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FREE EXERCISE RECONCEIVED: THE LOGIC AND LIMITS OF *HOSANNA-TABOR*

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ABSTRACT—Two terms ago, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court held that the First Amendment precludes ministers from bringing employment-related claims against their churches. In some ways, *Hosanna-Tabor* changed little. The lower courts had all reached that conclusion already, though the Supreme Court slightly expanded the breadth of the so-called ministerial exception. More important is how *Hosanna-Tabor* reconceptualized things, especially in how it pushed back somewhat against the Supreme Court's imperial decision in *Employment Division v. Smith*, where the Court had broadly held that the Free Exercise Clause did not entitle religious believers to exemptions from generally applicable laws. *Hosanna-Tabor* could end up an isolated anomaly, a peculiar concession to the importance of ministers and the intrusiveness of employment discrimination laws, a railroad ticket good for one day and train only. But the Court's opinion speaks of a broader principle, a principle whose boundaries it consciously puts off defining. And it is striking how so many decisions in the lower courts fall within *Hosanna-Tabor*'s principle. From employment discrimination law to labor law, from contract to tort, lower courts regularly dismiss all manner of cases in ways incompatible with *Smith* and for reasons akin to those given in *Hosanna-Tabor*. This Article looks at that universe of cases, reflects on some patterns that emerge, and works toward an explanation for what is happening and how courts should handle these issues.

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INTRODUCTION

Two terms ago, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court returned to religious liberty, holding that the First Amendment precludes ministers from bringing employment discrimination claims against their churches.¹ *Hosanna-Tabor's* holding was narrow, but its importance lies beyond its holding. Twenty years earlier, in *Employment Division v. Smith*,² the Supreme Court held that the Free Exercise Clause did not entitle religious believers to exemptions from generally applicable laws.³ *Hosanna-Tabor* distinguished *Smith*, claiming that *internal* church matters were outside *Smith's* reach.⁴ The Court drew this distinction from a string of early Supreme Court cases that had required courts to abstain from fights over church property. *Hosanna-Tabor* reaffirmed those cases and repeated their statements of principle, but added little of its own in further explanation.

Meanwhile, a curious development continues in lower courts across the country. All kinds of cases—from tort to contract, from labor law to corporate law—continue to be dismissed on grounds of religious liberty, despite *Smith* and for reasons somewhat akin to *Hosanna-Tabor*. Besides the ministerial exception, the most well-known example is that courts will not resolve claims of clergy malpractice.⁵ But these are just the two most salient and well-defined illustrations; ones less familiar and less tidy abound. The Connecticut Supreme Court recently dismissed the negligence

¹ 132 S. Ct. 694 (2012).

² 494 U.S. 872 (1990).

³ *Id.* at 886 n.3 (“[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . .”).

⁴ See *infra* notes 56–70 and accompanying text.

⁵ See *infra* notes 140–44 and accompanying text.

claims of a woman who fell during a Catholic charismatic healing service.⁶ The Texas Supreme Court recently dismissed a battery suit brought by a seventeen-year-old who claimed she was hurt during a church exorcism.⁷ And whatever the principle here, it is not limited to tort. Courts have dismissed claims that a rabbi was fired without good cause as his contract required,⁸ or that a parent violated his prenuptial agreement by bringing his children to a Catholic Mass,⁹ or that the Southern Baptist Convention failed to follow its own rules when it confirmed its slate of national officers.¹⁰

To be clear, these results are not all due to *Hosanna-Tabor*; most of these cases were decided before *Hosanna-Tabor*. And the reasoning in these cases rarely mirrors that of *Hosanna-Tabor* or its predecessor cases. With some important exceptions, these lower court opinions tend to be terse and unreflective—likely a product of state courts having too much on their plates. Some decisions cite only governing state court decisions; some cite little precedent at all. They certainly are not all consistent; indeed, their inconsistencies are glaring.¹¹ But if the answer is that lower courts have been somehow inadvertently and imprecisely stumbling toward *Hosanna-Tabor*, then that seems downright fascinating.

The old model of the Free Exercise Clause involved disputes between the government on one side and a religious believer (or group) on the other. This is the classic paradigm of church and state taught in constitutional law classes, and here *Smith* reigns. The new model involves disputes between religious believers. These cases have always been around, and have always posed more trouble for courts. *Hosanna-Tabor* unquestionably means that the new model will be handled differently from the old one, but it leaves the details wide open. This Article aims to offer a theory for these new model cases, seeking to put more flesh on this idea of church autonomy.

Part I of this Article examines the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* and the Court's conception of church autonomy. Part II argues that the implementation of this principle requires a somewhat imprecise distinction

⁶ See *Kubala v. Hartford Roman Catholic Diocesan Corp.*, 43 A.3d 662, 662 (Conn. 2012).

⁷ See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 13 (Tex. 2008).

⁸ See, e.g., *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654, 655 (2d Cir. 2009); see also *infra* note 207 (listing additional cases).

⁹ See *Zummo v. Zummo*, 574 A.2d 1130, 1157–58 (Pa. Super. Ct. 1990).

¹⁰ See *Crowder v. S. Baptist Convention*, 828 F.2d 718, 726–27 (11th Cir. 1987).

¹¹ See 2 WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 10:1, at 10-8 (2013) (“[T]he case law [regarding] the civil liability of religious organizations is not entirely consistent.”); Annotation, *Liability of Churches or Other Religious Societies for Torts Causing Personal Injury or Death*, 124 A.L.R. 814–15 (1940) (“The authorities upon the subject in hand are far from satisfactory and do not admit of the formulation of general rules.”); see also Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 526 (2007) (arguing that “the ‘church autonomy’ doctrine is more of a grab-bag of precedents than a clear rule or prohibition”).

between two kinds of legal obligations—imposed ones (like tort and criminal law) and assumed ones (like contract or property). Part III examines church autonomy in the former area, while Part IV examines church autonomy in the latter.

I. *HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL v. EEOC*

Hosanna-Tabor began as a garden-variety dispute over the scope of the ministerial exception. Cheryl Perich taught fourth grade at a small religious school run by Hosanna-Tabor Evangelical Lutheran Church.¹² She was responsible for her students' religious instruction, and she was also a commissioned minister in the national church, the Lutheran Church-Missouri Synod. After an escalating disagreement over when she would return from disability leave, the church removed Perich and she sued to get her job back. The lower courts disagreed over whether Perich's job duties and ecclesiastical office were enough to put her within the ministerial exception.¹³ But in the Supreme Court, the dispute widened into whether the ministerial exception should exist at all.

Two distinct lines of precedents converged in *Hosanna-Tabor*, with each side claiming its own as controlling. The first set of cases involved religious believers seeking exemptions from burdensome government regulation. The Supreme Court used to give exemptions in sufficiently sympathetic cases.¹⁴ But in 1990, in *Employment Division v. Smith*,¹⁵ the Supreme Court held that courts should generally not give exemptions if the law in question was neutral and generally applicable.¹⁶ The second line of cases involved internal religious disputes—two factions fighting over church property or a church officer disputing his removal. Here the Court's position had been firm: Churches resolved their own conflicts, and courts did not interfere. Sometimes the prevailing law was generally applicable, but the Court never cared and sometimes did not seem to notice.¹⁷ Churches

¹² For the facts that follow, see *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 699–701 (2012).

¹³ Compare *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881 (E.D. Mich. 2008) (concluding that Perich was a minister and that her claims were barred), with *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010) (concluding that Perich was not a minister and that her claims were not barred).

¹⁴ The Court used to ask whether burdens on religious liberty had been justified by a compelling governmental interest. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁵ 494 U.S. 872 (1990).

¹⁶ *Id.* at 886 n.3 (“[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . .”).

¹⁷ The dissenters noticed more often. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 726 (1976) (Rehnquist, J., dissenting) (criticizing the court for reversing the judgment of the

had the right to choose their officers, regardless of the usual principles of corporate or trust law.¹⁸ In a church split, courts could not give the property to the faction it believed closest to the church's original beliefs, even if such a method was used to resolve disputes in nonreligious organizations.¹⁹

Hosanna-Tabor fell into this second line of cases, in a sense. It, too, was a fight about the removal of a church officer. But the vitality of the second line of cases had been thrown into doubt by *Smith*. *Smith* had flattened them into a single cryptic sentence about how the government cannot get involved in “controversies over religious authority or dogma.”²⁰ The Solicitor General saw these cases as moribund anomalies, calling them simply “older cases concerning church-property disputes,”²¹ and dismissing them in stray sentences and footnotes.²² To employment lawyers, *Hosanna-Tabor* involved an issue of great visceral importance, but little practical importance. Ministers make up a tiny fraction of the labor market; most employment law courses will probably not even cover *Hosanna-Tabor*. But church-and-state scholars knew from the start that, no matter which way it was decided, *Hosanna-Tabor* would remake the field.

Though the Court surely did not find this case easy, its opinion does make it seem that way. Embedded within the second line of cases, the Court sees a clear, coherent, and powerful principle: “[R]eligious organizations [have] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”²³ Each has the “right to shape its own faith and mission through its appointments” without “government involvement in such ecclesiastical decisions.”²⁴ Churches choose their leaders; the government does not interfere. And there is no hand-wringing about this, no discernible hesitation. The part of the opinion establishing the ministerial exception takes less than three pages.²⁵

state courts when those courts had decided the religious dispute “just as they would have attempted to decide a similar dispute among the members of any other voluntary association”).

¹⁸ See *id.* (majority opinion) (barring the legal claims of a deposed bishop challenging his removal); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (chaplain); cf. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (parochial school teacher).

¹⁹ See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).

²⁰ *Smith*, 494 U.S. at 877.

²¹ Brief for the Federal Respondent at 11, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

²² See *id.* at 24–26 (distinguishing, in rapid succession, *Milivojevich*, *Mary Elizabeth Blue Hull*, and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952)); *id.* at 25 n.5 (distinguishing *Watson v. Jones*, 8 U.S. (13 Wall.) 679 (1872)); *id.* at 26 n.6 (distinguishing *Gonzalez*); *id.* at 40 n.10 (distinguishing *Catholic Bishop*).

²³ *Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff*, 344 U.S. at 116).

²⁴ *Id.* at 706.

²⁵ This is Part II.C of the opinion. See *id.* at 705–07.

The unanimity of the Court is also striking because the Justices are often deeply divided on church-and-state matters.²⁶ The Court has been unanimous only on basic propositions and extreme facts.²⁷ Lower courts universally accepted the ministerial exception, but it faced hostile reviews in the legal academy, a chilly reception from liberal public interest groups, and an open repudiation from the Solicitor General.²⁸ Had this case been decided 5–4, it would have been seen as a partisan victory, as conservative religious belief triumphing over liberal civil rights laws. But that narrative does not fit the facts. Justice Ginsburg has spent a good part of her life working to end discrimination; she joins the majority opinion with no expressed reservation.

Yet sometimes the price of unanimity is clarity, and perhaps *Hosanna-Tabor* illustrates that too. The Court is certain that there is a ministerial exception, but it is far less certain on the line between ministers and non-ministers—even though the latter, and not the former, was the issue that had divided lower courts.²⁹ On that latter issue, the Court’s opinion lays out four criteria: “[T]he formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.”³⁰ This is a classic balancing test, focused partially on clerical office (the first three criteria) and partially on job duties (the fourth). But the Court says little about each of these criteria, and nothing about how to weigh them against each other.³¹ Most of the guidance comes from the Court’s holding itself: wherever the boundary is, Perich is inside it.³² But the Court rejects a purely functional inquiry, emphasizing the importance of Perich’s clerical office.³³ And the Court adds that the functional part of the inquiry cannot simply be a measure of

²⁶ The Court’s recent decision on the constitutionality of the cross in the Mojave National Preserve produced six opinions and little agreement. *See* *Salazar v. Buono*, 559 U.S. 700 (2010).

²⁷ *See* *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

²⁸ *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 4 n.6 (2011) (discussing criticisms of the ministerial exception and providing citations); *see also supra* notes 21–22 and accompanying text (discussing the Solicitor General’s repudiation).

²⁹ *See* Lund, *supra* note 28, at 3 n.3 (discussing the circuit split).

³⁰ *Hosanna-Tabor*, 132 S. Ct. at 708.

³¹ The Court does not say whether clerical office would be enough without the religious job duties, and expressly declines to say whether the religious job duties would be enough without the clerical office. *Id.* (“We express no view on whether someone with Perich’s duties would be covered by the ministerial exception in the absence of the other considerations we have discussed.”).

³² *Id.* at 707 (“We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”).

³³ *Id.* at 709.

time spent—once one has the requisite degree of religious duties, one is a minister regardless of how many secular job duties one might also have.³⁴

Where this line ultimately gets drawn is obviously of great importance. Before *Hosanna-Tabor*, one criticism of the ministerial exception was that it was absolute, that it involved no balancing.³⁵ But it would be more accurate to say that the balancing happens categorically rather than case-by-case. Different balances between the governmental interest and the religious interest get struck by drawing the line between ministers and non-ministers in different places. This is another way in which *Hosanna-Tabor* aligns better with *Sherbert* and *Yoder*³⁶ than with *Smith*: it smacks of the old compelling interest test when the Court says that the employment laws are “undoubtedly important” but still insufficient to outweigh the religious interest.³⁷

Maybe the Court deserves criticism for failing to provide any clear line here, but the deeper problem is that there is simply no natural point of differentiation between ministers and non-ministers. In the forty years before *Hosanna-Tabor*, lower courts and commentators could not find it.³⁸ Perhaps this will commit the Court to taking a long string of ministerial exception cases. But the opposite result seems more likely. Without a way to make things better, the Justices will not want to get involved in this again.³⁹

On some issues, *Hosanna-Tabor* does give straightforward answers. For one thing, the Court had never decided whether church autonomy was a Free Exercise or Establishment Clause doctrine.⁴⁰ *Hosanna-Tabor* says that

³⁴ *Id.*

³⁵ See, e.g., Jack M. Balkin, *The “Absolute” Ministerial Exception*, BALKINIZATION (Jan. 13, 2012, 8:59 AM), <http://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html> (“One of the curious features of the Supreme Court’s version of the ministerial exception is that the rule is stated in absolute terms that eschew all attempts at balancing.”).

³⁶ See *supra* note 14 and accompanying text (discussing *Sherbert* and *Yoder* and the compelling interest test they had established for free exercise).

³⁷ *Hosanna-Tabor*, 132 S. Ct. at 710 (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”).

³⁸ Lower court and commentators often punted in precisely the same way as the Supreme Court did in *Hosanna-Tabor*. See *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) (“We leave for another day the formulation of a general test because, under any reasonable construction of the ministerial exception, Rosas meets the definition of a minister.”). I offered my own thoughts on this issue in a piece published just before *Hosanna-Tabor*. See Lund, *supra* note 28.

³⁹ See, e.g., *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1320–21 (1994) (Rehnquist, Circuit Justice) (internal quotation marks omitted) (noting that certiorari is typically denied in cases where a legal standard “cannot be reduced to formula,” because lower court decisions will tend to involve “factbound determination[s]”).

⁴⁰ See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (Free Exercise Clause); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (the First Amendment); *McDaniel v. Paty*, 435 U.S. 618, 638 & n.15 (1978) (Brennan, J., concurring) (Establishment Clause); *Serbian E. Orthodox Diocese v. Milivojevich*, 426

it is both.⁴¹ For a claim within the ministerial exception's proper scope, a church wins by invoking either the Free Exercise Clause or the Establishment Clause. What ripple effects *Hosanna-Tabor* might cause in the general jurisprudence of the Establishment Clause is profoundly unclear. Yet the Establishment Clause holding does perhaps suggest an important shift on the part of one particular Justice. For years, Justice Thomas has battled against the modern Establishment Clause, arguing that it applies only to the federal government and not the states.⁴² But *Hosanna-Tabor* dismisses both federal and state law claims, and dismissing state law claims on Establishment Clause grounds necessarily implies incorporation of the Establishment Clause.⁴³ It is not entirely clear that Justice Thomas means to give up this fight, but hopefully *Hosanna-Tabor* will make it harder for him to return to it.⁴⁴

Hosanna-Tabor also clarifies that the ministerial exception is an affirmative defense rather than a jurisdictional bar.⁴⁵ Some attach great importance to this issue, seeing it as raising a question specifically about the meaning of the Religion Clauses.⁴⁶ But the Court has for years been trying to rein in wildly expansive notions about what goes to subject matter jurisdiction across doctrinal areas, and *Hosanna-Tabor* seems to be just another example.⁴⁷ Of course, one likely consequence of the Court's non-jurisdictional approach is that ultimately unsuccessful claims will continue

U.S. 696, 709 (1976) (the First Amendment); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449–50 (1969) (the First Amendment); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (Free Exercise Clause, but also the separation of church and state).

⁴¹ 132 S. Ct. at 702 (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”); *see also id.* at 706 (reiterating the point).

⁴² *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 726–31 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring).

⁴³ *See* 132 S. Ct. at 701 (noting that the suit claimed “unlawful retaliation under both the ADA and the Michigan Persons with Disabilities Civil Rights Act”).

⁴⁴ *See id.* at 710 (Thomas, J., concurring) (endorsing a robust view of the ministerial exception). For a persuasive attack on Justice Thomas's view on incorporation, *see* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241–43 (2004).

⁴⁵ *See* 132 S. Ct. at 709 n.4.

⁴⁶ Compare Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (arguing that the ministerial exception is a defense based on subject matter jurisdiction), with Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289 (2012) (arguing that the ministerial exception is a merits-based defense); *see also* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891 (2013).

⁴⁷ A string of such cases are given in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General*, 558 U.S. 67, 81–82 (2009).

further than they did before. Ministerial status is a fact-intensive question.⁴⁸ Before *Hosanna-Tabor*, cases were disposed of on motions to dismiss.⁴⁹ Now summary judgment will probably be the norm.⁵⁰

Plaintiffs must have the right to prove their cases, of course, but this still poses a problem. Churches have a constitutional right to choose their ministers without governmental interference.⁵¹ Litigation is government interference. Financially speaking, litigation that costs as much as a damage judgment is just as harmful as a damage judgment. The ministerial exception should be thought of not just as a defense to liability, but as a right not to face litigation over the choice of one's clergy. This would suggest allowing churches to immediately appeal a conclusion that the plaintiff is not a minister⁵²—akin to the interlocutory appeals allowed in the contexts of officer immunity, double jeopardy, and state sovereign immunity.⁵³ This approach has benefits, but it also has costs: it would enable church defendants to prolong legitimate litigation, no matter how obvious it is that the plaintiff is not a minister. Maybe a better approach would be bifurcated discovery, with the court deciding the applicability of the ministerial exception in advance of allowing discovery on other issues.⁵⁴ This makes a great deal of sense: issues of ministerial status naturally separate from questions of discrimination and retaliation, and the facts surrounding ministerial status are less frequently disputed, more quickly and easily ascertained, and more objectively proven.

⁴⁸ One case, decided after *Hosanna-Tabor*, involved facts virtually identical to those of *Hosanna-Tabor*: both parish-owned schools, both within the Lutheran Church-Missouri Synod, both elementary school teachers, both commissioned ministers, both called positions. Of course, the case had to be litigated to judgment. See *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668 (N.D. Ill. 2012).

⁴⁹ See *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (noting how “assertion of the ministerial exception . . . is akin to a government official’s defense of qualified immunity, which is often raised in a Rule 12(b)(6) motion”).

⁵⁰ See *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 n.3 (5th Cir. 2012) (“Given the nature of the ministerial exception, we suspect that only in the rarest of circumstances would dismissal under Rule 12(b)(6)—in other words, based solely on the pleadings—be warranted.”).

⁵¹ “Governmental interference” is another phrase that runs throughout the Court’s opinion. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704 (2012) (“[G]overnment interference with a church’s ability to select its own ministers”); *id.* (internal quotation marks omitted) (“[F]ree from state interference [with regard to] matters of church government as well as those of faith and doctrine”); *id.* (internal quotation marks omitted) (“[F]reedom to select the clergy . . . is part of the free exercise of religion protected by the First Amendment against government interference”); *id.* at 707 (“The present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself”).

⁵² See *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870 (1994) (internal quotation marks omitted) (noting that interlocutory appeals are necessary when the right includes an “entitlement not to stand trial or face the other burdens of litigation,” because the right “would be effectively lost if a case [were] erroneously permitted to go to trial” (alteration in original)).

⁵³ See *Behrens v. Pelletier*, 516 U.S. 299, 305–07 (1996) (discussing these three examples).

⁵⁴ For a general discussion of bifurcated discovery, see John P. Rowley III & Richard G. Moore, *Bifurcation of Civil Trials*, 45 U. RICH. L. REV. 1, 19–20 (2010).

All this minutiae is of consequence, but it is minutiae nonetheless. The defining aspect of *Hosanna-Tabor* is in how it treats religion as distinctive. In *Smith*, and in the earlier regulatory burden cases, the Court framed the issue as whether religious believers should get an “exemption” from a generally applicable law. Exemptions evoke the idea of special treatment, which many equate with favoritism. The word “exemption” appears thirty-five times in the *Smith* opinions. But it does not appear anywhere in *Hosanna-Tabor*, in any of the opinions. (If it were not called the ministerial exception, the word “exception” would not appear either.) The Court does not ask whether churches should be *exempt* from employment discrimination laws. Instead, the Court asks whether churches have the right to choose their leaders. This is more than a clever rhetorical flourish—it is a change in baseline. It does not matter how anyone else is treated; religious groups have the right to choose their leaders. Churches do not get reformed by the government, no matter what else the government tries to reform. The Court begins by grounding this right in historical tradition and case precedent, but it quickly retreats back to the constitutional text: “[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.”⁵⁵

This sentence grows more awkward every time one reads it. The First Amendment speaks of religion, not religious organizations. Religion is what gets special solicitude. Religious organizations may also get special solicitude, but that would come only as a derivative consequence.

The Court, of course, knows all this perfectly well. But it will not say it, probably because it believes doing so would undermine *Smith*. Here the Court should take its own awkwardness seriously: when a precedent demands transparently false statements about constitutional text, it is time to rethink the precedent. In any event, the Court recognizes the need to distinguish *Smith*. Here is how the Court does so:

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *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.⁵⁶

This distinction has already come under fire from critics of *Hosanna-Tabor*.⁵⁷ Even fiercer attacks will eventually come from the other side, and

⁵⁵ *Hosanna-Tabor*, 132 S. Ct. at 706.

⁵⁶ *Id.* at 707.

⁵⁷ See, e.g., Caroline Mala Corbin, Essay, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951, 955 (2012) (“[T]his distinction . . . is far from self-evident.”); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 993 (2013) (“That distinction cannot hold water.”); Mark Strasser, *Making the Anomalous Even More Anomalous: On Hosanna-Tabor, the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL’Y & L. 400, 444

for an obvious reason. *Smith* scrapped the compelling interest test for Free Exercise by a 5–4 vote; *Hosanna-Tabor* was 9–0. If one of the two must be overruled, it will probably not be *Hosanna-Tabor*. There is no question which is the fixed star.

But neither of them will be overruled any time soon. The immediate question is how to best read them together. Some have said that *Hosanna-Tabor* draws a line between individuals and institutions. *Hosanna-Tabor* protects institutions; *Smith* refused to protect individuals.⁵⁸ That is a good first stab, but more is needed. Individuals have no right to use peyote under *Smith*, but neither does the Catholic Church. The Catholic Church can fire ministers for any reason under *Hosanna-Tabor*, but any individual who hires a minister would have exactly the same right.⁵⁹ Religious institutions will benefit from *Hosanna-Tabor*. But the case is more about the nature of religious association than the power of religious institutions.

Hosanna-Tabor distinguishes between “internal church decision[s]” and “outward physical acts.”⁶⁰ “Internal” is the important word, appearing at several crucial points in the opinion.⁶¹ But this “internal versus external” distinction runs immediately into a difficulty. After establishing the ministerial exception, the Court hints that churches selecting ministers would probably have no immunity from the child labor laws or the immigration laws.⁶² Such a conclusion seems instinctively right, and it is

(2012) (“[S]uch a distinction is unpersuasive . . .”). For an even stronger criticism, see Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html> (“With due respect: huh????”).

⁵⁸ See, e.g., Corbin, *supra* note 57, at 971 (“[T]he Supreme Court chose to tip the scales and protect religious institutions instead of religious individuals . . .”); Griffin, *supra* note 57, at 1016 (“Individual religious believers are subject to the rule of *Smith*, while institutions are not.”). Even some of *Hosanna-Tabor*’s defenders have phrased it this way. See, e.g., Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 835–36 (2012) (“*Hosanna-Tabor* suggest[s] a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions.”).

⁵⁹ Federal employment discrimination laws only apply to entities with a certain number of employees, but some state laws have no numerical thresholds in their laws. See Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 355 n.20 (2007) (providing citations to state laws).

⁶⁰ 132 S. Ct. at 707.

⁶¹ E.g., *id.* at 705 (internal quotation marks omitted) (“[I]nternal discipline and government . . .”); *id.* at 706 (“[I]nternal governance of the church . . .”); *id.* at 707 (“[I]nternal church decision . . .”); *id.* at 710 (Thomas, J., concurring) (“[M]atters of internal governance . . .”). Before *Hosanna-Tabor*, lower courts sometimes referred to the ministerial exception as part of a larger “internal affairs” doctrine. See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008) (Posner, J.) (arguing that the ministerial exception “is better termed the ‘ministers exception’ . . . [or] better still . . . the ‘internal affairs’ doctrine”).

⁶² *Hosanna-Tabor*, 132 S. Ct. at 710 (noting the church’s concession that the ministerial exception would not “bar government enforcement of general laws restricting eligibility for employment,” such as the laws forbidding the “hiring [of] children or aliens not authorized to work in the United States”).

consistent with what courts were doing before *Hosanna-Tabor*.⁶³ But this would seem to contradict what the Court said immediately before, because hiring an illegal alien as one's minister is an internal church decision, not an outward physical act.

To make sense of this, we must turn to a later line in the opinion where the Court remarks how "the [ministerial] exception applies only to suits by or on behalf of ministers themselves."⁶⁴ This is what seems to drive the Court's "internal versus external" idea. The church autonomy line of cases grows out of a notion of implied consent.⁶⁵ When one joins a church, one accepts the religious choices made by the church. People can leave or stay. But so long as they choose to stay, they accept how the church handles its religious affairs. Dissenters cannot use the coercive force of the government to compel a change in the church's religious views, practices, or governance.⁶⁶

The consent idea will be examined in more detail in the next Part, but the immediate point is that it can reconcile *Hosanna-Tabor*'s principle with its limits. Consent binds those who consent.⁶⁷ And it binds those who bring derivative claims. Consent here being of a constitutional nature, it bars the government from acting on behalf of those who consent. But it does not bar outsiders to the church, and it does not bar the government from acting on behalf of those outsiders.

This has the power to conceptually resolve the point about illegal aliens.⁶⁸ The government can prosecute a church for hiring an illegal alien as a minister because such a suit is on behalf of the public at large rather than any distressed church insider. This can also reconcile *Smith*. The government can prosecute the Native American Church for using peyote in

⁶³ In one case, Quakers challenged laws requiring them to verify the immigration status of their employees. The Court held that the issue was not governed by the church autonomy cases, but by the regulatory exemption cases. *See Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 959 (9th Cir. 1991) (noting that the church "simply argues that its religious principles compel conduct that [the immigration law] makes unlawful" and "[t]hat fact does not bring AFSC within the rule of *Catholic Bishop*"); *see also Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196, 198 (4th Cir. 1989) (holding that a church vocational program placing underage children with associated employers was barred by the Fair Labor Standards Act).

⁶⁴ *Hosanna-Tabor*, 132 S. Ct. at 710.

⁶⁵ *E.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) ("All who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it." (emphasis added)).

⁶⁶ *See Lund, supra* note 28, at 13 (summarizing the church autonomy cases this way).

⁶⁷ This is a familiar principle in law. But to give an example, two people who agree to fight each other cannot sue each other in tort, although the government can criminally prosecute them both. *See RESTATEMENT (SECOND) OF TORTS* § 892C cmt. b, illus. 3 (1979) ("A and B agree to fight a duel with pistols. A fires at B and his bullet strikes and breaks B's arm. A is not liable to B.").

⁶⁸ This does not explain *Hosanna-Tabor*'s point about children. The argument there would have to be that children are somehow incapable of consent, or that the government interest in protecting children is sufficiently compelling to outweigh church autonomy.

its religious rituals. But a suit by a minister against the Native American Church over the church's peyote use—imagine, say, an emotional distress claim brought by a disgruntled former minister, claiming bad spiritual consequences from using the drug—probably falls within *Hosanna-Tabor's* sphere. Of course, this introduces a very slippery distinction. It will be difficult to tell when exactly the government acts on behalf of insiders and when it acts on behalf of outsiders.⁶⁹ But this insider–outsider distinction provides a good starting point. Suits of the form “government versus church” will generally be within *Smith's* domain. Suits of the form “insider versus church” or “government on behalf of insider versus church” will be within *Hosanna-Tabor's*.

All this can make it seem like *Hosanna-Tabor* prefers churches over their ministers.⁷⁰ But this is wrong, or at least it should be wrong. Suits of the form “church versus insider” are just as barred as suits of the form “insider versus church.” The ministerial exception is a form of constitutionalized at-will employment; it enables both sides to leave the relationship at any time, without legal reprisal. In our modern age, employers now sue employees for things like breach of fiduciary duty and unfair competition. The duty of loyalty allows employers to claw back compensation when a jury finds that an employee has committed serious misconduct.⁷¹ The ministerial exception should bar these claims too. Juries do not decide whether ministers have done their jobs well or not. Ministers and churches may disagree about who was responsible for the relationship breakdown, but the government stays out of those disagreements.

Talk of constitutionalized at-will employment may remind some readers of the *Lochner* era, when the Court experimented with constitutionalized at-will employment with some bad results.⁷² And indeed, minimizing governmental influence in economic affairs now seems silly to most people; we tend to write off *Lochner* and its companion decisions as foolish misadventures. But minimizing governmental influence in religious

⁶⁹ To the extent the *Smith* Court considered the harms of Native American peyote use, they focused on the possibilities of diversion to those outside the Native American Church. See *Emp't Div. v. Smith*, 494 U.S. 872, 904–06 (1990) (O'Connor, J., concurring) (finding this to be a compelling interest justifying the burden on religion).

⁷⁰ Both sides have seen it this way. See, e.g., Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 244 (2012) (footnotes omitted) (“In the end, this article advocates for the proposition that a ‘minister’ may not sue her ‘church’ in the ‘civil courts’ for claims ‘arising out of the terms and conditions of her ministry.’”); Griffin, *supra* note 57, at 1010 (“The ministerial rule always favors employers.”).

⁷¹ See RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (“An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty . . .”); see also Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777 (discussing the duty of loyalty).

⁷² See *Adair v. United States*, 208 U.S. 161 (1908) (invalidating a federal law protecting railroad workers discharged for union activity as an unjustified imposition on the constitutional freedom to contract); see also *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating a similar state law).

affairs is not at all silly—that is the point of the First Amendment. “Laissez faire” means “leave it be” in French. That may be poor economic theory with no constitutional basis, as the Court eventually came to believe.⁷³ But leaving people be is precisely the right approach for government to take with regard to religion. The government does not practice religion; it does not interfere with the private practice of religion; it leaves religion be. A complex modern society like ours must impose limits on that principle out of necessity, but that is the principle. *Hosanna-Tabor* could be thought of as part of the state’s general laissez-faire attitude to the clergy. The state does not hire or fire clergy; it does not get involved when churches hire or fire them. The state does not pay clergy; it does not decide how much churches should pay them.⁷⁴ The state does not license clergy; it does not decree what qualifications churches can require.⁷⁵ All this the state leaves alone.

More will be said about the justifications for church autonomy and the scope of the church autonomy principle. The point of this Article is to work those things out. Certainly *Hosanna-Tabor* does not try to do so. The Court says explicitly that it only means to consider the employment discrimination laws.⁷⁶ Of course, any plausible reading of *Hosanna-Tabor* includes more than that. No court would allow Cheryl Perich to repackage her allegations into claims of negligence, defamation, or emotional distress.⁷⁷ This is an inference, of course, but it seems a necessary one. *Hosanna-Tabor* will not make any sense otherwise.

II. *HOSANNA-TABOR*, CHURCH AUTONOMY, AND RELIGIOUS VOLUNTARISM

Hosanna-Tabor establishes a certain principle with an uncertain scope: “[R]eligious organizations [have] power to decide for themselves, free

⁷³ See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

⁷⁴ See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008) (Posner, J.) (dismissing minimum-wage and overtime claims brought by ministers of the Salvation Army).

⁷⁵ See, e.g., *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627 (Tex. 2007) (holding unconstitutional a statutory regime where seminaries had to obtain certificates of authority or accreditation from the state).

⁷⁶ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”).

⁷⁷ Such claims were dismissed even before *Hosanna-Tabor*. See, e.g., *Guerrier v. S. New Eng. Conference Ass’n of Seventh-Day Adventists, Inc.*, No. CV085007824, 2009 WL 4282894 (Conn. Super. Ct. Nov. 12, 2009) (dismissing not only discrimination claims, but also a variety of tort claims, including claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and false light).

from state interference, matters of church government as well as those of faith and doctrine.”⁷⁸ This is a right of self-determination. Churches handle their own affairs.⁷⁹ Church decisions are made by church authorities, not by legislatures, administrative agencies, judges, or juries.⁸⁰ The government does not subsidize the religious functions of churches; it does not regulate those functions either. It does not dictate standards for religious behavior; it does not monitor compliance with those standards; and it does not issue licenses when they are satisfied or sanctions when they are not. Because the government does not itself make religious decisions, it has nothing to say about the religious decisions made by churches. If the government had a basis for interfering in religious controversies within churches, it would have a basis for interfering in religious controversies outside of churches.

These principles come out of the Supreme Court’s church autonomy cases, probably the most complicated area of the Religion Clauses. But to understand group freedom of religion, it helps to begin with individual freedom of religion. There is widespread agreement that religious faith and practice should be voluntary. This works smoothly enough with individuals. Each person decides for himself or herself what to believe. Within limits understandably imposed by the communal nature of society, each person decides for himself or herself how to practice his or her faith as well. No one gets to control another person’s religious conduct; no one has the right to force his religion on someone else. The last two points have become the core of the modern Establishment Clause: you have the right not to sit through someone else’s church service, whether it is a long service on Sunday⁸¹ or a short prayer at a high school graduation or football game.⁸² The law often gives people control over other peoples’ choices.⁸³

⁷⁸ 132 S. Ct. at 704 (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)); see also *id.* at 711–12 (Alito, J., concurring) (“The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.”).

⁷⁹ See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (footnotes omitted) (arguing that churches have the right “to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions”).

⁸⁰ See Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL’Y 253, 254 (2009) (“The essence of church autonomy is that the Catholic Church should be run by duly constituted Catholic authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law.”).

⁸¹ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144 (2003) (“In England, from the time of Elizabeth I, those who ‘absented themselves from the divine worship in the established church’ were subject to a fine of one shilling for a single absence and twenty pounds for a month’s absence.” (alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *52)).

⁸² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation).

But the law does not give people control over other peoples' religious choices.

With groups, the principle is the same, but the implementation grows more complicated. Each person's right of religious exercise has to be exercised in light of everyone else's. This creates tensions, and the Court's church autonomy cases represent its attempts to cabin those tensions as much as possible. The position they end up taking is that disgruntled members of a church cannot sue to try and change the religious beliefs, doctrines, and governance of their churches. For were that to happen, they would effectively control everyone else's religious choices.

One of the most important Supreme Court cases, *Presbyterian Church v. Mary Elizabeth Blue Hull*,⁸⁴ bears out these points most clearly. As in a number of the church autonomy cases, the issue was what to do with the property when a church split into two factions. The Georgia courts had applied the old English rule, where courts would decide which of the two factions came closest to the original beliefs of the church.⁸⁵ The Supreme Court in *Mary Elizabeth* unanimously held this unconstitutional. Its opinion talks at length about how the rule requires courts to answer inappropriate religious questions.⁸⁶ And when professors teach *Mary Elizabeth*, this is where they tend to focus.⁸⁷ But there is another key point to the case. The English rule had grown into a system where churches could not change their religious doctrines without the risk of later losing their property. Even a single dissenter that wanted things the old way could claim a departure from doctrine and sue for control of the property.⁸⁸ The departure-from-doctrine rule thus ended up reinforcing the status quo, a usually conservative status quo. In *Watson v. Jones*, dissenters used it to try and

⁸³ This is one way of seeing, for example, negligence law. *See* *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (holding that the owner of a vessel that broke free of its moorings negligently, and thus unlawfully, caused the sinking of another person's ship).

⁸⁴ 393 U.S. 440 (1969).

⁸⁵ *Id.* at 443–44.

⁸⁶ *See id.* at 449 (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”).

⁸⁷ *See, e.g.*, EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 899 (5th ed. 2014) (explaining *Mary Elizabeth* as part of a “no religious decisions principle,” whereby “[g]overnment officials . . . may not interpret religious doctrine” (emphasis omitted)); Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 57 (arguing that *Mary Elizabeth* establishes a principle that “courts must avoid intervening in religious disputes when doing so would entail their deciding theological or ecclesiastical questions”); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1836 (2009) (explaining *Mary Elizabeth* as being about “the state’s incompetence to decide matters that relate to the interpretation of religious practice or belief”).

⁸⁸ *See* Note, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1148 (1962) (“Read literally, the Lord Chancellor’s opinion [in the English departure-from-doctrine case, *Attorney General ex rel. Mander v. Pearson*, (1817) 36 Eng. Rep. 135 (Ch.)] seems to brook no doctrinal evolution within a congregation except on pain of forfeiture of its property.”).

seize property when the Presbyterian Church renounced slavery.⁸⁹ In *Mary Elizabeth*, dissenters used it when the church decided to ordain women.⁹⁰ If the rule existed today, it would be invoked by those upset by national churches deciding to ordain gays and lesbians.⁹¹

The lesson of *Mary Elizabeth* is that dissenters do not get to control their churches through litigation. And in many modern cases, that is precisely what is being sought, at least beneath the surface. A woman's husband becomes abusive.⁹² But she is a Jehovah's Witness, and Jehovah's Witnesses teach that marriage is permanent and that divorce is immoral.⁹³ When she finally leaves her husband, she sues the church, claiming that she would have left him a long time ago had it not been for the church's counseling. She thinks that the church caused those extra years of abuse, and she may be right about that. But whether she is right about that or not, her claim cannot go forward if the church has the right to teach what it believes about marriage.

Mary Elizabeth is one of many cases where the Supreme Court has dealt with two factions disputing over property. But, in an important sense, a church's religious beliefs, practices, and doctrines are just as rivalrous and excludable as a church's real property. Only one faction ultimately gets the property; only one faction ultimately controls the church's religious beliefs and practices. In *Mary Elizabeth* and the other church property cases, the Supreme Court has been clear: the duly constituted church authorities get to decide. In the cases that this Article will soon address, the same principle pushes toward the same conclusion.

In a sense, this also returns us to *Hosanna-Tabor*. In every ministerial exception case, a minister has lost his church and cannot get it back voluntarily. What the minister claims is a right to force the church back involuntarily. His argument is essentially this: I have a right to practice religion with them, no matter what they want.⁹⁴ The ministerial exception cuts this off at the knees. No one has the right to be a minister over a congregation against its will. In a system where religion is voluntary, no

⁸⁹ 80 U.S. (13 Wall.) 679 (1871).

⁹⁰ 393 U.S. at 442 & n.1.

⁹¹ See, e.g., Rector v. Bishop of Episcopal Diocese of Ga., Inc., 718 S.E.2d 237 (Ga. 2011).

⁹² E.g., DeCorso v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 829 A.2d 38 (Conn. App. Ct. 2003). But there is a long history of these cases. See, e.g., Radecki v. Schuckardt, 361 N.E.2d 543 (Ohio Ct. App. 1976); Bradesku v. Antion, 255 N.E.2d 265 (Ohio Ct. App. 1969); Carrieri v. Bush, 419 P.2d 132 (Wash. 1966).

⁹³ See 1 INSIGHT ON THE SCRIPTURES 639–40 (Watch Tower Bible & Tract Society of Pennsylvania 1988).

⁹⁴ Sometimes plaintiffs' attorneys have been a little too explicit about this. See *Ferreira v. Harris*, No. 06-CV-0163-CVE-SAJ, 2006 WL 1720546, at *5 (N.D. Okla. June 20, 2006) ("Plaintiff claims he has been denied his right to freely associate with a church of his choice by the actions of Woodland View.").

one can have the right to practice religion with people who do not want to practice religion with them.⁹⁵

Those who talk about church autonomy sometimes refer to the idea of implied consent because it features prominently in *Watson v. Jones*, the first church autonomy case: “All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.”⁹⁶ Implied consent gets a number of things right, but it can be misleading. Take *Hosanna-Tabor*, for example. Ministers certainly do not consent to discrimination. But they consent to being a minister in their churches, and it is that consent which precludes them from challenging how the church selects its ministers. Now maybe implied consent is not the best phrase for this; this is probably more analogous to assumption of risk. But of course it is true that implied consent is not consent, nor even a proxy for consent. Implied consent is a fiction used to operationalize the constitutional right of churches to have control over their own decisions.

With this conceptual background now in place, this Article divides the field of legal obligations into two areas—imposed legal obligations and assumed legal obligations. Imposed (or involuntary) legal obligations include those of tort and criminal law, as well as those of labor law and employment discrimination. The duties created by these laws are in no sense assumed by the parties—they are imposed by the law. Law here does not try to approximate human intentions; it is meant to override human intentions. By contrast, assumed (or voluntary) legal obligations include those of contract, property, and corporate law. The parties assume the duties created here: they choose to enter into contracts, trusts, and corporate arrangements.

Now, to be sure, this distinction is not airtight. One could argue, for example, that employment law obligations are assumed. Churches would be free of employment law if they choose not to hire people; churches that hire less than fifteen people are still mostly free of federal employment laws.⁹⁷ Because there is no general duty to rescue, one could say that all of tort law is assumed; tort law only kicks in when one voluntarily chooses to get involved with other people.⁹⁸ But we can only speak of private ordering because we believe that this distinction reflects something real, no matter how messy it ends up being in practice.

⁹⁵ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 n.5 (4th Cir. 1985) (“No member of a church may claim, under the First Amendment, an enforceable right to be considered or accepted by the church hierarchy as a minister.”).

⁹⁶ 80 U.S. (13 Wall.) 679, 729 (1871).

⁹⁷ See Lund, *supra* note 28, at 8–10 (discussing these points).

⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

Another reason to credit this distinction is that the Supreme Court has now tacitly adopted it. This is clear when one contrasts *Hosanna-Tabor* with the Court's earlier decision in *Jones v. Wolf*.⁹⁹ One constitutional way of resolving a property dispute between church factions, the Court said in *Jones*, was through "neutral principles of law."¹⁰⁰ Because churches could freely structure their property arrangements as they wanted, courts could use general principles of property law to discern where the church would have wanted the property to go in the event of a split.¹⁰¹ Those who argued against the ministerial exception relied heavily on *Jones*, saying that the employment discrimination laws were also neutral principles of law.¹⁰² But the Supreme Court in *Hosanna-Tabor* ignored that argument; none of the *Hosanna-Tabor* opinions even cite the case. The Court clearly thought *Jones* irrelevant.

The reason for this seems obvious in retrospect: *Jones* and *Hosanna-Tabor* belong to fundamentally different categories. *Jones* is a property case, a case about assumed legal obligations, where applying the regular rules of law heightens church autonomy by enabling churches to structure their affairs as they want. *Hosanna-Tabor* is an employment case, a case about imposed legal obligations, where applying the regular rules of law undercuts church autonomy. These two situations require different approaches, as the Supreme Court implicitly recognized in *Hosanna-Tabor*.

III. CHURCH AUTONOMY AND IMPOSED LEGAL OBLIGATIONS

When people think about constitutional freedoms, they typically imagine suits between a private entity and the government. But increasingly, the Supreme Court has had to address the effect of constitutional rights on civil suits between private parties. Most cases have involved the Free Speech Clause.¹⁰³ But speech is not special, or at least not uniquely special. Every constitutional right requires some immunity from generally applicable laws. A woman's constitutional right to an abortion would make little sense if the would-be father could sue the aborting

⁹⁹ 443 U.S. 595 (1979).

¹⁰⁰ *Id.* at 604.

¹⁰¹ *Id.* at 603 ("[T]he neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property . . .").

¹⁰² See Brief for the Federal Respondent, *supra* note 21, at 12, 26–28; see also Corbin, *supra* note 57, at 957–58 (making this argument about *Jones v. Wolf*).

¹⁰³ See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (dismissing intentional infliction of emotional distress, invasion of privacy, and civil conspiracy claims as barred by the First Amendment); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (dismissing interference with business relations claims); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (dismissing defamation claims).

woman for intentional infliction of emotional distress.¹⁰⁴ It would function exactly like a requirement of spousal consent, held unconstitutional long ago.¹⁰⁵ *Roe v. Wade* would break down if any woman who ended up regretting her abortion could turn around and sue the clinic in a wrongful death action.¹⁰⁶

Tort liability can also erode constitutional freedoms more subtly. Take *Doe v. Moe*,¹⁰⁷ which involved a couple in a long-term, sexually active relationship. One morning, they were having sex in one of their usual positions. But she changed positions quickly and without warning, slipped off of her partner, and fractured his penis.¹⁰⁸ So he sued her. The Massachusetts Court of Appeals dismissed his case, saying that she owed no legal duty to him. But taking this at face value misses the point, because there is always a legal duty to avoid physically injuring someone else.¹⁰⁹ The court here crafted a special “no duty” rule for self-consciously constitutional reasons. The court’s opinion cites all the usual suspects: *Griswold*, *Eisenstadt*, *Casey*, and *Lawrence*.¹¹⁰ And this makes sense. We talk about a constitutional right to sexual liberty; *Lawrence* talks about how “adult consensual sexual intimacy in the home [involves] vital interests in liberty and privacy.”¹¹¹ But if the principle is that people should get to do what they want behind closed doors without government interference, adult

¹⁰⁴ In hearing such a case, Judge Posner put it well: “[W]e do not see how, as a matter of either legal logic or common sense, the constitutional right of a woman to have an abortion without interference from the man who impregnated her can coexist with a . . . right of the man to interfere.” *Coe v. Cnty. of Cook*, 162 F.3d 491, 494 (7th Cir. 1998). Apparently the earliest case presenting this fact pattern was *Przybyla v. Przybyla*, 275 N.W.2d 112 (Wis. Ct. App. 1978), which dismissed an ex-husband’s intentional infliction of emotional distress claims against his former wife for having an abortion. *See id.* at 115 (“We hold that the intentional exercise by a woman and her physician of her right to terminate her pregnancy as protected by the United States Constitution, cannot constitute conduct that is so extreme and outrageous that it meets the [requirement for intentional infliction of emotional distress].”).

¹⁰⁵ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding spousal consent unconstitutional); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding spousal notification unconstitutional).

¹⁰⁶ *See, e.g., Doe v. Planned Parenthood/Chi. Area*, 956 N.E.2d 564 (Ill. App. Ct. 2011) (dismissing various claims against an abortion clinic, including wrongful death, negligent infliction of emotional distress, and alleged violations of the Illinois Consumer Fraud and Deceptive Business Act); *Acuna v. Turkish*, 930 A.2d 416 (N.J. 2007) (dismissing wrongful death, survival, and emotional distress claims).

¹⁰⁷ 827 N.E.2d 240 (Mass. App. Ct. 2005).

¹⁰⁸ “[T]he defendant landed awkwardly on the plaintiff, thereby causing him to suffer a penile fracture.” *Id.* at 243. The plaintiff was seriously and permanently injured. The court noted that he needed “emergency surgery,” then “endured a painful and lengthy recovery,” and still suffers “from sexual dysfunction that neither medication nor counseling have been able to treat effectively.” *Id.*

¹⁰⁹ RESTATEMENT (THIRD) OF TORTS § 7(a) (2010) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

¹¹⁰ *See Doe v. Moe*, 827 N.E.2d at 245 & n.5 (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

¹¹¹ 539 U.S. at 564.

men and women cannot sue each other for injuries arising out of sexual acts to which they both freely consented. Juries do not decide which sexual practices have benefits worth the risks. The diversity of sexual practices requires that such decisions be made privately and not collectively.

The same is true for religion. (Replace “sexual” with “religious” in the last two sentences—nothing should change.) *Hosanna-Tabor* begins implementation of this principle by differentiating *internal* church matters. With one eye on *Hosanna-Tabor*, and the other on the lower court cases we will soon discuss, this Article suggests an overarching principle: absent some compelling governmental interest, the First Amendment precludes insiders from suing their churches over matters of significant religious concern.

This first requires a discussion of insiders and outsiders. Insiders are bound by the principles of church autonomy, but outsiders are not.¹¹² Indeed, outsiders have constitutional rights *against* church autonomy; they have constitutional rights to be free from the power of other peoples’ churches. This is one way of seeing the nondelegation cases; the leading Supreme Court case here invalidated a statute giving churches power to deny liquor licenses.¹¹³

An important aspect of church autonomy is how every insider has the right to leave, the right to become an outsider. Maybe this is part of the church autonomy principle itself; maybe it describes the limits of church autonomy. But either way, church autonomy implies a constitutional right of exit from religious organizations. In discussing *Hosanna-Tabor* earlier, we said that the ministerial exception entitles both sides—both ministers and churches—to end the relationship at any time without legal liability. This constitutional protection accorded to ministers is one aspect of their constitutional right to exit.¹¹⁴

Though the distinction between insiders and outsiders makes intuitive sense, the line between them is blurry. *Hosanna-Tabor* treats ministers as insiders, barring their discrimination claims. Lower courts treat church members as insiders, barring suits challenging defamation, excommunication, or shunning.¹¹⁵ But there are gray areas. A number of recent suits involve children at Catholic schools challenging their expulsions in court. Catholic schools are part of the Catholic Church. And although they educate many non-Catholic students, those students chose a

¹¹² See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“[T]he [ministerial] exception applies only to suits by or on behalf of ministers themselves.”).

¹¹³ See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982) (invalidating a statute that gave power to churches and schools to prevent issuance of liquor licenses to establishments within 500 feet of them); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

¹¹⁴ See *supra* notes 70–71 and accompanying text (discussing this point).

¹¹⁵ See *infra* notes 177–78 and accompanying text (providing examples).

Catholic school. But this is a boundary question, and courts have split on the answer.¹¹⁶

This principle also requires a discussion of religiosity. The Free Exercise Clause is implicated only when the government interferes with religious beliefs or conduct.¹¹⁷ This is also true for church autonomy.¹¹⁸ This is why the regular tort rules apply to someone hit by the church bus¹¹⁹ or by a falling gargoyle.¹²⁰ Those suits threaten no religious practice. But once some religious practice is at stake, the First Amendment comes into play. It should not matter whether the practice is considered obligatory or not.¹²¹ The Supreme Court has always been clear that religious actions are protected, whether considered compulsory or not.¹²² *Hosanna-Tabor* reaffirms that position.¹²³ Yet lower courts sometimes get this wrong, with unfortunate effects. In one recent case, for example, the Connecticut Supreme Court held that a Buddhist group could be denied a permit for constructing a religious temple, despite a federal law requiring the government to offer a compelling governmental interest for any substantial burden imposed on religious exercise. The Connecticut Supreme Court

¹¹⁶ See *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1090–92 (Pa. 2009) (providing citations regarding the split in authority).

¹¹⁷ See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

¹¹⁸ See, e.g., *Kubala v. Hartford Roman Catholic Diocesan Corp.*, 41 A.3d 351, 357 (Conn. Super. Ct. 2011) (“When a defendant raises the free exercise clause of the [F]irst [A]mendment as a defense, the threshold question is whether the conduct of the defendants is religious.”), *aff’d*, 38 A.3d 1252 (Conn. App. Ct. 2012); *Checkley v. Boyd*, 14 P.3d 81, 87 (Or. Ct. App. 2000) (“[T]he success of a free exercise defense to a tort claim depends as a threshold matter on whether the conduct or statements on which liability is predicated were in fact religious in nature.”).

¹¹⁹ This hypothetical once actually arose. See, e.g., *Wollersheim v. Church of Scientology*, 66 Cal. Rptr. 2d 1, 9 (Cal. Ct. App. 1989) (“Thus, driving a Sunday-School bus does not constitute a religious practice merely because the bus is owned by a religion, the driver is an ordained minister of the religion, and the bus is taking church members to a religious ceremony.” (citing *Malloy v. Fong*, 232 P.2d 241 (Cal. 1951) (involving a thirteen-year-old boy who sued a church’s seminarian for a car accident on their way to vacation Bible school))).

¹²⁰ See *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (“The minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim.”).

¹²¹ See *Laycock*, *supra* note 79, at 1390 (“One of the most common errors in free exercise analysis is to try to fit all free exercise claims into the conscientious objector category and reject the ones that do not fit.”).

¹²² In *Smith*, for example, the Supreme Court did not ask whether the use of peyote was religiously required of the Native American Church plaintiffs. What was relevant was that the use of peyote was part of a religious practice. See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (describing the exercise of religion as involving “acts or abstentions . . . [that] are engaged in for religious reasons”); *id.* at 893 (O’Connor, J., concurring) (“[C]onduct motivated by sincere religious belief”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (asking whether a practice was “rooted in religious belief”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“[F]ollowing the precepts of [one’s] religion”).

¹²³ By holding the ministerial exception to be a categorical bar, *Hosanna-Tabor* made clear that it did not matter whether the church’s decision was necessitated by religious doctrine. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012).

concluded that the denial did not burden the group's religious exercise, apparently because the Buddhists had no religious objection to worshipping outside.¹²⁴

Courts also must take care not to conceive of the religious interest at stake too narrowly. Lawyers are not stupid; they will not openly challenge religious practices. Take the case about the plaintiff who alleged that church teaching caused her to stay with her abusive husband too long.¹²⁵ Rather than say that the church was wrong to teach that divorce was immoral, plaintiffs will say that the church should have referred her to a more professional counselor, or should have pressured the husband into therapy, or done some other such thing. Plaintiffs will plead their case around the religious issues.

Defamation claims provide another example. Unless *Hosanna-Tabor* puts some limits on defamation claims, plaintiffs need only rephrase their pleadings to avoid the ministerial exception.¹²⁶ Unable to argue that they were fired for wrong reasons, ministers will simply claim that the congregation stated wrong reasons in coming to its decision. This would be an end-run around the ministerial exception, but courts have sometimes bought into its logic.¹²⁷ Self-governance—and *Hosanna-Tabor's* principle, again, of one of self-governance—requires freedom of speech, which demands free and open lines of communication.¹²⁸ Churches have the right not only to dismiss ministers and expel congregants, but to freely talk about why ministers should be dismissed and congregants expelled. It would make no sense otherwise. It would encourage the worst kind of church decisionmaking otherwise. But only if courts adopt a bird's-eye view will they be able to recognize the religious interests at play here.

¹²⁴ See *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n*, 941 A.2d 868, 888 (Conn. 2008) (explaining that “building and owning a church is a desirable accessory of worship, not a fundamental tenet of the [c]ongregation’s religious beliefs” (quoting *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983))) (alteration in original).

¹²⁵ See *supra* note 92 and accompanying text (discussing *DeCorso v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 829 A.2d 38 (Conn. App. Ct. 2003)).

¹²⁶ See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119, 155 (2009) (arguing that to allow defamation claims in this context would be to allow “a collateral attack on a decision that is otherwise solidly protected by the ministerial exception”).

¹²⁷ See *Tubra v. Cooke*, 225 P.3d 862, 872 (Or. Ct. App. 2010).

¹²⁸ For a recent, interesting, and important extension of this principle, see *Purdum v. Purdum*, 301 P.3d 718 (Kan. Ct. App. 2013). In *Purdum*, a man brought a defamation suit against his former wife for things she said about him during a religious annulment proceeding in the Catholic Church. The Court dismissed the case as barred by the First Amendment. *Id.* at 727 (noting that “[t]here is no doubt that the First Amendment offers no protection to religious worshipers who make slanderous or libelous statements outside ecclesiastical tribunals, but that is not the case here” because the wife “asked for an annulment in a church forum as part of a church-approved, church-defined, and church-controlled process where the church would determine the validity of the church’s marriage sacrament”).

In addition to insider status and religiosity, the familiar idea of rules and standards also comes into play here.¹²⁹ Courts are (and should be) particularly suspicious about imposing liability on religious behavior through amorphous standards.¹³⁰ The lack of notice, combined with discretion as regards liability, creates tremendous potential for mischief. Yet there is also a deep suspicion of standards particular to the Free Exercise Clause. Before *Smith*, the Court had used a compelling interest test in Free Exercise cases, a test associated chiefly with two cases: *Sherbert* and *Yoder*. *Sherbert* involved a standard—South Carolina only gave unemployment compensation to people who had “good cause” for refusing to work.¹³¹ *Yoder* involved a rule—Wisconsin children under the age of sixteen had to attend public school.¹³² *Smith* overruled the compelling interest test, but it overruled neither *Sherbert* nor *Yoder*. The Court’s preservation of *Yoder* has always perplexed commentators.¹³³ But its preservation of *Sherbert*—which is now the “individualized exemptions” exception to *Smith*—fits perfectly with *Smith*’s emphasis on general applicability.¹³⁴ At its root, this is because so much of the constitutional danger in *Sherbert* flowed from the dangers of discrimination arising from an amorphous standard being used to judge religious behavior.¹³⁵

Finally, any account of church autonomy must acknowledge situations where religious freedom will have to be subordinated to other values. Even at the zenith of the Free Exercise Clause, courts refused regulatory exemptions in cases where there was some compelling governmental interest, and the same principle carries over to ideas about church

¹²⁹ “Rules are legal norms that are formal and mechanical. They are triggered by a few easily identified factual matters and are opaque in application to the values that they are designed to serve. Standards, on the other hand, are flexible, context-sensitive legal norms that require evaluative judgments in their application.” Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 740 (1997).

¹³⁰ See *infra* notes 144–53 (discussing the rule–standard distinction in the context of several cases).

¹³¹ *Sherbert* involved a Seventh-Day Adventist who refused to work on Saturday (her Sabbath) and sought unemployment compensation benefits. See *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963).

¹³² *Yoder* involved a number of Amish families who sought to end their children’s public schooling after the eighth grade. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

¹³³ See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990) (arguing that “the *Smith* Court’s [distinction of *Yoder* and its] notion of ‘hybrid’ claims was not intended to be taken seriously”).

¹³⁴ See *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990) (internal quotation marks omitted) (“[W]here 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.”).

¹³⁵ That *Sherbert* involved a vague standard has been largely forgotten now. *Smith* recast *Sherbert* simply as an equality case. But in his *Sherbert* dissent, Justice Harlan pointed out that there was no evidence that anyone had ever, for any reason, been allowed to refuse to work on Saturday and still receive unemployment compensation. There was no equality problem in *Sherbert*, but the Court awarded a religious exception anyway because of the vagueness of the rule. See *Sherbert*, 374 U.S. at 420 & n.1 (Harlan, J., dissenting).

autonomy.¹³⁶ Individuals cannot involuntarily sacrifice their neighbors as part of their religious observance—and neither can churches (even if the sacrifices were voluntary).¹³⁷ Churches obviously have no license to sexually abuse children.¹³⁸ Every constitutional right is exercised within bounds, and any theory that hopes to have some practical reality must take practical reality into account. Church autonomy is church autonomy within limits, and no more.

The question of when the government’s interest in regulation outweighs the interest in church autonomy is a question that admits of clear answers only in clear cases. This raises an important concern about the appropriateness and difficulty of judicial interest balancing.¹³⁹ This concern cannot be buried. Instead, the response can only be that some balancing is unavoidable, that the principle is worth the balancing, and that in many particular circumstances, sufficiently definite rules can indeed be worked out. Yet in the sections that follow, this Article will keep such concerns in mind as it tries to lay out, in as much detail as possible, a concrete and judicially manageable conception of church autonomy.

A. *Negligence, Intentional Infliction of Emotional Distress, and the Like*

Before we turn to the areas of disagreement, it helps to start where there is consensus. Courts are deeply split on many issues, but they all agree that the First Amendment prohibits tort claims of clergy malpractice.¹⁴⁰ Some have suggested that this is just a matter of equality and consistent with *Smith*—what makes the tort of clergy malpractice impermissible is the fact that it applies only to clergy.¹⁴¹ But this cannot

¹³⁶ See *supra* notes 14–16 and accompanying text (discussing the compelling interest test for Free Exercise).

¹³⁷ See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49–50 (1890) (“The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. . . . But no one, on that account, would hesitate to brand [such] practices, now, as crimes against society.”); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (“Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”).

¹³⁸ See *infra* note 189 and accompanying text (discussing the sex abuse cases).

¹³⁹ This concern is articulated well in Lupu & Tuttle, *supra* note 126, at 133 (pointing out that “the [same] questions of measurement and even-handedness raised [by modern arguments for church autonomy were] once employed—but now abandoned—in free exercise exemption cases”).

¹⁴⁰ See, e.g., *Richelle L. v. Roman Catholic Archbishop*, 130 Cal. Rptr. 2d 601, 608 (Cal. Ct. App. 2003) (“There is no such thing in the law as clerical malpractice.”); *DeCorso v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 829 A.2d 38, 46 (Conn. App. Ct. 2003) (“[C]ourts throughout the United States have uniformly rejected claims for clergy malpractice under the First Amendment.” (quoting *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 204 (Utah 2001))); Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. REV. 1089, 1112 (2003) (“Courts have universally rejected claims of clergy malpractice.”).

¹⁴¹ See, e.g., William P. Marshall, *Separation, Neutrality, and Clergy Liability for Sexual Misconduct*, 2004 BYU L. REV. 1921, 1943 n.103 (“Neutrality would presumably also not recognize

explain it. Clergy malpractice is a form of malpractice, and malpractice is a religion-neutral tort. Every court in this country will let you sue your doctor and lawyer for malpractice, yet none of them will let you sue your rabbi or priest.¹⁴² Only if religion is special does this make sense.

It is worth lingering over the reasons courts dismiss such suits. Clergy malpractice is a form of malpractice, which in turn is a form of negligence.¹⁴³ And negligence carries with it certain problems. Negligence is, in a sense, the converse of contract. Contract imposes duties to which the parties themselves agreed, in circumstances where they would have expected legal enforcement. Negligence imposes duties that a jury essentially believes the parties should have agreed to, in situations where they certainly did not, and in circumstances where legal enforcement was not remotely contemplated. And by and large, the negligence tort turns over legal power to juries for them to decide on the legal duties they think appropriate to impose.¹⁴⁴

In the context of religious behavior, this gives juries the power to decide what religious beliefs, practices, and doctrines are acceptable and which ones are not. To be sure, juries are told about the “reasonably prudent” standard, and directed to balance costs and benefits. But they themselves decide what counts as a cost and what counts as a benefit.¹⁴⁵

civil actions based upon claims of clergy malpractice because clergy malpractice is a religion-specific action and is therefore not neutral.”)

¹⁴² There may be one exception in *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991), which left open the possibility of such a claim. See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1816 n.100 (discussing *Faber*).

¹⁴³ “After all, malpractice is nothing but a species of negligence.” Michael Sean Quinn, *The Advice-of-Counsel Defense: A Response to Fischer*, 72 TEX. L. REV. 1487, 1498 n.39 (1994); see also *Rubens v. Mason*, 387 F.3d 183, 189 (2d Cir. 2004) (“[L]egal malpractice is a species of negligence.”); DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 471 (4th ed. 2011) (“Medical malpractice is a species of negligence.”). Some think of malpractice as slightly different from negligence in terms of the standard of care. In a negligence action, the defendant is judged by a reasonable person standard; in a medical malpractice action, she is judged by a reasonable doctor standard. See 3 WILLIAM W. BASSETT ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 11:53, at 11-280 to -281 (2013) (noting that “[t]he differentiating characteristic between ordinary negligence and malpractice is that malpractice is measured on a higher standard” because in malpractice cases the “defendant has a special form of competence that creates a different standard of care than that of the reasonable layperson”). Yet this does not distinguish malpractice and negligence because even in garden-variety negligence cases, the standard of care rises with the skills and capacities of the defendant. See RESTATEMENT (SECOND) OF TORTS § 299A (1965).

¹⁴⁴ Kenneth Abraham notes that “[n]o matter how negligence is defined in instructions to the jury, or in the law applied by a judge in a bench trial, the negligence standard is abstract and general,” and so “[w]ithin wide bounds, the finder of fact does not identify a pre-existing norm, but simultaneously determines for itself what would constitute reasonable behavior under the circumstances and then applies this norm to the situation at hand.” Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1191 (2001) (footnote omitted).

¹⁴⁵ See Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 435 (1999) (“That the issue of breach is put to the jury even when facts

Many religious actions and doctrines seem strange or incomprehensible to the general populace. Juries drawn from the general community will not see the benefits of religious beliefs and practices the same way as those inside the church. If they did, they would belong to the church! Every jury will do some discounting. Some jurors will be skeptical; others will be hostile. If you see religion as having little value, any cost or risk will be enough to tip the scale in favor of liability. If you see religion as having no value, any allegation of cost or risk will be enough. This cannot be squared with the First Amendment. The First Amendment protects the free exercise of religion. It does not protect the free exercise of religion when it is reasonably prudent. We have many religions in this country that some jury will find imprudent. The obnoxious, the hypocrites, the discrete and insular minorities—they get to practice their religions too.

The first American case of clergy malpractice involved a young man, Kenneth Nally, who suffered from depression.¹⁴⁶ He went to the pastors at his church for counseling. They tried to get him to go to a psychiatric hospital and to trained secular psychologists, but he refused and ended up committing suicide. His parents brought suit against the church, alleging that the pastors should have counseled Nally better and done a better job trying to get him into nonreligious counseling.¹⁴⁷ They were especially angry that Nally's pastor told him that suicide would not endanger his salvation: "[A] person who is once saved is always saved," he said.¹⁴⁸ Dismissing the case on nonconstitutional grounds, the California Supreme Court held that the church owed no legal duty to Nally. But it added that any sort of duty here would "stifle all gratuitous or religious counseling,"¹⁴⁹ thus making it "quite possibly unconstitutional."¹⁵⁰

Similar to *Nally* is the *DeCorso* case, discussed *supra*, about the Jehovah's Witness who had been in an abusive marriage. DeCorso sued her church, claiming that she would have left her husband years earlier had it not been for the church's teaching about the immorality of divorce. Both *Nally* and *DeCorso* involve terribly tragic injuries. But they also involve plaintiffs who seek control over church teaching. Some Evangelical Protestants teach the perseverance of the saints; the Jehovah's Witnesses teach the immorality of divorce.¹⁵¹ This is their right. "The government

are free of doubt shows that in negligence law independent value is put on the jury deciding what is reasonable conduct when the normative issue is open to debate."

¹⁴⁶ See *Nally v. Grace Cmty. Church*, 763 P.2d 948 (Cal. 1988); 3 BASSETT ET AL., *supra* note 143, § 11:53, at 11-284 (footnote omitted) ("*Nally v. Grace Community Church of the Valley* was the first clergy malpractice case ever filed in the United States.>").

¹⁴⁷ See *Nally*, 763 P.2d at 952-53.

¹⁴⁸ *Id.* at 952 (statement of Pastor Thomson).

¹⁴⁹ *Id.* at 959.

¹⁵⁰ *Id.* at 960.

¹⁵¹ For another case akin to *DeCorso*, see *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001). In *Franco*, a fourteen-year-old child recalled that, when she was seven, an

may not . . . punish the expression of religious doctrines it believes to be false.”¹⁵² Or, even more eloquently:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . [I]f those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.¹⁵³

That these cases even exist proves how the bare right to believe one’s faith and teach it to others can still be controversial.

It is important to stress one other point. Courts and commentators frequently suggest that the motivating principle here is that courts lack competence to come up with the standard of care.¹⁵⁴ This can be a problem, but it is not the real problem.¹⁵⁵ A Seventh-Day Adventist sues her Seventh-Day Adventist high school, claiming that she “was subjected to an inferior and substandard Biblical Christian education.”¹⁵⁶ The court should dismiss this claim (and it did).¹⁵⁷ But it is not out of an inability to come up with a

older boy in her church congregation had sexually abused her. Her parents asked church leaders what to do; they advised her to “forgive, forget, and seek [a]tonement.” *Id.* at 201. Her parents did that, but later changed their minds and went to the police. They then sued the church for the heightened emotional distress due to the delay, and for the emotional distress due to being ostracized by the church community for not taking the advice. *Id.*

¹⁵² *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

¹⁵³ *United States v. Ballard*, 322 U.S. 78, 86–87 (1944).

¹⁵⁴ *See, e.g., F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997) (“[S]uch a [malpractice] claim requires definition of the relevant standard of care [and] [d]efining that standard . . . would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.”); Lupu & Tuttle, *supra* note 142, at 1823 (“Courts have good reason to reject claims of clergy malpractice when such claims invite the court to determine the standard of pastoral care for a ‘reasonable Catholic priest’ or a ‘reasonable Orthodox rabbi’ [because] [t]hese are judgments that only that particular religious tradition can render and are precisely the kinds of appraisals that the doctrine of ecclesiastical immunity bars.”).

¹⁵⁵ Admittedly, in some cases, the problem grows severe. *E.g., Lightman v. Flaum* (*Lightman I*), 687 N.Y.S.2d 562 (N.Y. App. Div. 1999), *rev’d*, 761 N.E.2d 1027 (N.Y. 2001) (*Lightman II*). In *Lightman I*, a wife told two rabbis that she was seeing another man and that she was no longer engaging in the ritual purification required by Jewish law (failing to do so meant that she would not have to have sex with her husband). The rabbis told the husband, and in response the wife sued them for intentional infliction of emotional distress and other claims. The trial court let these claims proceed, saying that the rabbis’ actions were “outrageous and most offensive,” that “no member of the clergy . . . would dare breach the sanctity of his or her office to make public th[is] type of confidential, private disclosure[,]” and that “neither defendant had a ‘religious obligation as a Rabbi’ to make public what had been imparted to them.” *Lightman I*, 687 N.Y.S.2d at 569–70. But on appeal, the rabbis indeed indicated that they had a religious obligation to tell the husband of the wife’s infidelity. *See Lightman II*, 761 N.E.2d at 1029. Rather than try to resolve this debate about Jewish law, the New York Court of Appeals dismissed the case on other grounds. *Id.* at 1033.

¹⁵⁶ *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1455 (D. Colo. 1994) (quoting the plaintiff’s complaint).

¹⁵⁷ *Id.* (“[M]y adjudication of whether Andrea was provided an adequate Biblical Christian education in accordance with the tenets of the Seventh Day Adventist church is barred by the [F]irst [A]mendment.”).

standard of care. If we did not care about religious liberty, we would just turn it over to the lawyers to inform the jury about Seventh-Day Adventist theology and the reasonable expectations of Seventh-Day Adventists sending their kids to high school. But no court would do that. No matter how clear the standard of care for religious education happens to be, it is simply not something that the government enforces. If you do not like the religious education provided by your religious school, you have options. You can explain to your children how the school is wrong theologically; you can push for change internally; you can petition the higher church authorities (if there are any); you can find a different religious school; or you can send your kids to public school. But you cannot get the government to force the school to teach your version of Christianity, because you have no right to control the religious education of all the other children at that school.

This is not just about religious beliefs and religious teachings—it is about religious practices as well. Consider *Kubala v. Hartford Roman Catholic Diocesan Corp.*¹⁵⁸ *Kubala* involved a type of Catholic charismatic healing service, in which congregants would approach the altar to be prayed over by a priest. They then would rest in the spirit, falling back into the arms of a catcher. Dorothy Kubala had attended these services at this church for years. According to her complaint, during one service, she came under the influence of the Holy Spirit while at the altar and fell back, but was not caught properly. She hit her head and was badly hurt.¹⁵⁹ She brought suit, claiming several ways in which the church was negligent. The church should have conducted the service with people sitting or kneeling rather than standing, it should have put pads down around the altar, it should have warned people more explicitly about the dangers inherent in resting in the spirit, it should have selected better catchers, and it should have had better training for the catchers that it used.¹⁶⁰ All in all, she claimed that the priests and the church “failed to utilize that degree of care and skill or diligence ordinarily exercised by charismatic priests and churches in the Catholic Charismatic Revival.”¹⁶¹ The Connecticut Superior Court dismissed the case on First Amendment grounds, saying that the plaintiff’s claims were all “based on the defendants’ allegedly negligent performance of the healing ritual,” and that “[t]he performance of a religious healing ritual certainly falls under the types of doctrines and practices which the [F]irst [A]mendment is designed to protect.”¹⁶²

¹⁵⁸ 41 A.3d 351 (Conn. Super. Ct. 2011), *aff’d*, 38 A.3d 1252 (Conn. App. Ct. 2012).

¹⁵⁹ *Id.* at 354–55 (summarizing the facts and concluding that Kubala “suffered severe and painful injuries as a result”).

¹⁶⁰ *Id.* at 355, 363.

¹⁶¹ *Id.* at 355.

¹⁶² *Id.* at 357.

Kubala illustrates all the dangers that can arise from thoughtlessly applying regular tort rules to constitutionally protected behavior. The plaintiff probably sees this case as easy. She was injured, the church caused her injuries, and so the church should pay. But her suit really claims that the healing service here was illegal. That is strong language, but it is the right language. Torts are illegal acts.¹⁶³ Tort liability is government regulation, legally indistinguishable from a civil fine.¹⁶⁴ If Dorothy Kubala wins this case, it is a judicial declaration that the way the church conducted this healing service was illegal. And it will threaten charismatic healing services everywhere.

To be sure, neither Kubala nor any other plaintiff will claim that all charismatic healing services are illegal. They will simply say that this charismatic healing service was not done right. But this is a problem with regulation-by-tort: if a jury imposes liability, it will be unclear what exactly the church needs to do to avoid liability in the future, because it will be unclear why the jury imposed liability in the first place. Is it enough that the church puts a warning in the bulletin? Is it enough that the church lays down pads around the altar? A statute that laid out criteria for Catholic charismatic healing rituals would be unconstitutional.¹⁶⁵ But it would be better than handling this through tort law, because there is no safe harbor in tort law. Whatever precautions the church takes, the next jury may well find them insufficient. Lurking in the background, of course, is the reality that some juries will see any precautions as insufficient. They will not say this; they may not even consciously think it. But juries drawn from the outside world will have a hard time seeing the benefit of charismatic worship, and any injured plaintiff will be proof enough that the practice is too dangerous. The safe course for the church will be not to have any sort of charismatic healing service at all. But this chilling effect would intrude deeply on First Amendment freedoms—it would transform worship in the denominations that conduct these services.

This is not to say that *Kubala* is an easy case. There is an important difference between cases challenging church beliefs and those challenging church practices. We all still believe, as Jefferson did, that there is a difference between beliefs and acts.¹⁶⁶ Maybe, all things considered,

¹⁶³ See *Langford v. United States*, 101 U.S. 341, 345 (1879) (“[T]he very essence of a tort is that it is an unlawful act . . .”).

¹⁶⁴ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”).

¹⁶⁵ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue . . . regulates or prohibits conduct because it is undertaken for religious reasons.”).

¹⁶⁶ In his letter to the General Assembly of Virginia, Thomas Jefferson wrote: “That to suffer the civil Magistrate to intrude his powers into the field of [religious] opinion, and to restrain the profession or propagation of [religious] principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty . . . That it is time enough for the rightful purposes of civil

recovery is justified in *Kubala*. My problem is with courts that fail to appreciate what is at stake. There is a case whose facts are almost identical to *Kubala*, where liability was upheld on appeal without the appellate court detecting even the slightest constitutional problem.¹⁶⁷

Intentional infliction of emotional distress creates similar kinds of problems. If negligence permits the free exercise of religion only when reasonably prudent, the emotional distress tort permits the free exercise of religion only when not overly offensive. In some sense, the emotional distress tort is even more dangerous to constitutional values. Negligence traditionally required some sort of physical or economic impact; the emotional distress tort never did.¹⁶⁸ Juries can impose liability on almost any act they find sufficiently outrageous.¹⁶⁹ This has created some real problems, even outside the religious context.¹⁷⁰ And within the religious context, the effects have been extreme. A series of cases imposed enormous damages on unpopular minority groups, usually Scientologists and Hare Krishnas, for what juries claimed were improper methods of religious indoctrination.¹⁷¹ The lesson here seems to be that “given the opportunity to assess damages against religious organizations and officials for religiously motivated ‘outrageous’ conduct, juries do so with gusto.”¹⁷²

Many religions teach and do things that outsiders find outrageous. Everyday acts of church discipline, for example, seem outrageous to outsiders. Churches enforce certain standards, and expel or punish those who fail to meet them. Some shun those who have extramarital sex,¹⁷³ or

government for its officers to interfere when principles break out into overt acts against peace and good order . . .” 5 PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS’ CONSTITUTION* 77 (1987).

¹⁶⁷ See *Dadd v. Mount Hope Church & Int’l Outreach Ministries*, No. 278861, 2009 WL 961516 (Mich. Ct. App. Apr. 9, 2009) (upholding a jury verdict of over \$300,000 to a congregant who hit her head on the floor while slain in the spirit, without any reference to the First Amendment).

¹⁶⁸ See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 56–57 (1982) (explaining that the emotional distress tort “resembles negligence in that the defendant’s conduct is evaluated in terms of a vague standard,” but that there is no “requirement of a palpable, physical injury”).

¹⁶⁹ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (“Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”).

¹⁷⁰ See Givelber, *supra* note 168, at 52 (“[T]hat civil liability should turn on the resentments of the average member of the community appears to turn the passions of the moment into law.”); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (“‘Outrageousness’ . . . has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views . . .”).

¹⁷¹ Paul T. Hayden, *Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress as a Weapon Against “Other People’s Faiths,”* 34 WM. & MARY L. REV. 579, 615–22 (1993).

¹⁷² *Id.* at 617.

¹⁷³ See, e.g., *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875 (9th Cir. 1987); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007).

who speak out against the church,¹⁷⁴ or who commit heresy.¹⁷⁵ They do so for theological reasons, drawn from religious teaching, thinking it is the best way to encourage the expelled to reform and to protect those who remain. But juries will not be inclined to see religious discipline as an attempt to maintain social and doctrinal unity in an increasingly secular world. They will ask why the church could not maintain unity in some other way. They will ask why the church did not have better procedures to determine wrongdoing, why the scriptural text or church teaching should necessarily be read that particular way, why certain immoral acts get treated differently than others, and why religious groups that are supposed to be about forgiveness somehow cannot forgive.

The Supreme Court, more than a century ago, said that courts must stay out of this business: “[W]e have no power to revise or question ordinary acts of church discipline, or of excision from membership.”¹⁷⁶ Lower courts have followed suit, dismissing emotional distress claims stemming from acts of excommunication and shunning.¹⁷⁷ Some say the principle here is one of equality and consistent with *Smith*.¹⁷⁸ But again this is not true. Courts in these cases do not instruct juries to ignore the religious dimensions to these cases; they do not try to somehow separate the secular part from the religious part, and then compensate only for the former. They simply dismiss these cases. Churches have the right to expel their members for the same kinds of reasons that churches have the right to expel their ministers. Determining whether someone was expelled for a good or bad religious reason is difficult. But more fundamentally, it is not the jury’s job to decide which religious reasons are good and which are bad. No one has the right to be a member of a church that does not want him.

¹⁷⁴ See, e.g., *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975); *Anderson v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, No. M2004-01066-COA-R9-CV, 2007 WL 161035 (Tenn. Ct. App. Jan. 19, 2007).

¹⁷⁵ See, e.g., *Williams v. Gleason*, 26 S.W.3d 54 (Tex. App. 2000); cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (involving a minister removed from her position for violating internal religious rules).

¹⁷⁶ *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872). The Court continued, “[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” *Id.* at 139–40.

¹⁷⁷ See, e.g., *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875 (9th Cir. 1987); *Marks v. Estate of Hartgerink*, 528 N.W.2d 539 (Iowa 1995); *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Korean Presbyterian Church v. Lee*, 880 P.2d 565 (Wash. Ct. App. 1994).

¹⁷⁸ Eugene Volokh, for example, says, “[I]f a church inflicts emotional distress on the politician by excommunicating him, the excommunication would be constitutionally protected under the Free Exercise Clause.” Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1299 (2005). This result, he says, is required because the “emotional distress that flows from the religiosity of the offensive conduct, like emotional distress that flows from the content of people’s speech, may not form the basis of legal liability even under the generally applicable emotional distress tort.” *Id.*

To be sure, some of these claims are sympathetic and well-intentioned. Orthodox Jews have pointed out a very troubling problem in their own communities about the rules regarding divorce.¹⁷⁹ Jewish law prevents a wife from getting a religious divorce without the consent of her husband. This, in turn, has unequal effects on the two parties. A still-married woman who cohabits with a new partner is seen as an adulterer, and children born of that union are stigmatized. But a still-married man can cohabit without it being seen as adulterous, and children of that union are not humiliated. To some, tort law is the answer to this religious problem. Tort law should be used to force the husband into giving his wife a religious divorce.¹⁸⁰

But the gender inequity here is a belief and practice of Orthodox Judaism. Maybe it should change. But it should change because Orthodox Jews change it, not because the state changes it. The state does not reform Orthodox Judaism, even at the insistence of a substantial fraction of Orthodox Jews. And if Orthodox Judaism fails to change its practices, it may well lose members or even fall apart. But which religions survive is not the concern of the government. We have no established church; religions here do not get propped up by the state. Whether religions flourish or fail depends on the choices they make. The government does not punish them for those choices, but it also does not shield them from the consequences of those choices.

Other kinds of torts, like breach of fiduciary duty, should be treated the same way as negligence and emotional distress claims. Insiders should not be able to bring suits that impinge on a church's chosen religious beliefs or practices. Substance should be more important than form—constitutional protection should not depend on the elements of state tort law.¹⁸¹ Claims that a church committed malpractice should thus be treated the same, whether they are styled as negligence claims, breach of fiduciary duty claims, negligent infliction of emotional distress claims, or something

¹⁷⁹ Good introductions to this issue are Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 811–12 (1998), and Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 364–70 (1999).

¹⁸⁰ This kind of religious divorce is known as a “get.” See, e.g., Alan C. Lazerow, *Give and “Get”?* Applying the Restatement of Contracts to Determine the Enforceability of “Get Settlement” Contracts, 39 U. BALT. L. REV. 103, 124 (2009) (footnote omitted) (discussing how “many authors have argued that [women denied a get] can recover from their recalcitrant husbands under the widely-accepted tort of Intentional Infliction of Emotional Distress (IIED)”; see also David M. Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal to Give a Get as Intentional Infliction of Emotional Distress*, 4 J.L. & RELIGION 405 (1986).

¹⁸¹ See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (“[A] State cannot foreclose the exercise of constitutional rights by mere labels.” (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963))).

else.¹⁸² But courts sometimes falter. In a fit of formalism, courts sometimes label something a clergy malpractice claim when they want to dismiss it and a negligence claim when they do not.¹⁸³

Finally, it is worth spending a moment on claims that should not be barred. Claims by outsiders are unaffected by the principle of church autonomy, because religious groups have no right to affect nonconsenting outsiders. And every insider has a constitutional right to become an outsider.¹⁸⁴ In the brainwashing cases against the Hare Krishnas and the Scientologists, tort judgments were often based on flimsy reasons.¹⁸⁵ But if churches physically prevented people from leaving, liability would be an easy case. One difficult case involved a church member accused of violating a church prohibition on fornication.¹⁸⁶ In the middle of the church disciplinary proceedings, she tried to quit the church. Yet the church refused to stop the disciplinary proceeding. She sued and won a substantial jury verdict.¹⁸⁷ And on appeal, the Oklahoma Supreme Court generally agreed with the jury. The church's actions were constitutionally protected up to the moment she withdrew, but the church had to immediately abandon the disciplinary proceedings once she abandoned the church. This makes sense in a certain way: no one believes that churches can continue to harry people who have long left the church. But at the same time, individuals cannot have a unilateral right to shut down church proceedings. One has the right to never get on a roller coaster, but one has no right to insist that the roller coaster stop halfway up the hill (or halfway down the hill, for that matter). Yet this situation sits right on the fault line.

Finally, claims that do not impinge on the church's religious beliefs and practices are not barred either. There is no problem with liability in a

¹⁸² See *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir. 1994) (Ripple, J., concurring) (noting that a claim for breach of fiduciary duty is "simply an elliptical way of alleging clergy malpractice"); *Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991) ("[A]s with her negligence claim, [the plaintiff's] fiduciary duty claim is merely another way of alleging that the [clergyman] grossly abused his pastoral role, that is, that he engaged in malpractice." (emphasis omitted)); *Amato v. Greenquist*, 679 N.E.2d 446, 451 (Ill. App. Ct. 1997) ("[W]e will not determine the justiciability of [the plaintiff's] counts based upon the nomenclature used by the plaintiff . . ."); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198, 205 (Utah 2001) ("[D]espite [the] characterization of her negligence-based claims as gross negligence, negligent infliction of emotional distress, and breach of fiduciary duty, we must deal with the real issue here—clergy malpractice.").

¹⁸³ See, e.g., *Erickson v. Christenson*, 781 P.2d 383, 387 n.5 (Or. Ct. App. 1989) ("Characterizing plaintiff's claim as one for 'clerical malpractice,' [the defendant] argues that recognizing such a cause of action would require the court to develop a standard of care for pastoral counseling, an undertaking which inevitably would violate the First Amendment However, plaintiff's complaint alleges simple negligence.").

¹⁸⁴ See *supra* notes 112–16 and accompanying text (elaborating on this point).

¹⁸⁵ See *supra* notes 171–72 and accompanying text (elaborating on this point).

¹⁸⁶ See *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989).

¹⁸⁷ In the resulting suit, the plaintiff was awarded \$390,000 in damages as well as prejudgment interest. *Id.* at 769.

slip-and-fall case that happens in the church parking lot. It usually does not even occur to defendants in those cases to raise the First Amendment as a defense, and it does not matter whether the plaintiffs are members of the church or not.¹⁸⁸ The clergy sex abuse cases also probably fall into this category, although a full discussion of those cases is impossible here.¹⁸⁹

B. Battery, False Imprisonment, and the Like

Many courts, even those that dismiss negligence or emotional distress claims, often remark about how torts like battery and false imprisonment are different. Liability there, these courts suggest, should raise no constitutional issues.¹⁹⁰ This common intuition makes a great deal of sense, but it is perhaps more complicated than commentators have suggested. Consider a recent decision by the Texas Supreme Court: *Pleasant Glade Assembly of God v. Schubert*.¹⁹¹ The case involved a seventeen-year-old girl, Laura Schubert, and her family's church, Pleasant Glade Assembly of God.¹⁹² Pleasant Glade Assembly of God was a Pentecostal church that held itself out as adhering to a literal interpretation of the Bible, including the Bible's passages about spirits, demons, and demon possession. One Friday, Laura Schubert attended a youth group event at her church. After reports that someone saw a demon, the youth minister led the group in anointing the church in oil and casting out the demons. Schubert returned to the church for two services on Sunday.

The important events began with the Sunday evening service. During that service, Schubert collapsed to the ground, claiming that demons were after her. Church members then held her down as part of an exorcism. Schubert clenched her fists, gritted her teeth, made guttural noises, and

¹⁸⁸ See *Proto v. Most Holy Trinity*, No. CV095005234S, 2011 WL 2478309 (Conn. Super. Ct. May 25, 2011) (involving a plaintiff who alleged that he "was walking back to his vehicle, which was parked in a parking lot adjacent to the Church, when he 'tripped and was caused to fall and/or slip on and/or over a cement speed bump that was in the parking lot,' thereby sustaining personal injuries"); see also *Hanson v. Saint Luke's United Methodist Church*, 704 N.E.2d 1020 (Ind. 1998) (citing other cases).

¹⁸⁹ Others have looked at those cases thoughtfully and in detail. See Lupu & Tuttle, *supra* note 142. Douglas Laycock rightly points out how claims in a few of these cases would have far-reaching implications that would create serious religious liberty problems, but those seem to be atypical. See Laycock, *supra* note 80, at 273–74.

¹⁹⁰ See *Higgins v. Maher*, 258 Cal. Rptr. 757, 761 (Cal. Ct. App. 1989) (barring claims of intentional defamation and intentional infliction of emotional distress, but saying that "torts such as battery, false imprisonment or conversion cannot be perpetrated upon its members with civil impunity"). A number of other cases have similar language. See *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987); *Dobrota v. Free Serbian Orthodox Church*, 952 P.2d 1190, 1195 (Ariz. Ct. App. 1998); *Heard v. Johnson*, 810 A.2d 871, 885 (D.C. 2002); *Glass v. First United Pentecostal Church of DeRidder*, 676 So. 2d 724, 737 (La. Ct. App. 1996); *Tidman v. Salvation Army*, No. 01-A-01-9708-CV00380, 1998 WL 391765, at *7 (Tenn. Ct. App. July 15, 1998); *Patton v. Jones*, 212 S.W.3d 541, 554 (Tex. App. 2006).

¹⁹¹ See 264 S.W.3d 1 (Tex. 2008).

¹⁹² For the facts that follow, see *id.* at 1–5.

sometimes demanded to be freed. She came back to the church on Monday and again on Tuesday. On Wednesday, similar things happened. She again collapsed and writhed on the floor; church members again forcibly held her down, praying for her and trying to help her. On both occasions, Schubert suffered scrapes, carpet burns, and bruises. She initially did not mention any of this to her parents. But eventually she did, and eventually the Schubert family parted ways with the church and brought suit against it. In a 5–4 decision, the Texas Supreme Court held that Schubert’s claims of assault, battery, and false imprisonment were all barred by the First Amendment. Its logic was similar to the *Kubala* case.¹⁹³ Schubert was a member of the church, seeking to impose liability on the church because of what occurred during its long-established religious beliefs and practices.

Unlike the claims in the last Part, these should go forward to a jury. Perhaps part of it is that the case involves physical injury, although the same could be said for *Kubala*. Perhaps another part is that assault, battery, and false imprisonment involve rules rather than standards, which do not ask open-ended questions about the reasonableness or outrageousness of religious conduct.¹⁹⁴ But the best reason relates back to consent as the justification for church autonomy. Consent here has a double meaning and a double effect—it is part both of the church autonomy analysis and of the intentional tort analysis. If Schubert consented to the exorcism, then her intentional tort claims should fail for reasons unrelated to the religious context of her injuries. If Schubert did not consent, then her claims should succeed because the elements of the tort are satisfied and because that same lack of consent simultaneously vitiates any claim of church autonomy.¹⁹⁵ Schubert cannot sue about church practices in which she voluntarily participated. But she also has the right to leave the church at any time. An old case involved a Catholic priest who sued his superiors for committing him to a Catholic asylum where he would not be freed until he confessed his sins.¹⁹⁶ Recovery in that case is easy; and recovery in Schubert’s case is similarly easy if the facts are as she alleges.

Schubert’s claim should go forward, but there is still a vexing problem here. The culture gap between any jury and this church will be enormous. Texas has many Christian churches. But few Christians really believe in demons as a regularly occurring physical phenomenon, and even fewer

¹⁹³ See *supra* notes 158–65 and accompanying text (discussing *Kubala*).

¹⁹⁴ See, e.g., *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 16 (Tex. 2008) (Jefferson, C.J., dissenting) (internal quotation marks omitted) (noting that “[f]alse imprisonment does not require a showing of outrageous conduct” and “[e]valuating whether Pleasant Glade falsely imprisoned Schubert does not require the factfinder to determine the objective truth or falsity of the defendants’ belief”).

¹⁹⁵ The opinions in the case recognize this. See *id.* at 23 n.1 (Green, J., dissenting) (“If Schubert had consented to the church’s actions, the consent—under our familiar, neutral principles of tort law—would have completely defeated her claims.”).

¹⁹⁶ See *O’Moore v. Driscoll*, 28 P.2d 438 (Cal. Dist. Ct. App. 1933).

conduct exorcisms. Most Christians will see this church as a cult. Non-Christians will be equally suspicious. Yet there is an argument for consent here, or at least for a reasonable mistake about consent.¹⁹⁷ Schubert knew about the church's beliefs about demons, and she participated in services anyway. And Schubert freely returned to the church following the first exorcism, after having several days to reflect on what happened. Legal commentators are probably much more sensitive to these things than the average jury. But most of them have simply assumed that there is no way that anyone could ever have consented to this.¹⁹⁸ This backhanded exposes a serious problem: The jury will not approach the issue of consent with an open mind.

The best solution is not to dismiss the case outright, as the Texas Supreme Court did.¹⁹⁹ But it also is not to do what the lower court did and what the dissent in the Texas Supreme Court suggested. They really believed that the case could be handled by keeping all evidence of religion from the jury. This is, in fact, what the lower court did. The jury "heard almost nothing about religion during the trial due to the trial court's diligent attempt to circumvent First Amendment problems and to honor the court of appeals' mandamus ruling that neither side introduce religion as a reason for [Schubert's] restraint."²⁰⁰ But anyone can see how this will be a complete failure. Taking religion out of this case makes the church's actions inexplicable and even more offensive. They are now physically pinning someone down for no reason at all. The church cannot defend itself without talking about religion. But that brings us back into the religious thicket.

These problems cannot be solved; they can only be managed. The best answer lies in a jury determination about consent, coupled with substantial

¹⁹⁷ Either would be enough to defeat liability. See Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1069 (2006) (describing "the well-accepted apparent-consent doctrine," which says that "a defendant with a reasonable belief that plaintiff consents is absolved of liability, even if plaintiff does not actually consent").

¹⁹⁸ See Thomas Clark, *Exorcising Our Free Exercise Jurisprudence: A New Interpretation of Free Exercise in Pleasant Glade Assembly of God v. Schubert*, 7 FIRST AMEND. L. REV. 350, 366 (2009) ("In this case there is no consent to be subjected to false imprisonment or assault at all."); Cynthia Koploy, Note, *Free Exorcise Clause? Whether Exorcism Can Survive the Supreme Court's "Smith Neutrality,"* 104 NW. U. L. REV. 363, 369 (2010) ("The question presented to the Texas Supreme Court in *Pleasant Glade* was whether religious actors could be held liable for conducting a religious exercise on a church member when the exercise clearly satisfied the elements of a secular intentional tort.").

¹⁹⁹ See *Pleasant Glade*, 264 S.W.3d 1.

²⁰⁰ *Id.* at 18 (Jefferson, J., dissenting) (emphasis omitted). There has been a surprising amount of support for this idea. See Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 48 (2010) ("The trial court was able to keep evidence about the church's beliefs about exorcism out of the trial, and the jury was free under tort law to conclude that [Schubert] had consented to her church members' conduct and find no liability."); Koploy, *supra* note 198, at 382 (noting how "the trial court in *Pleasant Glade* kept the jury from hearing any religious testimony at the direction of the appellate court").

judicial review of that determination. The Supreme Court has developed principles for that review in the free speech context. Courts must carefully separate culpable defendants from nonculpable ones.²⁰¹ Courts must independently review the facts.²⁰² And they must decide the sufficiency of those facts under a clear and convincing standard.²⁰³ This is what should happen in *Pleasant Glade* and in the other cases where similar torts are alleged.

IV. CHURCH AUTONOMY AND ASSUMED LEGAL OBLIGATIONS

As we move from imposed legal obligations (such as tort) to assumed legal obligations (such as contract and property), the context shifts. Churches have no control over tort law or their obligations under it. But churches do have control over their contracts and property arrangements. The ministerial exception itself reflects this difference. Before *Hosanna-Tabor*, courts agreed that ministers could not bring discrimination claims, but they split on whether ministers could bring contract claims.²⁰⁴ *Hosanna-Tabor* mentions the issue, but stays away from it.²⁰⁵

This Article proposes a quite different legal rule for assumed legal obligations. Rules of contract and property enhance autonomy; they enable churches to structure their affairs as they wish. In general, principles of contract and property should apply to churches, as they do to other organizations. But this creates two problems that must be explored. The first lies in the difficulty of discerning what the church intended its legal obligations to be; this will be called the “legal intent” problem. The second lies in the difficulties that can arise from changed circumstances; this will be called the “dead hand” problem.

²⁰¹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982) (explaining that “[t]he First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another”).

²⁰² See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (“[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964))).

²⁰³ See *Sullivan*, 376 U.S. at 285–86.

²⁰⁴ There are several cases suggesting that such claims should be permitted. *E.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006); *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). For cases suggesting that such claims should be barred, see *infra* note 207.

²⁰⁵ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”).

A. Contract Cases and the Like

Again it is helpful to start where there is consensus. In the employment discrimination context, courts universally dismiss discrimination claims brought by clergy.²⁰⁶ In the contract context, courts universally dismiss cases brought by ministers under “just cause” provisions of their contracts.²⁰⁷ Courts will not decide whether a congregation really had contractually sufficient reasons for firing the priest or the rabbi.²⁰⁸ Such cases involve the same pretext problem that surfaced with the ministerial exception—juries charged with deciding the issue of good cause will have to make decisions about what the minister’s religious duties were and whether they were done right.²⁰⁹

In one sense, the contract claims are actually worse. In discrimination cases, the law establishes proper and improper reasons for dismissal. Sex, race, or being over forty are legally unjust causes; being an ex-offender, under forty, or a Green Party member are not.²¹⁰ In contract cases, juries decide not only why the church let the minister go, but also what types of reasons are valid. Nothing here stops juries from simply overriding religious judgments. A church might believe that a growing religious school and a tight budget justify letting go of a mediocre minister with an alcohol problem. A jury might find all of those same facts, but deem the firing illegal. And, of course, contract claims pose the same classic problem present in *Hosanna-Tabor*: Someone now has a right to lead a church against the church’s demonstrated will.

A natural first reaction is to question why any special theory of autonomy is necessary here. If churches want to avoid these just-cause contract claims, they should simply avoid making promises of just-cause employment. Contract law poses no inherent threat to church autonomy;

²⁰⁶ See *supra* Part I (discussing *Hosanna-Tabor* and the ministerial exception).

²⁰⁷ See, e.g., *Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654, 655 (2d Cir. 2009) (dismissing a rabbi’s claim that under the terms of the written contract, he could only be fired for “gross misconduct or willful neglect of duty”); *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1013 (N.D. Iowa 2007) (dismissing a rabbi’s claim that under the terms of the written contract because she could only be fired for “gross misconduct or an ongoing inability to perform the duties described in the agreement”); *Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y.*, No. 01-CV-7871 (KMW), 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004) (dismissing a minister’s claim that under the terms of the written contract, she could only be fired “for cause”).

²⁰⁸ See, e.g., *Friedlander*, 347 F. App’x at 655 (“[R]eview of *Friedlander*’s claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple’s funeral service policies . . . [and] whether any failures rose to the level of ‘gross misconduct or willful neglect of duty’”).

²⁰⁹ See *Lund*, *supra* note 28, at 51–57 (labeling this the inquiry problem and unpacking it in more detail).

²¹⁰ See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 623, 631 (2012)) (age over forty); Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2012)) (sex and race).

churches just need to be careful when making commitments.²¹¹ And surely the vast majority of a church's contracts will be enforced without regard to religion. A church's contracts with the property insurer or the gas company get treated as ordinary contracts. Otherwise, churches might have a hard time getting insurance or getting the heat turned on. The freedom to make legally binding contracts is so essential that taking it away usually amounts to oppression. Southern states, for example, took the right to contract away from African Americans during slavery and after Reconstruction;²¹² one state is now trying to take it away from illegal immigrants.²¹³ This is why the Supreme Court, in the very first church autonomy case, prominently stressed the rights of religious organizations to enter into contract and property agreements.²¹⁴ And in some circumstances, it advances not only liberty, but a specifically religious liberty: most will think of it as a good thing that courts will enforce a Muslim husband's promise to pay the sum he promised in the Mahr agreement, and a Jewish husband's promise to divide the marital property according to the order of the Jewish *beth din*.²¹⁵

1. The Legal Intent Problem.—What then explains the fierce reluctance of courts to enforce contract claims that involve distinctively religious obligations, such as the refusal of courts to adjudicate a dismissed minister's claim that he was fired without cause? This piece argues that it is chiefly because of what it terms the legal intent problem. In many of these cases, there is insufficient reason to think the parties intended or expected the contract to give rise to legally enforceable rights.

²¹¹ Some courts have seized on this point. “[A]pplication of state contract law does not involve government-imposed limits on [the defendant’s] right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary.” *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006); see also *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (“A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court.”).

²¹² See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 565 (2005) (“The inability of African-Americans to avail themselves of the law, whether by entering into contracts or by obtaining redress for wrongs, was among the hallmarks of slavery and the Black Codes.”).

²¹³ See Beason-Hammon Alabama Taxpayer and Citizen Protection Act of 2011, Pub. Act No. 535, § 27 (codified at ALA. CODE § 31-13-26(a) (2013)) (“No court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States . . .”).

²¹⁴ *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1871) (“Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally protected under the protection of the law . . .”).

²¹⁵ See *Lang v. Levi*, 16 A.3d 980 (Md. Ct. Spec. App. 2011) (upholding a decision dividing marital property made by of a Jewish *beth din*); *Odatalla v. Odatalla*, 810 A.2d 93, 95, 98 (N.J. Super. Ct. Ch. Div. 2002) (upholding an Islamic Mahr agreement dividing marital property because the parties had agreed to it before marriage). See generally Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 *N.Y.U. L. REV.* 1231 (2011).

To understand this point, one must begin with how we regularly make promises without any expectation that they will end up in court. You promise your spouse to go to the grocery store; you promise the Associate Dean to do a better job with faculty recruiting; you promise your travel agent not to book online. You may intend to keep these promises. But they are not promises that the law will necessarily enforce. It is not that these promises are trivial or hastily made. No-fault divorce is the rule these days, even though marital vows usually rank among the most important promises of peoples' lives.²¹⁶

Legal enforcement of promises, most think, should track peoples' desires for legal enforcement. In a perfect world, courts would enforce a promise if, and only if, the contracting parties would have wanted judicial enforcement.²¹⁷ But our world is far from perfect. Parties often do not make their intentions clear; sometimes they have different intentions. Even more problematically, parties often have no intentions regarding enforcement—they never think one way or the other about the prospect of litigation when they make promises.

In such situations, everything turns on the default. In England, the traditional default was non-enforcement—that is, promises were not enforceable without some indication that the parties intended judicial enforcement.²¹⁸ American law flips that presumption, generally assuming that parties want legal enforcement of their promises unless they specify otherwise.²¹⁹ This is where the problem lies, because it opens up the door to contract claims. When one looks at the cases, one sees courts constantly

²¹⁶ See Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 119 (2011) (“[A]ll fifty states have adopted some version of no-fault divorce.”).

²¹⁷ See Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 1022 (“In the ‘heaven of legal concepts’ . . . actors would not simply ‘promise’: they would ‘enforceably-promise’ or ‘unenforceably-promise’ . . . promisees would rely accordingly, and contract law could be taught in one semester.”).

²¹⁸ See *Balfour v. Balfour*, [1919] 2 K.B. 571 (A.C.) 579 (U.K.) (refusing to enforce a promise between a husband and wife because “the parties did not intend that [it] should be attended by legal consequences”); Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1448–50 (2009) (discussing the English rule).

²¹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) (“Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”). This somewhat overstates the matter. Other principles of contract law put limits on the kinds of promises courts will enforce—perhaps most notably, the requirement of consideration. See *id.* §§ 17, 71–81 (discussing consideration). And there are some exceptions to the presumption of enforcement. See *id.* § 21, cmt. c (“In some situations the normal understanding is that no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract. Traditional examples are social engagements and agreements within a family group.”); see also 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.13, at 190 (rev. ed. 1993) (“[I]f the subject matter and terms are *not* such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so.”).

asked to intervene in religious disputes under the flimsiest of contractual pretenses.²²⁰

Perhaps the earliest and most well-known case involved a district superintendent who allegedly told a pastor that, if the pastor kept working at his current parish, he would eventually get “a congregation more suited to his training and skills.”²²¹ The language was oral, nonspecific, and completely off the cuff. It was not a promise; it was not even a statement of fact—it was a statement about what the future might bring. It is the kind of thing people are told all the time, but the court let his breach of contract claim go forward.²²² In a more recent decision, one after *Hosanna-Tabor*, a missionary had a written employment contract with his church that said he was an at-will employee. The contract specifically mentioned the ministerial exception as being applicable to him.²²³ But the missionary alleged that before he left the country, he was orally promised that he would not be fired during the first three years unless there were “lifestyle issues.” When he was let go, he brought suit and his case continues.²²⁴

First published in 1784, the Book of Discipline “sets forth the theological grounding of The United Methodist Church.”²²⁵ It lays out procedures and substantive criteria for basically everything the Methodist church does.²²⁶ But plaintiffs regularly treat it as an 800-page-long employment contract. The church’s hostility to racial and gender discrimination becomes a legally binding promise not to discriminate;²²⁷ its detailed internal procedures for conducting dismissals, written in unambiguously religious language, become legally binding promises that the church must fulfill to the letter.²²⁸

²²⁰ See *infra* notes 221–42 and accompanying text (discussing cases).

²²¹ See *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990).

²²² *Id.* at 1361 (remanding for further proceedings).

²²³ See *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 991 (M.D. Tenn. 2012) (reciting contract language that the employee’s “relationship to the IMB will be that of an ‘at will’ employee” and moreover that “applicable First Amendment law [will also apply], including the ‘ministerial exception’”).

²²⁴ *Id.* at 1001–02 (dismissing the state law claims for lack of supplemental jurisdiction and sending the remainder of the case to state court).

²²⁵ THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, at v (2012).

²²⁶ *Id.* (“The *Discipline* [i]s the instrument for setting forth the laws, plan, polity, and process by which United Methodists *govern themselves*” (emphasis added)).

²²⁷ See *id.* at ¶ 425 (“[A]ppointments are made without regard to race, ethnic origin, gender, color, disability, marital status, or age, except for the provisions of mandatory retirement.”). This was litigated as a contract claim in *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 2004).

²²⁸ See *Music v. United Methodist Church*, 864 S.W.2d 286, 287 (Ky. 1993) (“Dr. Music claimed that a contractual relationship had been established between the parties by virtue of the *Book of Discipline of the United Methodist Church* (1988 edition), the ‘Employee Manual’ of the United

If accepted, these claims would never end. One dismissed minister claimed a contractual right to return to the pulpit because of an internal working policy of the church stating, “Where employees are found to be ineffective, counsel shall be given them”²²⁹ Another sued claiming that he had been fired in an improperly convened meeting and on an improperly seconded motion.²³⁰ These principles go beyond employment. One disgruntled Baptist tried to essentially appeal a parliamentary ruling of the Southern Baptist Convention into the federal courts.²³¹ He had tried unsuccessfully to amend the slate of candidates that had been proposed, and then asked the court to dismiss the current executive board of the organization and order a new convention run under his interpretation of the rules. An early Supreme Court case, *Serbian Eastern Orthodox Diocese v. Milivojevich*, made it clear that this is inappropriate—courts should not inquire into whether churches follow their own procedures.²³² But some courts ignored *Milivojevich*.²³³ *Hosanna-Tabor* reiterates the point, but it is too soon to tell whether it will be consistently heeded.²³⁴

Finally, there are the various quasi-contractual claims—alleged violations of the covenant of good faith and fair dealing,²³⁵ interference with prospective advantage,²³⁶ interference with contract,²³⁷ wrongful

Methodist Church. He further claimed that appellees violated the terms of his ‘employment contract’ by failing to follow the procedures set forth in Paragraphs 2620–2625 of the *Book of Discipline*”)

²²⁹ *Pierce v. Iowa-Mo. Conference of Seventh-Day Adventists*, 534 N.W.2d 425, 427 (Iowa 1995). There are other similar cases. *See, e.g., Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) (dismissing a claim over whether a nationwide church complied with its own bylaws when it removed the plaintiff from its list of eligible ministers); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1208 (Conn. 2011) (dismissing a claim that “the archdiocese’s own policies, procedures and practices with respect to performance evaluations” should be read so as “to provide the plaintiff with an opportunity to improve her job performance prior to terminating her employment or not renewing her contract”); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 311–12 (Mass. 2004) (dismissing a similar procedural claim).

²³⁰ *See Errgong-Weider v. United Congregational Church of Norwalk*, No. FSTCV116009458S, 2011 WL 5842378, at *1 (Conn. Super. Ct. Oct. 25, 2011).

²³¹ *See Crowder v. S. Baptist Convention*, 828 F.2d 718 (11th Cir. 1987).

²³² 426 U.S. 696, 724–25 (1976).

²³³ *See, e.g., Errgong-Weider*, 2011 WL 5842378, at *11 n.8 (“[A] party may seek judicial relief based on a church’s failure to follow its own procedures” (quoting *Alicea v. New Brunswick Theological Seminary*, 581 A.2d 900, 908 (N.J. Super. Ct. App. Div. 1990), *aff’d*, 608 A.2d 218 (N.J. 1992))); *Ervin v. Lilydale Progressive Missionary Baptist Church*, 813 N.E.2d 1073, 1077 (Ill. App. Ct. 2004) (“[T]he [F]irst and [F]ourteenth [A]mendments do not prohibit court intervention when the church fails to follow the procedures it has, itself, enacted.”).

²³⁴ *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012) (internal quotation marks omitted) (“We thus held [in *Milivojevich*] that by inquiring into whether the Church had followed its own procedures, the State 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.”).

²³⁵ *See, e.g., Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654 (2d Cir. 2009); *Marshall v. Munro*, 845 P.2d 424 (Ala. 1993); *Celnik v. Congregation B’Nai Israel*, 131 P.3d 102 (N.M. Ct. App. 2006).

²³⁶ *See, e.g., Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997).

discharge,²³⁸ unfair termination,²³⁹ and promissory estoppel.²⁴⁰ These are sometimes seen as contract claims, though they do not necessarily depend on any actual promise. In a suit against a Catholic seminary, a disappointed candidate claimed that his classmates, who he claimed were gay, had sexually harassed him. The New Jersey Supreme Court gave him a trial on his claim of an “implied contract”—his assertion that the seminary somehow promised him that this would not happen without making any specific promise at all.²⁴¹

Where courts dismiss these claims, the opinions typically talk about how deciding the contract claim would involve inherently religious issues that courts are not fit to resolve.²⁴² This is certainly true; deciding whether the rabbi had been fired for “good cause” would require courts to pass on religious questions. But this is not the root of the problem. Imagine a rabbi who will not sign his employment contract without a judicially enforceable “good cause” clause in it. If courts refuse to enforce such clauses, the temple and the rabbi will be at an impasse. They should be able to put something in the contract, if they want, that authorizes the court to adjudicate the matter. Many noted legal scholars disagree with this idea. They claim that the immunity surrounding matters of internal church governance is not waivable—that courts cannot get involved in these religious disputes, no matter what the parties want.²⁴³ But this is unintuitive. If they are sufficiently clear about it, religious groups should be able to enlist the courts to help them resolve their disputes.

The best explanation then for why courts hesitate to enforce these promises relates to expectations about legal enforcement. Parties simply do

²³⁷ See, e.g., *Celnik v. Congregation B’Nai Israel*, 131 P.3d 102 (N.M. Ct. App. 2006).

²³⁸ See, e.g., *Kraft v. Rector, Churchwardens & Vestry of Grace Church in N.Y.*, No. 01-CV-7871 (KMW), 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004).

²³⁹ See, e.g., *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511 (Va. 2001).

²⁴⁰ See, e.g., *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011).

²⁴¹ See *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002).

²⁴² See, e.g., *Friedlander v. Port Jewish Ctr.*, 347 F. App’x 654, 655 (2d Cir. 2009) (“[R]eview of Friedlander’s claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple’s funeral service policies . . . [and] whether any failures rose to the level of ‘gross misconduct or willful neglect of duty’”).

²⁴³ See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (Posner, J.) (citation omitted) (“[T]he ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel. A federal court will not allow itself to get dragged into a religious controversy even if a religious organization wants it dragged in.”); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 58 n.236 (1998) (“[T]he objection to judicial inquiry into religious doctrine cannot be waived.”); Lupu & Tuttle, *supra* note 142, at 1809 (“Religious entities thus possess a degree of autonomy over the resolution of internal disputes unlike any other known to the law, and this autonomy may not be surrendered by contract or other act of consent to state power.”).

not intend the “good cause” provision in the rabbi’s contract to be enforceable in a court of law. Churches mean to decide for themselves whether the minister was fit or unfit. That is one of their most core religious functions. It would be astonishing if they meant to turn that role over to some court. The religious questions inherent in these cases are not the problem; they are a symptom of the problem. The problem is that these promises were never intended to be judicially enforceable.

To handle this, we need a robust doctrine of waiver. Churches should be allowed to waive their right of self-governance.²⁴⁴ But waivers must be intentional,²⁴⁵ they must be clear and unambiguous,²⁴⁶ and there must be a strong presumption against waiver generally.²⁴⁷ If a church and a minister want judicial enforcement of the “good cause” clause in a minister’s contract, they must say so explicitly. Perhaps some more general provisions in a contract could suggest waiver—a choice-of-law clause, a choice-of-forum clause, or a liquidated damages clause. But even these should not be enough. Those clauses would only indicate that a lawyer drafted the employment contract. Absent some explicit mention of judicial resolution, contract claims should not go forward.²⁴⁸

2. *The Dead Hand Problem.*—The second problem with enforcing religious contracts is quite different from the first, and it comes up much less frequently. The dead hand problem arises from the intertemporal nature of contracts. Contracts create obligations today that the parties will be legally bound to perform in the future, sometimes the far distant future. In the context of religious obligations, this can create knotty problems. Religious arbitration provides a good example. Two Jews marry, and agree that in the event of a divorce, a *beth din* (a Jewish religious court) will resolve all legal issues between them. Years later, one of the spouses leaves the faith. Years after that, they divorce. Maybe the initial agreement should be enforced, even after all these years, even though one party left the faith long ago. But there is something troubling about this.²⁴⁹

²⁴⁴ See Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1471–73 (1988).

²⁴⁵ See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (internal quotation marks omitted) (“The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege.”).

²⁴⁶ See *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992) (internal quotation marks omitted) (“Waivers . . . to be effective, must be unequivocally expressed.”).

²⁴⁷ See *Roell v. Withrow*, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting) (internal quotation marks omitted) (“[C]ourts indulge every reasonable presumption against waiver.”).

²⁴⁸ Maybe there is one example. See *Menorah Chapels v. Needle*, 899 A.2d 316, 321 (N.J. Super. Ct. App. Div. 2006) (“The contract for funeral services executed in this case provided that: ‘All disputes involving this agreement shall be resolved in accordance with New Jersey law and may be heard in the Superior Court, Law Division’ Consent to resolution of this matter by a civil court thus exists.”).

²⁴⁹ Some have concluded that the enforcement of such a prenuptial agreement is simply unconstitutional. See Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*,

Admittedly, this problem is more hypothetical than real, but it comes up. Consider a case like *Zummo v. Zummo*,²⁵⁰ where a marrying couple agrees in a prenuptial agreement to raise their children Jewish. After the wedding, they have three children and then divorce ten years later. After the divorce, the father becomes Catholic and seeks to take his children to Catholic services. A lower court in Pennsylvania forbade him, citing the prenuptial agreement. But the appellate court reversed. Much of the appellate opinion focuses on the difficulties of defining Judaism.²⁵¹ But the deeper problem is that of the dead hand. Religious liberty includes a right to convert—a right to change one’s mind about religious matters.²⁵² The father’s 1978 promise to be Jewish and raise his kids as Jews now prevents him in 1991 from being Roman Catholic and raising his kids as Roman Catholics.

In *Cohen v. Cowles Media Co.*,²⁵³ the Supreme Court addressed this issue in the context of free speech. *Cohen* involved a reporter sued for breaking a promise of confidentiality made to a source. The Court rejected the reporter’s First Amendment defense, reasoning that the reporter had a constitutional right to report the name of his sources, but that he gave that up when he promised confidentiality. *Cohen* is somewhat controversial; it was a 5–4 decision.²⁵⁴ But the Court’s conclusion makes sense in light of free speech doctrine. Enforcing promises is a content-neutral restriction on speech, and the Court has interpreted the Free Speech Clause to generally allow content-neutral restrictions on speech.²⁵⁵ But *Cohen*’s premise is not a universal one.²⁵⁶ And some religious contracts cases may indeed present dead hand problems so serious that courts should refuse to enforce the

2 CARDOZO WOMEN’S L.J. 131, 152 (1995) (“It seems clear, however, that to compel a non-Jew to appear before a Jewish religious court [in this kind of circumstance], violates the First Amendment.”).

²⁵⁰ 574 A.2d 1130 (Pa. Super. Ct. 1990).

²⁵¹ *Id.* at 1146 (“The father is prohibited from taking his children to ‘religious services contrary to the Jewish’ faith. What constitutes a ‘religious service’? Which are ‘contrary’ to the Jewish faith? What for the matter is the ‘Jewish’ faith? Orthodox, Conservative, Reform, Reconstructionist, Messianic, Humanistic, Secular and other Jewish sects might differ widely on this point.”).

²⁵² See, e.g., *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144 (1987) (“The First Amendment protects the free exercise rights of [people] who . . . convert from one faith to another . . .”).

²⁵³ 501 U.S. 663 (1991).

²⁵⁴ For strong criticism of *Cohen*, see Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997).

²⁵⁵ The Court stressed the general applicability of the law in question. See *Cohen*, 501 U.S. at 669–72.

²⁵⁶ One cannot, for example, bargain away one’s constitutional right not to be enslaved. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 430 (2006). And lower courts have held that women cannot bargain away their right to an abortion. See *In re Baby M*, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *rev’d on other grounds*, 537 A.2d 1227 (N.J. 1988).

promises in question. Perhaps *Zummo* is such a case, perhaps not. But in any event, it is not possible to draw a precise line here. Courts will have to simply address these issues as they arise, case by case.

B. Property Cases and the Like

Property law, like contract law, relies on private ordering. So property cases involve the same kinds of issues and tensions as the contracts cases. But here the Supreme Court has been active in articulating a constitutional framework. In a sense, this final Part brings us full circle; we return now to the property case that gave rise to the church autonomy principles in the first place.

All of the early Supreme Court cases about church autonomy arose out of church schisms, where different factions of the church would claim ownership of the church's real property.²⁵⁷ The rules of law took a long time to settle. They also moved from being common law principles to constitutional ones.²⁵⁸ Even now, not everything is clear. As it stands, there are two methods approved by the Supreme Court for states to adopt when handling disputes over church property. The first is the organizational approach of *Watson v. Jones*,²⁵⁹ in which a court resolves property disputes by looking to the organizational structure of the church. In a hierarchical church, *Watson* gives the property to the hierarchy; in a congregational church, *Watson* generally gives the property to the majority of the congregation. The second is the neutral principles approach of *Jones v. Wolf*,²⁶⁰ under which courts use neutral principles of law to try and resolve religious disputes over property the same way as nonreligious disputes.

1. *The Legal Intent Problem.*—These two approaches can seem far apart. They can lead to different results in particular cases, which makes the choice between them important. On the other hand, they actually agree on the most fundamental principle. Courts do not independently decide, as some abstract matter, which of the parties is more deserving of the property in dispute. Instead the goal is for courts to discern the previously existing intentions of the parties. Before the dispute arose, the church might have had some understanding about where the property would go in the case of a schism. The goal of courts, everyone agrees, should be to recover and honor that understanding.²⁶¹ The recurring problem in these cases, of

²⁵⁷ See *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190 (1960); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Shepard v. Barkley*, 247 U.S. 1 (1918); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

²⁵⁸ See Lund, *supra* note 28, at 13–20 (tracing this development).

²⁵⁹ 80 U.S. (13 Wall.) 679 (1871).

²⁶⁰ 443 U.S. 595 (1979).

²⁶¹ See *id.* at 614 (Powell, J., dissenting) (describing the role of courts as being to “give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose”).

course, is that this understanding is difficult to discern; maybe it never existed at all. This is another variation of the legal intent problem. Both *Watson v. Jones* and *Jones v. Wolf* try to implement the church's preexisting legal intentions, but discerning those intentions runs into both practical and conceptual problems.

The choice between *Watson v. Jones* and *Jones v. Wolf* is difficult. Neither will get every case right—the question is which is better on average. All told, I think *Watson* provides the better proxy for the original intentions of the parties. *Watson* may not be perfect,²⁶² but there have been some real disasters with *Jones v. Wolf*. Courts have awarded property to schismatic congregations breaking away from hierarchical churches in situations where it is hard to believe that is what anyone believed would happen *ex ante*.²⁶³ Students often have a hard time understanding what could possibly be wrong with *Jones v. Wolf*. The fear is simply that there may be a sizeable class of church property disputes where the original understanding was that the national church would get the property in the case of the split, but that arrangement was never reduced to any kind of secular legal writing. And this is especially plausible when one realizes how *Watson v. Jones* exacerbates such a tendency. By holding that such writings were legally unnecessary, *Watson* encouraged churches to abandon them. *Watson* thus coaxed hierarchical churches into avoiding the very legal formalities that *Jones v. Wolf* then faulted them for not having.

Of course, *Jones v. Wolf* is not incompatible with hierarchical churches. It requires only that hierarchical churches redraft their property arrangements to make clear where they want the property to go to in the case of a schism.²⁶⁴ But this is so much more difficult than *Jones v. Wolf* makes it seem.²⁶⁵ Shortly after *Jones v. Wolf*, for example, the national Episcopal Church passed the Dennis Canon, which purported to create a trust in favor of the national church on all property held by any congregation.²⁶⁶ Local congregations were represented in the national church process, but they did not individually agree to the Dennis Canon. So

²⁶² For an example, see the analysis in *Southeastern Pennsylvania Synod of the Evangelical Lutheran Church v. Meena*, 19 A.3d 1191 (Pa. Commw. Ct. 2011) (treating the Evangelical Lutheran Church in America as a hierarchical church, and giving the property to the national church under *Watson v. Jones*).

²⁶³ See Patrick J. Schiltz & Douglas Laycock, *Employment in Religious Organizations*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 527 (James A. Serritella et al. eds., 2006).

²⁶⁴ See *Wolf*, 443 U.S. at 606 (“At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.”).

²⁶⁵ *Jones v. Wolf* makes it seem easy. See *id.* at 606 (noting that the parties “can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church” or that “[a]lternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church,” and concluding that “[t]he burden involved in taking such steps will be minimal”).

²⁶⁶ See *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 718 S.E.2d 237, 251–53 (Ga. 2011) (discussing the Dennis Canon).

when they now secede from the national church, they make the powerful argument that the Dennis Canon does not apply—because, after all, they never specifically agreed to it.²⁶⁷ Local congregations see the Dennis Canon as an attempt by the national church to steal their property. But maybe the blame rests with *Jones v. Wolf*. If the expectation before *Jones v. Wolf* was that the national church owned the property, then *Jones v. Wolf* changed the game on the national churches. *Jones v. Wolf* stole their property, so to speak, and the national churches cannot be faulted for trying to steal it back.

This is not the place to engage a full-fledged debate over the relative merits of *Watson v. Jones* and *Jones v. Wolf*. The point is that this whole debate is another manifestation of the same legal intent problem that surfaced in the contract cases.²⁶⁸ All agree that churches should be able to privately order their affairs as they wish, but problems arise because the parties' intent is so persistently difficult to discern in hindsight. But the conclusion here is the same as in the contract section—for the same reasons that courts hesitate to enforce certain contractual promises, they should be suspicious of the neutral principles logic of *Jones v. Wolf*.

2. *The Dead Hand Problem.*—*Watson v. Jones* and *Jones v. Wolf* deal with how to best discern the will of the church. The *Mary Elizabeth Blue Hull* case, mentioned earlier, deals with the problem of the dead hand.²⁶⁹ *Mary Elizabeth* involved the old English departure-from-doctrine rule. Under that rule, when a church splintered into factions, courts would give the church's property to the faction whose beliefs more closely resembled the beliefs of the original church. This, the rule presumed, is what the original donor of the property would have wanted. One problem was that courts would have to make theological judgments about the beliefs of the various factions.²⁷⁰ But the rule also posed a classic dead hand problem: why should the original donor get perpetual control over the property long after his death? And in practice, the departure-from-doctrine rule had a paralyzing theological effect; any change in church doctrine

²⁶⁷ See, e.g., *id.* at 257 (Brown, J., dissenting) (arguing that “[t]he Dennis Canon . . . is inconsistent with Georgia laws in many ways since it allows the National Church to create a trust without owning the trust property and without any deed . . . [and with] no expressed intent of [the local church] to transfer its property”). This position has triumphed in some cases. See, e.g., *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 685 S.E.2d 163, 174 (S.C. 2009) (“[W]e hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation’s property.”); *Masterson v. Diocese of Nw. Tex.*, No. 11-0332, 2013 WL 4608632, at *17 (Tex. Aug. 30, 2013) (concluding that, even if the Dennis Canon had legal effect, the Canon creates only a *revocable* trust—a trust revocable at the will of the congregation in question).

²⁶⁸ See *supra* Part IV.A.1 (discussing the legal intent problem in the context of contract cases).

²⁶⁹ See *supra* notes 84–90 and accompanying text (discussing *Mary Elizabeth*).

²⁷⁰ See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969).

created the possibility of a dissenter bringing suit to take control of the property.

In *Mary Elizabeth*, the Supreme Court unanimously held the departure-from-doctrine rule unconstitutional, so the dead hand issue rarely arises now in the context of church property. But the same issue has come up, strangely enough, in the context of individuals and their property. Generally speaking, individuals can create trusts for any number of purposes, including religious ones.²⁷¹ But the Restatement of Trusts makes a strange but significant exception to this general principle:

But the use of private trusts that create financial pressure regarding the future religious choices of beneficiaries is a different matter. A trust provision is ordinarily invalid if its enforcement would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion.²⁷²

The old cases—happily rare nowadays—involved children losing their inheritances if they departed from their parents’ religions.²⁷³ The Restatement takes the firm position that such trusts cannot be enforced.²⁷⁴ This again is a concern about the dead hand. The authors of the Restatement of Trusts do not cite (and maybe do not even know about) the church autonomy cases. There is no mention of *Watson* or *Mary Elizabeth*. But that is what is really happening. Courts are making exceptions to the usual law of trusts to protect beneficiaries from the religious influence of the dead hand.²⁷⁵

²⁷¹ See RESTATEMENT (THIRD) OF TRUSTS, § 29 cmt. k (2003) (“Individuals are normally free during life to promote their theological views among others, and to create charitable trusts during life or at death to support or advance a chosen religion.”).

²⁷² See *id.*

²⁷³ See e.g., *U. S. Nat’l Bank of Portland v. Snodgrass*, 275 P.2d 860, 862 (Or. 1954) (involving a will that allowed the testator’s daughter to inherit when she turned thirty-two, on the condition that she could prove “that she has not embraced, nor become a member of, the Catholic faith nor ever married to a man of such faith”); *In re Jamieson’s Estate*, 55 Pa. D. & C. 435, 436 (Pa. Orphans’ Ct. 1946) (“I hereby direct that if any of my daughters or their issue at the time of my decease be members of the Roman Catholic Church or shall thereafter join the Roman Catholic Church, the legacy or legacies hereby given to such daughter, child or children or issue . . . shall lapse . . .”).

²⁷⁴ The decided cases are more split. Some courts have struck down such trusts. See *In re Devlin’s Trust Estate*, 130 A. 238, 239 (Pa. 1925) (striking down a provision that provided the legacy with income “only so long as he is brought up and reared in the Roman Catholic faith”); *Drace v. Klinedinst*, 118 A. 907, 908 (Pa. 1922) (striking down a provision that required the legacies to remain “faithful to [the testator’s] religion”). Some courts have upheld them. See *Lockwood v. Killian*, 375 A.2d 998, 1000 (Conn. 1977) (upholding the religious requirement in a scholarship program for “needy, deserving boys . . . who are members of the Caucasian race and who have . . . specifically professed themselves to be of the Protestant Congregational Faith,” while simultaneously striking out the racial and gender requirements).

²⁷⁵ For a modern example, consider *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009), which involved a provision in a will that treated the testator’s grandchildren as deceased if they had married outside of the Jewish faith. The state appellate court struck the provision as violating public policy. See *In re Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. Ct. 2008). But the Illinois Supreme Court upheld it,

CONCLUSION

More than twenty years ago, in *Employment Division v. Smith*, the Supreme Court held that the Free Exercise Clause does not entitle religious observers to be exempt from generally applicable laws.²⁷⁶ Lower courts apply this principle faithfully in the context of suits between the government and religious believers. But in the context of suits between religious believers themselves, courts sometimes ignore *Smith*. They try to work out for themselves what the rules should be. And although the cases are not completely consistent, they do reveal strange patterns—as if for some reason, judges hearing these cases are all subconsciously drawn to the same basic underlying principles, even in cases with radically different factual postures.

This Article has tried to discover those basic principles, and has offered a unifying theory that seeks to explain them in their totality. For assumed legal obligations, like those of contract and property, churches should generally be treated like other organizations; private ordering must be allowed to do its job. But courts must pay attention to the legal intent and dead hand problems that this Article discusses. For imposed legal obligations (like tort or employment discrimination), courts should be quite hesitant about allowing insiders to bring suits challenging religious beliefs and practices.

Dissenting in a case seventy years ago, Justice Jackson remarked that “[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.”²⁷⁷ Despite the Supreme Court’s decision in *Employment Division v. Smith*, lower courts have embraced this idea when deciding religious disputes between private parties. The Supreme Court’s recent decision in *Hosanna-Tabor* confirms it. But what it means, and how it applies, will be an issue for all of us in the years to come.

stressing that the will’s conditions had to be satisfied at the time of the testator’s death, and that there was therefore no future religious or marital pressure on beneficiaries. See *Feinberg*, 919 N.E.2d at 903 (noting that the condition “operated on the date of her death to determine which, if any, of the grandchildren qualified for distribution on that date” and thus “[t]here was nothing any of the grandchildren could have done at that time to make themselves eligible or ineligible for the distribution”).

²⁷⁶ 494 U.S. 872 (1990).

²⁷⁷ *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting).

