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Why The Ministerial Exception Is Consistent With Smith—And Why It Makes Sense

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I. EXCUSES AND ACKNOWLEDGMENTS

This conference puts on the table two linked questions: Can *Hosanna-Tabor*[1] be reconciled with *Employment Division v. Smith*[2] and, if so, on what basis? Let me say straightway that I have at most an amateur's understanding of constitutional law and jurisprudence. I bring to our questions some intuitions about the best framework for thinking about them, and whatever light my home discipline of political theory can shed

1. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

2. Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

on them. I have also benefitted enormously from Christopher Lund's splendid law review article on the topic of this conference.[3]

II. JUSTICE SCALIA'S ORIGINAL INTENT

At the beginning of his majority opinion in *Employment Division v. Smith*, Justice Antonin Scalia sketched what he regarded as settled First Amendment jurisprudence. Among them: "The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."[4] In support of this proposition, he cites the classic institution autonomy cases: *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[5] *Kedroff v. St. Nicholas Cathedral*,[6] and *Serbian Eastern Orthodox Diocese v. Milivojevich*.[7] The obvious inference is that he saw no contradiction between this line of Supreme Court decisions and the argument he proceeds to make in *Smith*.

An exchange during the *Hosanna-Tabor* oral argument confirms this inference. As Douglas Laycock tells the story:

> Responding somewhat incredulously to the government's theory that whatever rights the church might have derive only from freedom of association, [Justice Scalia] said that "there, black on white in the text of the Constitution are special protections for religion." A little later, he was even more explicit: "*Smith* didn't involve employment by a church. It had nothing to do with who the church could employ. . . . I don't see how that has any relevance to this."[8]

As the only member of the Court to participate in both decisions, Justice Scalia's words have special resonance. But as he would be the first to insist, intention—even authorial intention—does not settle the matter. The question is whether the text and argument of the two cases form a tolerably coherent whole.

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3. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

4. *Smith*, 494 U.S. at 877 (citations omitted). Disputes over authority involve the rightful occupants and powers of religious offices; over dogma, the truth or authenticity of doctrinal claims.

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

6. Kedroff v. Saint Nichols Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

7. Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976).

8. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 855 (2012) (footnote omitted) (quoting Transcript of Oral Argument at 29, 37, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 1-553)).

I have long argued that *Smith* was wrongly decided, and I have often wondered how Justice Scalia would respond to the hypothetical that I have posed: Suppose the Volstead Act, which implemented the Prohibition amendment, had not contained an exemption for sacramental wine.[9] Would enforcing that act against core rituals of Catholics and Jews have been consistent with the Free Exercise Clause? I think not—indeed, obviously not. But the logic of *Smith* says otherwise.

III. A FLAWED POINT OF DEPARTURE

However flawed, *Smith* remains good law today, and for purposes of this paper I will treat it as such. I believe that *Smith* and *Hosanna-Tabor* can coexist, logically as well as peacefully—if the kind of cases to which each applies is carefully delimited. There is general agreement that this demarcation is inadequately specified, let alone theorized, in Chief Justice John Roberts's majority opinion.[10] The passage in which he distinguishes *Hosanna-Tabor* from *Smith* reads, in its entirety: "[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[11]

This distinction is at best incomplete. One sentence refers to "outward physical acts," presumably as counterposed to inner beliefs.[12] But the venerable belief or act distinction gets us nowhere in the case before us, which pivots on the status of an act—the church's decision to fire a minister. The following sentence draws another line, between an internal church decision and what transpires outside its institutional boundary. But presumably the Court does not want to say that all such internal decisions are immunized against legal scrutiny; there are too many instances in

9. *See* National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 308–09 (1919), repealed by Liquor Law Repeal and Enforcement Act, ch. 740, § 1, Pub. L. No. 74-347, 49 Stat. 872 (1935).

10. *See e.g.*, Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 992–94 (2013) (explaining that the Supreme Court "distinguished *Smith* from the ministerial exception" using a "strange argument" and a "distinction that cannot hold water"); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 834–35 (2012) ("The Court's analysis raises many questions. . . . This is a commendable example of judicial minimalism; . . . . But it does create uncertainty.")

11. *Hosanna-Tabor*, 132 S. Ct. at 707.

12. *Id.*

which settled law says that they are not. So the Court gestures toward a third line, between church decisions that affect its "faith and mission" and those that do not. But that cannot be right either, because in practice, drawing that line would inevitably entangle courts in the kinds of theological inquiries that they have repeatedly declared their incompetence to conduct and determination to avoid.

An example will illustrate the difficulty. It is often taken for granted that there are categories of cases, such as slip and falls in church parking lots, for which church beliefs and practices are irrelevant. But consider a facially innocuous municipal ordinance that requires all property owners to clear the sidewalks fronting their properties within six hours after a winter storm ends. If a snowfall begins on Friday night, by Saturday morning the sidewalk leading to the doors of an Orthodox Jewish synagogue will be treacherous. But Jewish law forbids every Jew from working on Shabbat, and shoveling snow fits squarely into that prohibition, so no congregant can do the job. Jewish law also prohibits carrying or conveying money on Shabbat, so the congregants cannot pay a non-Jew to clear the sidewalk. Unless some passer-by learns of the congregation's plight and shovels out of the goodness of his heart, the congregants will have no choice but to violate the ordinance. And if someone slips and falls on the sidewalk in front of their synagogue, they will be liable—despite the fact that complying with the ordinance would have forced them to violate the scrupulous observance of Shabbat, one of the defining requirements of traditional Judaism.

My little story has two morals. First, we cannot look at an act or a category of acts in isolation to determine whether it affects per se a religious organization's "faith and mission," a thoroughly Christian phrase, by the way, that would have no natural place in many other traditions. To state the obvious, different faiths imbue different acts with spiritual significance, and many of the boundaries thus drawn will go against the grain of civil law.

Second, the bare fact that a civil law burdens the practices of some religious faiths does not by itself settle the question of whether that law is consistent with the free exercise of religion. Pushed to the hilt, free exercise claims can go too far, unduly restricting the ability of civil authorities to pursue justice and the common good. Conversely, when the claims of civil law are pushed too far—especially in the name of justice for individuals—they end up trampling legitimate free exercise claims. In the end, we must be able to say "Thus far and no farther" and to give reasons for our judgment that most people will find compelling—or at least reasonable. We must try to go farther than Chief Justice Roberts did.

IV. REFLECTIVE EQUILIBRIUM IN MORALITY AND LAW

Let me suggest a point of departure. In *A Theory of Justice* and subsequently, the late John Rawls proposed a method—"reflective equilibrium"—for arriving at stable moral judgments.[13] A key element of this method is what he called "provisional fixed points"—considered judgments about particulars in which we have great confidence that racial discrimination is wrong, for example and with which any general account must be consistent.[14]

Rawls advanced this account in the context of moral philosophy, but it may be extended to other areas. There may be—and I shall suggest that there are—such fixed points within our constitutional order and traditions. Of course, they will not necessarily have any force outside this context; they will regulate a narrower range than do moral fixed points, which are meant to apply in a wide range of institutional and historical contexts. But no matter, because all we are looking for is a general justification of the ministerial exception that works for us. Whether it applies more broadly is another matter altogether.

This strategy risks boring readers with a series of innocuous banalities. I will take that risk in the hope that propositions we take for granted can shape our understanding of less obvious matters.

V. PROVISIONAL FIXED POINTS IN CHURCH AND STATE JURISPRUDENCE

My point of departure is a judgment almost universally shared, at least in the United States: *Government should not be in the business of selecting officials of religious organizations, or of limiting the ability of such organizations to choose the leaders they want.* This means that churches should not seek from government, and government should not render, any judgment about the fitness of individuals for religious offices.[15] Nor do laws banning what would be considered discriminatory in the civil realm apply with equal force to religious groups. Catholics exclude women from

13. JOHN RAWLS, A THEORY OF JUSTICE 20, 46–53 (1971).
14. *Id.* at 19–20.
15. Then-Secretary of State James Madison's refusal to advise Bishop Carroll about the selection of the official to oversee the Catholic affairs of the newly acquired Louisiana Purchase set the standard of American principle and practice. Chief Justice Roberts aptly cites this example in his *Hosanna-Tabor* decision. *Hosanna-Tabor*, 132 S. Ct. at 703 (citing Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *in* 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 63 (1909)).

the priesthood, as do Orthodox Jews from their rabbinate.[16] As far as I can tell, no one thinks that the writ of civil law extends to these practices. I assume that the same limitation would apply to membership. Men or women-only religions probably would not fare well over time, but it is no business of the state to prohibit them.

In this respect, among others, there is a difference between religious groups and many other kinds of associations. It is settled law that sex discrimination statutes apply to organizations such as the Rotary Club and Jaycees.[17] Some others—"expressive associations"—enjoy a greater measure of protection, on a case by case basis, although the lead case—concerning the Boy Scouts—remains highly controversial.[18] By contrast, religious groups enjoy a categorical *per se* immunity from sex discrimination laws and regulations, at least when it comes to the selection of their spiritual leaders.[19]

This is not to say that the selection of religious leaders is entirely outside the writ of civil law. To see why, imagine a religion that uses the "Is God with him?" test to determine its leader. To qualify, a candidate must put one bullet in a revolver, place the gun to his head, and pull the trigger. If he does and survives, he has proved his faith, and God has shown His favor.[20] If this seems preposterous, recall the test that Abraham had to pass to demonstrate his faith and assure his position as Judaism's lead patriarch.[21] Or—to get closer to home—consider a fundamentalist Mormon group that requires its leaders not only to preach plural marriage but also to practice it. The principle in all such cases is the same: if the state has the right to prohibit an act, then it has the right to prevent the selection of religious leaders through methods that employ or require that act. The fact that the First Church of La Cosa Nostra requires aspirants for religious office to be "made men" does not mean that the state should defer to this practice.

So what is the difference between laws against murder, which the state may enforce against the selection of religious leaders, and laws against discrimination on the basis of gender, which it may not? And even more pointedly, why may the state enforce prohibitions on polygamy but not

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16. *See, e.g.*, Maureen Fiedler, *Introduction* to BREAKING THROUGH THE STAINED GLASS CEILING: WOMEN RELIGIOUS LEADERS IN THEIR OWN WORDS, at xvii (Maureen Fielder ed., 2010).

17. *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 628–29 (1984).

18. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000).

19. *See Hosanna-Tabor*, 132 S. Ct. at 714.

20. Another selection process resting on the same principle would be an armed duel between two finalists for religious office.

21. *See Genesis* 22:1–18.

prohibitions on gender discrimination? I do not believe that legal concepts and categories alone will allow us to answer such questions. Rather, we will have to argue that freedom of religion can be practiced only within the framework of an ordered civil society—and that the preservation of such an order requires certain basic institutions and practices. Jews call these civil requisites the Noachide law, which is binding on all,[22] as distinct from *Halacha*, which is binding only on Jews.[23] Much later, H. L. A. Hart dubbed this the "minimum content of natural law"—not the totality required for a good life in a good society, but the basic requisites of a society that is tolerably ordered and decent.[24]

My suggestion is that intuitions of this sort lie behind the apparently contradictory judgments to which we—and American jurisprudence—are drawn. And because they are substantive and comparative—*X* is more fundamental than *Y*—they will always be contested. That does not mean that such judgments are wrong, or that the courts are wrong to make them. Indeed, they have no choice.

Another provisional fixed point: *civil law may rightly prohibit certain religious practices, whatever their theological justification and importance within particular religions.* A neo-Aztec group may sincerely believe that without annual virgin sacrifices, grave harm will ensue. Nonetheless, government may intervene to prevent and punish this practice. Another group may believe that regular sex between adults and minors is the road to salvation. Without rendering theological judgment, government may simply prohibit this practice, et cetera.

Embedded in this point is a widely accepted principle: beliefs are one thing, acts another. Government can forbid polygamy, but it cannot forbid churches from preaching the superiority of plural marriage.[25] In this respect, regardless of other differences, religious believers and institutions are on all fours with everyone else.

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22. *See* DAVID NOVAK, NATURAL LAW IN JUDAISM 149 (1998) ("The Noachide laws or 'the seven commandments of the children of Noah' . . . are those norms the Rabbis considered to be binding on all humankind, who, following scriptural narrative, are the descendants of Noah.").

23. *See id.* at 63 ("If 'ethics' be defined prima facie as a system of rules governing interhuman relations, then 'Jewish' ethics is identical with Jewish law. It is *Halakhah*.").

24. H.L.A. HART, THE CONCEPT OF LAW 193–94 (3d ed. 2012).

25. Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

Bringing together these two points, we reach a third: *civil law applies with full unmodified force to some activities of religious organizations but not others*. Regardless of theological doctrine, for example, religious officials who sexually abuse children are subject to criminal prosecution, and likewise for murder and other acts that the law rightly makes criminal.

Less clear is whether religious officials who become aware of such crimes are subject to a legal obligation to report them. Every state has a statute identifying persons who are required to report suspected child abuse and neglect to the appropriate authorities. Some states identify categories of professionals who are required to do so, but eighteen states mandate reporting for any person who suspects that such a crime has occurred. Some states designate confessional communications between clergy and members of their church as privileged, but many do not, and seven states explicitly disavow the clergy-penitent privilege as grounds for failing to report suspected child abuse or neglect.[26]

North Carolina provides a good example of how this issue plays out. A state statute requires "[a]ny person or institution" that suspects child abuse or neglect to report to the local department of social services.[27] Another provision of the law states that "No privilege shall be grounds for any person[s] . . . failing to report," even when the knowledge of suspicion is acquired in an "official professional capacity."[28] There is only one exception, for knowledge gained by "an attorney from that attorney's client during representation."[29]

A detailed analysis of North Carolina's child abuse and neglect system comments that "confidential communications between a person and his or her rabbi, minister, priest, or other religious confidant might be viewed as part of that individual's exercise of his or her protected religious freedom."[30] Indeed it might, and the same could be said of the religious confidant.

So what would happen if a Catholic priest ordered to testify about what he was told in the confessional refused to do so, invoking the Free Exercise Clause as a defense? No doubt his brief in the ensuing case would quote the Code of Canon Law, Canon 983: "The sacramental seal is inviolable; therefore, it is absolutely forbidden for a confessor to betray in any way a

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26. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1–3 (2014), https://www.childwelfare.gov/pubPDFs/manda.pdf [https://perma.cc/5Q27-D2MJ].

27. N.C. GEN. STAT. ANN. § 7B-301 (West, Westlaw through 2016 legislation).

28. N.C. GEN. STAT. ANN. § 7B-310 (West, Westlaw through 2016 legislation).

29. *Id.*

30. JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA 62 (3d ed. 2013).

penitent in words or in any manner and for any reason."[31] A priest who complied with a court order to testify rather than being held in contempt of court and jailed would break his oath to the Church and risk excommunication, not to mention his eternal salvation.

It is reasonably clear how the *Smith* framework would resolve this issue: the North Carolina law deals in a neutral way with conduct that the state is free to regulate; end of story. Indeed, that law might have passed muster in the pre-*Smith* era: the state is pursuing what is incontestably a compelling interest (the well-being of children) through means that, though harsh as applied to the priest, could well be the narrowest that would effectively promote that interest.

It is less clear how this issue would fare under *Hosanna-Tabor*. One may wonder whether the proposed distinction between outward acts and matters internal to the church really works: substitute the sacrament of wine for the ingestion of peyote and ask again whether exception-less Prohibition would concern only "outward physical acts." But granting the distinction arguendo, the seal of the confessional would seem to fall squarely on the other side of the line. Surely it affects the "faith and mission of the church itself." On the other hand, the state's interest in enforcing reporting requirements is hardly trivial.

Hosanna-Tabor tries to replace both balancing tests and the over-broad principle of *Smith* with a categorical dyad between inner and outer: if a matter is internal, it is outside the state's purview. But this distinction is too simple. As Christopher Lund observes:

> [A]ny account of church autonomy must acknowledge situations where religious freedom will have to be subordinated to other values. . . . Every constitutional right is exercised within bounds, and any theory that hopes to have some practical reality must take practical reality into account. Church autonomy is church autonomy within limits, and no more.[32]

If Lund is right—and I think he is—then some version of the "compelling state interest" test reenters through the back door, and the *Hosanna-Tabor* court owes us an account of how this test would function within the framework it creates. Because *Hosanna-Tabor* creates a strong presumption in favor of insulating internal church matters from public power, it would

31. CODE OF CANON LAW: LATIN-ENGLISH EDITION 361 (Canon Law Soc'y of Am. ed., 1983) (translating 1983 CODE c.983, § 1).

32. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1206–07 (2014).

take a really strong public interest to override it. To take an extreme case: suppose a serial murderer privately confesses to his crimes and tells his confessor that an irresistible impulse will compel him to continue until he is stopped. Should the fact that he tells this to a priest rather than a friend or family member make a difference in the eyes of the law?

A fourth provisional point*: government should not be in the business of assessing the truth of religious doctrines, or of judging their fidelity to some preexisting doctrinal orthodoxy.* As Lund points out, English law often called on courts to decide which of two competing factions competing for control of church property "came closest to the original beliefs of the church."[33] In *Presbyterian Church v. Mary Elizabeth Blue Hull*,[34] the Supreme Court unanimously set this practice aside as incompatible with the Constitution. "First Amendment values are plainly jeopardized," the Court declared, "when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[35]

As far as I know, there has been no serious effort to revisit this decision in the nearly half century since it was handed down. On the contrary: the intuitive heart of the decision—an aversion to the state becoming entangled with the church—swiftly became a pillar of First Amendment jurisprudence in cases such as *Walz v. Tax Commission of the City of New York*[36] and *Lemon v. Kurtzman.*[37] We now take it for granted that assessing the truth or fidelity of specific church doctrines is beyond both the competence and the jurisdiction of civil government. I find it hard to imagine the federal courts returning to anything resembling the once-standard English approach.

An apparently unrelated issue turns out to rest on the same considerations. As Lund observes, "Every court in this country will let you sue your doctor and lawyer for malpractice, yet none of them will let you sue your rabbi or priest."[38] Why not? What is the difference? The obvious answer is that in the cases of medicine and law, we have confidence that widely accepted civic norms enable us to develop standards applicable to all. It does not matter what your faith is, or indeed whether you have one: a doctor is a doctor, and the same basic standards of good practice apply to you and every other doctor. It is much harder to say the same for persons

33. *Id.* at 1198.
34. Presbytarian Church v. Mary Elizabeth Blue Hull Mem'l Presbytarian Church, 393 U.S. 440 (1969).
35. *Id.* at 449.
36. Walz v. Tax Comm'n, 397 U.S. 664 (1970).
37. Lemon v. Kurtzman, 403 U.S. 602 (1971).
38. *Lund*, *supra* note 32, at 1208.

of religious authority. Priests are bound by certain norms of practice that are internal to Catholicism, rabbis to Judaism, and so forth. A priest cannot counsel a pregnant teen girl to get an early-term abortion; a rabbi can. Is one of them good practice, the other malpractice? Which is which? Equally implausible is the idea that civil authorities should or can hold religious authorities to the standards of their own faiths. Are courts to be in the business of determining whether a priest's practices conform to the teachings of the seminary and the norms of the Church? If anything is the internal business of a religious institution, this is it.

A fifth provisional point: *from the standpoint of civil law, churches are voluntary associations.* This is so despite the fact that many religions do not so view themselves from a doctrinal point of view. For Orthodox Jews, the children of Jewish mothers are Jews by birth; traditional Muslims do not accept the right of believers to repudiate their faith; Catholics practice infant baptism. But our civil law does not criminalize apostasy, or even recognize it as a legal category. Nor does it permit religious organizations to retain individual members against their will.

Although political theorists debate the scope of "exit rights," they agree that the state must define and defend them. Voluntary associations cannot be prisons, and exit from membership cannot be made unduly burdensome. At some point, religious indoctrination turns into brainwashing; at some point, the surrender of personal resources to the religious community makes exit too difficult.

Churches are two-way voluntary organizations. Individuals cannot be drafted into them; as adults, anyway, they may choose for themselves whether to join. At the same time, churches may decide whether to grant or deny membership to applicants, on whatever grounds they see fit. If anything is internal to the faith and mission of the church, surely it is the requirements for membership, including the rules governing conversion.

As far as I know, the U.S. government has never been in the business of ordering religious associations to accept individual members, or categories of members, against such associations' will. Nonetheless, for more than thirty years it has been settled law that government may substantially burden membership practices that it cannot forbid outright. The seven-member majority in *Bob Jones* (eight-member with Justice Powell's concurrence) held that the federal government could interpret the statute governing tax-exempt organizations to exclude exemptions for religious schools with racially discriminatory admissions policies: "Government has a fundamental, overriding interest in eradicating racial discrimination

in education . . . [which] substantially outweighs whatever burden denial of tax benefits places on [the university leaders'] exercise of their religious beliefs."[39]

Having affirmed the ministerial exception in *Hosanna-Tabor*, could the Court go on to revoke the school's tax exemption as contrary to public policy? Almost certainly not. The reason is that history has long guided the Court's jurisprudence in this area.[40] Not only is race special, but also schools that propagate racist views to impressionable young minds occupy the bulls-eye of strict scrutiny. Laws prohibiting other categories of discrimination are important, but not as compelling as race.

In footnote twenty-one, the *Bob Jones* Court clarifies it's understanding of what makes race special. Schools that discriminate on the basis of race "cannot be deemed to confer a benefit on the public."[41] Their racial policies pervade and pollute the totality of their public impact. That may not be true, says the Court, for other categories. Therefore, they need not decide, and are not deciding, whether "an organization providing a public benefit and otherwise meeting the requirements of § 501c(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy."[42] The door remains open for future courts to decide whether violations of law or policy concerning gender, sexual orientation, or disability status are on all fours with race.

Another provisional point: *voluntarily joining a religious association always means accepting some internal rules of governance and discipline, and the state will be very reluctant to override them*. As the Court said long ago in *Watson v. Jones*[43]:

> All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[44]

This principle would seem to apply with special force when the terms of membership explicitly forbid taking church decisions to external authorities for adjudication. To accept those terms, then, is to forfeit claims, even rights, to which consenting individuals would otherwise be entitled.

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39. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).
40. *See id.* at 588 ("Tax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England.").
41. *Id.* at 596 n.21.
42. *Id.*
43. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).
44. *Id.* at 729.

I can see no reason why this logic of consent would not apply to church decisions promoting individuals to and removing them from positions of authority and responsibility. Catholic dissidents have every right to use whatever forums the Church provides to urge the ordination of women. But as Catholics, they have surrendered the right to promote their cause by appealing outside the church to secular laws against sex discrimination. Similarly, a church that required certain standards of physical health and function as conditions for holding religious office would be immune to challenges based on the Americans with Disabilities Act.[45]

Still, everything has limits, including consent. Individuals cannot surrender their right to be treated in ways that comport with basic enforceable societal norms. A neo-Aztec cult could not sacrifice virgins, even if the virgins were consenting adults. Parents could not consent to the sexual abuse of their minor children, even if they sincerely believed that their religion's theology required it. A church whose mandatory rituals include sex with minors receives no constitutional protection. Members of the clergy who commit such crimes are liable to prosecution, and doctrine is no defense. A fortiori, it is no defense for church members.

VI. CONCLUSION

It is time to pull together these *disjecta membra*.

In recent years there has been much discussion about narrow versus broad conceptions of religious free exercise. Narrow conceptions focus on religious doctrines, rituals, leaders, and members; broad conceptions add religion's role in the public square. This distinction manifests itself in politics. To oversimplify: liberals are comfortable with the narrow conception but worry that the broad conception will be used to justify the imposition of religious norms on society as a whole, while conservatives fear that confining religion to the narrow conception will create a "naked" public square that allows secular values to dominate by default.

The ministerial exception falls squarely within the narrow conception. That it has proved controversial—though not, as it turns out, within the Court—exemplifies a misguided line of argument that political theorist Nancy Rosenblum calls the "logic of congruence."[46] This argument's default assumption is that public laws and norms ought to be binding on associations

45. 42 U.S.C. § 12187 (2012).

46. *See* Nancy L. Rosenblum, *Democratic Families: "The Logic of Congruence" and Political Identity*, 32 HOFSTRA L. REV. 145, 151 (2003).

and even families. To carve out zones of immunity is to unleash the dogs of injustice. There must be an external authority to which aggrieved associations and family members can appeal.

With its deep roots in our history of racial subordination and family violence, this argument is viscerally powerful and valid—within limits. The problem is that like a swollen river, it has overflowed its banks and threatens vast stretches of surrounding territory. The template of racial and gender equality has been deployed repeatedly to generate new categories of claims for public redress, whatever the venue of the purported violation. At the end of this road lie truncated conceptions of free association and free exercise.

The ministerial exception is one part of a "thus far and no farther" counter-thrust. It reflects, at base, the conviction that religious groups should be able to choose their own leaders without external interference. In the process, these groups may employ criteria and procedures that would be inadmissible in the public and private sectors. Catholics and Orthodox Jews may exclude women from certain positions of leadership, and civil law cannot order them to change. In this respect, among others, religions have the right to be different.

Fortifying this conviction is the fact that religious groups are a species of voluntary association. As such, its members agree to be governed by certain norms and practices binding within only the group and on individuals only as long as they choose to be bound. Included among these norms and practices may be the agreement not to seek redress for grievances outside the authority of the association.

There is nothing strange about such an agreement. Many employment contracts include confidentiality requirements and promises not to compete with the employer for a certain period after the termination of the relation. In a wide range of circumstances, we may voluntarily surrender claims that we could otherwise bring. Not all rights are inalienable; indeed, most are not.

The third leg of the stool is a proposition central to liberal democracy as we have come to understand it: government lacks the capacity to settle disputes that rest wholly or in part on doctrinal differences, and it should not be in the business of doing so. That is why U.S. courts have abandoned the effort to resolve claims that assert "fidelity to doctrine" as the justification for owning property or occupying offices of religious authority; that is why the anti-entanglement norm has proved a sturdy growth in contemporary First Amendment jurisprudence; that is why, setting the standard for all future U.S. public officials, James Madison declined to be drawn into deliberations about the selection of church authorities.

None of this proves that the ministerial exception is without limit or exception. Indeed, I have come to wonder whether any legal or moral

conception is truly exceptionless. My argument does suggest, however, that the ministerial exception is a powerful presumption, rebuttable only by weighty civil considerations. A religion's selection procedures may require acts that the civil authorities may rightly forbid, wherever they may occur. I suspect that such instances will be rare.

It is one thing to say that the selection of ministers is immune to laws governing hiring decisions in the public and private sectors, quite another that ministers are exempt from laws applying to officials in other circumstances. This distinction features centrally in recent child abuse scandals. So we cannot move directly from the ministerial exception to a full-blown theory of religious institutional autonomy, any more than we can move directly from the privacy of the confessional (whatever its limits may be) to a comprehensive church exemption from ordinary requirements to report child abuse and other crimes as they become known to church officials.

I conclude with a profession of philosophical faith. As a Berlinian pluralist, I believe that the goods we rightly cherish rarely come packaged together. Almost always, we are compelled to choose between or among goods, and these are the hardest choices. Nearly every choice entails the real loss of some good, the lack of which will make the lives of some others worse than they could have been.

This is certainly the case for the ministerial exception. On my reading of the facts, Cheryl Perich would have had a good case if she had been able to bring the substance of her suit before a civil court. Because the Americans with Disabilities Act represents our collective judgment about fair treatment for individuals, there is a prima facie case that the ministerial exception protected an instance of genuine unfairness from legal scrutiny and redress. The ministerial exception, then, represents a second collective judgment: the goods the exception protects are weightier than the harms it allows. It is understandable that the most affected individuals and their most ardent supporters will dissent from this judgment.

This is part of a larger tension that suffuses our public life—as political theorist Jacob Levy puts it, "between the institutional realization of freedom to associate and of freedom within (or from) group life."[47] And, he adds wisely, "the ability to see freedom in our associational lives and power in the state all too often limits the ability to see power in associations and the possibility of freedom being enhanced by outside intervention—and vice

47. JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM 295 (2015).

versa."[48] We must, he concludes, reject the impulse to synthesize these tensions into a larger harmonious theoretical whole. This means "living with a degree of disharmony in our social lives . . . and our political theory."[49]

Despite my defense of the ministerial exception, I find myself compelled to accept Levy's conclusion. That means that the goods we have chosen to leave behind will continue to make a claim that we experience as a troubling moral dissonance.

48. *Id.*
49. *Id.*