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When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception

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NOTES

WHEN BIG BROTHER PLAYS GOD: THE RELIGION CLAUSES, TITLE VII, AND THE MINISTERIAL EXCEPTION

*Joshua D. Dunlap**

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.
>
> —James Madison[1]

INTRODUCTION

A congregation composed of immigrants from South Korea seeks to hire a South Korean as its pastor. An inner-city Catholic parish wants to hire a woman, instead of a man, to fill a counseling position. A Native American religious group restricts its hiring criteria so that only members of its own nation qualify to perform administrative duties. A tiny Baptist church only wants a male pastor. Can these religious entities make employment decisions according to such criteria? Under Title VII of the Civil Rights Act of 1964,[2] they cannot. Title VII, which has been an important tool in the laudable fight to eliminate discrimination in corporate America, forbids employment discrimination on the basis of race, color, religion, sex, and national

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1 James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* JAMES MADISON: WRITINGS 29, 30 (Jack N. Rakove ed., 1999).

2 Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2000).

origin.[3] Unfortunately, the application of Title VII to religious institutions in situations like those mentioned above[4] might prohibit innocuous behavior—and might have unintended constitutional implications.

Clearly, the Constitution does not grant the federal government unlimited regulatory power, even to further noble causes such as the elimination of discrimination;[5] the government's enumerated powers are constrained, for one, by independent constitutional provisions such as the Religion Clauses.[6] The Religion Clauses have particular importance when aggrieved current or prospective employees bring lawsuits against churches under Title VII. In such situations, Title VII at least implicates—and possibly violates—the Religion Clauses. After all, the application of Title VII to church employment decisions, which are arguably exercises of religious discretion, might burden churches' free exercise of religion or constitute a government establishment of religion. This conflict between Title VII and the Religion Clauses pits two fundamental interests against each other. On one hand, Title VII reflects this nation's dedication to eliminating discrimination;[7] on the other hand, the Religion Clauses embody the country's dedication to freedom of religion.[8] The conflict between these two interests requires courts to determine whether the application of Title VII to churches violates the Religion Clauses and their attendant

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3 *See id.* Section 703 reads, in pertinent part:

> It shall be an unlawful employment practice for any employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id.

4 It should be noted that Title VII does permit religious institutions to make employment decisions based on an individual's religion; so, for instance, a Catholic church could refuse to hire a Baptist preacher. *See id.* § 2000e-1(a).

5 *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (concluding that Congress exceeded its authority under Section 5 of the Fourteenth Amendment when it subjected states to suit in federal court for money damages under the Americans with Disabilities Act, 42 U.S.C. § 12112 (2000)).

6 The Religion Clauses declare that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

7 *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1079 (1996).

8 Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 12 (2000).

notions of free exercise, nonestablishment, and church autonomy.[9] Essentially, the interplay between Title VII and the Religion Clauses generates one basic—not to say simple—question: do the Religion Clauses require a "ministerial exception" that excludes churches' employment decisions from the scope of Title VII?[10]

This Note argues that the Free Exercise Clause mandates a broad ministerial exception to Title VII. Part I surveys circuit court decisions to define the current scope of the ministerial exception doctrine and examines a recent ministerial exception case, *Petruska v. Gannon University*.[11] Part II provides a justification for the ministerial exception based on history and the original understanding of the Free Exercise Clause—particularly in light of early state constitutions, the "theological" rationale for religious freedom, and Madison's conception of church-state relations. Part III turns to the application of the ministerial exception, examining the conflict between *Kedroff v. Saint Nicholas Cathedral*[12] and *Jones v. Wolf*[13] and proposing that *Kedroff*'s church autonomy rationale should govern in ministerial exception cases. This Note then addresses the proper scope of the ministerial exception, suggesting that government regulation of *any* church employment decision would extend the civil government's authority into areas of exclusively religious cognizance. Ultimately, this Note con-

9 Oliver S. Thomas, *The Application of Anti-Discrimination Laws to Religious Institutions: The Irresistible Force Meets the Immoveable Object*, 12 J. NAT'L ASS'N ADMIN. L. JUDGES 83, 83 (1992).

10 Three primary strands of thought have arisen in academic circles in response to this question. First, some scholars argue that the Religion Clauses do not preclude the application of Title VII to religious institutions. *See* Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 374–75 (1996); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 431–32 (1987); Rutherford, *supra* note 7, at 1128. Second, other scholars have promoted the idea that religious institutions may or may not be exempt from Title VII, depending on the circumstances. *See* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1549 (1979); G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1232–38 (1994); Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 410 (1984). Finally, a third group of scholars suggest that certain religious institutions should always be exempted from Title VII's requirements. *See* Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1698; 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, 1398 (1981).

11 462 F.3d 294 (3d Cir. 2006).

12 344 U.S. 94 (1952).

13 443 U.S. 595 (1979).

cludes that the Free Exercise Clause exempts all church employment decisions from the requirements of Title VII.

I. CURRENT MINISTERIAL EXCEPTION JURISPRUDENCE

Congress has never completely exempted religious institutions from the requirements of Title VII. When Congress originally enacted the Civil Rights Act of 1964, Title VII provided extremely limited statutory protection for religious institutions; employees of a religious organization who carried out the organization's *religious* activities could not sue their employers for *religious* discrimination.[14] In 1972, Congress amended Title VII to eliminate the language regarding "religious activities"; the altered statutory exemption excludes from Title VII any "religious corporation, association, educational institution, or society *with respect to the employment of individuals of a particular religion* to perform work connected with the carrying on . . . of its activities."[15] By adopting this provision after rejecting language that would have excluded religious employers from Title VII altogether,[16] Congress chose not to "confer upon religious organizations a license to make [employment] decisions on the basis of race, sex, or national origin."[17] Instead, Congress retained a fairly narrow statutory exemption[18]—leaving it to the courts to determine whether the Constitution required a broader exemption.

A. *Scope of the Ministerial Exception*

Beginning with the Fifth Circuit's 1972 decision in *McClure v. Salvation Army*,[19] the circuit courts created a constitutional exemption

14 Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1(a) (2000)).

15 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04 (codified as amended at 42 U.S.C. § 2000e-1(a) (2000)) (emphasis added). Congress has also provided other narrow exceptions that may affect religious institutions' employment decisions. *See* 42 U.S.C. § 2000e-2(e).

16 STAFF OF S. COMM. ON LABOR, S. COMM. ON LABOR & PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1229–30, 1258–60 (Comm. Print 1972).

17 Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985).

18 Courts have uniformly recognized that Congress retained a fairly narrow statutory exemption. *See* Petruska v. Gannon Univ., 462 F.3d 294, 303 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 361–62 & n.2 (8th Cir. 1991); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982).

19 460 F.2d 553 (5th Cir. 1972).

from Title VII—the ministerial exception.[20] In one sense, the ministerial exception exceeds the scope of the statutory exemption by permitting religious organizations to avoid the burden of conforming to any of Title VII's antidiscrimination provisions, including those regarding race, sex, and national origin, when they select their ministers. "Simply stated, the ministerial exception insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII."[21] In another sense, however, the ministerial exception is narrower than the statutory exemption because it only prevents the government from imposing secular standards on religious organizations' *ministerial* employment decisions—unlike the statutory exemption, the ministerial exception does not affect employment decisions regarding "secular" employees.[22] Although the

20 The *McClure* court found that the First Amendment required a ministerial exception, but ultimately construed the statute so as to avoid the constitutional question. *Id.* at 560–61. Subsequent cases have addressed the constitutional question squarely, but the resulting justifications for the ministerial exception have varied from circuit to circuit. Some courts have concluded that adjudication of Title VII claims in cases involving religious institutions would violate the Establishment Clause. *See Scharon*, 929 F.2d at 361–63; *Rayburn*, 772 F.2d at 1171–72. Other courts have cited the Free Exercise Clause as the foundation for the ministerial exception. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 187–88 (7th Cir. 1994). Yet others have viewed the church autonomy doctrine as an independent basis for the ministerial exception. *See* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999). This Note sets forth a justification for the ministerial exception based on the Free Exercise Clause. *See infra* text accompanying notes 107–15.

21 *Bollard*, 196 F.3d at 944.

22 EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) ("[T]he exception would not apply to employment decisions concerning purely custodial or administrative personnel."). Notably, while the exception only applies to ministerial employment decisions, the circuit courts have refused to review such decisions regardless of the institution's motivations. As the Fifth Circuit opined, it is impossible to "conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting [the judiciary] into a realm where the Constitution forbids [the courts] to tread, the internal management of a church." *Combs*, 173 F.3d at 350. Accordingly, the "state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Rayburn*, 772 F.2d at 1169; *accord* Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004) ("[R]equiring a church to articulate a religious justification for a personnel decision, such as firing a minister, is one . . . way in which government may not constitutionally interfere with religion."); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 703 (7th Cir. 2003) (permitting any examination of the reasons for church employment decisions "would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus").

exception varies somewhat among the eight circuits[23] that have recognized it, the resolution of ministerial exception cases generally depends on two factors: the type of religious institution and the function of the employee.[24]

1. Characteristics of a Qualifying "Religious Institution"

Despite the significance of the definition of "religious institution" for the purposes of the ministerial exception,[25] circuit courts have never set out the characteristics of a qualifying religious institution in the form of a categorical rule. Professor Thomas has suggested that there is a dichotomy between "pervasively sectarian" institutions, such as churches, and "religiously affiliated" institutions, such as religious hospitals or schools.[26] According to Thomas, courts treat pervasively religious institutions with more deference than religiously affiliated institutions.[27] Pervasively religious institutions are always exempt from regulation of ministerial employment decisions but may not be exempt with regard to decisions concerning secular employees.[28] On the other hand, religiously affiliated institutions are usually exempt from regulation of their ministerial employment decisions but are always subject to regulation of their secular employment decisions.[29] Cases involving religiously affiliated institutions—which provide the best available indications of what institutions fall under the ministerial exception[30]—have provided case-by-case examinations of the issue

23 The eight circuits that have adopted the ministerial exception include the Third Circuit, *Petruska*, 462 F.3d at 305; the Fourth Circuit, *Rayburn*, 772 F.2d at 1170–72; the Fifth Circuit, *McClure*, 460 F.2d at 560; the Seventh Circuit, *Young*, 21 F.3d at 185; the Eighth Circuit, *Scharon*, 929 F.2d at 362; the Ninth Circuit, *Bollard*, 196 F.3d at 945; the Eleventh Circuit, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303–04 (11th Cir. 2000); and the D.C. Circuit, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996).

24 Thomas, *supra* note 9, at 100; *cf.* Buchanan, *supra* note 10, at 1211–26 (focusing on the type of discrimination and the function of the employee as the two crucial variables in the ministerial exception analysis).

25 The definition of "religious institution" is critical because, in the words of the Fourth Circuit, the ministerial exception only protects the employment decisions of "religious institution[s]." *Rayburn*, 772 F.2d at 1168. Qualifying as a religious institution is a threshold which must be satisfied in order to trigger the ministerial exception.

26 *See* Thomas, *supra* note 9, at 101–06.

27 *See id.* at 101–02.

28 *See id.* at 101, 103–06.

29 *See id.* at 101–03.

30 Many ministerial exception cases involving pervasively religious institutions do not discuss this issue because the defendant institution's religious nature was so clear that the plaintiff did not challenge it. *See, e.g.*, Combs v. Cent. Tex. Annual Confer-

that, when taken together, suggest several general rules regarding the characteristics of a qualifying religious institution. First, an institution that is controlled or financed by a church or religious organization can qualify as a religious institution; the institution itself does not have to be a church—as in a congregation that meets for worship—in order to qualify.[31] Second, an institution that acts as the instrument of a church can qualify as a religious institution.[32] Third, an institution that fulfills some religious function, even if it does not exclusively carry out religious activities, can qualify as a religious institution.[33] Aside from these general rules, however, the circuit courts have provided little guidance in determining what institutions qualify for the ministerial exception.

2. Characteristics of a "Ministerial" Employee

The second crucial definition in ministerial exception cases is the definition of "minister." The ministerial exception currently does not affect all hiring decisions made by religious institutions; rather, it only affects decisions regarding ministers. "[T]he exception shelters certain employment decisions . . . so as to preserve the independence of religious institutions in performing their spiritual functions. Where no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law such as Title VII . . . ."[34] Accordingly, courts must ascertain whether the employee fills a "spiritual" or "religious" function in order to determine whether the employee is a "minister." That determination does not depend upon ordination; rather, the circuit courts have endorsed a more comprehensive and fact-specific inquiry.[35] "'As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be con-

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ence of the United Methodist Church, 173 F.3d 343, 345 (5th Cir. 1999); McClure v. Salvation Army, 460 F.2d 553, 556 & n.5 (5th Cir. 1972).

31 EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981).

32 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 464–65 (D.C. Cir. 1996).

33 Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362 (8th Cir. 1991).

34 EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000).

35 *Id.*; *Catholic Univ.*, 83 F.3d at 461. Indeed, courts have refused to classify some individuals as ministers, despite their ordination. *See Sw. Baptist*, 651 F.2d at 283–85.

sidered clergy.'"[36] Circuit courts have identified certain factors that would indicate such a spiritual role, including whether the individual would be "qualified and authorized to perform the ceremonies of the Church,"[37] "'engaged in activities traditionally considered ecclesiastical,'"[38] or responsible for "conveying the message of [the] organization to the public as a whole."[39] Given the open-ended and somewhat ambiguous nature of this "test," the circuit courts have found a wide variety of individuals to qualify as a minister.[40] Unsurprisingly, courts have also occasionally misunderstood the spiritual import of some employment positions.[41] Nevertheless, courts continue to make this inquiry, as evidenced by the Third Circuit's decision in *Petruska*.[42]

B. Petruska v. Gannon University

In *Petruska*, the Third Circuit took up the Title VII claims and state law claims of Lynette Petruska, the first female chaplain of Gannon University.[43] The litigation involved a dispute that arose after Petruska helped unseat the president of the private Catholic University.[44] About two years after the president's resignation, the University restructured its administration and curtailed Petruska's responsibilities.[45] The decision to restructure, which Petruska believed was motivated by gender discrimination, instigated a heated series of meetings and e-mail exchanges between Petruska and members of the administration.[46] The exchange culminated in Petruska's resignation.[47] Petruska then filed state law claims alleging, inter alia, breach of con-

36 Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bagni, *supra* note 10, at 1545 (internal quotation marks omitted)).

37 Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999).

38 *Id.* (quoting *Sw. Baptist*, 651 F.2d at 284).

39 Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 704 (7th Cir. 2003).

40 *See, e.g.*, *id.* at 703–04 (press secretary); *Starkman*, 198 F.3d at 176 (lay choir director); *Catholic Univ.*, 83 F.3d at 463–64 (member of university canon law faculty); *Rayburn*, 772 F.2d at 1168 (non-ordained associate in pastoral care); *Sw. Baptist*, 651 F.2d at 283 (faculty of seminary).

41 *See* Brady, *supra* note 10, at 1692–93 (arguing that, for instance, the court in *Southwestern Baptist* failed to recognize the spiritual function of the administrative staff at the seminary).

42 Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985).

43 *Id.* at 299–300.

44 *Id.* at 300.

45 *Id.* at 300–01.

46 *Id.*

47 *Id.* at 301.

tract as well as Title VII claims alleging gender and retaliatory discrimination.[48]

In addressing these claims, the Third Circuit confronted the question of whether adjudication of Title VII claims against a religious university would violate the First Amendment.[49] The court noted that most circuits had adopted the ministerial exception to prevent "any inquiry into a religious organization's underlying motivation for" employment decisions regarding clergy.[50] The Third Circuit agreed that applying Title VII to ministerial employment decisions would violate the First Amendment and joined the other circuits in adopting the exception.[51] According to the court, the ministerial exception "bar[s] any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions."[52]

In setting forth its constitutional justification for the ministerial exception, the Third Circuit relied upon two distinct aspects of the Free Exercise Clause. First, the court recognized that the Free Exercise Clause protects an individual's "'right to believe and profess whatever religious doctrine one desires.'"[53] The court reasoned that this right extended to churches as institutions because, "like an individual, a church in its collective capacity must be free to express religious beliefs . . . and communicate its religious message."[54] In order to communicate its message, a church must "retain the corollary right to select its voice."[55] Accordingly, because a minister is the "embodiment of [a church's] message," the court determined that the selection of a minister is "*per se* a religious exercise" with which the judiciary could not interfere.[56] Second, the court recognized that *Kedroff* had established the principle that the Free Exercise Clause protects "a religious institution's right to decide matters of faith, doctrine, and church governance."[57] The court concluded that a religious employer's selection of its ministers implicated this right because ministerial employment decisions are, ultimately, decisions about "who would perform . . . constitutionally protected spiritual functions"

48 *Id.* at 301–02.
49 *Id.* at 303.
50 *Id.* at 304–05 & n.7.
51 *Id.* at 305.
52 *Id.* at 307.
53 *Id.* at 306 (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)).
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*

such as teaching or spreading the faith.[58] Accordingly, the court held that ministerial employment decisions are "protected from governmental interference by the Free Exercise Clause."[59]

The court then applied the ministerial exception to the case at hand by asking "whether application of the state or federal law [would] limit Gannon's right to choose who performs particular spiritual functions on its behalf."[60] Because Petruska's Title VII claims did implicate the University's constitutionally protected right to determine who would perform the spiritual functions filled by the chaplain, the court concluded that the ministerial exception barred the claims.[61] The court then turned to Petruska's state law claims.[62] The court found that the application of state contract law to the University's employment decisions would not violate the Free Exercise Clause because "[o]n its face, application of state contract law does not involve government-imposed limits on Gannon's right to select its ministers: Unlike the duties under Title VII . . . contractual obligations are entirely voluntary."[63] Having disposed of the Free Exercise Clause challenge to the contract claim, the court then examined whether adjudication of the claim would violate the Establishment Clause by creating excessive entanglement with religion.[64] The court concluded that it did not because the "[r]esolution of this claim [did] not turn on an ecclesiastical inquiry."[65] Accordingly, the court dismissed Petruska's Title VII claims and remanded her state contract claim.[66]

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58 *Id.* at 307.

59 *Id.*

60 *Id.*

61 *Id.* at 307–08.

62 *Id.*

63 *Id.* at 310.

64 *Id.* at 310–11.

65 *Id.* at 312. The Third Circuit's decision not to consider the Establishment Clause until it had completed its ministerial exception analysis distinguishes it from other circuits, many of which have cited the Establishment Clause as a justification for the ministerial exception. *See* cases cited *infra* note 108. Many of these courts have concluded that adjudicating Title VII claims against churches would foster excessive government entanglement with religion on a substantive and procedural level. *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948–49 (9th Cir. 1999); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170–71 (4th Cir. 1985).

66 *Petruska*, 462 F.3d at 308, 312.

II. HISTORICAL JUSTIFICATION FOR THE MINISTERIAL EXCEPTION

This necessarily cursory review of current ministerial exception jurisprudence answers the initial question this Note posed about Title VII—according to the vast majority of circuit courts, the application of Title VII to religious institutions' ministerial employment decisions does violate the Religion Clauses. But this answer only gives rise to another question: are the courts correct in their reasoning, or have they misconstrued the First Amendment? Scholars have challenged the logic of the ministerial exception; in particular, some have questioned whether religious institutions have Free Exercise Clause rights.[67] The answer to this challenge, contrary to the assertion of Professor Lupu,[68] can be found in history and the original understanding of the Free Exercise Clause.[69] Early state constitutions, the "theological" rationale for religious freedom, and Madison's conception of church-state relations combine to provide a historical justification for the ministerial exception.

A. Early State Constitutions

The concept of a ministerial exception was not foreign to early American constitutional thought. The constitutions of the original thirteen states, which provide an invaluable source of insight into the Founders' political theories,[70] demonstrate that the Founders construed the power of government narrowly in regard to the church-minister relationship. Four early states—including three of the original thirteen states—expressly viewed ministerial employment deci-

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67 *See* Lupu, *supra* note 10, at 402.

68 *Id.* at 419 (arguing that "nothing in the debates or early drafts of the religion clauses gives the slightest support to the concept of corporate free exercise exemptions").

69 Admittedly, some scholars reject a historical approach to constitutional interpretation. A historical inquiry, however, provides some benefit even to those who adhere to this viewpoint. *See* Esbeck, *supra* note 10, at 353; *see also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006) ("[O]riginal understanding is relevant on almost any view of constitutional interpretation . . . ."). For a general discussion of the competing theories of First Amendment interpretation, see FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION 11–23 (2003).

70 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 618 (1950); *see also, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1117–18 (1990) (using state constitutional provisions as a historical tool to understand the First Amendment).

sions as an element of religious liberty and specifically guaranteed church autonomy in ministerial employment decisions.

The Massachusetts Constitution, which John Adams drafted,[71] protected churches' freedom to employ ministers upon their own terms. According to the Massachusetts Constitution, freedom of religion included the right for churches to make autonomous decisions regarding the employment of their ministers. Article III of Part I read: "Provided . . . that the several towns, parishes, precincts, and other bodies politic, or *religious societies*, shall, at all times, have the *exclusive right of electing their public teachers, and of contracting with them* for their support and maintenance."[72] This provision secured to religious societies the right to pay their ministers directly, rather than through the town treasurer.[73] More importantly, the provision guaranteed that religious societies could choose whom they wanted as a minister, rather than having the civil government appoint a minister.[74] Although Massachusetts had established a state religion,[75] the drafters of the constitution recognized ministerial employment decisions to be a matter of exclusively ecclesiastical, as opposed to civil, concern.

Nor were Adams and the Massachusetts framers alone in believing that religious liberty necessitated such specific protection of the church-minister relationship. Connecticut, Maine, and New Hampshire included similar provisions in their state constitutions. Connecticut provided that "each and every [religious] society or denomination . . . shall have and enjoy the same and equal powers, rights and privileges, and shall have power and authority to support

71 John Witte Jr., *One Public Religion, Many Private Religions*, *in* THE FOUNDERS ON GOD AND GOVERNMENT 23, 27 (Daniel L. Dreisbach et al. eds., 2004).

72 MASS. CONST. pt. I, art. III (amended 1833) (emphasis added). The language regarding parishes, towns, and precincts quickly lost its import. Originally, Massachusetts towns and parishes were identical to the church. *See* Baker v. Fales, 16 Mass. 488, 499 (1820) ("[A] parish, in this sense, is the same with a particular church or congregation; and this . . . is plainly agreeable with the sense, custom, and platform of the New England churches."). Upon disestablishment, towns and parishes could no longer be equated with the church, so Massachusetts revised its ministerial provision to protect only churches. *See* MASS. CONST. art. XI ("[T]he several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses . . . .").

73 *See* Witte, *supra* note 71, at 32–33.

74 *Id.* at 33.

75 LEO PFEFFER, CHURCH, STATE, AND FREEDOM 115 (rev. ed. 1967).

and maintain the ministers or teachers of their respective denominations."[76] The Maine Constitution replicated Massachusetts' ministerial provision: "[A]ll religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."[77] Article VI of the New Hampshire Constitution permitted a state establishment of religion, "[*p*]*rovided notwithstanding*, that the several towns, parishes, bodies corporate, or religious societies, shall, at all times, have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance."[78]

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76 CONN. CONST. of 1818, art. VII, § 1. Arguably, this provision is less expansive than the other states' provisions. The Connecticut provision does not grant "exclusive" power to contract with its ministers, but instead only recognizes the right to "maintain" ministers. *Id.* Nevertheless, it still demonstrates that the Founders recognized the fundamental importance of the ministerial position to the existence of religious institutions.

77 ME. CONST. art. I, § 3. The Maine provision, similar to the Massachusetts ministerial clause even though Maine prohibited the establishment of religion, demonstrates—along with the amended Massachusetts provision—that church autonomy in ministerial employment decisions was not merely a limitation upon state establishment of religion, but rather an independent aspect of the right to free exercise.

78 N.H. CONST. pt. I, art. VI (amended 1968). As in Massachusetts, the language regarding towns lost its import upon disestablishment and was eventually eliminated. N.H. CONST. pt. I, art. VI ("[T]he several parishes, bodies corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both.").

The New Hampshire Supreme Court's interpretation of the ministerial clause contained within its own constitution makes it clear that the framers of early state constitutions considered ministerial employment decisions to be an essential element of ecclesiastical independence from the state. *See* Holt v. Downs, 58 N.H. 170, 177 (1877). In reaching this conclusion, the New Hampshire Supreme Court referred to the Massachusetts Constitution—which, the court candidly admitted, was the source for the New Hampshire ministerial clause. *See id.* at 176.

> If the Massachusetts constitutional convention of 1779–'80, in the midst of the struggle for liberty, had proposed that the power, believed, at least by men of controlling influence, if not by the majority of the voters, to be a "prerogative" "granted by Christ" to the church, should be taken from the church . . . it seems equally certain that the proposition would have been regarded by the convention as one necessary to be explained, and that no explanation would have induced the people to accept it. No such overthrow of a fundamental doctrine of the ruling class could have been intended.
>
> And, if the legal meaning of the proviso cannot be drawn from the actual intent of the men who adopted it, it cannot, by legal construction, be made an inexplicable anomaly in our system of civil and religious rights. . . . The words, "*Provided, notwithstanding*," are significant. They emphasize a limitation of legislative power in ecclesiastical affairs, and introduce, not an

These early constructions of the right to free exercise demonstrate that the framers of the New England constitutions understood the importance of ministerial employment decisions to the exercise of religious liberty. The language of the New England constitutions—"religious societies" have an "exclusive" right to make contracts regarding the employment of their ministers—sounds peculiarly similar to the modern ministerial exception. Indeed, the church employment provisions are remarkable manifestations of a robust church autonomy doctrine; states which had established a state religion—a measure that Madison considered to be a restriction on religious liberty[79]—nevertheless protected the church-minister relationship as a fundamental element of religious liberty. The provisions reflect their authors' recognition that the individual or entity which selects a church's ministers controls the church itself[80] and that, in turn, churches play a vital role in maintaining individual free exercise.[81] Accordingly, the framers of the New England constitutions, in order to grant religious freedom genuine protection,[82] sought to ensure that civil government could not regulate the selection of church employees. In other words, these framers endorsed an approach to church employment decisions similar to that of the judicially-created ministerial exception to Title VII.

But is it fair to superimpose the reasoning of the Massachusetts, Connecticut, Maine, and New Hampshire constitutions on the Federal

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> invasion, but a guaranty, of religious independence. Not only is there no word indicating a design of depriving any religious association of the right of electing their own teachers, but the contrary design is expressed. A church, incorporated or unincorporated, not connected with a parish, has the exclusive right of electing its own teachers.

Id. at 177.

79 Madison argued against state establishment of religion because "[t]he Religion of every man must . . . be left to the conviction and conscience of every man." Madison, *supra* note 1, at 30.

80 *See* McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972).

81 *See* BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 43 (1997) ("[R]eligious meanings perpetuate themselves through collective activities. Hence, protecting religion must include protecting the social institutions that enable it to exist."). In Massachusetts, Adams' prescience regarding the importance of church autonomy in ministerial employment decisions became apparent almost immediately. As soon as the parishes were free to contract with ministers who agreed with their religious beliefs, they began rejecting the established Calvinist viewpoint and hiring Unitarian ministers. *See* Witte, *supra* note 71, at 32–33.

82 As the Ashfield Baptists wrote in a petition to the General Court: "[I]f we may not settle and support a minister agreeable to our own consciences, where is liberty of conscience?" Petition of the Ashfield Baptists to the General Court (1768), *in* STANLEY GRENZ, ISAAC BACKUS—PURITAN AND BAPTIST 172 (1983).

Constitution in order to justify the ministerial exception? After all, the Founders did not use the language of these particular state constitutions in the Federal Religion Clauses. The state constitutional provisions would simply be historical anomalies if they did not reflect the Founders' conception of the relationship between civil government and the church. However, as Roger Williams' and James Madison's writings demonstrate, the state constitutions—far from being anomalous—reflect the Founders' views of church-state relations and comport with one of the primary rationales for the adoption of the Religion Clauses.

B. Theological Rationale for the Religion Clauses

The Religion Clauses have a richer—and somewhat different—history than many realize.[83] The Religion Clauses were not primarily a function of the Enlightenment rationalism prevalent in Europe. On the contrary, many proponents of the First Amendment advanced religious reasons for free exercise and nonestablishment—most significantly the Baptists, who advocated a "theological school of thought"[84] in support of religious freedom. The proponents of the "theological" view, who played a determinative role in the framing of the Religion Clauses,[85] argued that the Religion Clauses were necessary to prevent the state from interfering with the functions of the church.[86] Indeed, until Jefferson's letter to the Danbury Baptists years after the adoption of the Bill of Rights, the discussion regarding the First Amendment had not been framed in terms of "separation of church and state,"

83 Scholars have already written extensively about the history behind the Religion Clauses, so it will not be repeated in detail here. *See, e.g.*, Esbeck, *supra* note 10, at 354–69; Marci A. Hamilton & Rachel Steamer, *The Religious Origins of Disestablishment Principles*, 81 NOTRE DAME L. REV. 1755, 1767–88 (2006); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421–1503 (1990).

84 *See* MARK HOWE, THE GARDEN AND THE WILDERNESS 8 (1965) ("Williams' principle of separation was primarily a principle of theology and Jefferson's predominantly a principle of politics."). For a discussion of the continuing importance of a religious justification for religious liberty, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 169–78, 196–223 (1991).

85 Esbeck, *supra* note 10, at 356; *see also* HOWE, *supra* note 84, at 19 (arguing that the idea of separation of church and state is "generally understood to be more the expression of Roger Williams' philosophy than that of Jefferson's"); PFEFFER, *supra* note 75, at 98–114 (describing the influence of the Baptists in Virginia and elsewhere in shaping religious liberty).

86 *See* HOWE, *supra* note 84, at 18; Paul G. Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, *in* CHURCH AND STATE 67 (Philip B. Kurland ed., 1976).

which implicitly limited the church, but rather in terms of establishment and free exercise, which only limited civil government.[87]

One of the earliest American advocates of the "theological school of thought," Roger Williams,[88] set out the fundamental "theological" justification for preventing the state from regulating ministerial employment decisions. Williams argued that in order to accord adequate protection for religious freedom, the state must not interfere with the church as it fulfilled its unique spiritual mission.[89] Accordingly, Williams conceived of church-state relations as two mutually exclusive spheres.[90] The ecclesiastical sphere included "setting up that forme of Church Government only, of which Christ hath given them a pattern in his Word" and "[e]lecting and ordaining of such officers onely, as Christ hath appointed."[91] By logical extension, "Magistrates, as Magistrates, have no power of setting up the Forme of Church Government, [or] electing Church officers."[92] According to Williams, civil government may not regulate a church's decisions regarding its polity, whether the decision addresses the church's form of government *or the selection of church employees.*

Civil government, according to Williams' "theological" viewpoint, does not have the authority to interfere with the selection of church ministers. To Williams, the ecclesiastical sphere encompasses the church's exclusive right to select ministers, while the civil sphere does not include the regulation of church polity—a position identical to that of the ministerial exception to Title VII. Williams' theory of church-state relations became influential in the formation of early American constitutional theory; through such men as Isaac Backus and John Leland, Williams' theory of church autonomy in ecclesiastical governance directly influenced the framing of the early New

87 DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 52 (2002).

88 *See* STOKES, *supra* note 70, at 201; Esbeck, *supra* note 10, at 357–58.

89 Esbeck, *supra* note 10, at 358.

90 *See* STOKES, *supra* note 70, at 199. Isaac Backus, an influential proponent of the "theological" viewpoint, wrote: "[I]t is needful to observe, that God has appointed two kinds of government in the world, which are distinct in their nature, and ought never to be confounded together; one of which is called civil, the other ecclesiastical government." ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY 9 (Boston, John Boyle 1773).

91 ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 248 (Samuel L. Caldwell ed., 1963).

92 *Id.*

England constitutions[93] as well as the First Amendment.[94] The writings of Madison would also reflect this distinct conception of religious liberty.[95]

C. *Writings of James Madison*

Madison's political theory manifested the influence of Williams' "theological" view of religious freedom. Certainly, Madison's conception of church-state relations did not resemble the constitutional version of the Berlin Wall or the Great Wall of China—meant to keep church out of civil society but not vice versa—that it has become.[96] Rather, Madison "advocated a jurisdictional division between religion and government based on the demands of religion."[97] Madison argued that "if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body."[98] Madison employed the imagery of a barrier constraining the powers of the government: "The preservation of a free Government requires, not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which

93 *See* PFEFFER, *supra* note 75, at 100 (describing Backus' correspondence with John Adams, the drafter of the Massachusetts Constitution, on the issue of state-established ministers).

94 David Little, *Roger Williams and the Separation of Church and State*, *in* RELIGION AND THE STATE 4, 7–15 (James Wood ed., 1985) (arguing that Williams influenced the Founders' view of religious liberty through John Locke and Isaac Backus).

95 *See* PFEFFER, *supra* note 75, at 99–100.

96 *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 115 (arguing that "for most members of the Founding Generation the idea of separating church from state meant protecting the church from the state—not the state from the church"). The "wall of separation" metaphor has wrongly emphasized *separation* concerns over *free exercise* concerns. The First Amendment was not intended to expel religion from the public arena; even Thomas Jefferson, contrary to popular opinion, did not intend for his "wall of separation" metaphor to imply a limit to the authority of the church. "The 'wall' reassured New England Baptists and others that the First Amendment inhibited the federal government from interfering with their religious exercise. . . . [Jefferson] understood that its strictures were not imposed on state governments or on the voluntary religious societies." DREISBACH, *supra* note 87, at 68–69; *see also* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 17–47 (1982) (concluding that history demonstrates that neither Madison nor Jefferson conceived of the First Amendment as creating strict separation of church and state); HOWE, *supra* note 84, at 19 (contending that the First Amendment was meant to "safeguard the spiritual realm from the encroachments of government"); STOKES, *supra* note 70, at 516 (arguing that Jefferson's main concern was "to prevent interference by the State in religious matters").

97 McConnell, *supra* note 83, at 1453.

98 Madison, *supra* note 1, at 30.

defends the rights of the people."[99] Madison believed that civil government should not abridge this "barrier" by establishing a religion because, simply, the idea that the "Civil Magistrate is a competent Judge of Religious Truth" could only be seen as "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages."[100]

Madison's theory of religious freedom, consistent with Williams' writings and the New England constitutions, implies that the civil government not only *should* not but actually *may* not usurp ecclesiastical functions. According to Professor Dreisbach, Madison's conception of religious freedom departed "from the old-world regime of religious *toleration*, in which religious exercise was a mere privilege that the civil state could grant or revoke at its pleasure."[101] The church does not possess its sphere of authority at the pleasure of the state; rather, its authority comes from a higher source altogether. Religious liberty is, at its core, a fundamental right rather than a product of the revocable lenience of the state. As Madison wrote, "This right is in its nature an unalienable right."[102] Therefore, while delineating a precise line between the spheres of church and state may be difficult[103]—perhaps nearly impossible—Madison argued that the line cannot be obliterated by the state and must be drawn in favor of the church's unalienable right of religious freedom. A "corrupting coalition" of civil government and ecclesiastical government or a "usurpation" of one or the other, Madison wrote, "will be best guarded [against] by an entire abstinance of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect [against] trespasses on its legal rights by others."[104]

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99 *Id.*

100 *Id.* at 32.

101 DREISBACH, *supra* note 87, at 86; *see also* STOKES, *supra* note 70, at 340 ("Madison did not believe that 'toleration' was sufficient.").

102 Madison, *supra* note 1, at 30; *see also* TIMOTHY L. HALL, SEPARATING CHURCH AND STATE 150 (1998) (relating Madison's view of the unalienable nature of religious liberty).

103 Madison himself wrote, "[I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points." Letter from James Madison to Reverend Adams, *in* 9 THE WRITINGS OF JAMES MADISON 484, 487 (Gaillard Hunt ed., 1910).

104 *Id.* Even Jefferson subscribed to the idea that the Religion Clauses protect the internal decisions of religious institutions. Jefferson wrote, "I consider the government of the United States as interdicted by the Constitution from intermeddling with *religious institutions*, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), *in* DREISBACH, *supra* note 87, at 153 (emphasis added). According to this rationale, government interference with the

Madison's theory has salience in the modern debate over the ministerial exception to Title VII. Because Madison's views strongly influenced the drafting of the First Amendment,[105] the Free Exercise Clause embodies and gives constitutional force to the argument that civil government does not have the authority to regulate religious matters. Therefore, the Free Exercise Clause, in accord with Madison's and Williams' views, protects religious freedom by requiring the state to refrain from usurping ecclesiastical functions—one of the most important of which is the selection of ministers.[106] As an aspect of the religious freedom protected by the Free Exercise Clause, the right of churches to choose their ministers is not revocable at the will of the state. Accordingly, the Free Exercise Clause does indeed insulate church employment decisions from state regulations such as Title VII.

D. Summary and Interpretive Implications

This overview of the relevant history of the First Amendment establishes the fundamental justification for the ministerial exception to Title VII. The New England constitutions suggest that ministerial employment decisions constitute a significant aspect of church autonomy, reflecting Williams' view that civil government and ecclesiastical government have distinct spheres of authority. Under this theory of church autonomy, both church and state are prohibited from infringing upon the authority of the other; the church is not to wield the sword and the state cannot assume clerical robes. Madison's writings attest that this concept of church autonomy within the ecclesiastical sphere influenced the formation of—and is protected by—the Religion Clauses. Therefore, the church autonomy doctrine embodied in the Religion Clauses forbids the government from interfering not only with church doctrine, but also with the internal governance decisions of religious institutions. Church *polity* is no less sacrosanct than church *doctrine.*

The proper locus of this church autonomy doctrine—and its corollary, the ministerial exception to Title VII—is the Free Exercise Clause. Several circuit courts have relied upon the test devised in

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internal affairs of religious institutions would be as unconstitutional as government interference with the doctrine of religious institutions.

105 *See* McConnell, *supra* note 83, at 1455 ("No other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison."); Witte, *supra* note 71, at 100.

106 *See* Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006), *petition for cert. filed,* 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1356–57 (D.C. Cir. 1990); McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972).

Lemon v. Kurtzman[107] to justify the ministerial exception to the Establishment Clause;[108] however, there has been significant dissatisfaction with this analytical framework.[109] At the very least, the *Lemon* test conflates the analyses of the Religion Clauses because its entanglement prong has been construed to prevent the government from burdening religion—a function better suited to the Free Exercise Clause.[110] Nevertheless, some have argued that the Establishment Clause should still provide the locus for the ministerial exception; Professor Esbeck has suggested that "the Establishment Clause concepts of nonentanglement and noninterference in intrafaith disputes should be unified and interpreted toward a general theory permitting only a limited role for government in the affairs of religious entities."[111] Esbeck correctly notes that a proper Establishment Clause analysis compels the civil government to avoid regulation of matters such as "doctrine, discipline, appointment of religious personnel, church polity, internal administration, and religious practice."[112] Indeed, government control over clergy is a quintessential indication of an established church. However, until the *Lemon* analysis is discarded in favor of a unified, historically justifiable Establishment Clause theory, religious institutions can be—and should be—protected under the Free Exercise Clause. After all, the "theological" viewpoint's influence on the formation of the Free Exercise Clause demonstrates that the Founders viewed the church's right to select its own ministers as a fundamental prerequisite for the corporate exercise of religion.[113] And, as Professor Laycock suggests, "regulation [that burdens religion] is properly challenged under the free exercise clause."[114] Accordingly, in order

107 403 U.S. 602, 612–13 (1971) (setting out a three-prong test requiring that the statute have a "secular legislative purpose," that the statute have a "principal or primary effect" that "neither advances nor inhibits religion," and that the statute "not foster excessive government entanglement with religion").

108 *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948–50 (9th Cir. 1999); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362 (8th Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169–71 (4th Cir. 1985).

109 *Bollard*, 196 F.3d at 948 n.2. The *Lemon* test has proven to be a malleable, amorphous test that often yields results that cannot be justified under a proper historical reading of the Establishment Clause. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397–400 (1993) (Scalia, J., concurring).

110 *See* Laycock, *supra* note 10, at 1379–84.

111 Esbeck, *supra* note 10, at 351–52.

112 *Id.* at 397.

113 *See supra* notes 70–82 and accompanying text.

114 Laycock, *supra* note 10, at 1384. Laycock argues that "[r]egulation that burdens religion . . . is simply not establishment. . . . [C]ourts that have analyzed the

to promote conceptual clarity in interpreting the Religion Clauses, courts should protect the ecclesiastical sphere under an explicitly Free Exercise Clause rationale rather than an Establishment Clause "entanglement" rationale.[115]

III. MODERN APPLICATION OF THE MINISTERIAL EXCEPTION

A. *Church Autonomy Cases v. "Neutral Principles of Law" Cases*

Despite the historical justification for the church autonomy doctrine and the ministerial exception to Title VII—as seen in the Founders' distinction between civil and ecclesiastical spheres of authority and the early constitutional guarantees of church autonomy in ministerial employment decisions—critics of the ministerial exception have contended that more recent developments at the Supreme Court have undermined the church autonomy doctrine. These critics have focused on the conflict between the Supreme Court's church autonomy cases and "neutral principles of law" cases.[116] In its church autonomy cases—beginning with *Watson v. Jones*[117]—the Supreme Court recognized the church autonomy doctrine, ultimately establishing church autonomy as a constitutional principle in *Kedroff*.[118] The church autonomy cases, although susceptible to multiple interpretations,[119] arguably included ministerial employment decisions as one aspect of church autonomy.[120] The Supreme Court, however, subsequently adopted a "neutral principles of law" analysis for church property disputes in *Wolf*,[121] creating some doubt as to the scope of the church autonomy cases. A comparison of *Kedroff*, which comports with the Founders' view of church autonomy, and *Wolf* suggests that

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church labor relations cases in establishment clause terms have invoked the wrong provision." *Id.*

115 In *Petruska*, the Third Circuit avoided the problem of conflating the Religion Clauses by adopting a rationale grounded in the Free Exercise Clause. *See supra* text accompanying notes 53–59. The Third Circuit only considered the Establishment Clause if a particular claim survived the Free Exercise Clause's ministerial exception inquiry. Petruska v. Gannon Univ. 462 F.3d 294, 310–11 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985). *Petruska*'s approach preserves the distinction between the Religion Clauses.

116 Ellenby, *supra* note 10, at 400–07; Lupu, *supra* note 10, at 405–08.

117 80 U.S. (13 Wall.) 679 (1871).

118 *See* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952).

119 Brady, *supra* note 10, at 1638–42.

120 *Id.* at 1638–39; Laycock, *supra* note 10, at 1394–98.

121 *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (saying that courts may, at their option, use "neutral principles of law" to resolve a church property dispute rather than *Watson*'s rule of deference to the church).

the conflict between the competing lines of cases should be resolved in favor of a broad ministerial exception to Title VII.

1. *Kedroff v. Saint Nicholas Cathedral* and *Jones v. Wolf*

Kedroff involved a dispute between the American and Russian dioceses of the Russian Orthodox Church regarding church governance.[122] The dispute focused on whether the American-elected archbishop or the Russian-appointed archbishop had rightful authority over the North American church.[123] The dispute prompted the New York legislature to attempt to resolve the controversy by enacting legislation transferring control of the New York churches from the "mother" church in Russia to the American diocese.[124] The question before the Court was whether the New York legislation violated the First Amendment.[125]

The Court concluded that "[l]egislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion"[126] and violates the "rule of separation between church and state."[127] In support of its conclusion, the Court cited *Watson* for the principle that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories . . . the legal tribunals must accept such decisions as final."[128] The Court went on to embrace *Watson*'s protection of the church's "unquestioned" right to organize "ecclesiastical government."[129] According to the Court, *Watson*

> radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.[130]

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122 *Kedroff*, 344 U.S. at 103–04.

123 *Id.* at 96–97.

124 *Id.* at 107.

125 *Id.* at 100, 107.

126 *Id.* at 107–08.

127 *Id.* at 110.

128 *Id.* at 113 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871)).

129 *Id.* at 114 (quoting *Watson*, 80 U.S. (13 Wall.) at 727).

130 *Id.* at 116. The Court suggested that review might be possible if "improper methods are proven," a reference to *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929). *Gonzalez* said that

In the Court's opinion, the New York statute violated this constitutional principle. Although the statute did not resolve a doctrinal question—indeed, the case presented "no schism over faith or doctrine"[131]—it "directly prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy."[132]

Standing in apparent contradiction to the Court's decision in *Kedroff* is *Wolf*. *Wolf* involved a conflict over the ownership of church property after a church schism divided a local congregation.[133] In resolving the dispute, the lower courts applied a "neutral principles of law analysis"—which consisted of examining deeds, state statutes, the corporate charter, and the church's constitution in search of a "neutral principle" that would resolve the dispute without addressing religious controversies—to determine whether the church property belonged to the majority or minority faction of the congregation.[134]

The Court concluded that the neutral principles of law approach satisfied the First Amendment because it was "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[135] The Court acknowledged that the First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice" and requires deference to church judicatories in "the resolution of issues of religious doctrine *or polity*."[136] However, the Court said that, subject to those constraints, courts are free to use "any one of various approaches for settling church property disputes."[137] Only if the study of the relevant legal documents required the resolution of a doctrinal question would a court have to defer to the ecclesiastical organization.[138] The Court said that the neutral principles of law

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> it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.

Id. at 16–17. However, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court dismissed this exception as involving "exactly the inquiry that the First Amendment prohibits." *Id.* at 713.

131 *Kedroff*, 344 U.S. at 120.

132 *Id.* at 119.

133 Jones v. Wolf, 443 U.S. 595, 598 (1979).

134 *Id.* at 599–601.

135 *Id.* at 603.

136 *Id.* at 602 (emphasis added).

137 *Id.* (quoting Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

138 *Id.* at 604.

approach would not violate the Free Exercise Clause because "religious societies can specify what is to happen to church property in the event of a particular contingency," ensuring "that a dispute over the ownership of church property will be resolved in accord with the desires of the members."[139] Accordingly, the Court stated that the First Amendment did not "require[ ] the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes."[140]

2. Applying *Kedroff* and *Wolf* to Ministerial Exception Cases

Neither *Kedroff* nor *Wolf* directly addresses the ministerial exception.[141] Given their relevance to the broader church autonomy issue, however, the principles espoused by these cases do have significant implications for determining whether the Supreme Court's precedents support a ministerial exception to Title VII. In cases involving government regulation of church employment decisions under Title VII, the *Kedroff* approach should govern for several reasons.

First, the factual situation in *Kedroff* provides a closer analog to government regulation of church governance than *Wolf* does. While both cases involved a property dispute, *Kedroff* ultimately depended on the resolution of an issue of church governance which the state had attempted to regulate.[142] To resolve the question before it, the *Kedroff* Court would have had to either independently resolve or uphold legislation purporting to resolve which diocese had the authority to select the church hierarchy. That determination was clearly a function of church polity, much like the determination of who is to serve as a minister in a local church. Indeed, the Court itself recognized the factual similarity between the dispute at issue in *Kedroff* and the typical ministerial exception case.[143] In contrast, *Wolf* did not ultimately require a decision regarding church governance; instead, *Wolf* only required a determination regarding which faction of a once-unified church had retained control over the church's property.[144]

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139 *Id.* at 603–04.

140 *Id.* at 605.

141 However, the Supreme Court did directly address judicial interference with ministerial employment decisions in *Milivojevich*; in that case, the Supreme Court found the judicial review of a church's removal of a bishop to be improper under the First Amendment. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976).

142 Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 96–98 (1952).

143 *See id.* at 107–08 (equating "church administration" and "appointment of clergy").

144 *Wolf*, 443 U.S. at 602.

Even the *Wolf* Court acknowledged that, while the judiciary has the authority to resolve church property disputes, the "resolution of issues of religious doctrine *or polity*" must remain an ecclesiastical decision.[145] The analytical distinction between church property disputes and church polity disputes[146] captures the key reason why *Wolf* should not govern in ministerial exception cases: judicial resolution of a property dispute does not create the same degree of coercion as legislative regulation of church employment decisions and, therefore, does not raise the same Free Exercise Clause concerns.[147]

Second, the rationale that supported adopting the "neutral principles of law" analysis in property dispute cases such as *Wolf* does not undermine the *Kedroff* church autonomy doctrine as it relates to ministerial employment decisions. According to the *Wolf* Court, the "neutral principles of law" analysis does not infringe on churches' free exercise rights in cases involving property disputes because churches could draft their documents so as to "ensure that a dispute . . . [would] be resolved in accord with the desires of the members."[148] However, while carefully drafting a church's charter and constitution might guarantee that any eventual property dispute would be settled

145 *Id.* (emphasis added).

146 *See* Kauper, *supra* note 86, at 73.

147 The ministerial employment decision is so fundamental to religion that its regulation by the state creates a significant coercive effect. As Brady argued, "[i]f religious communities are not able to teach, develop, and live out their ideas free from state interference, individual belief will . . . be suppressed." Brady, *supra* note 10, at 1677. In order to preserve religious communities' ability to maintain their beliefs, churches must "retain the corollary right to select [their] voice[s]" free from government interference. Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985). These fundamental concerns are not implicated in property disputes. Indeed, church property disputes would be more likely to fit within Madison's exception to church autonomy for "preserving public order." Madison, *supra* note 103, at 487.

This line of demarcation between church polity decisions and church property disputes—though a fine one—finds support by analogy from *Petruska*. In *Petruska*, the Third Circuit distinguished adjudication of a Title VII claim from adjudication of a contract claim. While "application of Title VII's discrimination and retaliation provisions [to the ministerial employment decision] . . . would violate the Free Exercise Clause," a similar application of "state contract law does not involve government-imposed limits on [a religious institution's] right to select its ministers," and therefore does not violate the Free Exercise Clause. *Petruska*, 462 F.3d at 308–10. After all, "[a] church is always free to burden its activities voluntarily through contract." *Id.* at 310.

148 *Wolf*, 443 U.S. at 603–04. The *Wolf* Court did suggest in dicta that "neutral provisions of state law governing the manner in which churches . . . hire employees" did not inhibit the free exercise of religion. *Id.* at 606. However, that assertion does not comport with the Court's assurances that churches could ensure that litigation would be resolved in accord with the members' desires.

in a manner satisfactory to the church's interests, churches retain no such protection in employment disputes involving a neutral, generally applicable law like Title VII. In employment disputes, the church has no recourse to ensure that its interests would not be harmed.[149] The absence of this measure of protection renders the Court's rationale for dismissing the church's free exercise concerns moot—and makes *Wolf*'s applicability to ministerial employment decisions doubtful.

Third, unlike *Wolf*, the rationale of *Kedroff* does apply to situations involving neutral, generally applicable legislation such as Title VII. In making the determination that questions of church governance are beyond civil authority, the *Kedroff* Court clearly held that intentional government interference with church polity violated the Constitution.[150] However, the *Kedroff* Court did not indicate that it had restricted—or intended to restrict—its holding to intentional government encroachment upon the ecclesiastical sphere. By recognizing "independence from secular control or manipulation" in "select[ing] the clergy" as a part of "the free exercise of religion,"[151] *Kedroff* also implicitly recognized church autonomy from facially neutral legislation regulating ministerial employment decisions. If churches have the power to make autonomous decisions regarding "church government,"[152] then it does not matter whether the government violates that autonomy intentionally or not. To hold otherwise would reduce church *autonomy* to a matter of mere *exemption* from otherwise valid laws.[153] Church autonomy from government regula-

149 Indeed, facially neutral laws such as Title VII can burden the free exercise of religion. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1000 (1990).

150 Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 107–08 (1952). *See* Brady, *supra* note 10, at 1641.

151 *Kedroff*, 344 U.S. at 116.

152 *Id.*

153 The argument for church autonomy should be distinguished from the argument for individual religious exemptions at issue in *Employment Division v. Smith*, 494 U.S. 872, 878 (1990). The Founders' conception of a separate sphere of church authority, outlined briefly in Part II, has no parallel in the debate over individual exemptions. As the history of the Religion Clauses demonstrates, the argument for church autonomy is not that an exception should be carved from a valid, enforceable law within the state's authority; instead, the argument is that the state does not have the authority to enforce the law against the church at all because church governance is entirely outside its sphere of authority and is instead the responsibility of the church. The D.C. Circuit used this logic when it distinguished *Smith* in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996). According to the D.C. Circuit, *Smith* does not stand "for the proposition that a *church* can never be relieved" from complying with a neutral law for two reasons. *Id.* at 462. First, "the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different

tion of ministerial employment decisions, if it is to be "autonomy" in the true sense of the word, must include autonomy from facially neutral laws.

Kedroff, then, should govern in ministerial exception cases. While church property decisions may be amenable to resolution through "neutral principles of law" analysis, employment discrimination decisions are not. Engaging in such an analysis would not promote neutrality at all; rather, it would subject a decision the Founders recognized as within the church's exclusive sphere of autonomy to regulation by the state. State regulation of church employment decisions would bring the core functions of the church under civil cognizance[154]—a result expressly rejected by our Founders. In the words of Madison, "The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants."[155]

B. Proper Scope of the Ministerial Exception

Even if scholars universally agreed that *Kedroff*'s church autonomy doctrine governed ministerial exception cases, it would still be necessary to determine the scope of the ministerial exception. The issue is simply this—are employment decisions regarding both "religious function" and "secular function" employees exempt from government regulation? Professor Bagni, in an early article on the ministerial exception, suggested that the ministerial exception should only protect employment decisions regarding "religious function" employees.[156] To Bagni, church relations with clergy must be "outside the scope of civil regulation because otherwise there would be too great an infringement on free exercise rights."[157] In contrast, according to Bagni, a church's relations with its "secular" employees could be subject to government regulation because such regulation would

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character from that at issue in *Smith*," and second, the ministerial exception can be justified solely on the grounds that churches have a "fundamental right . . . to 'decide for themselves, free from state interference, matters of church government.'" *Id.* (quoting *Kedroff*, 344 U.S. at 116).

154 *See generally* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 114 ("When the government coerces a group to accept or to retain . . . a person whom the group would otherwise reject or expel, it blindly enters the religious domain.").

155 Madison, *supra* note 1, at 30–31. The possibility of inequity arising from autonomous church decisions "is far preferable to the conversion of secular courts into ecclesiastical tribunals." PFEFFER, *supra* note 75, at 302.

156 Bagni, *supra* note 10, at 1539–40.

157 *Id.* at 1539.

impose only a minimal burden on free exercise.[158] Most circuit courts have accepted this general approach.[159]

This approach suffers from a significant flaw. As Bagni himself noted, basing the level of protection on the function of the individual employee makes the definition of "minister" critical.[160] One might assume that it would be fairly simple to determine who does and who does not have a significant spiritual role in a particular religious institution; if that were so, restricting the exemption to the church-minister relationship might not have much significance. However, an employee's classification can form the central dispute in a Title VII case[161] because the highly subjective "function" test employed by the courts leaves this issue to be decided on a case-by-case basis.[162] Inviting such fact-intensive judicial investigations into the inner workings of churches has troubling implications;[163] granting the judiciary the authority to define who performs "enough" spiritual functions to qualify as a minister gives the government much the same power as it would possess if the ministerial exemption did not exist. By narrowly defining "minister," courts might—indeed, will inevitably—refuse to protect positions that a church may deem vital to its spiritual integrity.[164] The current approach permits the judiciary to control a church by imposing liability for refusing to hire individuals who may not comport with the church's religious mores even if the church attaches great spiritual significance to the position that the court deems "secular."[165] The power to define what is and what is not a ministerial position within a church—and, hence, what is central to the church—is the power to define the church itself.[166]

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158 *Id.* at 1539–44.

159 *See* Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6 (3d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3398 (U.S. Jan. 16, 2007) (No. 06-985).

160 Bagni, *supra* note 10, at 1545.

161 *See, e.g.*, EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283–85 (1981) (concluding that four ordained Baptist ministers did not qualify for the ministerial exception because they did not perform "ecclesiastical or religious" tasks).

162 *See supra* text accompanying notes 34–42.

163 *See* Brady, *supra* note 10, at 1694–95.

164 *Id.* (explaining how the Fifth Circuit defined "minister" in a manner "incompatible with . . . Catholic polity").

165 *See* Gedicks, *supra* note 154, at 138–69; Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571, 586.

166 *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2138 (2003) ("The power to appoint and remove ministers is the power to control the church.").

This issue arose in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos.*[167] In *Amos*, which upheld the constitutionality of the statutory exemption from Title VII,[168] the Court concluded that the judiciary must leave the definition of "religious function" to the church.[169] As Justice Brennan acknowledged in his concurring opinion, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself."[170] If the courts arrogated the responsibility to determine whether an activity is religious or secular, they would assume a distinctly religious function—that of defining the nature of the religious institution. "While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. . . . As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."[171] Such uncertainty might unduly burden the religious practices of a church:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.[172]

In turn, this burden contravenes the Free Exercise Clause.

In light of these constitutional concerns, the ministerial exception must encompass all employment decisions made by churches. As Professor Brady argued, "the only effective and workable protection for the ability of religious groups to preserve, transmit, and develop their beliefs . . . is a broad right of church autonomy that extends to all aspects of church affairs."[173] In contrast, Bagni's definition requires an extensive inquiry into church affairs in order to determine whether an employee engages in "religious" or "secular" functions; that inquiry runs counter to the Supreme Court's conclusion in *Amos.*[174] For churches to maintain their autonomy, their core functions must not be subject to government definition. Indeed, permit-

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167 483 U.S. 327, 342 (1987).

168 *Id.* at 335–40.

169 *Id.* at 327–28; *see also* EVANS, *supra* note 81, at 129 ("The Court held that the threshold question—whether an activity of a church is a religious activity—was itself a distinction reserved for the institution alone.").

170 *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

171 *Id.* at 343–44.

172 *Id.* at 336 (majority opinion).

173 Brady, *supra* note 10, at 1698.

174 *See* Gedicks, *supra* note 154, at 148.

ting the judiciary to define what is "truly" religious would subject the scope of church autonomy to the limits tolerated by the state. That, to be certain, was precisely what Madison rejected; religious liberty is not a matter of toleration, but rather of unalienable right.[175]

CONCLUSION

This Note has suggested that the Free Exercise Clause demands a broad ministerial exception to Title VII. The Founders protected church autonomy under the Free Exercise Clause and recognized that civil government does not have the authority to regulate church governance; indeed, early state constitutions identified ministerial decisions as an integral part of churches' exclusive sphere of authority. The Supreme Court faithfully reflected the Founders' conception of church autonomy in *Kedroff*, where it acknowledged that matters of church polity and governance are within the exclusive jurisdiction of the church. The Supreme Court extended that conception of church autonomy in *Amos*, recognizing that the judiciary must not usurp the church's role in defining what is or is not a spiritual function. Accordingly, courts should enforce a ministerial exception encompassing both "secular" and ministerial employees in order to prevent the government from interfering with church governance.

There remains an even more fundamental question—one that can only be raised here. Entirely apart from the question of whether churches *do* have autonomy is the question of whether churches *should* have that autonomy. There are—as might be expected—two competing views. One supports vibrant religious freedom and posits that religious institutions act as an important restraint on civil government. "[D]emocratic government flourishes best," according to Brady, "when religious communities are free to develop, teach, and practice their religious beliefs and doctrines without government interference."[176] Gedicks framed this idea in negative terms: "[O]ne has more to fear from unlimited governmental power than from a strong right of religious group autonomy; it is the latter that will serve as a check on the former."[177] The opposing view, in contrast, seeks to restrain religious freedom and suggests that religious institutions constitute a threat that the state can choose to tolerate or regulate. Lupu argued that "[l]arge and powerful religious institutions . . . may be a threat to . . . the operation of the machinery of the state,"[178] while

175 *See supra* notes 101–02 and accompanying text.

176 Brady, *supra* note 10, at 1705.

177 Gedicks, *supra* note 154, at 99.

178 Lupu, *supra* note 10, at 442.

Ellenby asserted that churches form "a powerful obstacle to the administration of justice."[179] According to this viewpoint, the state restrains religious institutions, not vice versa. Those who adopt this view and advocate government regulation of core religious decisions, however, must answer one question—is it wise to ask "Big Brother" to play God?

179 Ellenby, *supra* note 10, at 411.