After *Espinoza*, What's Left of the Establishment Clause?

By Carl H. Esbeck

Religious Liberties Practice Group

About the Author:

Carl Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lyda Emeritus Professor of Law, University of Missouri.

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Other Views:

• Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343 (2014), https://harvardcrcl.org/wp-content/uploads/sites/10/2011/09/343_Geddicks.pdf.

• Brief for the Federal Respondent, Hosanna-Tabor v. EEOC, No. 10-553 (U.S. Sup. Ct. 2012), *available at* https://www.justice.gov/sites/default/files/osg/briefs/2011/01/01/2010-0553.mer.aa.pdf.

• Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246, slip op. at 56 (2020) (Ginsburg and Kagan, JJ., dissenting; Breyer, J., dissenting; Sotomayor, J., dissenting), *available at* https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.

On June 30, 2020, the Supreme Court of the United States handed down its decision in *Espinoza v. Montana Department of Revenue*.[1] In a 5 to 4 ruling, the Supreme Court held that when there is a government program with a secular purpose, such as education, health care, social services, emergency disaster assistance, or economic relief, the Free Exercise Clause requires that the program be available without regard to religion. A government cannot enact a law or program that purposefully[2] discriminates against religion, a religious practice, or an individual because of his or her religion.[3]

In 2015, the Montana legislature created a program to expand parental choice in primary and secondary education. The statute provided an income tax credit of up to $150 for any state income taxpayer who donated money to a student scholarship organization ("SSO"). In turn, SSOs would use the donations to fund scholarships for students attending private K-12 schools. Kendra Espinoza and other plaintiffs enrolled their children in private religious schools. Ms. Espinoza successfully applied for scholarships to defray the cost of her daughters' tuition. However, the tax credits and tuition awards to attend private schools were halted following a determination by the state supreme court that the aid to religious schools violated the state constitution.

The appeal in *Espinoza* built on *Trinity Lutheran Church v. Comer*, where the Court held that a childcare center could not be denied a state grant to pay for a new playground surface to enhance child safety simply because of the center's status as church-operated.[4] With reference to a state constitutional

1 140 S. Ct. 2246 (2020) (Roberts, C.J., for the Court, joined in full by Thomas, Alito, Gorsuch, and Kavanaugh, JJ).

2 "Purposefully" means the legislature's objective or goal as apparent from the plain text of the statute and its authoritative interpretation. It need not be shown that government officials acted invidiously or with malice, only that the government intended to do what it did. Inquiry into "purpose" may go beyond the mere text or "face" of a statute. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-34 (1993); *see* Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 699 (1994) (plurality opinion in part).

3 *See Church of Lukumi Babalu Aye*, 508 U.S. 520; McDaniel v. Paty, 435 U.S. 618 (1978) (plurality opinion).

4 137 S. Ct. 2012 (2017). As he did in *Trinity Lutheran*, Chief Justice John Roberts limited the holding in *Espinoza* to status-based discrimination. *Espinoza*, slip op. at 9-12. The state constitutional provisions in both Missouri and Montana discriminated based on status. However, Justice Neil Gorsuch has convincingly pointed out that a distinction between religious status and religious use is not durable. *Id.* at 2-8, (Gorsuch, J., concurring); *Trinity Lutheran*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring in part, joined by J. Thomas). And Chief Justice Roberts said he "acknowledge[s] the point but need not examine it here." *Espinoza*, slip op. at 12. Moreover, Roberts noted that two of the Court's previous free exercise holdings struck down use or conduct restrictions. *Id.* (citing *Church of Lukumi Babalu Aye*, 508 U.S. 520 and Thomas v. Review Bd., 450 U.S. 707 (1981)). This seems to all but abandon the status/use distinction for most future applications of the Free Exercise Clause.

prohibition on government aid going to religious organizations, Missouri denied the funding because of the grantee's status as a church. This purposeful discrimination was found to violate the Free Exercise Clause. For some, *Trinity Lutheran* was distinguishable from *Espinoza* because the aid was for playground safety,[5] which was perceived to be more secular in character than the religious elementary schools assisted in *Espinoza*.

Two decades ago the Supreme Court held that the Establishment Clause permitted a government program of secular purpose to directly confer benefits to K-12 religious schools, along with other schools similarly situated, so long as the aid was not diverted to an explicitly religious purpose.[6] When it came to indirect aid, the Court had been even more lenient in its scrutiny under the Establishment Clause.[7] In the latter instance, such as with school vouchers and tuition tax deductions, the power to choose is in the hands of the ultimate beneficiary who then exercises that authority by selecting the service provider, whether secular or religious. Because the beneficiary is not a state actor, it does not matter that the benefit might also work to advance explicitly religious beliefs or practices.

The Court in *Espinoza* said the parties did not dispute that the Establishment Clause allowed such aid, nor could they.[8] The type of aid was indirect via tax credits, but whether the aid was direct or indirect was not at all determinative in the Court's decision.[9] It seems that the Court is no longer concerned with diversion of the aid or the nature of the aid delivery mechanism. Going forward, the Free Exercise Clause requires religious groups to be able to compete for all secular programs without discrimination due to religious status. To be sure, the government may require that recipient schools, including religious schools, be accredited. In that way, the state is assured that it receives full secular educational value in return for the aid. But that is the end of the state's educational interests. It does not matter that religious schools also provide their students with a religious education and an integrated secular/sacred environment for nurturing the faith. Indeed, the religious character of a school is often a material reason parents select it for their children. This approach has the added virtue of reducing regulatory entanglements between church and state.

Espinoza does not mean that a state is compelled to provide funding for K-12 religious schools. A state may continue to provide money and other aid only to public schools, thereby excluding all similarly situated private schools, whether nonsectarian or religious.[10] That too is discrimination of a sort, but it is not discrimination based on religion.

The rationale behind *Espinoza* is to enlarge religious choice (historically termed religious "voluntarism") within the educational, health care, and social service initiatives of the modern welfare state. This avoids putting pressure on individuals and religious organizations through financial incentives that are biased against religion. For example, if people want to obtain drug rehabilitation counseling at their church rather than from a secular agency, they ought to have that choice. If that freedom of choice is to be meaningful, then church-affiliated rehabilitation centers have to be equally eligible for government funding. Of course, the religious providers have to meet the same criteria for proficiency and success as other eligible providers, but their religious status should not disqualify them from public aid.

In *Espinoza*, Montana became purposefully discriminatory only after state tax officials and later the state supreme court determined that the state constitution did not permit religious schools to participate in the scholarship program. Accordingly, while the original legislation was intended to assist all private schools, as implemented the law turned out to be non-neutral because of the state constitutional exclusion. Because the discrimination was intentional, the Free Exercise Clause was violated. Had the claim concerned generally applicable legislation that was neutral as to religion, then the law of *Employment Division v. Smith*[11] would have applied. Under *Smith*, generally applicable legislation that has an adverse but unintended impact on religion does not violate the Free Exercise Clause. The *Smith* decision is up for reconsideration in the fall of this year in *Fulton v. City of Philadelphia*.[12]

Now that the Supreme Court has decided that government aid for education, health, social services, and other such secular programs must be available to providers without regard to religion, what is left of the Establishment Clause? Many commentators had thought that such access to taxpayer funds violates the Establishment Clause. So, it might be difficult for them to see a future for a clause that should be, to their point of view, the chief guarantor of the separation of church and state. Yet despite what such commentators might have thought, *Espinoza* can be seen, not as a break with separationist doctrine, but as an extension of it. In trying to properly interpret the Establishment Clause, the

5 *Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (limiting holding to aid for playground resurfacing).

6 *See* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (in face of Establishment Clause challenge, upholding federal primary and secondary education act that provides equal aid to public and private schools, including religious schools). The controlling opinion was that by Justice Sandra Day O'Connor, *id.* at 836, concurring in the judgment, joined by Justice Stephen Breyer. *See* Marks v. U.S., 430 U.S. 188, 193 (1977) (explaining that when Supreme Court fails to issue majority opinion, the opinion of the members who concurred in the judgment on the narrowest grounds is controlling).

7 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding school vouchers for K-12 schools, including religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing special education services to Catholic student not prohibited by Establishment Clause); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student choosing to use grant for training as cleric); Mueller v. Allen, 463 U.S. 388, 399-400 (1983) (upholding a state income tax deduction for parents paying school tuition).

8 *Espinoza*, slip op. at 7.

9 *See id.* (relying on *Trinity Lutheran* where the nature of the aid was direct).

10 *See* Norwood v. Harrison, 413 U.S. 455, 462 (1973); Everson v. Board of Educ., 303 U.S. 1, 16 (1947) (dictum); Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (E.D. Mo.), *aff'd mem.*, 419 U.S. 888 (1974); Brusca v. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

11 494 U.S. 872 (1990).

12 U.S. Supreme Court No. 19-123, *cert. granted* 140 S. Ct. 1104 (Feb. 24, 2020). A decision in *Fulton* is not expected until spring 2021.

Court has sought to prevent government from putting its thumb on the scale of private religious judgment, whether for individuals or religious institutions. In that light, the Establishment Clause forbids the government from preferring religion, or taking sides in religious disputes. But it also permits the government to exempt religion from regulatory burdens imposed on others; the state thereby leaves religion alone, and a state does not establish a religion by leaving it alone. The integrating principle behind the clause is not to prevent the government from doing things that might benefit religion. Rather, it is to keep government from interfering with the voluntary choices by citizens that are religious, as well as walling off from state interference the internal autonomy of religious bodies. Seen from that vantage, *Espinoza* is of a piece with a separation of church and state that minimizes the role of government in private religious judgment while expanding the liberty to exercise religion or choose another path.

I. Religious Preferences Violate the Establishment Clause

A. What is a Religious Preference?

If we look back at the last century, there are examples of religious preferences that strike us as crude today. Government cannot penalize blasphemy, sacrilege, or other expression that speaks ill of a religion.[13] Government cannot compel an individual, upon pain of material penalty, inconvenience, or loss of public benefit, to profess a religious belief[14] or to observe an explicitly religious practice.[15]

A more plainspoken way of defining a religious preference is that the government is taking sides on a religious question. The establishment of a state church is the quintessential act of taking sides in a religious matter. Accordingly, the Establishment Clause prohibits government from purposefully discriminating between or among religions,[16] and from using classifications based on denominational or church affiliation to extend benefits[17] or to impose burdens.[18]

On the other hand, the government may use classifications based on a person's religious beliefs or practices—as distinct from denominational affiliation—to lift civil burdens from those individuals. For example, Congress may confer conscience objector draft status "on religious pacifists who oppose war in any form."[19] Government cannot use classifications that single out a particular religion's practice for favoritism, as opposed to favoring a general category of religious observance.[20] For example, prison authorities may accommodate religious dietary requirements, but they may not accommodate only kosher diets; the latter would be a religious preference that violates the Establishment Clause. To accommodate religious prisoners and still satisfy the Establishment Clause, authorities should permit inmates to

13 *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down law permitting censorship of films that are "sacrilegious"); *see also* Epperson v. Arkansas, 393 U.S. 97, 107 n.15 (1968) (dictum concerning blasphemy statutes).

14 *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (overturning requirement of an oath declaring belief in God as a prerequisite for public office); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). Concerning compelled speech, this is an area where the purview of the Free Speech and Establishment Clauses overlap. Additionally, the Constitution provides that there may be no religious test for federal office. U.S. Const. art. VI, cl. 3.

15 *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("[G]overnment may not coerce anyone to support or participate in religion or its exercise."); *cf.* McGowan v. Maryland, 366 U.S. 420, 431-49 (1961) (holding that a Sunday closing law is not explicitly religious and thus that compelling its observance does not violate the Establishment Clause).

16 *See* Larson v. Valente, 456 U.S. 228 (1982) (unconstitutional discrimination in state regulatory legislation adverse to new religious movements); Fowler v. Rhode Island, 345 U.S. 67 (1953) (ordinance permitting church services in park but no other religious meetings was a way of unconstitutionally preferring some religious groups over others based on a given sect's type of religious gatherings or occasion for delivering sermons); Niemotko v. Maryland, 340 U.S. 268 (1951) (unconstitutional to deny use of city park for Bible talks when permits were issued for worship services by other religious organizations and for Sunday school picnics).

When a law of nondiscriminatory purpose has a disparate effect on religious organizations or their observances, the Establishment Clause is not violated. *See* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 696 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (effect on religious groups was not purposeful, but the unintended effect of IRS's facially neutral, secular regulation); *Larson*, 456 U.S. at 246 n.23.

17 "Benefit" means affirmative financial assistance for a secular purpose in the nature of a subsidy, grant, entitlement, loan, or insurance, as well as a tax credit or deduction. A tax exemption, such as that upheld for religious organizations in *Walz v. Tax Comm'n*, is to be distinguished from tax credits and deductions. 397 U.S. 664 (1970). A tax exemption is considered government's election to "leave religion where it found it" and is thus not considered a benefit. The idea that exemptions, credits, and deductions for organizations should all be regarded alike as "tax expenditures," while useful in other areas of legal policy, does not make sense in dealing with issues that arise under the Religion Clauses. *See* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L.J. 299, 345 (1976); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285 (1969).

18 *Grumet*, 512 U.S. at 702-08 (plurality opinion in part); Gillette v. United States, 401 U.S. 437 (1971); *see Larson*, 456 U.S. at 246 n.23 (further explaining *Gillette*). The rationale, in part, is that the Court wants to avoid making membership in a denomination more attractive. If the rule stated in the text was not the law, then merely holding religious membership would result in the availability of a civil advantage. For example, it would violate the rule stated in the text if Congress were to confer conscientious objector draft status "on all Quakers," for that may induce conversions (real or pseudo) to Quakerism.

19 *See Gillette*, 401 U.S. at 448-60; *Grumet*, 512 U.S. at 715-16 (O'Connor, J., concurring in part and concurring in the judgment). Government can either treat all religions alike, not concerning itself with unintended effects, or government can purposefully lift civic burdens from individuals based on their religious practices. What is impermissible is to lift such burdens based on an individual's denominational or religious affiliation.

20 *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down state law favoring Sabbath observance); *cf.* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 n.11 (1987) (explaining and distinguishing *Caldor*); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). For example, if Saturday as a day of rest is required to be accommodated by employers, then all religious days of rest must be accommodated. If a student absence from public school is excused for Good Friday, then so must absences for all religious holy days.

request food that meets the dietary requirements of all religions present in the prison population.

More generally, it is an unconstitutional preference for government to confer a benefit targeted on a religion or on those observing a particular religious practice.[21] *Estate of Thornton v. Caldor, Inc.* is the leading case.[22] The Connecticut legislature was about to repeal its law prohibiting retailing on Sunday.[23] Anticipating that the repeal would lead to scheduling conflicts between employers and churchgoing employees, the legislature took the side of the employee over the retail employer.[24] The new statute read in part: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day."[25] Donald Thornton was an employee of Caldor, Inc., a retail department store.[26] He was a Presbyterian and observed Sunday as his Sabbath.[27] When the store began opening on Sundays, Thornton worked Sundays once or twice a month.[28] Unhappy with the situation, he invoked the statute and demanded Sundays off.[29] The store resisted, and the State Board of Mediation filed a lawsuit on Thornton's behalf.[30] The store argued that the Connecticut statute violated the Establishment Clause, and the Court agreed.[31]

The Supreme Court found that the Connecticut law forced the private sector to assist in the religious observance of fellow citizens.[32] That is what a preference often does: the government compels one private citizen to help another private citizen better conform to his or her religion.[33] The religious preference in *Caldor* was doubly offensive, for the statutory right was "unyielding."[34] That is, the statute took no notice of the commercial burden imposed on the employer or of the inconvenience to Thornton's co-workers who would have to fill in during his absence on Sundays.[35] An unyielding statute that compelled private parties to assist others in their religious duties was found to be state action that transgressed the Establishment Clause.

It is possible for a religious preference to pass constitutional challenge. In *TWA v. Hardison*, decided a few years before *Caldor*, the statutory provision in question—a requirement that covered employers adjust to the needs of their religious employees[36]—was a religious preference.[37] However, the Court upheld the law because the employer's duty of religious accommodation was not unyielding, as it was in *Caldor*, for the duty dissolved if the employer met the burden of showing "undue hardship."[38] The Supreme Court did not reach the claim that the law requiring accommodations for religious employees—section 2000e(j) of Title VII of the Civil Rights Act—violated the Establishment Clause,[39] albeit the prospect of such a ruling influenced the Court's interpretation of the statute.[40] The Court held:

> To require TWA to bear more than a *de minimis* cost in order to give [the employee-claimant] Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.[41]

Congress enacted section 2000e(j) to address a conflict created by private market forces. The government stepped into that conflict and took the side of the religious claimant over that of the employer. In that sense, section 2000e(j) is like the statute in *Caldor*, a religious preference that raised Establishment Clause concerns.[42] However, unlike in *Caldor,* the section 2000e(j) preference was not absolute: employers did not have to comply if they could show that the requested accommodation would create an "undue hardship."[43] The *TWA* Court avoided reaching the Establishment Clause question by interpreting the preference as relieving the employer from the duty to accommodate an

21 *See Grumet*, 512 U.S. at 702-08 (legislation favoring one particular religious sect is unconstitutional); *Texas Monthly*, 489 U.S. at 14-15 (plurality opinion) (upholding sales tax exemption for those purchasing religious sacred writings).

22 472 U.S. at 709-11.

23 *Id.* at 705 n.2.

24 *Id.* at 706 n.3.

25 *Id.* at 706.

26 *Id*. at 705.

27 *Id.* at 705-06.

28 *See id*. at 705.

29 *Id.* at 706.

30 *Id.* at 706–07.

31 *Id.* at 707, 710–11.

32 *See id.* at 710.

33 *See id.* at 708 ("[G]overnment . . . must take pains not to compel people to act in the name of any religion.").

34 *Id.* at 709–10.

35 *Id.* at 708–09.

36 42 U.S.C. § 2000e(j). Care should be exercised to not confuse Title VII's preference favoring religious employees in § 2000e(j), a duty imposed on employers, with Title VII's exemptions for religious employers found in §§ 2000e-1(a) and 2000e-2(e)(2). *TWA* involved the former and *Amos* the latter.

37 432 U.S. 63, 66 (1977).

38 *See id.* at 84–85.

39 *See id.* at 69 n.4.

40 *See id.* at 89 (Marshall, J., dissenting) ("The Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of [TWA's] constitutional challenge unnecessary.").

41 *Id.* at 84 (majority opinion) (footnote omitted).

42 The Title VII accommodation at issue in *TWA* is not to be confused with general civil rights antidiscrimination statutes. Rather, it is a mandate to prefer employees who need affirmative help to both work and practice their religion. So the latter asks of the private sector to take on a new obligation so that the employee can better practice his religion. It is a plea for special treatment, not equal treatment. Hence, it is rightly characterized as a preference.

43 42 U.S.C. § 2000e(j).

employee when the burden was more than de minimis.[44] So long as the statutory preference costs the employer nothing or next to nothing, it is harmless to the employer, and therefore the state action did not in fact have any effect on the conflict. That being so, the Court quite consciously misinterpreted what Congress required by the accommodation. And we now know, after *Caldor*, that it needlessly did so under the belief that the Court had to give this interpretation to save the statute from violating the Establishment Clause. So long as the accommodation is not unyielding, but balances the competing interests of employer and employee, the statute does not fail the *Caldor* rule against religious preferences.

Larkin v. Grendel's Den, Inc. is another example of an unconstitutional preference.[45] *Larkin* struck down a municipal ordinance that gave churches the right to veto the issuance of liquor licenses to businesses within a 500-foot radius of the church.[46] Religious interests were preferred by the city over private retailing interests, and the preference was unyielding. The Court hastened to point out that it was not uncommon for cities to consider, along with other factors, the desire of churches to be free from noisy and rowdy neighbors.[47] Such considerations are constitutional, but a zoning ordinance cannot take the next step and grant an absolute preference in favor of church interests over competing secular interests.[48]

B. Religious Exemptions Are Not Preferences

The Establishment Clause is not violated when government enacts regulatory or tax legislation but provides an exemption from these burdens for those holding religious beliefs or practices. Such exemptions are at the discretion of a legislature and have as their purpose to ameliorate hardships borne by religious minorities and other dissenters who find themselves out of step with the prevailing social or legal culture. Statutory religious exemptions are common in our nation where there is a long and venerable tradition of religious tolerance.

A categorical mistake has emerged in the secondary literature (but not the case law) where statutory religious *exemptions* are conflated with religious *preferences*. The two are quite different. As to preferences, it is entirely proper to be concerned when a government intentionally favors religion over the secular. Being able to distinguish an exemption from a preference is paramount.

A true exemption ensures that a regulatory or tax burden imposed on others is not also required of the religiously devout who are predisposed to conform to their faith. Government does not establish religion by choosing to leave it alone. Because the religious devotion of the one invoking the exemption—not the government's decision to withhold regulation—is the driving force behind the religious observance, any harm that befalls a third party is the result of wholly private conduct.

In *Corporation of the Presiding Bishop v. Amos*, a janitor was dismissed from employment by his church-affiliated employer for failing to tithe to the church. He filed a claim for religious discrimination.[49] Title VII of the Civil Rights Act exempts religious employers from such claims when the adverse employment decision was motivated by the religious beliefs or practices of the employer.[50] The janitor claimed that this exemption violated the Establishment Clause. The Supreme Court readily acknowledged that the janitor suffered a religious burden.[51] However, he was harmed by his own church, not as a consequence of the religious exemption provided by Congress. As Justice Byron White wrote for the Court, "Undoubtedly, [the janitor's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of altering his religious practices or losing his job."[52]

A helpful way to think about what the Supreme Court held in *Amos* is to draw on the law of state action. When a legislature passes a statute that says an entity in the private sector may take a certain action, it is not state action when a private actor later avails itself of that opportunity. In *Flagg Brothers, Inc. v. Brooks*, the legislature permitted landlords to use self-help in removing the possessions of a tenant who was behind on the rent and had abandoned the leasehold.[53] A landlord availed itself of the self-help option. The tenant later sued the landlord for removing the tenant's property without adequate notice and opportunity for a hearing as required by the Due Process Clause of the Fourteenth Amendment. The lawsuit was dismissed because the Fourteenth Amendment only binds state actors, and the landlord's exercise of self-help was not state action.

A true preference arises when government takes note of a religious dispute and proceeds to affirmatively impose its resolution on the conflict. These disputes often emerge in situations not of the state's creation, usually from private social or market forces. When the legislature's intervening law takes the side of the religious disputant, the government is intentionally preferring religion over the secular. If the government's resolution

44 *See TWA*, 432 U.S. at 84.

45 459 U.S. 116 (1982).

46 *See id.* at 117.

47 *See id.* at 125.

48 *Id.* at 124 nn.7–8. There is commentary in *Larkin* suggesting that the constitutional offense was that the municipal ordinance delegated sovereign authority to a religious organization. *Id.* at 125-27. But the fact that the ordinance created an unyielding preference for religious interests over business interests was quite enough to justify the holding. In a modern regulatory state, many tasks formerly done by the government are delegated to the private sector. Just as the issuance of state drivers' licenses can be delegated to an independent contractor, so can the issuance of liquor licenses. There are few exclusive sovereign functions. It is best to regard *Larkin* as a straightforward case of striking down an unyielding religious preference.

49 483 U.S. 327, 330 (1987).

50 42 U.S.C. §§ 2000e–2000e-17. In Title VII, Congress did not cover acts of religious discrimination by religious employers. *Id.* at § 2000e-1(a). The nature of the religious employer exemption in Title VII is sometimes misunderstood. The exemption reflects a determination by Congress that religious employers should not be subjected to claims of religious discrimination. The exemption begins with language that places this type of claim outside the scope of all Title VII. *Id.* ("This subchapter shall not apply to . . . .").

51 *Amos*, 483 U.S. at 337 n.15.

52 *Id.*

53 436 U.S. 149 (1978).

of the dispute goes on to unyieldingly side with religion such that any harm to third parties is not also weighed in the balance, then the Supreme Court will strike down the preference. The prototypical case is *Caldor*, striking down a law where Connecticut took the side of a religious claimant in a dispute with his employer.

Parallel to the rationale in *Amos* is that in *Walz v. Tax Commission of New York*.[54] The Supreme Court was asked to consider whether a municipal property tax exemption for churches and other houses of worship advanced religion in violation of the Establishment Clause.[55] The Court 8-1 held that it did not. The *Walz* Court reached two conclusions of law. First, it held that the tax exemption for religious organizations was not a subsidy, but the government electing not to impose a tax burden on religion and thereby leaving religion alone.[56] In the Court's own words, the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but [it] simply abstains from demanding that the church support the state."[57] The Court distinguished an exemption from a subsidy saying that it "cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on [others]."[58] The proposition is simple: government does not establish religion by leaving it alone. As to the virtue of "leaving churches alone" arising from the principle of church-state separation, the Court observed: "The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation."[59] Unlike a religious preference, a tax exemption for religious entities "tends to complement and reinforce the desired separation [thereby] insulating each from the other."[60]

Second, the *Walz* Court rejected a quid pro quo argument as a justification for upholding the tax exemption. The tax commission had argued that the exemption was valid because it compensated religious groups for generating social capital through providing the poor and needy with welfare services, education, and health care.[61] Religious charities do just that, of course, but viewing the tax exemption as a reward for good works invites unconstitutional entanglement by way of "governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."[62] Moreover, a reward-for-works rationale would risk violating the rule against authorities taking up religious questions concerning the validity, meaning, or importance of religious beliefs and practices. The rationale behind the no-religious-questions rule is that the government lacks the jurisdiction to make judgments concerning the civic value of religious practices. To contemplate civil courts passing on such questions implies an established state church against which "unapproved" ministries and "underperforming" churches are civilly tested and found wanting.

The *Walz* Court noted that religious organizations were not the only ones that received tax-exempt status under the city ordinance, but were joined by art, educational, and poverty-relief organizations.[63] However, the Court did not say that the inclusion of secular organizations in the tax exemption was necessary to its holding. Indeed, in cases like *Amos*[64] and *Zorach v. Clauson*,[65] the Court upheld exemptions that were exclusive to religious organizations or religion.

In addition to *Amos* and *Walz*, the Supreme Court has in five other instances rejected an Establishment Clause challenge to a discretionary religious exemption. In *Cutter v. Wilkinson*, the Court upheld the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[66] which accommodates religious observance by prison inmates otherwise subject to correctional policies.[67] In *Gillette v. United States*, a religious exemption from the military draft for those opposed to all war was found not to violate the Establishment Clause.[68] The Court in *Zorach v. Clauson* found that a public school policy of release from the state compulsory education law to allow pupils to attend voluntary religion classes away from the school grounds did not violate the Establishment Clause.[69] In *Arver v. United States*, the draft exemptions during World War I pertaining to clergy, seminarians, and pacifists were found not to violate the Establishment Clause.[70] Finally, in *Goldman v. United States*, the Court summarily rejected constitutional claims to the same military draft exemptions, relying on the newly decided holding in *Arver*.[71]

Academics who attack religious exemptions often blur the line between exemptions and preferences to make their case

54 397 U.S. 664.

55 *Id.* at 666–67.

56 *See id.* at 675 (majority opinion).

57 *Id.*

58 *Id.* at 673.

59 *Id.* at 675 (footnote omitted).

60 *Id.* at 676.

61 *Id.* at 674.

62 *Id.* Justice William Brennan's concurrence did rely on the reward-for-works justification, but no other Justice joined his opinion. *See id.* at 687–88 (Brennan, J., concurring).

63 *Id.* at 666–67 & n.1, 673.

64 *Amos*, 483 U.S. at 338–39.

65 343 U.S. 306, 315 (1952) (upholding a local public school release-time policy that exempted students from a state compulsory education attendance law to attend religion classes).

66 42 U.S.C. §§ 2000cc–2000cc-5.

67 544 U.S. 709, 720 (2005).

68 401 U.S. at 448–60.

69 343 U.S. at 308–15.

70 245 U.S. 366, 376, 389 (1918).

71 245 U.S. 474, 476 (1918). *Arver* and *Goldman* also illustrate that a religious exemption can be granted by a legislature even in the absence of coercion of religiously informed conscience. The World War I exemption to the draft embraced not only religious pacifists, but also clergy and seminarians without regard to the latter two showing they would suffer a religious burden if drafted. *See id.*; *Arver*, 245 U.S. at 367.

against the former.[72] These scholars were particularly distressed by the decision in *Burwell v. Hobby Lobby Stores, Inc.*,[73] with its broad application of the Religious Freedom Restoration Act ("RFRA")[74] that brought relief to a closely held for-profit corporation.[75] In some instances, no doubt, elected lawmakers should exercise their discretion and narrow or deny an exemption sought by religiously faithful people. It is entirely proper for legislators to consider any palpable harm to third parties as part of the overall political calculus. This is the familiar balancing for the common good by the two political branches, legislative and executive. But elected lawmakers are not constitutionally prohibited from enacting religious exemptions. And once the political branches have struck their balance and enacted a law with an exemption, the judicial branch should not rebalance the equities under the guise of discovering a constitutional violation.

II. Government Symbols and Other Expression with Religious Content

The Establishment Clause prevents the government from using its vast powers of communication to promote explicitly religious beliefs or practices.[76] Accordingly, the government may neither confess explicitly religious beliefs,[77] nor advocate that individuals profess explicitly religious beliefs or observe religious practices.[78] However, government may acknowledge the role of religion in society and teach about its contributions to, for example, history, literature, music, charity, architecture, and the visual arts.[79]

The Supreme Court has struggled with whether the Establishment Clause is implicated when a motto, anthem, official seal, or patriotic pledge places the government's imprimatur on monotheism,[80] or on an explicitly religious belief or practice.[81]

72 *See* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Van. L. Rev. En Banc 51, 54-55, 61-62 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343, 357-71 (2014).

73 573 U.S. 682 (2014).

74 42 U.S.C. §§ 2000bb–2000bb-4.

75 These scholars claim that any burden that is traceable to a religious exemption is a "third-party harm" that renders the exemption violative of the Establishment Clause. This notion was explicitly rejected by Justice Alito, joined by Justice Gorsuch, in a concurring opinion filed in *Little Sisters of the Poor v. Pennsylvania*, slip op. 1, 140 S. Ct. 2367 (2020). *Little Sisters* involved a religious exemption from the Affordable Care Act involving health care policies providing coverage for contraceptive drugs and devices. Justice Alito took up several issues not reached by the Court. He said that while RFRA was a religious exemption, it did not create a burden for employees by depriving them of contraception benefits in their health care plans. Rather, the Affordable Care Act itself, as implemented, exempted religious objectors from having to provide contraception coverage, and therefore never promised such benefits. Because of that exemption, there never was an entitlement to contraception coverage; if there was no entitlement, there was no loss of benefit and therefore no harm. *Id.* at 18 & n.13.

76 *See* Westside Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original).

77 The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical story of creation are explicitly religious. *See* Engel v. Vitale, 370 U.S. 421 (1962) (teacher-led prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (teacher-led prayer and Bible reading); *Lee*, 505 U.S. 577 (prayer at commencement); McCollum v. Board of Educ., 333 U.S. 203 (1948) (teaching religion); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching creationism in science class); *Epperson*, 393 U.S. 97 (barring the teaching of evolution in science class). On the other hand, legislation restricting abortion, Sunday closing laws, rules prohibiting interracial marriage, teenage sexuality counseling, and loaning secular textbooks are not explicitly religious. *See* Harris v. McRae, 448 U.S. 297 (1980) (abortion restrictions); *McGowan*, 366 U.S. 420 (Sunday closing law); *Bob Jones*, 461 U.S. at 604 n.30 (student interracial dating); Bowen v. Kendrick, 487 U.S. 589 (1988) (teenage counseling); Central Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968) (textbooks).

78 *See McCollum*, 333 U.S. 203 (facilitating the teaching of religion); *Engel*, 370 U.S. 421 (teacher-led prayer); *Schempp*, 374 U.S. 203 (prayer and devotional Bible reading); Wallace v. Jaffree, 472 U.S. 38 (1985) (encouraging prayer); *Edwards*, 482 U.S. 578 (teaching creationism); *Epperson*, 393 U.S. 97 (prohibiting teaching evolution); *Lee*, 505 U.S. 577 (prayer). *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative chaplain and prayer).

There are narrow exceptions to this rule in situations where government has isolated an individual from his or her religious community, such as in the armed forces or prisons. In these "special environments," government may bring religion to the individual because government is responsible for the individual's inability to obtain the requisite religious services at his or her own initiative. *See Schempp,* 374 U.S. at 299 (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.").

79 *See Edwards*, 482 U.S. at 606-08 (Powell, J., concurring); *Schempp*, 374 U.S. at 225; *McCollum*, 333 U.S. at 235-38 (Jackson, J., concurring). The rule stated in the text accords with *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1981) (allowing public school to include Christmas music as part of a balanced program of secular and sacred selections representative of the culture and season).

80 America's governmental institutions have long acknowledged general theism in such forms as the national motto ("In God We Trust"), the Pledge of Allegiance (". . . one nation, under God, indivisible . . ."), and patriotic music ("God Bless America"). The idea that our governmental institutions are in a sense "under God" was present at America's founding, and the political philosophy is reflected in many of its constituting documents and the words of early statesmen. *See* Rector of Holy Trinity Church v. United States, 143 U.S. 457, 465-72 (1892) (numerous references to America's religious origins); *Wallace*, 472 U.S. at 91-106 (Rehnquist, J., dissenting) (same). As Justice William O. Douglas observed for the Court concerning America in *Zorach v. Clauson*, "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. This is a First Amendment issue of great sensitivity, and the lower courts have, in uneasy fashion, avoided working out the implications of America's public theology. *See* Sherman v. Community Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) (reciting the Pledge of Allegiance at public schools, including the phrase "one nation, under God," is not unconstitutional where students are free not to participate); O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979) (rejecting claim that the national motto "In God We Trust" and its required use are unconstitutional).

81 Elected and other high public officials may, without violating the First Amendment, be particularistic about religious faith when they speak. In America, pronouncements by elected officials that interweave patriotism and religion have a long and venerable tradition. Familiar examples are presidential speeches that call upon God's providence as the nation faces some new challenge or adventure or addresses that conclude with

For example, on the same day that a government's display of the Ten Commandments was found constitutional, a similar display of the Ten Commandments was found unconstitutional.[82] While teacher-led prayer in public schools has consistently been struck down,[83] prayer by a state legislative chaplain has been upheld.[84]

In *Town of Greece v. Galloway*, the Supreme Court upheld a municipal practice of beginning meetings of the town governing board with a prayer delivered by a variety of local volunteer clergy.[85] As historical precedent, the Court referred to prayers before the Continental Congress and the First Congress's approval of paid legislative chaplains. While some of the prayers were explicitly Christian, none disparaged other religions. The *Galloway* Court went on to reject four alternatives offered by those challenging the prayers. Each alternative was itself forbidden by the Establishment Clause. The alternatives were: to allow only nonsectarian prayer, a limitation that officials could enforce only by parsing and censoring the content of each prayer;[86] to allow only prayer offered by individuals chosen through a process of "religious balancing" based on local demographics, inviting more intense involvement by officials with competing religions;[87] to offer only prayers acceptable to a majority of Americans, a none too subtle establishment of a national religion;[88] or to script prayers that aligned with an American "civic religion," a mix of patriotism and nationalism that competes with actual religions and that the Court had earlier rejected as a form of religious establishment.[89]

In an effort to cut through the confusion, the Court recently signaled a more sweeping shift in how it approaches these cases. In *American Legion v. American Humanist Association*, the Court looked to historical events and understandings as guides for interpreting the Establishment Clause.[90] This is part of a larger push to interpret the Establishment Clause in accord with its original public meaning. The case addressed a state-sponsored World War I memorial featuring a large Latin cross that was alleged to prefer the Christian faith. There is no denying that a Latin cross is the preeminent symbol of Christianity, for it speaks of the atoning sacrifice of Jesus Christ and is widely recognized as such. There also is no denying that the 32-foot long cross was the dominant feature of the WWI memorial located on a traffic island at a major highway intersection in Maryland.

Justice Samuel Alito began his opinion for the Court by acknowledging that a Latin cross is profoundly religious to Christians, but he argued that at the same time the WWI memorial cross is secular in its meaning to the state.[91] Further, a memorial or similar display can have a religious meaning at the outset, but then the object's meaning—at least for the state—can evolve and transform over time.[92] Thus the circuit court was mistaken to conclude that a Latin cross is inherently Christian and thus per se unconstitutional no matter the longevity of the symbol or other context. In this regard, the Court majority entertained the theory—contested by plaintiffs—that the Memorial Committee had initially adopted the design because Americans visualized the Great War in terms of the rows upon rows of individual white crosses at the military gravesites in Europe.[93]

In holding that the memorial's cross did not violate the Establishment Clause, six of the seven Justices in the majority sharply criticized the test announced almost 60 years ago in *Lemon v. Kurtzman*.[94] Then they proceeded to follow a different

". . . may God bless America," celebrating Thanksgiving as a day for collective acknowledge of God's hand in the harvest and other good favor, and the practice started by George Washington of taking the presidential oath of office with the added ". . . so help me God." *See Zorach*, 343 U.S. at 312-13 (dicta approving of "appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths" and "the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'"); Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring) (same).

82 *Compare* McCreary County v. ACLU, 545 U.S. 844 (2005) (Ten Commandments in county courthouse display case unconstitutional) *with* Van Orden v. Perry, 545 U.S. 677 (2005) (Ten Commandments monument on grounds of state capitol constitutional).

83 *See* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer offered by student at solemn occasion that authorities had set aside at beginning of high school football game violated the Establishment Clause).

84 *See Marsh*, 463 U.S. 783 (approving prayer by chaplain at beginning of state legislative day).

85 572 U.S. 565 (2014).

86 *Id.* at 581 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.").

87 *Id.* at 585-86 ("[T]he Constitution does not require [the town] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest . . . would require the town 'to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each' . . . [which would be] a form of government entanglement with religion that is far more troublesome than the current approach.") (quoting *Lee*, 505 U.S. at 617 (Souter, J., concurring)).

88 *Id.* at 582 ("[I]t would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some.").

89 *Id.* at 581 ("Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."). In *Lee v. Weisman*, the Court had already said, "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction . . . ." 505 U.S. at 590.

90 139 S. Ct. 2067 (2019) (plurality opinion in part).

91 *Id.* at 2074, 2090. *See also id.* at 2082-83 (arguing that "longstanding monuments, symbols, and practices" tend to develop secular purposes and meanings alongside their religious origins); *id.* at 2075 ("The image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I . . . .") (footnote omitted).

92 *Id.* at 2074, 2075, 2085-87, 2089-90.

93 *Id.* at 2089 ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials."). *See also id.* at 2076, 2085.

94 403 U.S. 602 (1971). The Court in *Lemon* said that a government's law or practice challenged under the Establishment Clause must pass a

interpretative approach. Five of the six Justices, still a Court majority, would interpret the Establishment Clause by aligning it with historical practices and understandings. Yet what qualifies as a binding historical practice was still a matter of disagreement among the five. Justice Alito, in a part of his opinion commanding only a plurality, collected examples from federal historical events and noted that officials involved in these occurrences were careful to embrace multiple Christian denominations and disparaged no faiths.[95] He did not claim that these historical examples were inclusive of all faiths. However, given the 1919–1925 period when the memorial was designed and erected, it was sufficient that those who conceived the memorial centered on the Latin cross moved forward in a spirit of inclusiveness with respect to religion and did not intentionally disparage others. We will have to await further cases to see if the Supreme Court adopts a comprehensive rule of interpretation based on the Establishment Clause's original public meaning.

III. The Religious Question Doctrine and the Rhetoric of "Entanglement"

In *Thomas v. Review Board,* the state sought to defeat an employee's free exercise claim challenging the government's denial of unemployment compensation.[96] Thomas was laid off from a factory when he refused to work on parts for military tanks because he was a religious pacifist. By using the testimony of a co-worker who was also a longtime member of the same religion as Thomas, the state sought to show that Thomas, a new convert, was misapplying the teachings of his newfound denomination. The Supreme Court would have none of it, observing that Thomas "drew a line" concerning his own beliefs that the state had to accept lest the civil courts become "arbiters of scriptural interpretation."[97]

It is common for the modern Supreme Court to declare that the judiciary must avoid legal classifications that cause it to probe into the religious meaning of words, practices, or events,[98] as well as for the courts to avoid making determinations concerning the centrality of a religious belief that has been drawn into question.[99] Such declarations affirm what is an important restraint on the jurisdictional reach of the courts. Typically called the "religious question doctrine," the rule bars the judiciary—indeed all civil officials and authorities—from attempting to resolve disputes over the correctness of what a religious person or organization believes, or from taking up an issue that goes to the validity, meaning, or importance of a religious belief or practice.

The religious question doctrine has developed in response to a threefold concern: (1) judges lack competence to resolve doctrinal questions; (2) the government must not interfere in matters internal to a given religion; and (3) when a court favors one interpretation of a sacred text or miraculous event over competing interpretations, there is a micro establishment of religion. There are two aspects to the first concern about lack of judicial competence. First, the civil courts do not have subject matter jurisdiction over religious questions. Second, civil judges do not have the theological training and experience to rightly divine answers to religious questions.[100] The lack of subject matter jurisdiction is attributable to the Establishment Clause. It is a mark of a state church, such as the Church of England, that the civil government determines the doctrine and liturgy of the church. When government in any of its offices, including the office of civil judge, takes on the business of resolving religious disputes, it ends up favoring one side and disfavoring the other. That harms both voluntary religion and civil government. Government divining and dictating religious truth (or falsehood) has inevitably resulted in a breach of the peace by inflaming and multiplying civic divisions along religious lines. The American solution is to bracket religious questions and move them outside the government's authority, resulting in more liberty and more domestic tranquility. This is church-state separation at its most constructive. Of course, political and religious disagreement and

test consisting of three factors: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted).

95 *American Legion*, 139 S. Ct. at 2087-88 (Alito, J.).

96 450 U.S. 707.

97 *Id.* at 715, 716. Thomas was a Jehovah's Witness. He believed his religion prohibited him from working in a factory on the task of fabricating turrets for military tanks. *Id.* at 710.

98 *See* Rosenberger v. Rector & Visitors, 515 U.S. 819, 843-44 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Bob Jones*, 461 U.S. at 604 n.30 (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Thomas*, 450 U.S. at 715-16 (not within judicial function or competence to resolve religious differences); *Gillette*, 401 U.S. at 450 (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); *Walz*, 397 U.S. at 674 (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

99 *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *Amos*, 483 U.S. at 336 (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Smith*, 494 U.S. at 886-87 (same).

100 The latter task is not akin to the choice-of-law problem of a judge determining the law of a foreign country. Rather, in many instances religious doctrine has evolved, or is said by one faction to have evolved, such that the task of determining current orthodoxy is both contested ground and a moving target.

division is protected by the Free Speech Clause.[101] Divisiveness does not itself violate the Establishment Clause, but certain governmental actions that help cause divisions along religious lines can violate the clause. For example, when government takes sides in a religious controversy, it is violating the rule against religious questions—and that is forbidden by the Establishment Clause.

RFRA[102] has been the cause of some high-stakes applications of the religious question doctrine. When bringing a claim under RFRA, an element of the prima facie case is to show that claimants are "substantially burden[ed]" in their religion.[103] The substantial burden element cannot invite a judicial inquiry into whether the religious belief at issue is central to or mandated by the claimant's faith system.[104] That would be a question concerning the importance or meaning of the religious belief and thus forbidden by the religious question doctrine. Rather, as the Court held in *Hobby Lobby*, the question RFRA poses is whether the challenged law or policy "presents believers with the choice of either violating their religious beliefs or suffering a substantial penalty."[105] In *Hobby Lobby*, an employer's failure to provide the required contraceptive coverage in health care plans for all employees, or to let its insurance carrier do it for the employer at no additional cost, resulted in tens of thousands of dollars in fines. Fines at that level easily met the substantial burden element.

Similarly, in *Little Sisters of the Poor v. Pennsylvania*,[106] the Third Circuit found that the Little Sisters failed RFRA's required showing of a substantial burden on their religion. The health care regulations required that the Little Sisters merely sign a certificate to relieve the religious order of the contraception mandate, in which case the insurance carrier would take over the legal duty. The circuit court deemed this a minor, one-time inconvenience to the Little Sisters.[107] But the substantial burden element does not ask how easy it would be for religious claimants to violate the teachings of their faith in order to comply with the offending law. That would be a judgment concerning the importance of a religious practice to the claimant and thus violate the rule against answering religious questions. Rather, RFRA's substantial burden element frames the inquiry as one that can be answered by a civil judge: "What harm occurs if the claimant remains faithful and disobeys the law?" The Little Sisters would have incurred thousands of dollars in penalties if they did not comply—easily a substantial burden as the Court held in *Hobby Lobby*.

In *Walz v. Tax Commission of New York*, the Supreme Court first sang the virtues of avoiding entanglement between the institutions of church and state.[108] A property tax exemption for churches was not only found to be consistent with the Establishment Clause, but the Court praised the exemption because it avoided administrative entanglements otherwise present in the property appraisal and tax administration of ad valorem statutes.[109] Just one year later in *Lemon*, the Court fashioned a wholly new requirement that governments eschew "excessive entanglement" between church and state to avoid violating the Establishment Clause.[110] In a complex society, however, a certain level of regulatory interaction between church and state is inevitable, even desirable. While the *Lemon* test is now in disfavor, for a time there were cases where administrative entanglement alone, deemed to be excessive by some measure never quantified, led to laws being deemed unconstitutional.[111] That unhappy state of affairs seems to have gotten sorted. The idea that regulatory entanglements independently implicate the Establishment Clause has now been contracted and subsumed into the rule against taking up religious questions. Judges and lawyers continue to refer to "entanglement" as their descriptor for when a church-state boundary has been crossed, but it is now just a succinct and colorful way of describing a failure by officials to heed the rule against religious questions.

The religious question doctrine does not forbid government authorities to inquire into the *sincerity* of a party asserting a claim to religious freedom.[112] As difficult as it can be to measure what is in the hearts of people with respect to their religious professions, requiring sincerity is a logical necessity. The Religion Clauses must not be allowed to become a refuge for fakers, frauds, and charlatans.

The scope of the religious question rule also leaves room for government to make inquiries *about* a religion. These are factual findings concerning a given religion's nature, beliefs, or practices that do not go on to assess their validity, meaning, or importance. For example, a civil magistrate, using the familiar rules of evidence, can determine whether a community center or an international disaster relief organization is a religious employer that therefore qualifies for an exemption from federal

101 *See McDaniel*, 435 U.S. at 641 (plurality opinion) (Brennan, J., concurring in the judgment). Justice Brennan observes that religious organizations have as much right as other types of organizations to engage in political activism.

102 42 U.S.C. §§ 2000bb to 2000bb-4.

103 *Id.* at 2000bb-1(a).

104 This principle was added to RFRA by amendment in August 2000. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(A).

105 573 U.S. at 726.

106 U.S. Supreme Court No. 19-431, slip op.1, 140 S. Ct. 2367 (2020).

107 *See* Little Sisters of the Poor v. Pennsylvania, 930 F.3d 543, 572-74 (3d Cir. 2019), *reversed* Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (U.S. Sup. Ct. 2020). You can almost imagine the circuit panel thinking, "Look, Sisters, just sign the piece of paper and be done with it, once and for all. How hard is that?"

108 397 U.S. 664.

109 *Id.* at 674 (holding that exemption had the laudable effect of not expanding "the involvement of government [with religious organizations] by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of those legal processes"). *See also id.* at 676.

110 *See Lemon*, 403 U.S. at 612-13 ("entanglement" elevated to a third test for measuring Establishment Clause compliance).

111 *Lemon* held that state programs to aid K-12 religious schools generated excessive entanglement between church and state in violation of the Establishment Clause. *Id.* at 617-18.

112 The leading case on sincerity as necessary to invoking a religious freedom claim under the First Amendment is *United States v. Ballard*, 322 U.S. 78.

employment nondiscrimination laws.[113] It is no invasion of religious freedom to ask an employer, claiming to be statutorily exempt, to demonstrate that it is organized under state law as a religious corporation and that it holds itself out to the public as such. A recent decision concerning collective bargaining and religious colleges is illustrative. Reversing a prior decision to the contrary, the National Labor Relations Board ruled that lay faculty at a Lutheran college were not subject to union organization.[114] The prior case law recognized collective bargaining rights for lay faculty unless a college was "substantially religious in character."[115] That put the NLRB in the position of making exacting inquiries into the religious curriculum and other programs at the college, and then weighing the religious importance of these classes and the religious meaning of its other endeavors. Judging the degree of religiosity of these matters was unconstitutionally entangling. To avoid transgressing the religious question rule, the Board's new three-part inquiry looks to whether the college: (a) holds itself out to the public as religious; (b) is a nonprofit; and (c) is affiliated with a church or other religious organization.[116] Such findings of fact are permitted because they are *about* religion, but they do not question whether the tenets of the religious college are important or meaningful to maintaining its religious character.

IV. The Church Autonomy Doctrine More Generally

With respect to matters of internal governance, churches and other religious societies are free from regulation or other juridical burdens.[117] This has come to be known as the doctrine of church autonomy.[118] While the principles of church autonomy reference both Religion Clauses,[119] they are primarily derived from the Establishment Clause because of its natural grounding in church-state separation.

The rule against religious questions discussed in Part III is a subpart of the church autonomy doctrine. Church autonomy also entails the selection and control of the organization's polity (i.e., ecclesiology), the selection and control of clergy and other ministers (i.e., ecclesiasticism), and the admission and retention of church members. Common in this area of law are religious disputes over title to church property. The state courts have devised "neutral principles of law" as a means of settling these disagreements. The formation of such neutral principles is permitted by the Supreme Court, even encouraged. But their adoption is permitted only if the neutral principles do not transgress church autonomy. In other words, the principles adopted to settle a church title dispute are "neutral" only if they honor the doctrine of church autonomy.

The Establishment Clause and the Free Exercise Clause each have their own line of cases. However, there is a distinct, third line of cases that tracks the development of church autonomy. The first case in this line is *Watson v. Jones*.[120] The Supreme Court in *Watson* laid down the first broad principles of church autonomy when courts deal with disputed matters in religious bodies that concern doctrine, polity, and ecclesiastical oversight.[121] To avoid trespassing on church autonomy courts should defer to church authorities:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[122]

Watson was a post-Civil War case that involved a struggle between two factions of a local Presbyterian church for control of the church building. Title to the property was in the name of the trustees of the local church. However, the deed and charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."[123] The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that it possessed "the power of deciding in all controversies respecting doctrine and discipline."[124] Following the Civil War, the General Assembly ordered the members of all local congregations who believed in a divine basis for slavery to "repent and forsake these sins."[125]

A majority of the local church members were willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time when the local church first joined with the general church. The minority's legal theory was that the general church held an interest in the property of the local church subject to an implied trust. The condition said to be implied was that the church adhere to its original doctrines. Any departure by the general church meant a breach of trust and thus forfeiture of its interest

113 *See, e.g.,* Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (developing an approach for determining who is a religious organization and thus able to invoke the religious employer exemption); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) (same).

114 Bethany College and Thomas Jorsch and Lisa Guinn, 369 NLRB 1 (No. 98, June 10, 2020).

115 *Id.* at 2.

116 *Id.* at 3-4.

117 *See* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 190 (2012).

118 Professor Paul G. Kauper first used the term in *Church Autonomy and the First Amendment: The Presbyterian Church Case*, in Church and State: The Supreme Court and the First Amendment 67, 95 (Paul Kurland ed., 1975).

119 *Hosanna-Tabor*, 565 U.S. at 188-89.

120 80 U.S. (13 Wall.) 679 (1872).

121 In *Watson,* the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because *Watson* was decided prior to *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson*, federal courts sitting in diversity could deviate from state substantive law. 41 U.S. (16 Pet.) 1 (1842). Further, the First Amendment Religion Clauses had not yet been applied to the states through the Fourteenth Amendment.

122 *Watson*, 80 U.S. at 727.

123 *Id.* at 683.

124 *Id.* at 682.

125 *Id.* at 691.

in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when the general church repudiated the original, proslavery doctrine. Because they were the "true church," the minority faction maintained that it should be awarded the local church real estate.[126]

The Supreme Court rejected the implied trust theory—which originated in English law with its established Church of England[127]—because the departure from doctrine inquiry would require the civil adjudication of a religious question. The Watson Court gave three reasons for determining that it did not have subject matter jurisdiction of the case: (1) civil judges are unschooled in religious doctrine and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law;[128] (2) for the civil law to award the property to the faction adhering to original doctrine would entail the government taking sides, thereby "establishing" one creedal position while severely inhibiting changes in religious doctrine;[129] and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the polity of the entire church and its administration.[130] These bases for church autonomy are rooted, said the Court, in the American governmental system that—unlike the English system—separates the institutions of church and state, thereby sharply limiting the involvement of civil courts in the affairs of religious bodies.[131]

Watson's principles were elevated to First Amendment stature in *Kedroff v. Saint Nicholas Cathedral*.[132] The Supreme Court in *Kedroff* struck down a New York statute that displaced control of the Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union with a church sub-organization limited to the Diocese of North America. The felt need to transfer control of ecclesiastical authority was linked to the Marxist Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."[133] Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members," but transferred control over domestic churches by legislative fiat,[134] the Court held that the statute violated the "rule of separation between church and state."[135] The *Watson* Court had repudiated the English implied trust rule and its departure from doctrine standard, but only as a matter of federal common law. A number of states had continued to follow the implied trust rule as a matter of their own common law. *Kedroff,* however, clearly foreshadowed the sweeping aside of the common law in those states still following the English rule.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, the Supreme Court held that the rule of church autonomy from *Watson* was now a First Amendment principle.[136] *Presbyterian Church* involved a dispute between a general church and two of its local congregations over who had the authority to control the local church properties. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from original doctrine and practice.[137] Georgia followed the implied trust rule with its requisite fact finding into alleged departures from doctrine. On the basis of a jury's finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations. On appeal, the Supreme Court held that the First Amendment does not permit a departure from doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state,"[138] the Court said, "leaves the civil court *no* role in determining ecclesiastical questions in the process of resolving property disputes."[139]

The Supreme Court in *Serbian E. Orthodox Diocese v. Milivojevich* rejected an Illinois bishop's lawsuit challenging a top-down reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from office.[140] *Milivojevich* involved internal church administration and clerical appointment, which the Court determined were insulated from civil review under the First Amendment.[141] There was no dispute between the parties that the Serbian Eastern Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the ecclesiastical body in Europe that had decided the bishop's case.[142] Nor was there any question that the matter

126 *Id.* at 691-94.

127 *Id.* at 727-28.

128 *Id.* at 729, 730, 732.

129 *Id.* at 728, 730, 735.

130 *Id.* at 729. *See also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-20 (1976) (civil courts will not tell general church that it is misapplying its own canons). The Supreme Court has held that consent to be governed by the church polity and its authorities is sufficient to protect an individual member's free exercise right, so long as the member has the absolute right to leave the church at any time. Order of Saint Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914). Departing from a church, of course, means a cleric or church member leaving behind the "work of one's hands," both spiritual and material. But being willing to leave behind one's spiritual and material works is what is impliedly consented to at the outset when one voluntarily joins both the church-wide units and local congregations of a denomination.

131 80 U.S. at 728-29, 730.

132 344 U.S. 94 (1951).

133 *Id.* at 106.

134 *Id.* at 119.

135 *Id.* at 110.

136 393 U.S. 440 (1969).

137 *Id.* at 442 n. l.

138 *Id.* at 445-46.

139 *Id.* at 447 (emphasis in original).

140 426 U.S. 696 (1976).

141 *Id.* at 709, 713, 720, 721.

142 *Id.* at 715.

at issue was a religious dispute.[143] Nevertheless, the state court decided in favor of the defrocked bishop in Illinois because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner. On appeal, the U.S. Supreme Court rejected an arbitrariness exception to the judicial deference rule of *Watson* when the question concerns church polity or supervision of a bishop.[144] When the subject of the dispute is within one of the spheres of church autonomy, civil courts may not examine whether the church judicatory body properly followed its own rules of procedure.[145] To accept jurisdiction over such subject matters is not "consistent with the constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[146]

Using reasoning similar to that in *Watson,* the *Milivojevich* Court explained that there are three bases for a First Amendment prohibition of civil court jurisdiction in such cases. First, civil courts cannot delve into canon law or church documents.[147] These matters are too sensitive to permit any civil probing because such inquiry may prove intrusive and entail the court taking sides in a religious dispute. Second, civil judges have no training in canon law and theological interpretation.[148] Third, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness,'" cannot be borrowed from American civil law and grafted onto a church's polity to somehow "modernize" the church.[149] The Supreme Court also reversed the state court's undoing of the diocesan reorganization, holding that the Illinois court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."[150] The enforcement of church documents, often unclear to a civil judge, cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."[151]

The Supreme Court held in *Jones v. Wolf* that courts may, in limited instances, devise "neutral principles of law" to adjudicate intrachurch disputes that affect title to property.[152] Courts may examine church charters, constitutions, deeds, and trust indentures to resolve property disputes using "objective, well-established concepts of trust and property law familiar to lawyers and judges."[153] The method's advantage is that it sometimes "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes . . . ."[154] However, a neutral principles approach may not be used in a manner that trespasses into any of the subjects reserved to church autonomy. The Court said it was clear "that the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."[155]

In *Watson,* the rule of judicial deference was encouraged as a means of resolving a dispute while still honoring church autonomy doctrine. That can work in a church with a hierarchical polity. In *Wolf*, "neutral principles of law" was approved as an alternative to judicial deference. Neither of these two rules is an exception to the doctrine of church autonomy. Rather, these rules are alternative means of resolving an intrachurch dispute over title while honoring church autonomy:

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. In such a case, if the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.[156]

In other words, the available dispute resolution principles are "neutral" only if they avoid transgressing the doctrine of church autonomy.

In January 2012, the U.S. Supreme Court issued its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[157] This was the Court's first church autonomy case since *Wolf* was decided in 1979. *Hosanna-Tabor* involved a fourth-grade teacher, Cheryl Perich, who sued her employer, a church-related religious school, alleging retaliation for having asserted her rights under the Americans with Disability Act (ADA).[158] In the lower federal courts, the school raised the "ministerial exception" as a defense, which recognizes that under the First Amendment religious organizations have the exclusive

143 *Id.* at 709.

144 *Id.* at 712-13.

145 *Id.* at 713.

146 *Id.*

147 *Id.*

148 *Id.* at 714 n.8.

149 *Id.* at 714-15.

150 *Id.* at 721.

151 *Id.* at 723.

152 443 U.S. 595, 602-06 (1979). The *Wolf* Court made it clear that a neutral principles approach is not mandated by the First Amendment. Rather, in intrachurch property disputes, the use of neutral principles is a permissible alternative to the judicial deference rule. *Id.* at 602.

153 *Id.* at 602-03.

154 *Id.* at 605.

155 *Id.* at 602.

156 *Wolf*, 433 U.S. at 604. *See also Milivojevich,* 426 U.S. at 712-13 (that "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures" and that is an inquiry prohibited by the First Amendment); Md. & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."); *id.* at 369 n.2 ("Only express conditions [in a church document] that may be effected without consideration of doctrine are civilly enforceable" by a civil court.).

157 565 U.S. 171.

158 42 U.S.C. §§ 12101 *et seq.*

authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, retention, and all the other terms and conditions of employment. As a matter of church autonomy, the ministerial exception overrides not just the ADA, but a number of venerable employment nondiscrimination civil rights statutes.[159]

The Supreme Court, in an opinion by Chief Justice John Roberts, wrote that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[160] The Court said that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[161] Accordingly, in a lawsuit that strikes at the ability of the church to govern itself, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck on the side of ecclesial freedom: "When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."[162]

In *Hosanna-Tabor*, the U.S. Department of Justice's Office of the Solicitor General (OSG) claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the OSG, was that the government be formally neutral with respect to religion and religious organizations. That was the case here, said the OSG, because the ADA treats religious organizations just like every other employer when it comes to discrimination on the basis of disability. The same is true of federal and state civil rights statutes prohibiting discrimination on the bases of sex, age, race, and so forth. The OSG allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were still subject to the ADA.[163] The nondiscrimination statutes could be blind to religion and religious organizations, asserted the OSG, and while Congress could choose to accommodate religion, the First Amendment did not require it to do so.

The Court reacted to the OSG's argument for a religion-blind Constitution by calling it "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[164] Religious organizations have freedom of expressive association, not merely to the same degree as other expressional groups, but much more. The text of the First Amendment recognizes the unique status of organized religion, and a properly conceived separation of church and state that is to the good of both.[165] So the *Hosanna-Tabor* Court held that the First Amendment requires a ministerial exception that is in the nature of an immunity.[166]

Before proceeding to examine more closely the facts that convinced the Court that this teacher was a minister for purposes of the exception, the Chief Justice had to distinguish *Employment Division v. Smith*.[167] In *Smith*, the state of Oregon had listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* were Native Americans who had been employed as counselors at a private drug rehabilitation center.[168] They were fired for illegal drug use after they used peyote in a religious ceremony, and they were later denied unemployment compensation by the state because they were fired for cause. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a neutral law of general applicability that happened to have an adverse impact on the religious use of peyote.[169]

Chief Justice Roberts admitted that the ADA was a neutral law of general applicability that happened to have an adverse effect on Hosanna-Tabor's personnel decisions.[170] But then, for a unanimous Court, he drew this distinction between *Hosanna-Tabor* and *Smith*: "The present case, in contrast [to *Smith*], concerns government interference with an internal church decision that affects the faith and mission of the church itself."[171] Without the ministerial exception, a civil court would be ordering a church to employ a minister by command of the state—historically an act of a state with an established church. The Court proceeded to carve out a subject-matter class of cases to which the rule in *Smith* does not apply: those involving "internal" decisions within the church's autonomous sphere of self-governance.

Obviously, a sacrament is an important religious practice, and the *Smith* plaintiffs suffered a material burden on this religious observance that was unrelieved by the rule in *Smith*. But the point of church autonomy is not to relieve religious burdens as such. If it were, then *Hosanna-Tabor* would have been at odds with and thereby overruled *Smith*. That did not happen. Rather,

159 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

160 *Hosanna-Tabor*, 565 U.S. at 188.

161 *Id.* at 196.

162 *Id.*

163 *Id.* at 188-89.

164 *Id.*

165 *See, e.g., McCollum*, 333 U.S. at 212 ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Engel*, 370 U.S. at 431 (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

166 *Hosanna-Tabor*, 565 U.S. at 188-90.

167 494 U.S. 872.

168 *Id.* at 874.

169 The *Smith* decision is up for reconsideration in *Fulton v. City of Philadelphia*, U.S. Sup. Ct. No. 19-123. The *Fulton* case will be argued in November 2020, and a decision is expected in spring 2021.

170 *Hosanna-Tabor*, 565 U.S. at 189-90.

171 *Id.* at 190.

Hosanna-Tabor distinguished *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on an organization's religion but the government's intrusion into the self-governance of religious groups. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."[172]

The *Hosanna-Tabor* Court went on to provide another example in which *Smith* does not apply: in lawsuits over title to church property, the government must not take sides on the question concerning the rightful ecclesiastical authority to resolve the property dispute.[173] These two examples—a church selecting its own minister and a church determining the ecclesiastical judicatory with final authority to solve disputes over title to property—are contrasted with the religious practice at issue in *Smith*: an individual's ingestion of peyote as part of a sacrament.

A survey of the High Court's cases yields relatively few—yet important—subject matters of this sort within which civil officials have been barred categorically from exercising jurisdiction: (1) the validity, meaning, or importance of religious questions, and resolving doctrinal disputes;[174] (2) the selection of ecclesiastical polity, including the proper application of procedures set forth in a church's organic documents, bylaws, and canons;[175] (3) the selection, credentialing, promotion, overseeing, discipline, or retention of clerics and other ministers;[176] and (4) the admission, discipline, or expulsion of church members.[177]

Church autonomy cases are relatively few but they are important because once it is determined the doctrine applies, no rejoinder is permitted by the opposing party. That is, once it is determined that a suit falls within the subject matter class of internal church governance, there is no follow-on judicial balancing. There is no balancing because there can be no legally sufficient governmental interest to justify interfering in internal church affairs. The First Amendment has already struck the balance.[178] In this regard, the Court criticized the OSG's argument that the school's religious reason for firing Perich was pretextual. "This suggestion misses the point of the ministerial exception," wrote the Chief Justice:

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.[179]

The defense upheld in *Hosanna-Tabor* is an affirmative defense. Lower courts applying *Hosanna-Tabor* have properly interpreted the ministerial exception not as a personal right, but as a structural limitation on government action.[180] That *Hosanna-Tabor* is a constraint on the power of the government explains why the case is rooted in large part in the Establishment Clause. The text of that clause bespeaks a structural limit on authority: "Congress shall make no law" about a given subject matter described as "an establishment of religion." As Chief Justice Roberts wrote, "the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers, and "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions."[181] The Chief Justice gave examples in which the English Crown had interfered with the appointment of clergy in the established Church of England.[182] The Establishment Clause was adopted in America to flatly deny such power to our national government.[183]

There is a welcome absence of balancing tests in *Hosanna-Tabor*. Such tests abound in past areas of doctrine derived from the Religion Clauses, including: prohibitions on endorsements of religion thought to lower the perceived standing of religious

172 *Id.* at 194.

173 *Id.* at 190.

174 *Md. & Va. Churches of God*, 396 U.S. at 368 (per curiam) (avoid doctrinal disputes); *Presbyterian Church*, 393 U.S. at 449-51 (refusing to follow a rule that discourages changes in doctrine); *Watson*, 80 U.S. at 725-33 (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see Thomas*, 450 U.S. at 715-16 (courts are not arbiters of scriptural interpretation).

175 *Milivojevich*, 426 U.S. at 708-24 (civil courts may not probe into church polity); *Presbyterian Church*, 393 U.S. at 451 (civil courts forbidden to interpret and weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts not allowed to interfere with merger of two Presbyterian denominations).

176 *See Milivojevich*, 426 U.S. at 708-20 (civil courts may not probe into defrocking of cleric); *Kedroff*, 344 U.S. at 116 (courts may not probe into clerical appointments); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directing archbishop to appoint petitioner to ecclesiastical office). *See also* NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers).

177 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson*, 80 U.S. at 733 (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them).

178 *Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

179 *Id.* at 194-95 (internal citation omitted).

180 *See* Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses."); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural protection "rooted in constitutional limits on judicial authority").

181 *Hosanna-Tabor*, 565 U.S. at 188-89.

182 *Id.* at 182-85.

183 *Id.* at 183-85.

minorities in the political community;[184] a requirement that a law's "principal or primary effect must be one that neither advances nor inhibits religion," as distinct from lesser effects;[185] and injunctions on government's "excessive entanglement" with religion, as distinct from lesser entanglements.[186] Balancing tests are still valid under the Free Exercise Clause, but not in cases where the subject matter warrants the categorical protection of what Justice Alito calls "religious autonomy."[187] In the latter instances, the First Amendment, understood within the Western liberal tradition and America's state-by-state disestablishments that gave rise to church-state separation, has determined that hiring, promoting, supervising, and dismissing ministers is one area of authority that is not to be rendered unto Caesar.[188]

The Court in *Hosanna-Tabor* found that the fourth-grade teacher, Cheryl Perich, was a "minister" and therefore that her claim must be dismissed. Perich was also a part-time school principal and held an earned ecclesial title issued by her denomination to laity. She also used the title of minister to claim tax advantages and for other reasons. It was not clear to the lower courts if the ministerial exception was limited to organizational leaders, visionaries, and top administrators,[189] or if the definition also extended to those performing explicitly religious functions like teaching religion, leading students in worship, and directing students in classroom prayer. Perich was not an organizational leader and visionary. However, she was a part-time school principal, held a lay ecclesial title, had completed some theological classes, and on occasion had used the title of minister.

The circuit court in *Our Lady of Guadalupe School v. Morrissey-Berru*—a 2020 case addressing application of the ministerial exception—treated these items as requirements on a check list, and the High Court reversed.[190] Writing for a 7-2 Court, Justice Alito noted that the ministerial exception is a subpart of the more encompassing "principle of church autonomy" that relies on both the Establishment and Free Exercise Clauses.[191] In the two cases that were consolidated for the appeal in *Our Lady of Guadalupe*, the Court said:

> The independence of religious institutions in matters of faith and doctrine is closely linked to independence in what we have termed "matters of church government." . . . This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.
>
> . . . Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. . . . [A] wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.[192]

The Court went on to find that the two K-12 teachers in the religious schools were ministers for purposes of the exception. Accordingly, their employment claims alleging discrimination on the basis of age and disability, respectively, were dismissed. The nonrenewal of the contracts of the teachers were reported by the schools to be based on poor classroom performance,[193] and thus the decision did not hinge on the schools having a religious purpose for severing the employment relationship. That makes sense because what is being protected here is autonomy in internal operations and governance, not a right of religious staffing. The Court admitted that it would have been easier to find that the claimants were ministers if they met the items on the checklist, but it said that none were required. What mattered was what the employees did[194] and the sort of institutions at which they were employed.[195] The institutions here were K-12 religious schools,

184 Justice O'Connor, concurring in *Lynch v. Donnelly*, first suggested an "endorsement test" to determine violations of the Establishment Clause. 465 U.S. at 687, 690-92. She proposed that government endorsement of religion was unconstitutional because it made religious minorities feel of lesser status, not full members of the political community. Yet whether a state has endorsed religion is in the eyes of the beholder, for to others the government is merely acknowledging religion, a reality to which the state could hardly be blind. Accordingly, application of the rule quickly mired in failed attempts to objectify it.

185 Summarizing prior precedent, the Court in *Lemon* held that a violation of the Establishment Clause was present where a law failed to meet any one of three requirements. 403 U.S. at 612-13. The second requirement or prong of *Lemon* was that the principal or primary effect of the law must not be to advance religion. But it was unclear when a law's principal effect was to advance religion, as opposed to benignly acknowledge or accommodate it, so it was difficult to apply this requirement consistently against commonplace and otherwise agreeable religious symbols and practices. Indeed, it was never convincingly explained why it was wrong for a law to incidentally, as opposed to purposefully, advance religion.

186 *See Lemon*, 403 U.S. at 612-13. The third prong of the Court's *Lemon* test was that the law in question must not generate excessive entanglement between church and state. But some administrative interaction between church and state can hardly be avoided and is obviously in the public interest, e.g., building codes and zoning laws. And the Court could never explain just when the level of such interactions exceeded the norm and became "excessive," and therefore unconstitutional. Nonentanglement is more like a rule of prudence that is desirable for its good tendencies, not a bright line that when crossed should cause a given church-state arrangement to fall because unconstitutional. Hence, it is not the stuff of a fixed constitutional boundary that can be policed with consistency.

187 *Hosanna-Tabor,* 565 U.S. at 198. Many have observed that "ministerial exception" is not a good label for the rule. Some, like Justice Alito, are suggesting the rule be called "religious autonomy." That makes sense, in part, because the ministerial exception is a subset of the church autonomy doctrine.

188 *See* Carl H. Esbeck and Jonathan J. Den Hartog eds., Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776–1833 10-12 (2019).

189 *Hosanna-Tabor*, 565 U.S. at 188, 196.

190 U.S. Sup. Ct. No. 19-267, slip op. 1, 140 S. Ct. 2049 (2020).

191 *Id.* slip op. 10-12.

192 *Id.* slip op. at 10-11 (citations, internal quotations, and notes omitted).

193 *Id.* slip op. at 6, 9.

194 *Id.* slip op. at 11 ("What matters, at bottom, is what an employee does.").

195 *Id.* slip op. at 1-2, 26-27.

which are integral to passing on the faith to the next generation. And the claimants taught classes in Catholic doctrine, led the students in classroom prayer and recitation of creeds, accompanied the students to weekly mass, and agreed to employment contracts setting forth the religious mission of the school and agreeing to do nothing to undermine it.[196]

In sorting which employees occupy a religiously central position or perform a substantial religious function such that they are deemed ministers, judges must be careful to not violate the religious question doctrine. Justice Thomas filed a concurring opinion stating that the determination as to who is a minister ought to be unilaterally decided by the religious employer.[197] Justice Alito, for the Court, did not go that far. But he was deferential to the employers in interpreting the evidence from which the Court held that the two teachers were ministers for purposes of church autonomy.[198]

Church autonomy involves freedom for religious organizations, but it is freedom of a different sort. What is involved is not an ordinary constitutional right that can be overcome upon the showing of a compelling governmental interest not achievable by a means more narrowly tailored. Rather, the defense operates like an immunity from suit as to certain discrete subject matters that go to a religious organization's control over the doctrine, polity, and personnel that execute its present vision or determine its future destiny.

V. The Difficulty in Defining Religion

The First Amendment's use of the word "religion" necessarily makes the definition of religion a question of constitutional law. Although a definition is of great theoretical difficulty, in practice the issue rarely arises. To avoid omitting unfamiliar and emerging religions from constitutional protection, the Supreme Court has evaded defining the term.[199] Accordingly, the definition remains broad and indeterminate,[200] including naturalistic, nontheistic, and anthropocentric religions.[201] However, the definition excludes a purely personal or philosophical way of life.[202]

Religious claimants under the First Amendment may disagree with their co-religionists, be unsure or wavering,[203] or be recent converts.[204] A religious claimant need not be a member of an organized religious denomination, community, or sect.[205] However, a claimant must be sincere.[206] The Establishment Clause is not implicated when a law reflects a moral judgment about conduct that is harmful or beneficial to the common good, even if a religion shares that judgment.[207]

VI. Conclusion

The driving force behind the American disestablishment of state churches in the period 1776 to 1833 was remarkably straightforward, if difficult to implement after centuries of Christendom. The idea was that it was best for both church and government when "religious beliefs are a matter of voluntary choice by individuals and their [religious] associations, and that each sect is entitled to 'flourish [or fail] according to the zeal of its adherents and the appeal of its dogma.'"[208]

With this principle in mind, the common thread that runs through most of the forgoing cases is the minimization of governmental influence over the religious choices of individuals and organizations. In *Espinoza*, the rule of nondiscrimination in the funding of religious and nonreligious private schools in Montana was not an end in itself. Rather, equal treatment was a means to minimizing the government's influence over the choices of parents when enrolling their children in school, religious or otherwise. Similarly, when imposing general regulatory and tax burdens on society, the Court in *Amos* and *Walz* held that

196 *Id.* slip op. at 2-9.

197 *Id.* slip op. at 1-3 (Thomas. J., concurring, joined by Gorsuch, J.). Complete deference to the religious employer would be too easily abused.

198 *Id.* slip op. at 21-22.

199 The Court has addressed the definition of religion for the purpose of legislation and the military draft, but not for purposes of the First Amendment. *See* Welsh v. United States, 398 U.S. 333 (1970) (plurality opinion); United States v. Seeger, 380 U.S. 163 (1965).

200 Often the government stipulates to the nature of the claim "being religious," but then raises other defenses. An excellent discussion concerning the definition of religion appears in *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring in result). Judge Arlin Adams' definition was later adopted in the Third Circuit in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). He defined religion for purposes of the First Amendment as a belief system that seeks comprehensive answers to life's ultimate questions with characteristics such as clergy, sacred literature, holy days, formal services, and efforts at propagation.

201 *See Seeger*, 380 U.S. 163 (belief system qualifies as a religion in selective service system if it occupies a place in claimant's life parallel to that filled by an orthodox belief in God); *Torcaso*, 367 U.S. at 495 n.11 (naming as nontheistic religions "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism").

202 *See* Frazee v. Illinois Dep't of Emp't Sec., 489 U.S. 829, 833 (1989) ("[O]nly beliefs rooted in religion are protected by the Free Exercise Clause."); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

203 *See Thomas*, 450 U.S. at 715-16. It is sufficient if the practice in question is religiously motivated so long as the burden is more than de minimis. It would be an impoverished notion of religion that limits it to a list of absolute "do's and don'ts." For many major religious groups, obedience by a religious claimant is often not religiously *compelled* but is *motivated* by the faith. The teaching of a Sunday school class or volunteering to work in the church nursery, of example, are done out of religious motive rather than compulsion.

204 *See Hobbie*, 480 U.S. 136.

205 *See Frazee*, 489 U.S. 829.

206 *See Ballard*, 322 U.S. 78; *see Thomas*, 450 U.S. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .").

207 *See* Bowen v. Kendrick, 487 U.S. 589, 604 n.8, 613 (1988); *Harris*, 448 U.S. at 319-20; *McGowan*, 366 U.S. at 442; Hennington v. Georgia, 163 U.S. 299, 306-07 (1896); *see Bob Jones*, 461 U.S. at 604 n.30.

208 *See McDaniel*, 435 U.S. at 640 (Brennan, J., concurring in the judgment) (quoting *Zorach*, 343 U.S. at 313 (footnote omitted)).

government may exempt religious persons and organizations from those same burdens. This is government leaving religion alone, again minimizing its role so that private religious judgments can be freely made.

Critics on the left compare funding cases like *Espinoza* and its rule of equal treatment with cases like *Amos* that have upheld religious exemptions, and they decry the inconsistency. When equality helps religion, you are for equality, say progressives, but when being exceptional helps religion's cause, you are for exemptions. Not so. The rules of equality and exemptions are instrumental, mere tools in the service of minimizing government's impact on private religious choice. The older term for this is religious voluntarism, the driving force behind the disestablishment of religion in the American revolutionary states.

Religious preferences are a different story. These occur when government interjects itself into a private dispute and takes the side of religion over the interests of the other disputants. In *Caldor*, government sided with religious employees wanting their Sabbath off. In *Larkin*, government unyieldingly sided with churches in busy downtowns wanting control over neighboring enterprises. In both cases, the result was that some private actors were compelled to aid the religious observance of others. This does not minimize government's influence over private religious choices, but increases it.

The same integrating principle of minimizing the government's role over religious choices largely fits the Supreme Court's cases involving government speech of religious content. Government should refrain from expressing itself in favor of (or against) an explicitly religious message or a particular religious observance. That part is easy. The difficulty comes in determining when the content of the government's speech or observance is explicitly religious and when it is something else, such as honoring the sacrifices of the nation's war dead, as with the WWI memorial cross in *American Legion*. That is not to say that the meaning of a Latin cross to Christians is anything less than the atoning sacrifice of Jesus Christ. It is just that the state of Maryland did not have in mind this explicitly Christian message when it took over the maintenance of the memorial to soldiers who died in the Great War. This is not a difficult concept: Government can have a message by its sponsorship of a memorial or other symbol that is not religious, while at the same time there are those in the private sector that hear or see in that same symbol an explicitly religious message. The government is responsible only for its own messages and points of view. The Bill of Rights does not hold government to account for the multifarious interpretations of symbols by other viewers. The "not taking sides" principle enters into *American Legion* with the findings that Maryland neither intended to exclude non-Christians nor sought to disparage the faiths of others. *Town of Greece v. Galloway* is admittedly a harder case, but the municipality's reserving of time for local volunteers to pray was understood as an attempt by the town to solemnize the work of the council. Americans are still a religious people, and such a people instinctively elevates the seriousness of an occasion, crisis, or civic danger with prayer. And again, the "not taking sides" principle enters with the Court disallowing any government prayer that intentionally marginalizes other religions or disparages those who practice them.

The rule against civil authorities taking up the validity, importance, or meaning of religious questions, and the larger command to completely shield from regulation those discrete subjects of internal self-governance by churches, also work to minimize the government's role in private religious choices. However, the church autonomy doctrine is about more than religious choices. The breathing space reserved by the doctrine is about control over the leaders and propagators of a religious organization and their role in the ministry's operations, strategic planning, and vision for the future. There are a few things about religious institutions that have to be in their complete control, being essential not just to their present character, but also to their overall direction and destiny. Over the centuries of Western legal tradition, church and state have worked out their respective spheres of authority. It is a laudable mark of governmental modesty when the modern welfare state can pause to acknowledge that the long arm of its writ is not without boundaries.