects of civil litigation.[172] Religious liberty requires such space, no less than other First Amendment freedoms.

The same concern with the effect of tort law on constitutional rights led the Court to extend the *New York Times* standard to shield the notorious *Hustler* magazine from liability for the intentional infliction of emotional distress.[173] There, the Court took pains to emphasize that even though:

168. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

169. Monitor Patriot Co. v. Roy, 401 U.S. 265, 270 (1971).

170. 376 U.S. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

171. *Button*, 371 U.S. at 433.

172. *See id.*

173. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52, 56 (1988) (relying on the need for "breathing space" as a central reason to conclude that a press defendant was immune from a claim for intentional infliction of emotional distress).

> [T]he law [generally] does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . [and] while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.[174]

In short, the availability of a tort remedy gave way to the constitutional value of free speech in order to protect the First Amendment's guarantee of "public debate about public figures."[175]

These constitutional protections for free speech remain as vibrant as ever. The Supreme Court recently reversed a multi-million dollar jury verdict against a church and its members on a claim of intentional infliction of emotional distress. In *Snyder v. Phelps*,[176] the Court held that a church, its pastor, and some of its parishioners could not be held liable for holding a deeply offensive political protest near a military funeral. The Court reasoned that the church members' messages were entitled to "special protection"[177] under the Free Speech Clause because their picketing occurred "at a public place on a matter of public concern."[178] It further reasoned that a jury finding of "outrageousness" arose from "a highly malleable standard"[179] that was insufficient to overcome the church's free speech rights. Satisfying the common law elements of a tort claim for intentional infliction of emotional distress was, therefore, considered insufficient to supersede the church's constitutionally guaranteed free speech rights.

Tort law also runs up against limits placed by state and federal law on the extent of liability borne by state and municipal governments and their employees. State statutes frequently curb such liability by placing exemptions or qualifications on the government's amenability to suit or on remedies available against a government defendant.[180] Without such limits, state and local governments would be hampered in carrying out their responsibilities by the constant threat that even meritorious lawsuits would divert scarce public resources from higher ends. Federal law is also solicitous of local government prerogatives. The primary

174. *Id.* at 53.

175. *Id.*

176. 131 S. Ct. 1207, 1219 (2011).

177. *Id.*

178. *Id.*

179. *Id.*

180. *See, e.g.*, CAL. GOV'T CODE § 818 (West 2012) (excusing public entities from liability for punitive damages); *Id.* at § 818.8 (excusing public entities from liability for intentional or negligent misrepresentation); FLA. STAT. § 768.28(5) (2011) (describing the terms of the state's "limited waiver of sovereign immunity," including a ban on punitive damages and pre-judgment interest); MINN. STAT. § 3.736, subd. 3 (2010) (setting forth several exclusions from tort liability for the state and is employees, including a flat ban on the state's payment of punitive damages); *Id.* at § 466.03 (setting forth several exclusions from tort liability for municipal governments and their employees).

federal statute for vindicating the infringement of constitutional rights by state and local governments, 42 U.S.C. § 1983, has been construed to bar vicarious liability against municipalities.[181] Hiring a tortfeasor is not enough to subject a city to liability under § 1983, no matter how egregious the employee's actions.

The discretionary function exception under the Federal Tort Claims Act (FTCA)[182] provides another example of a broad limit on governmental tort liability. This exception bars any negligence claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[183] The rationale for the exception is to avoid second-guessing or impeding the function and decision-making process of government officials, which would necessarily arise from the fear of potential tort liability.[184] Rather, tort law's focus on providing a remedy for every wrong steps aside to facilitate the ends of government efficiency and unencumbered decision making.

In addition, Good Samaritan laws, which have been adopted by virtually every state,[185] provide yet another prevalent example of tort law yielding to other public policy considerations. These laws preclude, or at least limit, tort liability for medical professionals or other individuals who offer assistance to imperiled individuals in order to promote and encourage such assistance.[186]

A final illustration can be seen in the abolishment of common law actions, most often by so-called heart balm statutes, for certain traditional wrongs arising from consensual, intimate relationships. In California, for example, causes of action for alienation of affection, criminal conversation, seduction of a person over the age of legal consent, or breach of a marriage promise have each been abolished by the legislature.[187] Likewise, "[a] fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages."[188] It is not that these causes of action fail to address very real harms. Rather, California's decision to abolish such claims reflects the

181. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U. S. 658, 694 (1978).

182. 28 U.S.C. § 2671 (2006).

183. 28 U.S.C. § 2680(a) (2006).

184. *See* United States v. Gaubert, 499 U.S. 315, 323 (1991).

185. *See* Stewart R. Reuter, *Physicians As Good Samaritans*, 20 J. LEGAL MED. 157 (1999) (noting that all states and the District of Columbia have Good Samaritan statutes, with some even having multiple laws "to give additional categories of potential Good Samaritan immunity").

186. *See id.* at 158 (noting that doctors feared liability as well as the costs of litigation prior to Good Samaritan statutes' enactment).

187. *See* CAL. CIV. CODE § 43.5 (West 2012).

188. *Id.* § 43.4.

judgment that notwithstanding such harms "certain sexual conduct and interpersonal decisions are, on public policy grounds, outside the realm of tort liability."[189] Many states have followed the same approach.[190] Although problems of evidence and fraud figured among the reasons for abrogating these kinds of claims, the effect has been to create a tort-free zone for intimate relationships. Since evidentiary and fraud problems exist and are dealt with in many areas of tort law, abrogation could be defended just as well, if not better, on the ground of society's interest in safeguarding the autonomy of intimate relationships from the corrosive effects of civil litigation.

As these examples illustrate, the right to compensation is not the only value at stake when defining tort law claims. Common law claims have been limited or abolished to protect institutions and groups of individuals such as the press, state and local governments, rescuers, and those in intimate relationships that serve constitutional and social values thought to supersede the bare right to compensation.

B. Crafting Tort Rules to Avoid Injuring Religious Institutions Serves Constitutional and Social Values

The diverse examples presented above show how much the law of tort has been crafted to protect important societal institutions. Together these exceptions, immunities, and accommodations reflect the practical wisdom of Justice Cardozo's warning about "[t]he tendency of a principle to expand itself to the limit of its logic."[191] Crafting tort law to avoid unnecessary collisions with the autonomy of religious institutions thus reflects a well-established pattern in the law, not an unwarranted anomaly.

Religion is special under the Constitution. The very first words of the First Amendment mark it out as distinctive: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[192] The text of the religion clauses evinces the

189. Perry v. Atkinson, 240 Cal. Rptr. 402, 405 (Cal. 1987).

190. *See, e.g.*, FLA. STAT. § 771.01 (2011) ("The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished."); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2012) ("The rights of action to recover sums of money as damages for alienation of affections, criminal conversation, education, or breach of contract to marry are abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action. No contract to marry made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for its breach."); TEX. FAM. CODE § 1.106 (West 2012) ("A right of action by one spouse against a third party for criminal conversation is not authorized in this state."); *Id.* § 1.107 ("A right of action by one spouse against a third party for alienation of affection is not authorized in this state.").

191. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

192. U.S. CONST. amend. I.

Framers' "respect for religion's special role in society"[193] and, in particular, "gives special solicitude to the rights of *religious* organizations."[194] As Professor McConnell has noted, "[t]he textual insistence on the special status of 'religion' is, moreover, rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment."[195] The Supreme Court and individual justices have recognized that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which by its terms, gives special protection to the exercise of religion."[196] The Court has also recognized that "[a]s the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity."[197]

Protecting the free exercise of religion necessarily requires protection for the religious institutions and faith communities that make religious exercise possible and meaningful. As explained at the outset, religious organizations produce unique individual and social goods that merit special legal protection.[198] Without it, government actions, whether legislative, regulatory, or judicial, can distort or destroy those organizations and the goods they produce. In fact, to label the benefits produced by religious organizations as "goods" is potentially misleading. The word adequately describes the social benefits that religious organizations deliver in the form of food, shelter, and other welfare services, but "goods" fails to capture the profound understandings, duties, benefits, and life-shaping commitments that characterize the connections between religious organizations and individual believers. For many religious believers, those connections form the most significant relationships of their lives.

Law can skew those connections, thereby compromising a religious organization's capacity to continue functioning as a locus of faith. The tendency of faith-based and secular legal standards to be incommensurable leaves churches and other religious organizations especially vulnerable to the coercive (and from their perspective, corrosive) forces of law. Litigation, actual or threatened, against a religious organization carries the possibility of distorting a faith community's "process of self-definition" by imposing money damages

193. McCreary Cnty. v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring); *see also* McConnell, *supra note* 13, at 1496.

194. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 712–13 (2012) (emphasis added).

195. McConnell, *supra note* 13, at 1496.

196. Thomas v. Review Bd., 450 U.S. 707, 713 (1981) (citations omitted).

197. Emp't Div. v. Smith, 494 U.S. 872, 901–02 (1990) (O'Connor, J., concurring in the judgment) (citing Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 9).

198. *See supra* Part II.A.

as the price of adhering to a religiously-motivated practice that a judge or jury finds objectionable. This chain of events naturally poses "the danger of chilling religious activity."[199] As with other First Amendment freedoms, the rights protected by the religion clauses "are delicate and vulnerable, as well as supremely precious in our society."[200] And just as other First Amendment freedoms "need breathing space to survive," so too religious liberty requires that government regulate "only with narrow specificity."[201]

Crafting tort law with "narrow specificity"[202] to avoid infringing the constitutionally protected autonomy of religious institutions thus reflects society's regard for the importance of religious organizations and this Nation's most profound constitutional principles. It is to that task of assessing and crafting tort doctrines in light of the church autonomy doctrine that we now turn.

IV. EASY ANSWERS AND CUTTING-EDGE QUESTIONS IN THE COLLISION BETWEEN THE CHURCH AUTONOMY DOCTRINE AND TORT LAW

A. Tort Claims Against Religious Organizations For Which the First Amendment Denies Jurisdiction

Correctly applied, the First Amendment's church autonomy doctrine should clearly bar various civil claims against religious organizations. These include (1) claims for clergy malpractice or breach of fiduciary duty arising out of an exclusively religious relationship; (2) claims arising from church membership status or criteria or from ecclesiastical discipline of church members (including excommunication); (3) claims against churches by ministers, other clerics, or those with important religious or internal governance functions based on allegations of wrongful termination, discrimination, or breach of employment contracts, as well as claims by third parties against churches or church officials for the negligent hiring or termination of clergy; (4) claims that a clergy member violated a religious duty to maintain the confidentiality of a member's confession or other statement; and (5) claims based on a church's alleged failure to follow its own doctrines, policies, or ecclesiastical standards. Each of these claims presents such palpable conflicts with the church autonomy doctrine that it has usually been an easy matter for courts to dismiss them as beyond the competence of civil

199. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343–44 (1987) (citation omitted).

200. NAACP v. Button, 371 U.S. 415, 433 (1963).

201. *Id.*

202. *Id.*

courts.

1. Clergy Malpractice and Breach of Fiduciary Duty

Ecclesiastical counseling and other religious relationships between church leaders and church members sometimes lead to claims that clergy should be held to a court-defined standard of care under a claim of clergy malpractice, conceived as analogous to other forms of professional malpractice. However, appellate courts have unanimously rejected such claims.[203] Courts commonly cite the unconstitutionality and impossibility of interpreting church doctrine in order to define a standard of care for clergy within a particular faith and then to determine whether a cleric's conduct fell below that standard.[204]

The reasons for rejecting clergy malpractice were memorably articulated in the leading case of *Nally v. Grace Community Church of the Valley*.[205] There, the California Supreme Court rejected a claim of negligence against a clergyman for allegedly failing to warn parents of the mental state of their son who committed suicide after receiving religious counseling. The court explained that "[b]ecause of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors."[206] The court also discerned that "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious

203. *See, e.g.*, Franco v. Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198, 204 (Utah 2001) ("[C]ourts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment"); *accord* Handley v. Richards, 518 So. 2d 682 (Ala. 1987); Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); F.G. v. MacDonell, 696 A.2d 697 (N.J. 1997); Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907 (Neb. 1993); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993).

204. *See, e.g.*, Schmidt v. Bishop, 779 F. Supp. 321, 327–28 (S.D.N.Y. 1991) ("Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or the jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible.") (citations omitted); Amato v. Greenquist, 679 N.E.2d 446, 450 (Ill. App. Ct. 1997) ("To permit claims for clergy malpractice would require courts to establish a standard of reasonable care for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of [religious] doctrine."); H.R.B. v. J.L.G., 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (holding that adjudication of clergy malpractice claims "would require courts to define and express the standard of care followed by a reasonable clergy of the particular faith involved, which in turn would require the Court" to examine and interpret the religious doctrines).

205. 763 P.2d 948 (Cal. 1988).

206. *Id.* at 960.

entity."[207]

The *Nally* court was correct that there cannot be "a reasonable clergy standard" similar to standards applied to physicians or other professionals. Theological understandings of the nature and role of clergy in the lives of parishioners and within a worshipping community differ radically among faith traditions and even within different denominations of the same faith tradition. What a Catholic priest, Protestant pastor, Jewish rabbi, Mormon bishop, Muslim imam, or leader of another faith ought to say or do in counseling or caring for a parishioner is defined by scripture, religious doctrines, sacred tradition, ecclesiastical policies and procedures, and a host of other religious intangibles depending on the religion. In some faiths, a cleric is a literal mediator between God and an individual, while in others he or she is a fellow believer with special religious training. In some religions, one has a duty to submit to the divine leadership of clergy, while in others the very concept of human spiritual authority does not exist. Numerous other conceptions exist amidst the great diversity of American religions. Thus, a plaintiff's allegation that a cleric failed to provide the counseling, care or protection required by the religion or by the plaintiff's "reasonable" religious expectations simply cannot be adjudicated in civil courts because there are no objective secular standards by which to evaluate such claims. They would require civil courts to make religious rather than legal judgments, and to impose secular duties on clergy that may conflict with religious duties, in violation of the First Amendment. The same is true of a claim that all religious officials should conform to some secular standard of clergy reasonableness; there is simply no religion-neutral, secular basis for determining what duties clergy of myriad faiths owe to their parishioners, and any attempt to create such a duty would amount to governmental regulation of religion. Courts, to their credit, have done a good job of making clear that issues of clergy malpractice are ecclesiastical matters that under the First Amendment must be addressed by religious institutions, not the judiciary.

Practically identical constitutional considerations have prompted courts to hold that no legally cognizable fiduciary duty arises from purely ecclesiastical relationships.[208] A fiduciary duty imposes a legally enforceable obligation to act for the benefit of another person on matters within the scope of the relationship.[209] Typical fiduciary relationships

207. *Id.*

208. *See* Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) (per curiam); *Schmidt*, 779 F. Supp. 321; Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839 (Me. 1999); Gray v. Ward, 950 S.W.2d 232 (Mo. 1997); *Schieffer*, 508 N.W.2d at 907; L.C. v. R.P., 563 N.W.2d 799 (N.D. 1997).

209. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES)

include those of principal and agent, attorney and client, trustee and beneficiary, and guardian and ward.[210]

Breach of fiduciary duty claims against clergy are often dismissed as thinly disguised claims of clergy malpractice.[211] Courts have recognized that the problem with claiming breach of fiduciary duty against clergy or churches under most circumstances is the impossibility of defining the nature and scope of the alleged duty of care without intruding into the constitutionally protected autonomy of religious organizations.[212]

Shoehorning clerics and congregants into a fiduciary relationship with legal duties violates the church autonomy doctrine because, in determining the nature of such context-specific relationships, the judicial analysis "inevitably require[s] inquiry into the religious aspects of the [clergy–parishioner] relationship" in order to establish "the duty owed by [a cleric] to [his or her] parishioners."[213] Plaintiffs sometimes specifically allege a fiduciary duty based on the trust and confidence they placed in their cleric because of his or her spiritual authority and their own devotion to church teachings. These are precisely the types of allegations civil courts refuse to consider.[214] "However consequential [such a relationship] may be in a religious context, it provides no basis to support liability in a civil context."[215] As noted, clerics and congregants relate to each other in diverse and often contradictory ways, depending on a particular faith's understanding of the nature and role of clergy in a parishioner's spiritual life. From this diversity of understandings, "it is impossible to show the existence of a fiduciary

§ 42 (Tentative Draft No. 4, 2004).

210. *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 795 (1983).

211. *See Dausch*, 52 F.3d at 1428–29 (affirming the district court's rejection of a fiduciary duty claim as "an elliptical way to state a clergy malpractice claim"); *Schmidt*, 779 F. Supp. at 327 ("The Court must address the real issue here—clergy malpractice—rather than plaintiff's rather fanciful characterization of the claim as 'counseling malpractice.'").

212. *See Dausch*, 52 F.3d at 1438 ("If the court were to recognize such a [claim for] breach of fiduciary duty, it would be required to define a reasonable duty standard and to evaluate [the clergy's] conduct against that standard . . . ."); *Schmidt*, 779 F. Supp. at 326 ("[I]n analyzing and defining the scope of a fiduciary duty owed persons by their clergy, the Court would be confronted by the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman required by the law of negligence."); *H.R.B.*, 913 S.W.2d at 99 (holding that a breach of fiduciary duty claim "inevitably require[s] inquiry into the religious aspects of the [clergy–parishioner] relationship" in order to establish "the duty owed by [a clergy] to [his or her] parishioners."); Langford v. Roman Catholic Diocese of Brooklyn, 677 N.Y.S.2d 436, 439 (N.Y. 1998) (rejecting breach of fiduciary duty claim on finding it "impossible to show the existence of a fiduciary relationship [in clergy–parishioner cases] without resort to religious facts").

213. *H.R.B.*, 913 S.W.2d at 99.

214. Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 249-50 (2007) (holding that the First Amendment "clearly forbid[s] [a court's] consideration of the religious obligations, if any, of a clergy member to his or her congregants, or of the 'trust and confidence' that may be engendered in congregants solely by viture of the clergy's religious authority").

215. Petrell v. Shaw, 902 N.E.2d 401, 408 (Mass. 2009).

relationship [in clergy–parishioner cases] without resort to religious facts."[216] Stated simply, the same constitutional limits that prevent courts from entertaining claims for clergy malpractice likewise prevent them from imposing a "reasonable clergyman" standard in the form of a one-size-fits-all fiduciary duty.[217] Claims of fiduciary duty have been rejected even when a pastoral counseling relationship develops into a consensual sexual relationship among adults, although courts are somewhat divided on this point.[218] The central animating principle of these decisions is that religious relationships and their concomitant religious duties do not by themselves create secular fiduciary duties.[219]

A more difficult issue arises when a person is qualified both as a member of the clergy and as a licensed professional. In sorting out such claims, courts avoid imposing a fiduciary duty where the claim is founded on a religious counseling relationship and the defendant is both a cleric and a professionally trained counselor. However pleaded, asserting that an ecclesiastical defendant failed to exercise his or her religious authority consistent with proper religious standards amounts to the uniformly discredited claim of clergy malpractice.[220] The issue is not whether the defendant holds a professional license or whether professional standards were violated; it is whether he or she was acting

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216. *Langford*, 677 N.Y.S.2d at 439 (rejecting fiduciary duty claim).

217. Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1823 (inviting a court to determine the standard of care for "a 'reasonable Catholic priest' or a 'reasonable Orthodox rabbi' . . . are precisely the kinds of appraisals that the doctrine of [church autonomy] bars").

218. *See* Marmelstein v. Kehillat New Hempstead, 892 N.E.2d 375, 376, 379 (N.Y. 2008) ("Allegations that give rise to only a general clergy-congregant relationship that includes aspects of counseling do not generally impose a fiduciary obligation upon a cleric."); Doe v. Roman Catholic Diocese of Rochester, 907 N.E.2d 683, 684 (N.Y. 2009) (following *Marmelstein* in reversing a lower court decision because the congregant made only bare allegations that the priest occupied a position of control or dominance and that she was uniquely vulnerable); Richelle L. v. Roman Catholic Archbishop of S.F., 130 Cal. Rptr. 2d 601, 618 (Cal. Ct. App. 2003) (explaining that priest accused of a sexual relationship with a congregant held not liable for the breach of fiduciary duty, because her "claim of vulnerability rest[ed] *solely* on her 'deeply religious nature'" and determining how far she was "vulnerable to [the priest] and unable to protect herself effectively" presented "profoundly religious questions, as to which the courts may not constitutionally inquire"). *But see* F.G. v. MacDonell, 696 A.2d 697, 704 (N.J. 1997) ("Unlike an action for clergy malpractice, an action for breach of fiduciary duty does not require establishing a standard of care and its breach. Establishing a fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor. A violation of that trust constitutes a breach of the duty . . . ."); Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989) ("[P]laintiff's claim for outrageous conduct is not premised on the mere fact that Christenson is a pastor, but on the fact that, because he was *plaintiff's* pastor and counselor, a special relationship of trust and confidence developed.").

219. *See* Petrell v. Shaw, 902 N.E.2d 401, 407 (Mass. 2009) (rejecting a claim of fiduciary duty, in part, because the religious relationship between the claimant and the church authorities "provides no basis to support liability in a civil context").

220. *See* Dausch v. Rykse, 52 F.3d 1425, 1428–29 (7th Cir. 1994) (per curiam); Franco v. Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198, 204 (Utah 2001).

as a religious leader or as a secular professional when the alleged injuries occurred.[221] If a defendant acts in a religious capacity, no fiduciary duty should be imposed.[222] But if a cleric holds himself or herself out as qualified to give professional secular counseling, courts have found that a fiduciary duty is owed when providing purely secular services.[223]

2. Church Membership, Recruiting, and Ecclesiastical Discipline

The church autonomy doctrine also produces easy answers where a tort claim is brought against a religious organization based on a person's removal from church membership. Courts consistently reject such claims, reasoning that the ambit of constitutionally protected church autonomy includes the freedom to set and apply membership criteria without judicial supervision.[224] Excommunication and other penalties related to church discipline are ecclesiastical and spiritual matters that lie beyond the jurisdiction of civil courts.[225] To hold otherwise would disregard the Supreme Court's repeated injunction that civil courts cannot adjudicate "a matter which concerns . . . church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[226] Judges and juries would, in effect, supplant ministers, priests, rabbis, and bishops in deciding how religious beliefs ought to translate into action and in

221. *See* Westbrook v. Penley, 231 S.W.3d 389, 391 (Tex. 2007).

222. *See* Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960 (Cal. 1988) (rejecting a claim of clergy malpractice because imposing a duty of care on pastoral counselors "would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity"); Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1324 (Ill. App. Ct. 1986), *cert. denied*, 479 U.S. 915 (1986) (holding that "adjudication of the present case would require the court to extensively investigate and evaluate religious tenets and doctrines" and that "the first amendment precludes such an intrusive inquiry by the civil courts into religious matters").

223. *See Marmelstein*, 892 N.E.2d at 376, 379 (noting a cleric who is also a licensed professional may be held liable for breach of fiduciary duty "under existing laws and secular standards that govern the practice of those professions"); Sanders v. Casa View Baptist Church, 134 F.3d 331, 334, 338 (5th Cir. 1998) (holding First Amendment did not shield a minister from liability for damages arising from sexual affairs with two church employees when he had "represented that he was qualified by education and experience to provide marriage counseling").

224. *See, e.g.*, Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875 (9th Cir. 1997); O'Connor v. Diocese of Honolulu, 885 P.2d 361 (Haw. 1994); Marks v. Hartgerink, 528 N.W.2d 539 (Iowa 1995); Parish of the Advent v. Protestant Episcopal Diocese of Mass., 688 N.E.2d 923 (Mass. 1997); Smith v. Calvary Christian Church, 614 N.W.2d 590 (Mich. 2000); Conic v. Cobbins, 44 So. 2d 52 (Miss. 1950); Fowler v. Bailey, 844 P.2d 141 (Okla. 1992).

225. *See* Watson v. Jones, 80 U.S. 679, 730 (1871). "We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church." *Id.* (quoting Shannon v. Frost, 42 Ky. 253, 258 (1842)).

226. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713–14 (1976) (quoting *Watson*, 80 U.S. at 733–34).

forming a religious organization's doctrines, governance, practices, discipline, and future development. Courts have understandably rejected this course, acknowledging instead that churches enjoy constitutionally guaranteed autonomy from civil oversight to determine the eligibility of their members for purely ecclesiastical benefits, such as continuing membership and fellowship, participating in worship and ritual, or receiving sacraments—even if such determinations cause embarrassment or loss of social status.[227]

Claims based on church recruitment should be similarly rejected unless a church's recruitment practices include secular deception or coercion. Unless a religious institution engages in unlawful activity—such as using illegal substances, threatening physical harm, or other criminal wrongdoing—to persuade people to join or contribute, tort law has no basis for deciding whether recruitment practices are tortious.[228] While a religious institution's practices could include actionable physical coercion, no tort claim should be permitted based on religious representations, such as that God would bless someone for joining or giving money to a church, or conversely, that God would curse someone for failing to do so.[229] If the promised spiritual outcomes do not materialize, the member's quarrel lies with God and the religion generally, not with a legal action against the church. In contrast, a cause of action may exist under narrow circumstances if a church uses purely secular (often financial) misrepresentations to recruit members.[230] For example, a new member might bring a suit for fraud against a church

227. *See Paul*, 819 F.2d at 883–84 (holding First Amendment precludes a former Jehovah's Witness from recovering damages for injuries arising from the church practice of shunning former members); Guinn v. Church of Christ, 775 P.3d 766, 775 (Okla. 1989) (finding that the First Amendment bars claims against church leaders for acts undertaken to discipline a member of the congregation); *see also* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 659 (10th Cir. 2002) (holding that public congregational meetings held by church leadership to discuss the homosexual relationship of a clergy member were not actionable as sexual harassment under federal civil rights laws because "[T]hese statements were not purely secular disputes with third parties, but were part of an internal ecclesiastical dispute and dialogue protected by the First Amendment."). *But see Guinn*, 775 P.3d at 783 (holding that a former church member could bring a claim of intentional infliction of emotional distress against church leaders who publicized her adultery in their congregations after she had withdrawn from church membership).

228. *See* Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public."); Schneider v. State, 308 U.S. 147, 164 (1939) ("[F]raudulent appeals may be made in the name of charity and religion . . . [and] be denounced as offenses and punished by law.").

229. *See, e.g.*, Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996) (pastor's promises "based not on statement of religious doctrine or belief" but were "promises to perform particular acts" could be basis of fraud action); Hancock v. True Living Church of Jesus Christ of Saints of the Last Days, 118 P.3d 297, 300 n.2 (Utah Ct. App. 2005) (refusing to adjudicate a religious promise in a suit for fraud).

230. *See, e.g.*, Molko v. Holy Spirit Assoc. for the Unification of World Christianity, 762 P.2d 46, 60 (Cal. 1988) (concluding that a religious organization could be held liable for fraudulent recruiting practices without offending the First Amendment).

that recruited him based on an intentionally false representation of a financial return in exchange for joining the organization and contributing his assets. But such a claim would be available *only* when the misrepresentation is exclusively secular and not mixed with religious beliefs and claims; trying to adjudicate a claim of misrepresentation that is based, even in part, on religious facts—such as promises that God will make a person prosperous—would violate the principle of church autonomy.

Third parties occasionally try to impute liability to a religious organization merely because a member committed a tort or crime, suggesting that a church has committed wrong by allowing a person to be a member or to participate in its rites and ceremonies. Yet churches are not insurers or enforcers of their members' compliance with morality, much less the law. Nor are churches secular endorsers of their members' good character. By nature, religious institutions admit both saints and sinners. Some have procedures for excommunicating ordinary members, whereas others lack even a doctrinal concept of excommunication. Indeed, the very notion of "membership" varies radically among faith communities. In some faith traditions, "a person may be a full participant in a church, fully aware of and actively engaged in all of its practices, without ever having become a formal church member."[231] Other faiths "do not include a concept of 'membership' at all, and do not require membership for adherents to participate in the faith's formalities and customs."[232] Hence, nothing legal can or should be read into a church's decision to restrict, or not restrict, a parishioner's membership rights or access to worship services. A church, for example, does not endorse or ratify a member's tortuous or criminal misconduct by allowing him or her to continue in full fellowship or to participate in religious ceremonies. Membership in a faith community or participation in its sacraments is a religious matter that should be legally meaningless.[233]

3. Hiring or Retention of Clergy

As the Supreme Court reiterated in *Hosanna-Tabor*,[234] the selection of religious leadership is the sole prerogative of faith communities. The Founding generation well understood from its own experience, as well as England's, that "[t]he power to appoint and remove ministers and

231. Smith v. Calvary Christian Church, 614 N.W.2d 590, 594 (Mich. 2000).

232. *Id.*

233. *See* Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 738 A.2d 839, 848 (Me. 1999).

234. 132 S. Ct. 694 (2012).

other church officials is the power to control the church."[235] It should, therefore, come as no surprise that the First Amendment prohibits the government from regulating ecclesiastical offices through a system of state licensing and that "the Supreme Court has on a number of occasions ruled against efforts to overturn the judgment of a religious institution with respect to a selection for church office."[236] Consistent with this ban on ministerial licensing, religious organizations have the constitutionally rooted autonomy "to determine what the essential qualifications of [clergy] are and whether the candidate possesses them."[237] The Supreme Court has held:

> By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.[238]

Professor Laycock has further explained that "[w]hen the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."[239]

Public policy considerations also weigh against any tort claim seeking to challenge a religious organization's choice of its own leadership. "The right to choose ministers is an important part of internal church governance and can be essential to the well-being of a church."[240] Safeguarding a faith community's autonomy over its future rests on several common sense reasons:

> Those in such positions are the authors of each faith community's

235. McConnell, *supra* note 47, at 2136.

236. Lupu & Tuttle, *supra* note 217, at 1809, 1810 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929)); *accord Hosanna-Tabor*, 132 S. Ct. at 694; McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328 (4th Cir. 1997); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); First Eng. Lutheran Church of Okla. City v. Evangelical Lutheran Synod of Kan. & Adjacent States, 135 F.2d 701 (10th Cir. 1943); Equal Emp't Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996); Cha v. Korean Presbyterian Church of Wash., 553 S.E.2d 511 (Va. 2001).

237. *Gonzalez*, 280 U.S. at 19; *accord* Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), *aff'd*, 185 F.3d 873 (10th Cir. 1999) ("The choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution.").

238. *Hosanna-Tabor*, 132 S. Ct. at 703.

239. Laycock, *supra* note 5, at 1391.

240. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002).

> continuing vision. They regulate its worship life, preside over changes in its liturgy and sense of values, and communicate its stories, beliefs, ethics, and sense of continuity from one generation to the next. State interference with the selection of leaders thus implicates the religious community's method of transmitting its vision and cannot help but alter the content of the vision itself.[241]

The church autonomy doctrine accordingly preserves for religious organizations the freedom to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."[242]

Claims against churches for the wrongful hiring or retention of clerics may be brought by clerics themselves or by third parties. Disappointed clergy members sometimes bring lawsuits on the ground that they were wrongfully denied employment or terminated. These claims strike so close to the heart of a church's control of its own destiny that courts have found little trouble dismissing them.[243] The same principles have led courts to dismiss federal discrimination claims brought by ministers against their churches.[244] Both lines of decisions commonly find that a civil court has no standards or authority by which to second guess who a church selects or keeps to preach or spread the religion or to mediate between God and the faithful. The First Amendment "ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone."[245]

The same First Amendment bar on adjudication applies to suits brought by current or former employees holding unordained offices and unpaid volunteers who perform spiritually significant functions within a church.[246] An action for negligent hiring or retention should not lie

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241. Lupu & Tuttle, *supra* note 217, at 1809.

242. Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 341–342 (1987) (Brennan, J., concurring) (quoting Laycock, *supra* note 5, at 1389).

243. *See, e.g.*, United Methodist Church, Balt. Annual Conference v. White, 571 A.2d 790 (D.C. 1990); Daniels v. Union Baptist Ass'n, 55 P.3d 1012 (Okla. 2001). The same reasoning holds true with respect to a religious institution's autonomy to decide whether a person should rise in the hierarchy or be dismissed. In some jurisdictions there is a tort for wrongful termination. But as regards churches, this is a zone where secular tort or labor-law standards for hiring and firing appropriate for private industry do not apply.

244. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 694; Petruska v. Gannon Univ., 462 F.3d 294, 307–08 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (dismissing a female chaplain's Title VII claims for gender discrimination and retaliation for opposing sexual harassment against a private Catholic university because the decision to restructure university leadership and demote her fell within the ministerial exception); Gunn v. Mariners Church, Inc., 84 Cal. Rptr. 3d 1, 9 (Cal. Ct. App. 2008) (applying ministerial exception to a church leader's public announcement that a former worship director had been dismissed for homosexuality).

245. *Hosanna-Tabor*, 132 S. Ct. at 709 (citation and quotation marks omitted).

246. *See id.* at 707–709 (explaining that the "nature of the religious functions performed," such as "a role in conveying the Church's message and carrying out its mission" and an "important role in transmitting the Lutheran faith to the next generation," rather than a "rigid formula," determine ministerial status for purpose of the ministerial exception); *Petruska*, 462 F.3d at 307–08 (noting the

against a church based on the actions of a volunteer responsible for selecting worship music or teaching Bible study. By contrast, such a claim might well lie against a church where an employee or volunteer is engaged solely to perform secular functions, such as mowing the chapel lawn.

Third parties have brought related claims against churches for negligent hiring or retention on the ground that the injuries inflicted by the cleric resulted from the church's management decisions.[247] A cause of action for negligent hiring in the secular context is generally available when the employer knew or should have known of the risks to others in offering employment, a standard that in practice turns on the adequacy of pre-employment investigation.[248] Similarly, a cause of action for negligent retention turns on the employer's duty to ensure that employees remain fit for their employment responsibilities.[249] Because the decision to hire or retain a minister is so infused with religion and with a church's right of self-definition autonomy, courts have been similarly hostile to these claims when applied to churches.[250] Nevertheless, some division of opinion remains,[251] which may be explained, at least in part, by a lack of understanding about the church autonomy doctrine and its effects on the correct application of common law tort doctrines. The Supreme Court's decision in *Hosanna-Tabor* underscores the constitutional imperative of not interfering with a church's sole "authority to select and control who will minister to the faithful," whether by injunctive relief or money damages.[252]

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ministerial exception applies to the selection and retention of those who perform "spiritual functions"); Equal Emp't Opportunity Comm'n v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 805 (4th Cir. 2000) ("[T]he functions of the music ministry and music teaching positions in this case are integral to the spiritual and pastoral mission of Sacred Heart Cathedral."); *Catholic Univ. of Am.*, 83 F.3d at 465 ("[E]mployment as a tenured member of the Department of Canon Law so clearly meets the ministerial function test."); Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (noting the unordained office of associate in pastoral care "so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems").

247. *See generally* RESTATEMENT (SECOND) OF TORTS § 317 (1965) (describing the employer's duty of reasonable care to prevent an employee's injuring others).

248. *See* Malicki v. Doe, 814 So. 2d 347, 362 n.15 (Fla. 2002) ("Liability in these cases focuses on the adequacy of the employer's pre-employment investigation into the employee's background.").

249. *See* 27 AM. JUR. 2D *Employment Relationship* §§ 475–76 (1996).

250. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995) ("[T]he First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.").

251. *See Malicki*, 814 So. 2d at 360 ("We reject the contention that the First Amendment may be invoked to bar the adjudication of this dispute because this case is not an internal church matter. Rather, this is a dispute between church officials and two parishioners who allege that they were injured as a result of the negligence of the church officials.").

252. 132 S. Ct. at 709.

4. Breach of Confidentiality

Courts have long accorded a testimonial privilege for confidential communications between a religious leader and a church member under the heading of the "priest–penitent privilege." The Roman Catholic Church recognized the binding confidentiality of the confessional by at least the fifth century.[253] English common law, with its history of state supremacy over religious affairs, appears to have been unsettled on whether a civil court could compel a cleric to violate that confidentiality when a priest came into possession of otherwise competent evidence.[254] But American legislatures and courts adopted the privilege early on,[255] and the Supreme Court acknowledged it in 1876.[256] Today, "[a]ll fifty states have enacted statutes granting some form of testimonial privilege to clergy-communicant communications"[257]—generally by legislation and often by court rule as well—and it figures as a recognized element of federal procedure.[258]

As the Supreme Court has explained, "The priest–penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[259] The privilege reflects an aspect of the transcendent role played by religious organizations in the lives of their members to invite and facilitate personal guidance and direction. Whether conceived of as a sacrament,

253. 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5612 n. 47 (1992 & Supp. 2010).

254. Legal scholars disagree over the status of the priest-penitent privilege under English common law. It is commonly asserted that the privilege did not exist after the Reformation. *See* 8 JOHN H. WIGMORE, EVIDENCE § 2394, at 869 (John T. McNaughton rev. ed. 1961) ("But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of [the priest–penitent] privilege."). Substantial doubt is cast on that proposition by the authors of *Federal Practice and Procedure* who declare, however, that "[t]he authority cited in support of this proposition is seldom impressive" and that the weight of historical evidence seems to be that the question "'has never been solemnly decided.'" WRIGHT & GRAHAM, *supra* note 253, at § 5612 (quoting JAMES FITZJAMES STEPHEN, DIGEST OF THE LAW OF EVIDENCE 171 (1876)).

255. *See* People v. Phillips, (N.Y. Ct. Gen. Sess. 1813), *reported in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 109 (1813) (holding that "upon the ground of the constitution, of the social compact, and of civil and religious liberty" a Catholic priest could not be compelled to disclose the identity of a thief, as revealed during confession).

256. *See* Totten v. United States, 92 U.S. 104, 107 (1876) ("[S]uits cannot be maintained which would require a disclosure of the confidences of the confessional.").

257. Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1997); *see also In re* Grand Jury Investigation, 918 F.2d 374, 381 (3rd Cir. 1990).

258. *See In re* Grand Jury Investigation, 918 F.2d at 377 ("We further hold that this privilege protects communications to a member of the clergy, in his or her spiritual or professional capacity, by persons who seek spiritual counseling and who reasonably expect that their words will be kept in confidence.").

259. Trammel v. United States, 445 U.S. 40, 51 (1980).

a component of individual repentance, or an effort to redirect one's life in conformity with religious conviction and commitment, the act of confessing wrong to a spiritual adviser and seeking his or her counsel is an indispensable element of many faith traditions. Like other evidentiary privileges, the priest–penitent privilege is "rooted in the imperative need for confidence and trust,"[260] on the understanding that a relationship of trust will tend to aid the spiritual and mental health of the religious institution's members and encourage complete candor with a person's spiritual adviser. Under the privilege, conversations that occur when a person seeks out spiritual counseling or redemption are not discoverable in a court of law.[261] The nature of the communication and the underlying relationship explain why the privilege has been construed broadly to include non-penitential communications with a religious leader responsible for pastoral counseling.[262]

Yet despite the legal privilege, a confidential communication with clergy remains an inherently religious act. Thus, courts typically refuse to allow tort claims against ministers for breaching the priest–penitent privilege, whether in or out of court.[263] Courts reason that an ecclesiastical duty of confidentiality is not enforceable by courts, and that while the law recognizes the privilege, it does not impose a legal duty of confidentiality on ministers.[264] As the New York Court of Appeals explained, "statutory privileges are not themselves the sources

260. *Id.*

261. *See, e.g.*, CAL. EVID. CODE § 1033 (West 2010) ("[A] penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege."); FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . . .").

262. *See, e.g.*, Scott v. Hammock, 870 P.2d 947, 952 (Utah 1994) (explaining that non-penitential communications to a Mormon bishop lay within the clergy–penitent privilege because "[A] constricted interpretation of the privilege does not take into account the essential role that clergy in most churches perform in providing confidential counsel and advice to their communicants in helping them to abandon wrongful or harmful conduct, adopt higher standards of conduct, and reconcile themselves with others and God."); Kruglikov v. Kruglikov, 217 N.Y.S.2d 845, 847 (N.Y. Sup. Ct. 1961) ("[I]t it matters not how and by whom the meeting was initiated . . . . The fact is that they consulted a representative of their faith in the privacy of his study in the Synagogue with a view to reconciliation and restoring their marriage.").

263. *See* Lightman v. Flaum, 97 N.Y.2d 128, 137 (2001) (holding that the state statute according an evidentiary privilege for clergy–penitent communications "does not give rise to a cause of action for breach of a fiduciary duty involving the disclosure of oral communications between a congregant and a cleric"); Hester v. Barnett, 723 S.W.2d 544, 554 (Mo. Ct. App. 1987).

264. *See Barnett*, 723 S.W.2d at 554 ("The tradition that a spiritual advisor does not divulge communications received in that capacity, moreover, evern if a tenet of 'ministerial ethics' . . . describes a moral, not a legal duty. In the absence of a legal duty, a breach of a moral duty does not suffice to invest tort liability."); *Scott*, 870 P.2d at 956 n.5 (explaining that the "clergy privilege is merely a rule of evidence that protects certain communications from disclosure during litigation; it does not define a cleric's ethical obligations within his or her own religion").

of fiduciary duties but are merely reflections of the public policy of this State to proscribe the introduction into evidence of certain confidential information absent the permission of or waiver by a declarant."[265] In short, a cleric's obligation to maintain confidences is a spiritual matter, not a legal one. As with other religious practices, the law protects such communications but does not regulate them.

Courts sometimes circumvent this prohibition on civil liability for a breach of clerical confidentiality by imposing secular duties of confidentiality on ministers who hold themselves out as having the skill and knowledge of a licensed or professional counselor.[266] Except where the cleric was acting as a secular professional rather than a cleric, these decisions err by mistaking the source of a cleric's authority. Unlike the members of other learned professions, religious leaders owe their authority and understanding of their duty of confidentiality to religious doctrine, polity, tradition, and ecclesiastical practice, not to secular education, skill, state licensing, or the law.[267] A claim that a minister breached the confidentiality imposed on the clergy as a matter of religious duty is a thinly veiled claim for clergy malpractice that lies outside the jurisdiction of civil courts. As explained previously, the more sound approach is to find that unless a minister is acting solely as a professional secular counselor or therapist and breaches a duty of confidentiality in that capacity, no claim lies for divulging confidential communications obtained during pastoral counseling. Otherwise, courts will find themselves inevitably entangled in conflicts between the civil and religious duties of clergy who are licensed counselors.[268]

5. Claims Grounded on a Church's Alleged Failure to Adhere to Ecclesiastical Standards

Tort claims sometimes turn on allegations that a religious organization failed to follow its own doctrine, canon law, ecclesiastical standards, policies, or procedures. Such claims often allege further that the plaintiff detrimentally relied on these doctrines and policies, and

265. *Lightman*, 97 N.Y.2d at 135.

266. *See* Barnes v. Outlaw, 937 P.2d 323, 328 (Ariz. Ct. App. 1996).

267. *Lightman*, 97 N.Y.2d at 136 ("[C]lerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy–congregant spiritual counseling relationship.").

268. *See* Westbrook v. Penley, 231 S.W.3d 389, 402 (Tex. 2007) (holding that the defendant cleric's "dual roles" as "secular counselor" and "pastor" probably could not be distinguished, and that "Any civil liability that might attach for Westbrook's violation of a secular duty of confidentiality in this context would in effect impose a fine for his decision to follow the religious disciplinary procedures that his role as pastor required and have a concomitant chilling effect on churches' autonomy to manage their own affairs.").

thus was injured by the lack of compliance. As with clergy malpractice claims, courts have tended to reject such "church malpractice" claims out of hand, reasoning that such claims necessarily require civil courts to interpret and police ecclesiastical standards contrary to the First Amendment.[269] These decisions recognize that civil courts have "no authority to determine or enforce standards of religious conduct and duty."[270] For example, in *Milivojevich*, the Supreme Court held that by inquiring into whether the Church had followed its own procedures, the Illinois Supreme Court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church.[271] In sum, courts have generally agreed that tort liability cannot arise from religious doctrine, duties, or policies.[272]

B. Tort Claims Where First Amendment Limitations Ought to Apply

Not all tort claims have turned out to be easily reconciled in practice with the church autonomy doctrine. Courts have sometimes found it confusing or unappealing to apply the First Amendment "all the way down." In this subpart, we discuss some of these claims, along with related issues of discovery and punitive damages. Each issue illustrates the underappreciated truth that judge-made common law is no less subject to the constitutional limits of the church autonomy doctrine than any statute or regulation.[273]

1. Negligent Training or Supervision of Spiritual Functionaries

Aggrieved plaintiffs sometimes claim a church is liable for injuries

269. *See In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 89 (Tex. Ct. App. 1998) (determining that whether or not a church was "negligent or misapplied church doctrine" when attempting to cast out demons from a young girl "is not a justiciable controversy"); L.L.N. v. Clauder, 563 N.W.2d 434, 444 (Wis. 1997). In *Clauder*, the court concluded that it could not adjudicate whether the church should have known of the defendant's propensity to engage in sexual affairs, reasoning that "[T]o examine the vow of celibacy, and the church's action or inaction when faced with an alleged violation, would excessively entangle the court in religious affairs, contrary to the First Amendment." 563 N.W.2d at 444 (footnote omitted).

270. Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994); *see also* Richelle L. v. Roman Catholic Archbishop, 106 Cal. App. 4th 257 (2003) (A church "ha[s] no greater civil duty based upon its religious tenets").

271. 426 U.S. 696 at 720.

272. *See Clauder*, 563 N.W.2d at 444 ("The vow of celibacy by clergy is a religious decision based upon religious belief; it does not create a duty.").

273. *See* Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (reversing a New York Court of Appeals judgment that adjudicated the right of a Russian Orthodox Patriarch to occupy a New York cathedral, solely because the church autonomy doctrine as enunciated in *Kedroff* prevailed over state common law).

inflicted by spiritual functionaries on the theory that the church negligently trained or supervised them. Judicial decisions have been divided on these claims.[274] The reasons for dismissing them are evident. Although ostensibly based on notions of secular duty, a claim that a church negligently supervised its own clergy intrudes into ecclesiastical matters:

> The imposition of secular duties and liability on the church [for negligent supervision of clergy] as a 'principal' will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest . . . . Because of the existence of these constitutionally protected beliefs governing ecclesiastical relationships, clergy members cannot be treated in law as though they were common law employees.[275]

These constitutional difficulties stem from the nature of tort law itself. Courts cannot determine whether a cleric or spiritual functionary was reasonably trained or supervised without a standard of care against which to measure a church's conduct. Defining that standard runs into the same dilemma as in clergy malpractice: the alternatives are imposition of a uniform, state-created secular standard or a religion-specific spiritual standard. Either injects a court into the constitutionally prohibited area of religious self-governance.[276]

Bringing a claim of negligent training against a church for the acts of its ministers raises particularly acute conflicts with the church autonomy doctrine. A clergy's authority to act in religious matters depends on religious qualifications like congregational consent, priesthood lineage, ordination, and educational certification recognized by a particular denomination. The authority assuredly does not depend on the state's permission, which is unlike other professions, such as medicine, where

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274. *Compare* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791–92 (Wis. 1995) ("[T]he tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies."), and *Schmidt*, 779 F. Supp. at 332 (holding that a pastor "is not analogous to a common law employee" for purposes of adjudicating claims of negligent hiring or supervision, because those claims would raise "First Amendment problems of entanglement" that "might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs"), *with* Odenthal v. Minn. Conference of Seventh-Day Adventists, 657 N.W.2d 569, 575–76 (Minn. Ct. App. 2003) (affirming the district court's subject matter jurisdiction over claims of negligent training and supervision brought against a church for marital counseling conducted by a pastor).

275. Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 445 (Me. 1997).

276. *Pritzlaff*, 533 N.W.2d at 790. "Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender." *Id.* (footnotes omitted) (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 47 (1994)).

authority to practice is granted by statute.[277] The training, education, and formation of clergy are ecclesiastical matters that touch on some of the most deeply sensitive aspects of religion. Permitting a claim for negligent training effectively regulates church polity and internal organization contrary to the First Amendment, no less than if the legislature directly imposed educational and training requirements on priests, pastors, and rabbis by statute. Both conflict with the church autonomy doctrine by permitting judges and juries to sit in judgment of religious organizations for the management of their own religious leaders.

Claims of negligent supervision might lie against a religious organization under exceptional circumstances where incursions into church autonomy are limited. In such circumstances, the Missouri Supreme Court's reasoning in *Gibson v. Brewer*[278] supplies a constitutionally sensitive approach by distinguishing between ordinary negligent supervision and intentional failure to supervise.[279]

Gibson involved claims against a Catholic diocese for negligently supervising a priest accused of abuse.[280] The court discerned the critical flaw in bringing a negligence claim against a religious organization: "Adjudicating the reasonableness of a church's supervision of a cleric—what the church 'should know'—requires inquiry into religious doctrine."[281] Concluding that such an inquiry "would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision," the court declined to apply a claim of negligent supervision against the diocese for the priest's alleged misconduct.[282]

The court sharply distinguished between the church's negligent acts and its intentional ones, noting that holding a religious organization liable for its intentional acts "does not offend the First Amendment."[283] Such a claim exists if, according to the court:

(1) [A] supervisor (or supervisors) exists (2) the supervisor (or

277. Lightman v. Flaum, 97 N.Y.2d 128, 136 (2001) ("[C]lerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy–congregant spiritual counseling relationship.").

278. 952 S.W.2d 239 (Mo. 1997).

279. The approach in *Gibson*, with its heightened intent rule, echoes the Supreme Court's approach in *Sullivan* to "press autonomy" in libel cases involving public figures, which also imposed a heightened intent standard so as to preserve the press's freedom to ensure the free-flow of information and commentary. *See supra* notes 168–175 and accompanying text (discussing *Sullivan*).

280. *See Gibson*, 952 S.W.2d at 243, 247.

281. *Id.*

282. *Id.* at 247.

283. *Id.* at 248.

> supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor's inaction caused damage, and (5) the other requirements of the *Restatement (Second) of Torts* § 317 are met.[284]

The critical point is that § 317 requires actual knowledge.[285] Because the victim and his parents in *Gibson* "alleged that the Diocese knew that harm was certain or substantially certain to result from its failure to supervise [the priest]," the court reversed the trial court's dismissal and allowed the claim.[286]

Gibson's distinction between negligent supervision and intentional failure to supervise in the face of actual knowledge of danger furnishes a constitutionally sensitive model for adjudicating such claims. The approach permits relief in egregious cases involving failure-to-supervise a clerical employee known to pose a specific danger, while avoiding constitutionally prohibited inquiries into religious belief, church government, and what ecclesiastical leaders "should have known" in the conduct of their religious duties.

By contrast, applying a standard of constructive knowledge to churches in negligence cases carries several constitutional defects. A standard of constructive knowledge would pressure churches to change their policies and polities—which arise from religious beliefs—to create supervisors over ordinary clerics.[287] This approach would impose a *de facto* secular or "reasonable church" standard for monitoring clergy as juries decided whether a church had constructive knowledge based on preconceived secular or majority-religion notions of how clergy should be supervised. Further, a standard of constructive knowledge would strongly pressure churches to reject any person from ministry or ecclesiastical leadership who may have once been accused (perhaps unfairly) of wrongdoing, frustrating religious beliefs in repentance, forgiveness, and redemption.[288] These concerns become all the more acute when faith communities rely heavily on volunteer lay ministers, drawn from ordinary members of the congregation, rather than on

284. *Id.*

285. *See* RESTATEMENT (SECOND) OF TORTS § 317 (1965) (requiring proof that the master "knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control").

286. *Gibson*, 952 S.W.2d at 248.

287. *See id.* at 248 (holding that a claim for intentional failure to supervise a cleric does not authorize a court to inquire "whether or not a cleric *should* have a supervisor") (emphasis added).

288. *See* L.L.N. v. Clauder, 563 N.W.2d 434, 441 (Wis. 1997). The court found that "due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience." *Id.* (citation omitted). *See also* Pritzlaff v. Archdiocese of Milwauke, 533 N.W.2d 780, 790 (Wis. 1995).

professional clerics.

Serious practical obstacles stand in the way as well. Holding a religious organization to its constructive/"should have known" knowledge of the tortious propensities of leaders and members is wholly unrealistic. Many denominations serve millions of members worldwide with tens of thousands of clerics. Knowledge of a single person's actions typically cannot accurately or fairly be attributed to church leaders who, in fact, knew nothing about them, or who may have had, at best, incomplete or less than credible knowledge of the risks. Imputing to such organizations constructive notice of the background and character of virtually every ministerial employee or volunteer, and then holding them liable for allegedly failing to adequately monitor them, would impose a crushing and unconstitutional burden on the exercise of religion.

2. Vicarious Liability

Claims of vicarious liability also have become a familiar item on the menu of tort claims against religious organizations. A commonly alleged theory of recovery is that the church is vicariously liable for the injuries perpetrated by a cleric who conducted a sexual affair with or sexually abused a parishioner. Such claims are antithetical to the common law and the church autonomy doctrine alike.

The traditional common law rule for vicarious liability is that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[289] Suits against churches that press a claim of vicarious liability tend to turn on whether the clergy's alleged wrongs fall within the scope of his or her employment. Virtually all courts agree as a matter of law that sexual torts committed by clergy are outside the scope of employment.[290] That conclusion is reinforced by the fact that essentially all religions strongly

289. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

290. *See, e.g.*, Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a more difficult argument than that [the priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of St. Rita's, his employer . . . given [his] vow of celibacy and the Catholic Church's unbending stand condemning homosexual relations . . . ."); Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988) ("When a priest has sexual intercourse with a parishioner it is not part of the priest's duties nor customary within the business of the church. Such conduct is contrary to the principles of Catholicism and is not incidental to the tasks assigned a priest by the diocese. Under the facts of this case there is no basis for imputing vicarious liability to the diocese for the alleged conduct of Grabrian."); *accord* N.H. v. Presbyterian Church (U.S.A.), 998 P.2d 592, 599 n.30 (Okla. 1999) (collecting cases and stating that its "survey of national jurisprudence reveals that the majority of jurisdictions considering the issue of sexual contact between an ecclesiastic officer and a parishioner have held that the act is outside the scope of employment as a matter of law").

condemn sexual misconduct and exploitation.

An extreme minority of courts diverge.[291] In *Fearing v. Bucher*,[292] the Oregon Supreme Court held that a man who had been sexually abused while a minor by his parish priest could bring a claim of vicarious liability against the Archdiocese of Portland. The court acknowledged that the priest's "alleged sexual assaults on plaintiff *clearly* were outside the scope of his employment."[293] Nevertheless, the court reasoned that "an employee's intentional tort rarely, if ever, will have been authorized expressly by the employer," and that, therefore, it "virtually always will be necessary to look to the acts that led to the injury to determine if *those* acts were within the scope of employment."[294] Armed with this broad definition of the scope of employment, the court had little trouble finding vicarious liability:

> A jury reasonably could infer that [the priest's] performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of his employment.[295]

Fearing marked a dramatic expansion of vicarious liability in Oregon and a sharp departure from established law across the nation. That result shifted the doctrinal focus away from the traditional analysis of whether the illegal or even criminal conduct itself occurred within the course and scope of employment to a much broader inquiry of whether a lawful relationship arose during the course and scope of employment that later facilitated the tortious conduct. By the reasoning in *Fearing*, vicarious liability follows any act, however intentional or criminal and however remote in time and place from the hours of employment, if it was within the tortfeasor's employment responsibility to cultivate a personal relationship with an eventual victim. Because notice and foreseeability are not required for vicarious liability claims, Oregon's aberrant approach effectively imposes a rule of strict liability on organizations whose employment activities include fostering close personal relationships, as if such organizations were engaged in inherently dangerous activities and thus liability must be imposed

291. *See, e.g.*, Fearing v. Bucher, 977 P.2d 1163 (Or. 1999); Odenthal v. Minn. Conference of Seventh-Day Adventists, 657 N.W.2d 569, 577 (Minn. Ct. App. 2003) (affirming the denial of summary judgment on a claim of vicarious liability against a religious organization for the injuries allegedly caused when a cleric engaged in a sexual affair with a parishioner).

292. 977 P.2d at 1163.

293. *Id.* (emphasis added).

294. *Id.* at 1166 n.4.

295. *Id.* at 1168.

regardless of fault.[296]

No sensible person doubts that tort law should recognize the wrongfulness of sexual abuse, but even that worthy end cannot justify arbitrarily expanding liability. Employers—and especially religious employers—should not be deemed insurers against the private criminal conduct of their employees and volunteers. At bottom, *Fearing* contradicts the bedrock common law rule that vicarious liability attaches to an employer only if the tortious acts themselves occurred within the course and scope of employment and that self-serving, criminal acts are outside the scope of employment as a matter of law. The decision's disregard for the principles of duty and fault also stand in sharp contrast to the Supreme Court's measured interpretation of federal law's primary vehicle for enforcing federal civil rights against state and local government, 42 U.S.C. § 1983. However egregious the allegation, the Court has followed the rule that "a municipality may not be held liable under § 1983 *solely because it employs a tortfeasor*."[297] *Fearing* essentially adopted the opposite rule that an employer is automatically liable, regardless of fault, even for the crimes of an employee if the employee's duties included cultivating a personal relationship with the plaintiff. Nothing in ordinary common law principles justifies so unlimited an expansion of liability for employers such as churches, the YMCA, Boy Scouts, and even fast food restaurants where managers may be expected to cultivate warm relationships with teenage employees to enhance productivity.

Fearing likewise collided with the church autonomy doctrine by effectively imposing strict liability on the religious relationship between a cleric and parishioners. It is difficult to imagine a more direct incursion into "matters of church government as well as those of faith and doctrine"[298] than to hold a church strictly liable for the unauthorized, unknown, and unexpected crimes of its ministerial employees and volunteers. This highly punitive rule, specifically targeted at religious organizations, forces churches to choose between potentially ruinous liability and religious convictions concerning the necessity of personal ministry. Churches cannot be held strictly liable for encouraging religious leaders to cultivate close personal relationships with parishioners without the forces of civil litigation compelling faith communities to rewrite, reshape, or in some cases terminate core religious practices. In this regard, *Fearing* violated the

296. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (providing strict liability for sellers of inherently dangerous products).

297. Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997) (emphasis added).

298. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

constitutional right of faith communities to define themselves[299] and freely exercise their respective religions, much as strict liability for libel claims against newspapers would violate the constitutional right of the press to establish diverse editorial voices in carrying out its vital functions.

The rule that intentional torts and criminal acts lie outside the scope of an agency relationship is all the more compelling in the case of religious volunteers. To an even greater extent than with clerical employees, sexual misconduct and other crimes by unpaid church volunteers fall outside the scope of any agency relationship. Common law agency decisions have consistently held that the scope of an unpaid volunteer's agency is narrow.[300] As with paid clergy, sexual misconduct lies far outside the limited scope of a church volunteer's agency. Indeed, intentional torts should seldom, if ever, qualify as within the scope of a church volunteer's agency.[301] Religious organizations would face intolerable burdens if the law left any doubt that vicarious liability is limited to non-intentional torts committed within the precise scope of any alleged volunteer agency.

3. Defining Religious Agents and Who Acts for the Church

Adopting constructive notice as the standard in negligent training and supervision cases also rides roughshod over a church's right to define its agents' duties.[302] Even inquiring into the ecclesiastical relationship

299. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself."). As Professor Laycock has written, "Deciding who will conduct the work of the church and how that work will be conducted is an essential part of the exercise of religion." Laycock, *supra* note 5, at 1398.

300. *Compare* Baxter v. Morningside, Inc., 521 P.2d 946, 949 (Wash. Ct. App. 1974) (holding a charitable organization liable for injuries from a car accident caused by its volunteer whose agreement with the organization "controll[ed] the time, destination and purpose of the trip"), *with* Scottsdale Jaycees v. Superior Ct., 499 P.2d 185, 189 (Ariz. Ct. App. 1972) (refusing to hold a charitable organization liable for injuries from a car accident caused by its volunteer who was on his way to an organization meeting, because the drive was outside the scope of his employment). *But see* Lourim v. Swensen, 977 P.2d 1157, 1161 (Or. 1999) (concluding that the Boy Scouts of America exercised sufficient control over a volunteer troop leader to be held vicariously liable for his sexual assaults on a teenage boy).

301. *See* Jeffrey E. v. Cent. Baptist Church, 243 Cal. Rptr. 128, 130 (Cal. Ct. App. 1988) (concerning sexual abuse by Sunday school teacher); Juarez v. Boy Scouts of Am., Inc., 97 Cal. Rptr. 2d 12, (Cal. Ct. App. 2000) (concerning sexual abuse by scoutmaster).

302. *See* Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) ("Insofar as concerns retention or supervision, the pastor of a Presbyterian Church is not analogous to a common law employee . . . . The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation."). *But see* C.J.C. v. Corp. of the Catholic Bishop of Yakima, 985 P.2d 262, 274 (Wash. 1999) ("[W]e find churches (and other religious organizations)

between a church and its functionaries to determine the existence and character of an agency relationship presents constitutional difficulties:

> When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident. The exploration of the ecclesiastical relationship is itself problematic. To determine the existence of an agency relationship based on actual authority, the trial court will most likely have to examine church doctrine governing the church's authority over [its minister or functionary].[303]

Incorrectly identifying or describing an agency relationship between a church and its membership or leaders also infringes on church autonomy. Unpredictable liability can result when a court attributes an agency relationship to a person who is alleged to be an active member of the church but who has no actual authority from the hierarchical organization. Such a result offends church autonomy, which secures to religious organizations the right to determine who has the authority to speak and act on its behalf. Ecclesiastical-sounding titles can present additional traps for a court unfamiliar with their real significance within the faith.[304] While titles such as "called" and "ordained" ministers can have great religious significance and may be associated with secular agency, when determining whether a person, in fact, has a legal agency relationship with a church for purposes of tort liability the court should defer to the religious organization's good faith representation of the meaning of religious titles and focus primarily on secular indicia of legal agency, such as employment and control over property or finances. The mere fact that a church member follows the tenets of his or her faith or the encouragement of ecclesiastical leaders and engages in personal outreach to others within or outside the faith—such as by following the biblical injunction to visit the poor and afflicted or by sharing one's faith in the homes of others—does not make him or her a legal church agent. Persons who live their religion or evangelize for their faith do not by that fact alone become legal agents of their church for whose actions the church can be held liable.[305]

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subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.").

303. Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 444 (Me. 1997).

304. *See* Schwartz & Lorber, *supra* note 1, at 53 ("[B]ecause of the great variation in meaning among religions, religious titles alone are never an appropriate basis for creating a duty or imposing liability on a religious institution.").

305. *See* Nally v. Grace Cmty. Church, 47 Cal. 3d 278, 298 (1988) ("[E]xtending liability to voluntary, noncommercial and noncustodial relationships is contrary to the trend in the Legislature to

4. Discovery

Discovery orders directed against religious organizations often bristle with First Amendment issues.[306] The Supreme Court identified the central problem with such orders in rejecting the NLRB's attempt to apply neutral principles of labor law to Catholic high schools: "It is not only the conclusions that may be reached by the Board [in adjudicating such claims,] which may impinge on rights guaranteed by the Religion Clauses, but also *the very process of inquiry* leading to findings and conclusions."[307] Churches can hardly be said to possess their constitutionally guaranteed autonomy—a sphere of activity with "independence from secular control or manipulation"[308]—if litigants can rummage through their most confidential and sacred matters in ordinary civil litigation.

The unfortunate reality is that discovery requests too often operate as a weapon to coerce settlements, even for baseless claims.[309] This phenomenon means that "[t]he litigation process itself can be intimidating, especially to small or unpopular sects, and offensive to religious sensibilities."[310] Discovery demands of churches are often overly broad by design. The requests may extend to a church's financial records, in violation of its religious doctrine that members should pay tithes or offerings confidentially as an act of private faith and without regard to the financial need of the church;[311] to its disciplinary files about instances of misconduct wholly unconnected to the parties and claims before the court, violating the privacy interests of every person whose information is disclosed and religious doctrines guaranteeing

encourage private assistance efforts.").

306. *See e.g.*, In re CFWC Religious Ministries, Inc., 143 S.W.3d 891, 892 (Tex. App. 2004) ("[T]he United States Supreme Court has held that compelled disclosure of the identities of members or contributors of an organization may have a chilling effect on those members or contributors as well as on the organization's own activity.").

307. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979) (emphasis added).

308. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

309. *See, e.g.*, Doak v. Superior Ct., 65 Cal. Rptr. 193, 198 (Cal. Ct. App. 1968) ("The threat of having to place a dollar value on one's assets and to disclose that valuation to strangers, may well serve as a powerful weapon to coerce a settlement which is not warranted by the facts of the case."); Rupert v. Sellers, 368 N.Y.S.2d 904, 911 (N.Y. App. Div. 1975) (noting financial discovery "could constitute undue pressure on such defendants in such actions to compromise unwarranted claims").

310. Laycock, *supra* note 5, at 1411 (citing *NLRB*, 440 U.S. at 507–08).

311. *See, e.g.*, *Matthew* 6:1 (King James) ("Take heed that ye do not your alms before men, to be seen of them: otherwise ye have no reward of your Father which is in heaven."). Moreover, because information spreads rapidly and can be easily accessed through the internet, and because religious organizations often conduct humanitarian, ministry, and missionary efforts in far-flung places throughout the world, compelling the disclosure of an international church's financial holdings also increases the risk of kidnapping for ransom and its associated threats of violence, torture, and murder for church leaders, members, and missionaries.

confidentiality for voluntary confessions; or to other sensitive information about a church's doctrinal development, sacred ceremonies, organizational structure, decision-making bodies, policies, and personnel. Such requests can be enormously invasive, "inject[ing] the civil courts into substantive ecclesiastical matters"[312] where even "the very process of inquiry"[313] into the requested religious materials may compel a court to scrutinize what are intrinsically religious matters. Such intrusions can powerfully affect religious organizations. Even the fear of discovery into the sacred inner workings of churches can cause them to alter their internal religious practices, policies, and procedures and their record keeping, disrupting the delicate process by which religious beliefs and doctrines are generated.[314]

This is not to suggest that religious institutions should be wholly exempt from discovery, but rather that courts must carefully examine and refine discovery requests to balance the tension between providing plaintiffs with material information and intruding upon constitutional limits that protect church autonomy. For example, if a cleric is alleged to have driven drunk and caused an accident while in the scope of employment, discovery into church receipts for alcohol purchases for that cleric would likely be a legitimate inquiry. But, discovery into all alcohol expenditures for the church—including for sacramental use during congregational services—would go too far by unduly intruding into constitutionally protected religious traditions and practices. Likewise, discovery into sacred religious rites not open to the public is likely too invasive under almost any circumstance to be justified; such information should be deemed privileged under the First Amendment. With these considerations in mind, a number of courts have recognized[315]—and more should follow suit—that the church autonomy

312. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969).

313. *NLRB*, 440 U.S. at 502.

314. *See id.* at 449 (noting that when courts intrude into ecclesiastical matters "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern").

315. *See, e.g.*, United Methodist Church, Balt. Annual Conference v. White, 571 A.2d 790, 792 (D.C. 1990) (citing *NLRB*, 440 U.S. at 503) ("The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain circumstances in order to avoid subjecting religious institutions to defending their religious beliefs and practices in a court of law."); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218, 222 (N.J. 1992) (expressing concern that civil litigation against a religious institution not proceed "unless the incidents of litigation—depositions, subpoenas, document discovery and the like—would not unconstitutionally disrupt the administration of the religious institution"); Equal Emp't Opportunity Comm'n v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) (noting the EEOC cannot force seminary to produce statistical report regarding its faculty or administration); *see also* Bollard v. Soc'y of Jesus, 196 F.3d 940, 950 (9th Cir. 1999) ("The limited nature of the inquiry,

doctrine shields religious organizations from discovery requests that would intrude too far into the internal workings of a church.

5. Punitive damages

Another phenomenon in civil litigation that requires consideration in light of the church autonomy doctrine is the all-too-familiar claim for punitive or exemplary damages. These damages are intended not merely to augment compensatory damages but to punish the tortfeasor, deter others from committing the same wrongs, and encourage private litigation to vindicate legal rights.[316] All three purposes of punitive damages may conflict with church autonomy protections when directed at churches and religious organizations, but the aims of punishment and deterrence are especially problematic.[317]

Punitive damages serve to punish the tortfeasor, as a kind of quasi-criminal penalty on egregiously wrongful conduct.[318] When directed at churches and religious organizations, this power to punish can be the power to penalize religious belief. A well-known case brought against the First Church of Christ, Scientist illustrates the problem. In *Lundman v. McKown*,[319] the Minnesota Court of Appeals reversed an award of $9 million in punitive damages against the church based on the death of a minor who was denied medical care for juvenile-onset diabetes.[320] Despite difficult facts and the importance of ensuring that minors receive proper medical attention, the court found the award unconstitutional for "imposing punitive damages on a church to force it to abandon teaching its central tenet."[321] The court further concluded that "under these facts, the risk of intruding—through the mechanism of punitive damages—upon the forbidden field of religious freedom is

combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.").

316. *See* Smith v. Wade, 461 U.S. 30, 57–58 (1983) (Rehnquist, J., dissenting); *see also* Godberson v. Miller, 439 N.W.2d 206, 208 (Iowa 1989) ("Punishment, not compensation, is the goal [of punitive damages]."); Bowman v. Doherty, 686 P.2d 112, 122 (Kan. 1984).

317. Nor is the church autonomy doctrine alone in placing substantial limitations on the imposition of punitive damages. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (limiting recovery for private defamation claimants to compensation for actual injuries); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991) (assessing the amount of a punitive damages award to determine whether it was consistent with the Fourteenth Amendment Due Process Clause); Newport v. Fact Concerts, Inc., 453 U.S. 247, 266, 267 (1981) (noting punitive damages unavailable against municipalities for violations of 42 U.S.C. § 1983).

318. *Haslip*, 499 U.S. at 19 (describing punitive damages as "quasi-criminal").

319. 530 N.W.2d 807 (Minn. Ct. App. 1995), *cert. denied sub nom.* Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996).

320. *Id.* at 813.

321. *Id.* at 816.

simply too great."[322]

The *Lundman* court discerned why ordering punitive damages against a church to penalize its religious teachings is so deeply violative of the Constitution: deterrence is not a valid policy objective when it amounts to deterring or punishing a religious belief. As the Supreme Court stated, "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[323] Allowing private individuals to target religious beliefs or practices, such as Christian Science, with punitive damages authorized by state law transgresses the "fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[324] Even an unfounded threat of punitive damages may "improperly affect the way in which a religious organization carries out what it views as its religious mission" and have a "potentially chilling[] effect upon the practices of religious groups."[325]

Besides infringing on church autonomy, pursuing the twin aims of punishment and deterrence can transform punitive damages into an engine of religious persecution. According to the Supreme Court, "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[326] Logically, this principle applies with equal force to court judgments driven by plaintiffs seeking to punish a church and to legislative enactments pursuing the same end.

Courts have generally understood that punitive damages have the power to cripple or destroy an institution and that churches are not the same as mere businesses or other secular entities. That is why punitive damages may be assessed against a religious organization only under the most exceptional circumstances.[327] For example, if a religion

322. *Id.*

323. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

324. *Catholic Univ. of Am.*, 83 F.3d at 462 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)). To the extent a religious practice exists that directly violates compelling state interests—such as the proverbial human sacrifice example—the state itself may of course use criminal law to punish and deter specific criminal acts. *See* McDaniel v. Paty, 435 U.S. 618, 628 n.8 (1978) (noting that "[T]he courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony."). It is obviously not against the First Amendment to prosecute a murder. But neither tort nor criminal law can be used to compel the abandonment of a belief or suppress religious speech about that belief.

325. *See* Rowe v. Superior Ct., 19 Cal. Rptr. 2d 625 (Cal. Ct. App. 1993).

326. Church of the Lukumi Babaulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

327. *See Lundman*, 530 N.W.2d at 816; Bredberg v. Long, 778 F.2d 1285, 1290 (8th Cir. 1985) (applying remittitur to eliminate punitive damage awards against the personal assets of religious defendants). *But see* Mrozka v. Archdiocese of St. Paul and Minneapolis, 482 N.W.2d 806, 811 (Minn.

commanded its followers to intentionally harm others, destroy property, incite violence or otherwise commit criminal violations, and clergy actively participated and facilitated such acts, punitive damages could be appropriate. However, where a religion directs its followers to engage in conduct that violates no law, yet may appear objectively contrary to the followers' best interests, such as in the *Lundman* case, courts should exercise restraint and not punish the religious institution.

6. Institutional Negligence—Imposition of Broad Tort Duties on Religious Organizations

Some plaintiffs have attempted to allege institutional negligence claims against churches. The notion of institutional negligence originated in medical malpractice litigation, where courts reasoned that "hospitals have an independent duty to assume responsibility for the care of their patients," a duty that requires hospitals "to conform to the legal standard of reasonable conduct in light of the apparent risk."[328] Directed against churches, a claim for institutional negligence would seek to hold religious organizations liable for failing to adopt reasonable policies, procedures, or organizational structures to mitigate allegedly known risks. The theory is that sexual abuse or financial frauds, in particular, are so prevalent within churches that they have a duty to implement heightened safety procedures; to deliver general warnings to their members about the danger of abusers or con artists within the faith community; and to reorder their internal policies, practices, and polity to guard members against such risks. In such cases, the plaintiff generally does not allege that particular religious officials committed wrongs or breached duties that led to the plaintiff's injury, but rather that regardless of individual wrongdoing or even notice, the injury arose because the institution itself was negligently organized or negligently failed to adopt adequate policies and procedures. This cause of action is thinly developed, yet is beginning to appear more frequently in litigation. Only a pair of reported decisions raise a claim of institutional negligence in the context of religious organizations.[329] But the

Ct. App. 1982) (distinguishing *Milivojevich* and holding that an award of punitive damages against a church for negligently permitting a minor to be abused did not violate the Establishment Clause); Christofferson v. Church of Scientology, 644 P.2d 577, 607–08 (Or. Ct. App. 1982), *cert. denied*, 459 U.S. 1206 (1983) (permitting a punitive damages claim against a religious organization despite First Amendment objections).

328. Frigo v. Silver Cross Hosp. & Med. Ctr., 876 N.E.2d 697, 721, 723 (Ill. App. Ct. 2007) (citations omitted).

329. *See* Doe v. Catholic Archbishop of Chi., 703 N.E.2d 413, 414 (Ill. App. Ct. 1998) (bringing a claim of institutional negligence against the Archbishop); Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967, 970 (Conn. Super. Ct. 1998) (quoting Konkle v. Henson, 672 N.E.2d

implications of institutional negligence for the future of tort law and religious liberty are serious enough to merit detailed discussion.

To the extent an institutional negligence claim alleges that a religious organization did not comply with some sort of "generally accepted practice" within the broader religious community, it is merely a "church malpractice" claim that fails for all the reasons discussed previously in the context of clergy malpractice. Stated simply, the state cannot impose a reasonableness standard on religion. To the extent it treats organized religion as something akin to an inherently dangerous activity, this standard finds no basis in tort law and likewise offends the Constitution. An "institutional negligence" claim is flatly invalid under the religion clauses of the First Amendment because it attacks a church's very structure: the way it operates as an institution; the manner in which ministers and volunteers are selected, supervised, and retained; and the reasonableness of church policies and procedures that are based on doctrine, scripture, canon law, and sacred tradition. Insofar as the claim imposes special burdens on religious organizations as compared with analogous organizations, it is also discriminatory. Therefore, as explained in greater detail below, courts should reject such claims.

a. Common Law Defects

A tort is traditionally defined in terms of a duty owed to a particular person and the breach of that duty. Institutional negligence departs from this pattern by presuming a broad and undefined duty to be "better" organized or to teach and supervise more "effectively." These duties are not attached to the defendant because of its knowing choices or fault in a particular situation or because of the special nature of the defendant's relationship with a particular plaintiff. The breadth and vagueness of these alleged duties make institutional negligence little more than strict liability, contending that the organization should have had reasonable policies and that the policies by definition must not have been reasonable because someone was injured.

In this sense, institutional negligence resembles the abstract

450, 456 (Ind. Ct. App. 1996) ("Several courts have determined, however, that a claim of institutional negligence does not require any inquiry into religious doctrine or practice. 'Instead, review only requires the court to determine if the Church Defendants knew of [the minister's] inappropriate conduct, yet failed to protect third parties front him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards.'"); *see also* Samantha Kluxen LaBarbera, Note, *Secrecy and Settlements: Is the New Jersey Charitable Immunity Act Justified in Light of the Clergy Sexual Abuse Crisis?*, 50 VILL. L. REV. 261, 282–83 (2005) (footnotes omitted) ("[V]icarious liability may be proper because 'institutional negligence' has been a component of the clergy sexual abuse scandal. Scholars have concluded that the church's hierarchical and internal discipline structures contributed to an institutional approach that fueled the scandal.").

negligence claims against corporations in the premises liability context that courts uniformly reject as speculative because they essentially judge the defendant's conduct by what the plaintiff's expert considers "good" or "effective" security measures.[330] Institutional negligence invites the same error by requiring an after-the-fact comparison between an organization's policies and practices and the policies recommended as "reasonable" by such an expert. The comparison is speculative because it is almost always possible to contend that some policy different than the one in place would have prevented abuse or injury. A claim of institutional negligence also seeks to hold churches responsible for failing to comply in the past with present standards. In cases involving sexual abuse, churches are faulted in current litigation for not having sophisticated policies and procedures years or even decades before society and corporate institutions were even aware of the nature and scope of the problem. Such an approach is inconsistent with common law tort analysis.

b. Constitutional Objections and Practical Obstacles

Institutional negligence also turns the church autonomy doctrine on its head in that, rather than eschewing the "analysis or examination of ecclesiastical polity or doctrine in settling [civil] disputes,"[331] institutional negligence makes such analysis and examination the crux of the claim. Where the church autonomy doctrine recognizes that religious organizations have the constitutionally guaranteed "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,"[332] institutional negligence converts these prohibited ecclesiastical zones into the very subject matter of discovery and trial—indeed, the very basis of liability. It would be difficult to imagine a cause of action more perfectly designed to infringe on the First Amendment's guarantee of autonomy for religious organizations. Such an action would invite multiple forms of infringement and raise a host of practical problems.

For example, discovery requests would be fraught with First Amendment issues. A claim for institutional negligence opens the door

330. *See, e.g.*, Nola M. v. Univ. of S. Calif., 20 Cal. Rptr. 2d 97, 107 (Cal. Ct. App. 1993) (rejecting as speculative claim that better security measures for the premises at USC would have prevented sexual assault; plaintiff "must do more than simply critique a defendant's security measures or compare them to some abstract standard espoused by the plaintiff's security expert"); Lopez v. McDonald's Corp., 238 Cal. Rptr. 436 (Cal. Ct. App. 1987) (rejecting abstract negligence claim based on mass murder at a McDonald's restaurant); Noble v. L.A. Dodgers, Inc., 214 Cal. Rptr. 395 (Cal. Ct. App. 1985) (rejecting abstract negligence claim for assault after a baseball game).

331. Jones v. Wolf, 443 U.S. 595, 605 (1979).

332. *Kedroff*, 334 U.S. at 116.

to sweeping and intrusive discovery requests of leadership structures, organizational policies, and membership disciplinary files about instances of misconduct and abuse unrelated to the allegations in the pleading. Legitimate questions of privacy for non-parties and production burdens on a church could be shrugged off as the unavoidable costs of hearing the claim on its merits. But because the attack is aimed at a religious organization itself, the scope of discovery requests is potentially as wide as the organization's membership. It could well include church records predating the alleged misconduct by decades and covering the entire state, nation, or world. In casting a wide net, the effort would be to portray an entire faith community as inherently dangerous or tortious, even if the factual allegations are directed at less than a handful of people from a single congregation. Responsible documentation of misconduct and records designed to assist in preventing abuse or other risks in the future could be twisted into allegations that the organization knew it had a serious, systemic problem with misconduct and failed to act appropriately or engaged in a cover-up. A church's high level leadership may be targeted for disruptive depositions and interrogatories on the allegation that the organization and its top level leadership either willfully or negligently failed to take appropriate steps to protect the plaintiff and other similarly situated church members. Discovery requests are prone to abuse by litigants who employ them to coerce settlements, however unjustified. Poorly managed, they reflect the worst of our civil justice system in the form of scorched-earth tactics. That institutional negligence practically requires such tactics to succeed ought to weigh heavily against its validity.

Punitive damages would also be the natural product of institutional negligence claims. Even if a defendant had no knowledge that a criminal perpetrator posed a risk of harm to a plaintiff, the claim would allow a plaintiff to argue that the defendant church knew criminal behavior was sometimes perpetrated by church members or was within the faith community and that the defendant organization failed to do enough to prevent injury, such as adopting different or better ecclesiastical policies and procedures. As previously explained, courts routinely reject analogous arguments. If clergy malpractice is no claim at all because it would require courts to inquire into religious polity, practice, or doctrine,[333] it follows that institutional negligence should be uniformly rejected for the same reasons. No church should have to

333. *See* Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960 (Cal. 1988) ("Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.") (citations omitted).

prove that its religious organization, beliefs, and practices conform to the secular demands of the larger community or to some "reasonable church" standard, and in any event, none of those religious matters validly establish legal duties.[334]

In the end, recognizing a new cause of action for institutional negligence is not only deeply flawed, but unnecessary. Other causes of action, well settled and consistent with the church autonomy doctrine, offer adequate recovery for victims of abuse or mistreatment by religious organizations and indirectly encourage greater vigilance against misconduct without directly punishing a church for its doctrines, polity, or ecclesiastical practices. In addition to holding the particular actor civilly and criminally liable for conduct such as sexual abuse, the religious institution may be held civilly liable if it breached a duty arising out of "a special relationship of custody or control" with the victim,[335] so long as that relationship is independent from the religious status of the minister or other spiritual functionaries. Claims for improper supervision or retention may also be available for injuries arising from sexual abuse when, as discussed above, a church has actual notice of its employee's history of sexual abuse or other actual knowledge such that the harm was certain or substantially certain to result.[336] Established claims like these can provide a fair opportunity for abuse and other victims to recover for wrongs committed by religious organizations and the incentive for faith communities to find practical solutions within their own traditions to guard against such wrongs.

C. Future Tort Claims Seeking to Expand Affirmative Duties

A common flaw of several tort liability theories made against religious organizations, and particularly with regard to a claim for institutional negligence, is a misguided attempt to impose affirmative duties on churches in contradiction of "the premise that there is no duty to rescue or help others."[337] Courts generally follow the rule that "the

334. *See* Roman Catholic Bishop v. Superior Ct., 50 Cal. Rptr. 2d 399, 406 (1996) ("[T]he church had no greater civil duty based upon its religious tenets.").

335. *See id.* at 1564 (quoting *Nally*, 47 Cal.3d at 293).

336. *Compare* Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997), *and* Mark K. v. Roman Catholic Archbishop, 79 Cal. Rptr. 2d 73, 78 (Cal. Ct. App. 1998) (finding that the church had negligently supervised and retained a priest "by permitting him to have access to plaintiff in situations where there was a potential for sexual abuse, or at least failing to warn [the victim] of [his] known propensity for engaging in sexual conduct with boys" when the church "had a more than adequate basis for being suspicious" of him), *with Roman Catholic Bishop*, 50 Cal. Rptr. 2d at 400 (holding that a victim of abuse could not prevail on her claims of negligent hiring, supervision, and retention of a parish priest who abused her because the church lacked "prior notice of the priest's unfitness").

337. Schwartz & Lorber, *supra* note 1, at 12.

mere fact that one individual knows that a third party is or could be dangerous to others does not make that individual responsible for controlling the third party or protecting others from the danger."[338] The amount of effort or risk necessary to provide assistance is irrelevant, and, typically, no duty exists. This rule is so strong a force in the legal system that it extends beyond tort law. State and local governments have no affirmative duty to assist their citizens, even to prevent the denial of basic civil rights by private actors.[339]

A major exception to this no duty to rescue rule occurs when a "special relationship" exists that imposes a duty for an actor to protect or assist another, or to control the conduct of third parties.[340] While the term "special relationship" carries no independent legal significance,[341] the law has developed to recognize a select group of relationships between two or more parties as requiring a duty of care where the traditional default "no duty" rule would otherwise apply.[342] Courts impose these heightened duties because of "the party's superior control to perceive and protect the more susceptible party from danger."[343] Section 314A of the *Second Restatement of Torts* enumerates such special relationships: common carriers and their passengers; innkeepers and their guests; land possessors who lawfully hold their premises open to the public and land entrants; and custodians and those in their custody.[344] This finite Restatement list has endured for nearly a half-century to provide straightforward liability rules.

The newly developed *Third Restatement of Torts*, however, makes a significant departure from this well-settled law.[345] In addition to

338. *Id.* at 19.

339. *See* DeShaney v. Winnebago Cnty., 489 U.S. 189, 197 (1989) (denying a claim for compensation against government officials that returned a child to the custody of his violent father, who afterward beat him until he suffered permanent brain damage: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

340. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

341. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (Proposed Final Draft No. 1, 2005).

342. *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482 (D.C. Cir. 1970) (placing duty of care on landlord to take protective measures to prevent criminal acts from being perpetrated against tenants); Baker v. Fenneman & Brown Props., LLC, 793 N.E.2d 1203, 1206–10 (Ind. Ct. App. 2003) (finding that a restaurant owner owes an ill patron a duty of care); Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 973 (Wash. 1988) (finding that a school district owes a duty of care to students engaged in interscholastic sports).

343. Schwartz & Lorber, *supra* note 1, at 20.

344. *See* RESTATEMENT (SECOND) OF TORTS § 314A; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b) (Proposed Final Draft No. 1, 2005).

345. *See generally* Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 JOHN MARSHALL L. REV. 319 (2011).

adding entirely new special relationships to the select list,[346] Section 40 of the new Restatement creates uncertainty in the law by opening the door for courts to find special relationships that have never before been recognized. While the Second Restatement "expresses no opinion as to whether there may not be other [special] relations" giving rise to an affirmative duty,[347] the Third Restatement holds that "[t]he list of special relationships provided in this Section is not exclusive."[348] Rather, the new Restatement states that, in addition to the new special relationships listed, courts are free to recognize others. The Third Restatement even suggests that "[o]ne likely candidate" is the relationship among family members.[349]

No court has recognized a special relationship based solely on the ecclesiastical relationship between a church official and a congregant.[350] The reasons for such judicial reticence are evident. Imposing a special relationship on every church official would create a duty to rescue, protect, or warn with a potentially limitless scope. Additionally, such an imposition would, theoretically, apply to a church official's relationship with all church members, some of whom a cleric might have never met before. A special relationship may be validly imposed on a church official or church only if sufficient reasons support the imposition of heightened duties based on purely secular factors that are independent of the ecclesiastical relationship. A church official operating a bed and breakfast, for example, may be held to the heightened duties of a special relationship because the nonreligious nature of the relationship (innkeeper and guest) fits within the traditional enumerated special relationships. In the absence of these other relationships, however, courts should not unilaterally recognize a new, potentially retroactive,[351] affirmative duty based upon an ecclesiastical relationship. To do so would violate the First Amendment by intruding upon the internal ecclesiastical affairs of religious communities.

In addition to these recent concerns, Section 38 of the Third

346. Section 40 specifically includes as a new special relationship the relationship between a school and its students and a landlord and its tenants. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40.

347. RESTATEMENT (SECOND) OF TORTS § 314A caveat.

348. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. o (Proposed Final Draft No. 1, 2005).

349. *Id.*

350. *See e.g.*, Berry v. Watchtower Bible & Tract Soc'y, 879 A.2d 1124, 1129 (N.H. 2005) ("We decline to hold that the fact of church membership or adherence to church doctrine by the plaintiff's creates a special relationship between the plaintiffs and [the church]."); Bryan R. v. Watchtower Bible & Tract Soc'y, 738 A.2d 839, 847 (Me. 1999) ("The creation of an amorphous common law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to both unlimited liability and liability out of all proportion to culpability.").

351. *See* Schwartz & Appel, *supra note* 345, at 348.

Restatement also presents particular difficulties for religious organizations. It invites courts to infer affirmative duties from statutory text: "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and its scope."[352] This broad "black letter" rule did not exist in either of the prior Restatements and lacks support under existing case law.[353] Remarkably, it empowers judges to recognize affirmative common law duties under statutory law where they have never before existed, without the support of case law or other authority, and where the legislature in no way intended for a common law affirmative duty to exist.[354]

By this new Restatement rule, something such as a child abuse reporting statute could be fashioned into a private right of action in tort law despite the contrary holdings of most courts.[355] Churches could become targets of wide-ranging lawsuits predicated on lawyers' interpretation of a statute notwithstanding the legislature's judgment about the appropriate statutory penalty for a violation. The resulting threat of potential litigation could pressure churches into abandoning their own religious convictions to help those around them in order to avoid potential civil liability, contrary to the First Amendment's guarantee of autonomy to make that choice free of such pressure.[356] Section 38's potentially unbounded approach thus threatens to dramatically upset existing limits on tort duties, including constitutional limits placed by the church autonomy doctrine.[357] Courts should, therefore, reject the overbroad approaches of the new Restatement and instead surgically design liability rules using the church autonomy doctrine as their guide.

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352. RESTATEMENT (THIRD) OF TORTS § 38 (Proposed Final Draft No. 1, 2005).

353. *See* Schwartz & Appel, *supra note* 345, at 334–35.

354. *See id.*

355. *See id.* at 335–36 (discussing Judge Richard Posner's ruling in Cuyler v. United States, 362 F.3d 949, 952 (7th Cir. 2004), rejecting creation of affirmative duty via a child abuse reporting statute); *see also* Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints, 98 P.3d 429, 432 n.7 (Utah Ct. App. 2004) (declining to create a private right of action from the child abuse reporting statute because the legislature did not specifically provide it).

356. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343–44 (1987) (noting that "the [faith] community's process of self-definition would be shaped in part by the prospects of litigation" and that the resulting pressure would "create the danger of chilling religious activity").

357. *Cf.* Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 349 (Alaska 1990). In *Samaritan Counseling*, the court held that a counseling center could be held liable for the consensual sexual relationship between one of its pastoral counselors and a patient, in part, on the principle that vicarious liability serves "'to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise.'" *Id.* (quoting Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972)).

D. Applying "Neutral Principles" to Tort Claims Against Religious Organizations.

Plaintiffs rarely argue that the First Amendment has no application to tort claims against religious institutions. They argue instead that common law torts are neutral laws of general applicability under *Smith v. Employment Division*,[358] or they invoke language from Supreme Court church autonomy cases regarding the application of "neutral principles" to religious organizations.[359] Some courts, taking an improperly narrow view of the church autonomy doctrine, have held that if a tortious act was not motivated by religious doctrine then claims based on such conduct are not subject to the church autonomy doctrine.[360] In this view, tort claims would only be barred by the church autonomy doctrine if, for example, the court were asked to decide which side in a lawsuit was correct in its interpretation of church doctrine.

The assertion that *Smith* applies broadly to allow all claims against religious institutions so long as they are based on generally applicable law or neutral principles was soundly rejected by the Supreme Court in *Hosanna-Tabor*, as noted above.[361]

Other courts have rightly recognized a distinction between adjudicating claims against religious organizations that are truly based on neutral principles, and those that require interpretation of doctrine, policy, and administration. "[A] church can be vicariously liable for the negligent operation of a vehicle by a pastor in the scope of employment," and churches can be liable for negligence to a person "who slipped and fell on church premises."[362] But "[q]uestions of hiring, ordaining, and retaining clergy . . . necessarily involve interpretation of religious doctrine, policy, and administration," and adjudication of such claims "would result in an endorsement of religion by approving one model for church hiring, ordination, and retention of clergy" over another model when these are "quintessentially religious" matters that the First Amendment "commits exclusively" to the church.[363] The mere fact that tortious conduct is not motivated by

358. Clark & Roggendorf, *supra* note 163 at 520–21.

359. *See e.g.*, Presbyterian Church in the United States, 393 U.S. at 449 ("And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.").

360. *See e.g.*, Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (applying "neutral principles" to adjudicate claims of negligent hiring and supervision).

361. *Hosanna-Tabor*, 132 S. Ct. at 707 ("*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns *government interference with an internal church decision that affects the faith and mission of the church itself*.").

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

363. *Id*. at 246–47.

religious doctrine does not exempt the claim from the church autonomy doctrine.

V. SUMMARY AND CONCLUSION

The church autonomy doctrine should figure more prominently in formulating tort law claims against religious institutions. This doctrine provides a unifying thread that connects tort law, constitutional law, and sound public policy in cases involving religious organizations. In adjudicating such claims, too many courts stumble over matters that the First Amendment has reserved to religious authorities.

This Article represents an effort to show how courts can employ the church autonomy doctrine to reach fair and consistent outcomes, and to give religious institutions notice of what conduct is expected of them so that they may avoid liability. The Article has explained that the church autonomy doctrine produces easy answers for several kinds of claims against religious organizations: (1) claims for clergy malpractice or breach of fiduciary duty arising out of an exclusively religious relationship; (2) claims arising from church membership criteria or ecclesiastical discipline of church members (including excommunication or failure to excommunicate); (3) claims against churches by ministers or other clerics based on allegations of wrongful termination, discrimination, or breach of employment contracts for ministerial positions and claims by third parties against churches or church officials for the negligent hiring or termination of clergy; (4) claims that a clergy member violated his or her religious duty to maintain the confidentiality of a member's confession or other statement; and (5) claims based on a church's alleged failure to follow its own ecclesiastical standards or to conform to alleged standards of reasonableness for religious communities. Each of these claims should fail because it requires a court to second guess the determinations of religious bodies or to adjudicate matters of religious doctrine, polity, or practice.

Not all answers are easy, of course, but the doctrine of church autonomy goes a long way toward simplifying and clarifying where tort law's limits lie. While claims of negligent training and supervision are commonly asserted in litigation, challenging a church's training and oversight of its spiritual functionaries poses a serious and unavoidable conflict with church autonomy. The requirement of actual knowledge provides a clear, rational boundary between permissible liability for intentional failure to supervise and an invalid claim for negligent supervision. In addition, vicarious liability cannot arise from purely ecclesiastical relationships; such claims should, contrary to the near strict-liability approach of Oregon law, retain traditional limits imposed

by course and scope of employment requirements. Further, this Article has explained why discovery must not be so broad or intrusive as to bring into court the very matters protected from state control by the church autonomy doctrine and why punitive damages are seldom a legitimate remedy against a religious organization, given that the twin policy aims—punishment and deterrence—are often illegitimate in the religious context. Finally, the novel cause of action for institutional negligence should be rejected, as it thoroughly contradicts the basic premises of tort law and the First Amendment.

In surveying the outer edges of tort law, the constitutional guarantee of non-interference by civil authorities in ecclesiastical matters must be respected. That autonomy erects a structural barrier between religious activities and civil power, preserving a space for churches to govern themselves where "civil courts exercise no jurisdiction."[364] Within that space, religious organizations may decide for themselves questions of religious faith and doctrine; disputes calling for adjudication of ecclesiastical structure or polity; the relationship between a religious organization and its clergy; and the standards by which church members are admitted, guided, disciplined, and expelled.[365] The church autonomy doctrine prevents the state from controlling the church, just as other lines of Establishment Clause precedent prevent the church from controlling the state.

These constitutional protections for religious freedom can and should place limits on tort law. Limits of this kind are a familiar part of the law. It is well recognized that First Amendment considerations of freedom of speech place limits on the law of libel and slander. While a few legal commentators and plaintiffs' attorneys have argued that tort rules should be applied uniformly to all defendants, including religious institutions, courts have rejected such arguments in favor of a more nuanced approach that accounts for more values than only compensating the injured. Sound common law adjudication starts with the recognition that tort law is not uniform in its scope and application of liability—providing recovery to the injured is not the only value—and that tort law actions are just as much "government action"[366] as direct regulation.

Beyond the limits on government action embodied in the Free Exercise and Establishment of Religion clauses of the Constitution, tort

364. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713–14 (1976) (quoting Watson v. Jones, 80 U.S. 679, 733–34 (1871)).

365. *See* Esbeck, *supra* note 17, at 44–45.

366. *See* Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam). In *Kreshik*, the Court held that "It is not of moment that the State has here acted solely through its judicial branch, for, whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *Id.* (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958)) (citation omitted).

law itself should recognize that religious institutions are not mere businesses selling products or services. They must have autonomy if religion and communities of faith are to survive and flourish. Tort law needs to recognize that regardless of general forces that push to expand liability, religious organizations and faith communities are different from secular institutions both in their history and in their function. Their purposes and objectives differ from secular institutions; the roles they play in people's lives are fundamentally different. The explicit and implicit contrast between religious organizations and government entities, commercial enterprises, professional associations, and even secular charities are facts to be recognized as tort law shapes the duties it imposes on religious institutions. These differences between churches and other public or private institutions justify unique treatment in tort law. As commentators have noted, "Tort law rules and processes should not permit religious character alone to trigger the imposition of duties, nor should tort law effectively require religious entities to restructure themselves to satisfy a state-imposed vision of the 'good' or well-ordered religion."[367]

* * *

At bottom, the church autonomy doctrine calls on judges to recognize constitutional limits on their jurisdiction over disputes that are fundamentally religious. The Supreme Court long ago identified "matters of church government as well as those of faith and doctrine"[368] as lying beyond the judicial ken. The late Justice Mosk captured this sense of judicial limitations eloquently:

> This is not to deny that a court might be tempted to believe itself competent in at least some religious matters and under at least some circumstances. Yet it must not yield. The essence of religion is to go beyond the bounds of reason . . . . Judges in our polity may not follow.[369]

It is that sense of judicial modesty that holds the greatest promise for continuing to ensure that tort law remains consistent with our society's deep commitment to the principle of religious freedom and to the autonomy of churches to give form, meaning, and reality to that freedom.

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367. Lupu & Tuttle, *supra* note 217, at 1834.

368. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

369. Smith v. Fair Emp't. & Hous. Comm'n, 913 P.2d 909, 934 (Cal. 1996) (Mosk, J., concurring) (citation omitted).