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I. INTRODUCTION

Much has been written about the protections afforded by the Free Exercise Clause when government regulation impacts the religious practices of individuals, and if one looks for guidance from the Supreme Court, the rules are fairly clear. Government action designed to thwart religious exercise is, of course, unconstitutional.[1] A more difficult issue arises when the state does not intend to burden religious exercise but does so inadvertently. Prior to 1990, the Supreme Court had long employed a balancing approach that afforded significant relief. Under this approach, developed in the seminal case *Sherbert v. Verner*,[2] individuals were entitled to exemptions from laws that substantially burdened religious conduct unless enforcement was justified by a compelling state interest.[3] In 1990, in *Employment Division v. Smith*,[4] the Supreme Court

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1. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 523, 532–33 (1993); Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

2. 374 U.S. 398 (1963).

3. The Court applied this approach in numerous cases. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987); United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd., 450 U.S. 707, 717–19 (1981); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). During this period, the Supreme Court applied an approach more deferential to the government in the context of the military, *see* Goldman v. Weinberger, 475 U.S. 503 (1986), and prisons, *see* O'Lone v. Shabazz, 482 U.S. 342 (1987). In addition, free exercise protections were not available where the relief sought by the claimant would have required the government to change the way it managed its own internal affairs. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 448–49 (1988); Bowen v. Roy, 476 U.S. 693, 699–700 (1986).

4. 494 U.S. 872 (1990).

abandoned this balancing test for all but a few categories of cases.[5] Under the Court's new rule, the Free Exercise Clause does not excuse individuals from compliance with neutral, generally applicable laws that are not intended to burden religious exercise.[6] Scholarly writing addressing the proper scope of free exercise protections for individuals has been extensive, and even more than a decade after *Smith*, individual free exercise rights remain a familiar subject in the academic literature.[7]

The scholarly and judicial landscape is much different when one turns to the free exercise rights of religious organizations. Just as in the case of individuals, government regulation frequently impacts the activities of religious groups. For example, common areas of litigation include: the application of federal antidiscrimination statutes to employment decisions;[8] the imposition of mandatory collective bargaining requirements under state and federal labor laws;[9] the application of state licensing, teacher certification and

5. The balancing test still applies to "hybrid situations" involving free exercise claims in conjunction with other constitutional rights. *See id.* at 881–82.

6. *Id.* at 878–79.

7. For a sampling of influential articles, see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000) [hereinafter Gedicks, *Defensible Free Exercise Doctrine*]; Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998) [hereinafter Gedicks, *An Unfirm Foundation*]; Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View From the Clergy*, 18 J.L. & POL. 387 (2002); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996) [hereinafter Laycock, *Religious Liberty as Liberty*]; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 [hereinafter Laycock, *Remnants of Free Exercise*]; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, U. CHI. L. REV. 308 (1991) [hereinafter Marshall, *In Defense of* Smith]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90) [hereinafter Marshall, *The Case Against*]; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) [hereinafter McConnell, *Singling Out Religion*]; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990). For historical analyses, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

8. *See infra* Part II.B.

9. *See infra* Part II.B.

curriculum requirements to church-operated schools;[10] zoning and historic preservation regulation;[11] and the licensing and regulation of religiously affiliated social services programs.[12] However, while clashes between churches[13] and regulators are recurring, one finds fewer scholarly works addressing the free exercise rights of religious groups and much less guidance from the Supreme Court. Indeed, the Supreme Court has, surprisingly, never directly addressed the scope of free exercise protections when government regulation interferes with the internal affairs of religious groups. The Court has addressed claims for tax exemptions,[14] but none of these cases has involved government action that directly impinges on internal church operations.

While no case has addressed this issue directly, Supreme Court precedents involving religious groups provide support for three very different approaches.[15] On the one hand, there is some support for a broad right of "church autonomy"[16] that prohibits government interference with internal church affairs regardless of whether the activities affected are religious in nature or more mundane administrative matters. On the other hand, Supreme Court decisions also support an approach that mirrors *Smith*'s rule for individuals. When government action is neutral and generally applicable, religious groups are not entitled to special relief even if the regulation burdens religious practices. In between these two options, a third approach provides limited relief where government regulation

10. *See, e.g.*, Johnson v. Charles City Cmty. Sch. Bd. of Educ., 368 N.W.2d 74 (Iowa 1985); State *ex rel.* Douglas v. Faith Baptist Church, 301 N.W.2d 571 (Neb. 1981); State v. Whisner, 351 N.E.2d 750 (Ohio 1976).

11. *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990); Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293 (Alaska 1982); Soc'y of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992).

12. For a discussion of cases in this area, see Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343 (1992).

13. I use the term "church" broadly to refer to both Christian groups as well as non-Christian organizations.

14. *See* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

15. *See infra* Part II.

16. Douglas Laycock popularized the use of this term in his influential piece, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

impinges on religious practice or activity. Under this middle position, religious organizations do not have a broad right of autonomy over all internal affairs, but they are entitled to exemptions from laws that burden religious practice. Each of these approaches can be found in lower court decisions, and each has its supporters in the legal academy.

This Article examines the Supreme Court's decision in *Smith* for guidance in choosing among these three options. The use of *Smith* as a prism through which to analyze the free exercise rights of religious groups makes sense for several reasons. First, no satisfactory account of religious group rights can be developed without evaluating the ramifications of *Smith*. While *Smith* dealt with protections for individuals, courts and scholars know that they must wrestle with the meaning of *Smith* in the group context. For some courts and scholars, the meaning of *Smith* for religious groups is simple: religious groups, just like religious individuals, are not entitled to special exemptions from neutral state action. For others, however, *Smith* is not relevant at all to the free exercise rights of religious groups, and they look to other lines of Supreme Court precedent for appropriate standards. My examination of *Smith* reveals that *Smith* is not only relevant to an analysis of religious group rights but is also very helpful for choosing among the three options outlined above. The opinion of the Court in *Smith* raises a number of issues that clarify what is at stake in making this choice, and its lessons are surprising. When read carefully, *Smith* supports a broad right of church autonomy that extends to all aspects of church affairs, the most religiously sensitive as well as the more mundane.

II. THREE POSSIBLE APPROACHES

While the Supreme Court has never directly addressed the protections afforded by the Free Exercise Clause when government regulation interferes with church affairs, a number of the Court's decisions provide guidance. The earliest source of guidance is a series of cases regarding intrachurch disputes over property.[17] These

17. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese for the United States and Can. v. Milivojevich, 426 U.S. 696 (1976); Md. and Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94 (1952);

decisions span over one hundred years, and within them, one finds arguments for all three approaches to religious group rights outlined above. Several other Supreme Court cases also bear on this issue, and they too have left the choice between these approaches unresolved. In this section, I will examine these Supreme Court decisions and the support they provide for each of these approaches. I will then examine two lines of lower court cases that reflect these different possibilities, and I will observe the same split among legal scholars.

A. Supreme Court Case Law

The first time that the Supreme Court addressed an intrachurch dispute over property was in *Watson v. Jones*,[18] decided in 1872. The litigation in *Watson* arose when divisions over slavery and loyalty to the federal government resulted in a schism within the Presbyterian Church in the United States after the Civil War.[19] The General Assembly, which functions as the highest judicatory in Presbyterian polity, had supported the union and opposed slavery; after the war ended, the General Assembly sought to enforce these views among church members.[20] The General Assembly's policy resulted in a split that affected the local congregation of the Walnut Street Church in Louisville, Kentucky.[21] As the congregation's members divided over support for the General Assembly, both factions claimed ownership of the church's property.[22] One of the factions sued in federal court based on diversity of citizenship, and on appeal, the Supreme Court applied federal common law. While *Watson* long antedated the Court's application of the First Amendment to the states, the Court was guided by what it described as "a broad and sound view of the relations between church and state under our system of laws."[23] According to the Court, in America, "[t]he law knows no heresy, and is committed to the support of no dogma,"[24] and individuals have the right to form voluntary religious associations for the

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

18. 80 U.S. (13 Wall.) 679 (1872).

19. *See id.* at 690–93.

20. *See id.* at 690–91.

21. *See id.* at 692.

22. *See id.* at 692–93.

23. *Id.* at 727.

24. *Id.* at 728.

expression, practice, and dissemination of any religious doctrine that does not violate "the laws of morality or property" or "infringe personal rights."[25] This freedom includes the right to create church tribunals for the resolution of contested questions,[26] and when church members form a hierarchical polity, courts must defer to the highest of these tribunals on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" when disputes arise.[27] Applying this rule, the Court held that the property of the Walnut Street Church belonged to the faction loyal to the General Assembly.[28]

The Court gave several reasons for its rule. First, when individuals join together to form churches with hierarchical forms of governance, they voluntarily agree to submit to the decisions of church tribunals on disputed questions.[29] When courts defer to the highest judicatory of a hierarchical polity, they are deferring to the choice made by church members. Second, deference also respects the proper boundaries between church and state. Quoting with approval the opinion of a South Carolina court, the *Watson* justices stated: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[30] Finally, the Court observed that civil courts are "incompetent judges"[31] of the intricacies of church teaching.[32] If courts become embroiled in questions of faith and doctrine, they will "involve themselves in a sea of uncertainty."[33]

Within the *Watson* opinion, one can find support for all three approaches to government regulation of church affairs discussed above. One may argue, for instance, that the right to form voluntary religious associations and to determine rules for church governance requires broad protection from neutral government regulation as well as judicial deference in religious controversies. Whenever state

25. *Id.* at 728–29.

26. *Id.* at 729.

27. *Id.* at 727.

28. *See id.* at 734.

29. *Id.* at 729.

30. *Id.* at 730 (internal quotation marks omitted) (quoting Harmon v. Dreher, 17 S.C.Eq. (Speers Eq.) 87 (S.C. App. Eq. 1843)).

31. *Id.* at 732 (internal quotation marks omitted) (quoting German Reformed Church v. Commonwealth *ex rel.* Seibert, 3 Pa. 282 (1846)).

32. *See id.* at 729, 732.

33. *Id.* at 732.

laws interfere with church control over internal affairs, they infringe on this freedom. Indeed, as Professor Laycock has noted, government regulation "is in some ways a greater intrusion" on the church than judicial resolution of disputes because "regulation always imposes external rules."[34] A system of government that gives individuals the right to form religious associations, no matter how unorthodox, places church affairs beyond the competence of government. A broad right of church autonomy also best accords with the separationist views regarding church and state expressed in *Watson*. When the Court affirmed that in America, "religious liberty [is secured] from the invasion of the civil authority,"[35] the justices were envisioning a sphere of institutional autonomy beyond the power of the state.

A less expansive view of religious group rights is also consistent with the reasoning in *Watson*. When *Watson* requires judicial deference on contested "questions of discipline, or of faith, or ecclesiastical rule, custom, or law,"[36] it may, indeed, require relief from government regulation that affects religious beliefs and practices, but such relief need not extend to matters that lack ecclesiastical or religious significance. If, for example, state regulation only affects secular aspects of church operations, religious freedom is not at issue and *Watson* has nothing to say. Moreover, a broad right of autonomy that extends to all aspects of church administration regardless of whether religious matters are implicated would be gratuitous favoritism that no other type of nonprofit or charitable organization enjoys. *Watson* supports limited protection when government regulation interferes with ecclesiastical matters or conflicts with church doctrine, but it does not support a broader right of church autonomy.

The *Watson* opinion supports yet a third interpretation. *Watson* is a decision about the limitations of judicial review in cases of intrachurch controversies. It is not a case about neutral government regulation, and it does not require special protections for religious groups even when the state interferes with religious beliefs or practice. When courts address intrachurch disputes over property,

34. Laycock, *supra* note 16, at 1396.

35. *Watson*, 80 U.S. at 730 (internal quotation marks omitted) (quoting Harmon v. Dreher, 17 S.C.Eq. (Speers Eq.) 87 (S.C. App. Eq. 1843)).

36. *Id.* at 727.

they seek a peaceful resolution of the controversy that accords with the expectations of church members, and, thus, deference to the highest church tribunal in hierarchical polities makes sense. In this respect, the decision in *Watson* was not novel, nor were its underlying principles appropriate solely for religious organizations. Indeed, the *Watson* majority specifically stated at the outset of its opinion that it would be applying general principles applicable to all voluntary charitable associations.[37]

In cases involving neutral government regulation, additional state interests are at stake. When the government regulates, it does so to achieve legitimate, and often pressing, policy objectives. Special exemptions for religious organizations would undermine these objectives. Moreover, neutral government regulation of church affairs does not infringe the freedoms protected in *Watson*. The Court in *Watson* affirms the right of individuals to join together in religious associations and to create tribunals to settle contested questions of faith and doctrine. When the government imposes neutral regulation, rather than engages in the resolution of internal disputes, these tribunals have no role to play. Moreover, the freedom to determine internal church structures and governance does not imply a right to exemption from external rules that are the result of democratic decision making and that apply equally to all similarly situated associations.

Subsequent intrachurch dispute decisions also support these multiple interpretations. In *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*,[38] decided eighty years after *Watson*, the Court used some of its broadest language describing religious group rights. The *Kedroff* Court found in *Watson* "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[39] According to *Kedroff*, this freedom has constitutional protection under the Free Exercise Clause.[40] The Court expressly approved of *Watson*'s rule of deference in cases of internal church disputes[41] and

37. *Id*. at 714.
38. 344 U.S. 94 (1952).
39. *Id*. at 116.
40. *See id*. at 115–16.
41. *See id*. at 110–16, 120–21.

affirmed as well a "rule of separation between church and state."[42] Drawing upon this separationist view, the Court identified a "[f]reedom to select . . . clergy"[43] and an "ecclesiastical right [to] . . . choice of . . . hierarchy."[44] In addition, the Court spoke of protections for "church administration,"[45] the "operation of . . . churches,"[46] and "polity."[47] Thus, the Court seemed to come close to embracing a broad right of church autonomy over internal church administration and governance.

The holding in *Kedroff* is, however, limited. The litigation in *Kedroff* concerned the right to occupy a Russian Orthodox cathedral in New York.[48] After the Russian Revolution, the New York legislature had transferred control of the property from the central governing authority of the Russian Orthodox Church in Moscow to church authorities in America.[49] The *Kedroff* Court held that the transfer of power from one church authority to another violated the First Amendment.[50] Clearly, the *Kedroff* Court believed that intentional interference with church government is unconstitutional. However, *Kedroff* did not address neutral government regulation that inadvertently interferes with church administration. Moreover, it is not clear from the Court's opinion how far the independence that it envisioned should extend. Protected aspects of church affairs include the choice of clergy and hierarchy, and other "matters strictly ecclesiastical,"[51] but whether more mundane aspects of church governance receive similar protection is left unresolved.

These ambiguities remain in more recent decisions. For example, in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*,[52] the Court held that courts must defer to church tribunals on matters of polity and administration as well as faith and doctrine.[53] However, like *Kedroff*, this case involved an intrachurch

42. *Id.* at 110.
43. *Id.* at 116.
44. *Id.* at 119.
45. *Id.* at 107, 117.
46. *Id.* at 107.
47. *Id.* at 117.
48. *Id.* at 95–97.
49. *Id.* at 97–99, 105–07.
50. *Id.* at 110, 119.
51. *Id.* at 119.
52. 426 U.S. 696 (1976).
53. *Id.* at 710.

dispute, not neutral government regulation, and the scope of protected matters of church government is unclear. *Milivojevich* involved "quintessentially religious controversies" over church discipline and the choice of clergy,[54] as well as diocesan reorganization, an "issue at the core of ecclesiastical affairs."[55] For matters involving less sensitive issues, the scope of First Amendment protection remains uncertain.

The Court's most recent intrachurch dispute case marks a substantial shift in the Court's treatment of church controversies, but the same ambiguities remain. In *Jones v. Wolf*,[56] decided in 1979, the Court held that courts may, but need not, employ the rule of deference developed in *Watson*. Instead of automatically deferring to the decision of the highest tribunal in hierarchical polities, courts may use "neutral principles of law" to resolve the dispute, or any other approach that does not require consideration of religious questions.[57] Under the neutral-principles approach, courts use secular principles of property and trust law to examine the language of deeds, church charters or constitutions, state statutes, and any other relevant documents.[58] Only when the interpretation of these documents would require courts to resolve ecclesiastical questions must courts defer to the decisions of religious bodies.[59] The advantage of this approach is that it "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[60]

At first glance, the Court's decision in *Wolf* seems to undermine the free exercise protections established in earlier cases. In *Wolf*, the Court's priority appears to be avoiding judicial entanglement in religious questions. As long as there is no danger that courts will become embroiled in doctrinal issues, the Court indicates that any one of a number of approaches to intrachurch disputes may be

54. *Id*. at 720; *see also id*. at 717 ("Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern . . . .").

55. *Id*. at 721.

56. 443 U.S. 595 (1979).

57. *Id*. at 602.

58. *Id*. at 600–04.

59. *Id*. at 604.

60. *Id*. at 603; *see also id*. at 605 ("The neutral-principles approach . . . obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.").

permissible.[61] The dissent in *Wolf* observes that applying neutral principles of law, or another of these permissible approaches, may well result in overturning the decision of church hierarchies.[62] According to the dissent, such an outcome would interfere with the free exercise of religion.[63] In the view of many scholars, the lesson for church organizations facing neutral government regulation is that such regulation will be sustained as long as its application does not require the examination of religious questions.[64] Because neutral regulations are, by definition, secular standards, such entanglement will not occur often. Churches do not have an independent right to be free from government interference that does not involve state bodies in religious matters.

A second look at *Wolf*, however, reveals other possible interpretations of the majority's decision. The Court in *Wolf* was careful to point out that the advantages of the neutral-principles method are not limited to nonentanglement. The use of neutral principles of law permits courts to avoid entanglement in ecclesiastical questions while at the same time securing free exercise values.[65] Through appropriate use of secular language and property concepts, religious organizations can specify the resolution they would prefer in the event of a dispute.[66] In this way, the neutral-principles approach "can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members."[67] While the dissent argues that the neutral-principles method undermines free exercise rights, the majority insists that "[n]othing could be further from the truth."[68] Thus, the majority's

61. *See id.* at 602.

62. *See id.* at 613–14, 616 n.3 (Powell, J., dissenting).

63. *Id.* at 613–14, 616–17 & n.3 (Powell, J., dissenting).

64. *See* Marci A. Hamilton, *Religious Institutions, The No-Harm Rule, and the Public Good*, 2004 BYU. L. REV. 1099; Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 406–08 (1987); *see also* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 294 (1994) ("*Jones v. Wolf* sharply undermines any claim that the Free Exercise Clause confers a wide-ranging right of autonomy upon religious organizations.").

65. *See Wolf*, 443 U.S. at 603–04.

66. *See id.* at 603.

67. *Id.* at 604. Whether the neutral-principles approach will always work as envisioned by the majority in *Wolf* has been questioned by Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1881–86 (1998).

68. *Wolf*, 443 U.S. at 605–06.

approval of the neutral-principles method arguably reflects a continuing commitment to the free exercise rights of religious organizations as well as entanglement concerns. Such a commitment to free exercise is consistent with protections from neutral state regulation as well, either in the form of a broad right of church autonomy or more limited relief in situations where religious beliefs or practices are burdened.

Indeed, in its earlier decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[69] the Supreme Court indicated that avoidance of judicial entanglement in religious doctrine itself serves free exercise values. In *Hull*, decided ten years before *Wolf*, the Court suggested for the first time that the use of neutral principles of law may be a permissible method for resolving church property disputes.[70] Just as in *Wolf*, the Court in *Hull* appeared to give priority to entanglement concerns.[71] However, the reason that the Court gave for these concerns reflects a continuing commitment to free exercise. According to the Court, if courts become involved in resolving religious questions, "the hazards are ever present of inhibiting the free development of religious doctrine."[72] The Court repeated this statement in *Milivojevich*.[73] Thus, it is, in part, free exercise values that demand nonentanglement.

To the extent that other forms of government action, such as neutral government regulation, also intrude upon the free development of religious doctrine, the reasoning in *Hull* supports additional relief. Indeed, the reasoning in *Hull* goes even further. In *Hull*, the Court's concerns were not limited to actual burdens on the free development of religious doctrine. The Court was also

69. 393 U.S. 440 (1969).

70. *See id.* at 449.

71. *See id.* at 445 (noting that the state has a legitimate interest in resolving church property disputes but "[s]pecial problems arise . . . when these disputes implicate controversies over church doctrine and practice"); *id.* at 447 (explaining that the logic of *Watson* "leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes"); *id.* at 449 ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."); *id.* (concluding that the First Amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine").

72. *Id.*

73. *See* Serbian Eastern Orthodox Diocese for the United States and Can. v. Milivojevich, 426 U.S. 696, 710 (1976).

concerned with the "hazard" or danger of such interference. If the danger of interference also raises First Amendment problems, arguably only a broad right of church autonomy would provide sufficient protection. Any time government regulation impacts internal church affairs, there is a real danger that the development of doctrine will be affected. Even where the regulation does not appear to touch upon matters of religious belief or doctrine, these hazards are present.

A handful of other Supreme Court cases that address protections for religious organizations also lend support to the three approaches to government regulation found within the Court's intrachurch dispute cases. For each approach, there is a decision that seems to favor it. However, like the Court's intrachurch dispute cases, none of these decisions squarely addresses the free exercise rights of religious groups.

For example, in 1979, the same year that *Wolf* was decided, the Court seemed to approve a broad right of church autonomy in *NLRB v. Catholic Bishop of Chicago*.[74] The litigation in *Catholic Bishop* arose when unions of lay teachers at several Catholic secondary schools sought to bargain collectively with their diocesan employers under the National Labor Relations Act (NLRA).[75] The dioceses refused on the grounds that application of the Act would impinge on their control over the religious mission of the schools and, thus, violate the First Amendment.[76] The Court agreed that application of the Act would give rise to serious constitutional questions.[77] The Court identified the danger of entanglement in religious matters and also stated that "mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management."[78] Whether the Court meant to suggest that any government regulation that interferes with internal church affairs raises First Amendment problems is unclear, and the Court did not elaborate further upon this statement. Following its statement, the Court did observe that ensuing conflicts

74. 440 U.S. 490 (1979).

75. *See id.* at 492–95.

76. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1123 (7th Cir. 1977).

77. *See Catholic Bishop*, 440 U.S. at 501–04.

78. *Id.* at 503 (internal quotation marks omitted) (quoting Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist., 337 A.2d 262, 267 (Pa. 1975)).

between clergy-administrators and the National Labor Relations Board, and between administrators and union negotiators, would further entangle religion and government.[79] Thus, it is possible that the Court simply meant that encroachment on church autonomy would exacerbate entanglement problems rather than raise an independent First Amendment problem. In any event, the Court in *Catholic Bishop* ultimately sidestepped resolving any constitutional questions and decided the case on statutory grounds. According to the Court, in view of the serious constitutional questions it identified, there must be a clear affirmative intent by Congress to cover the teachers under the NLRA before the Court would construe the Act to apply to them.[80] Finding none, the Court declined to construe the Act to cover them and avoided resolving the First Amendment issues.[81]

In *Ohio Civil Rights Commission v. Dayton Christian Schools*,[82] the Supreme Court seemed to support a different approach. The litigation in *Dayton* arose when Dayton Christian Schools ("Dayton") refused to renew the contract of a female teacher, Linda Hoskinson, after learning that she had become pregnant.[83] The stated reason was that mothers should be at home when their children are young.[84] When Hoskinson threatened litigation based on state and federal antidiscrimination laws, the school terminated her because she failed to follow the "Biblical chain of command" in seeking relief.[85] Hoskinson then filed a complaint with the Ohio Civil Rights Commission alleging gender discrimination in violation of state law.[86] The school filed an action in federal court seeking to enjoin the administrative proceedings.[87] The school argued that any investigation of Hoskinson's claim or imposition of sanctions would

79. *See id.* at 503.
80. *See id.* at 501.
81. *See id.* at 507.
82. 477 U.S. 619 (1986).
83. *Id.* at 623.
84. *Id.*
85. *Id.* at 622–23.
86. *Id.* at 623–24.
87. *Id.* at 624.

violate the First Amendment.[88] The Sixth Circuit agreed with the school and granted the injunction.[89] The Supreme Court reversed.[90]

The Supreme Court's decision in *Dayton* was based on abstention grounds.[91] According to the Court, Dayton will have an adequate opportunity to raise any constitutional arguments in the state proceedings.[92] However, the Court also added that "however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."[93] By making this statement, the Court seems to suggest that the outcome of Dayton's constitutional claim may turn on whether Dayton's decision to discharge Hoskinson was, in fact, religiously motivated or whether the professed religious reason was merely pretextual. If the school's reason for the discharge was actually religious, constitutional relief might be appropriate, but if the school's decision was not religiously motivated, the Court suggests that application of antidiscrimination statutes would be permissible. An investigation into the school's motive would not be relevant if the Court believed that all regulation impinging upon church control over internal operations were unconstitutional. Thus, the Court seems to reject a broad right of church autonomy while it leaves open the possibility of narrower protections where government regulation interferes with religious belief and practice. One must be careful, however, not to read too much into the Court's statement. The Court's comment was brief and remains dicta. By resting its holding on abstention grounds, the Court did not resolve Dayton's First Amendment claims. It is quite possible that upon full consideration of the constitutional issues involved, the Court would embrace broader protections than it seems to envision here.

88. *Id*. at 624–25.

89. *Id*. at 625. The Sixth Circuit's decision can be found at 766 F.2d 932 (6th Cir. 1985).

90. *See Dayton*, 477 U.S. at 622.

91. *See id*.

92. *See id*. at 628.

93. *Id*.

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,[94] the Court again left the scope of free exercise protections for religious organizations unresolved. At issue in *Amos* was a provision in Title VII of the Civil Rights Act of 1964 exempting religious organizations from the Act's prohibition against religious discrimination in employment.[95] The exemption permits religious organizations to discriminate on the basis of religion in employment regardless of whether the employee engages in religious functions.[96] While Congress had originally exempted only the organization's religious activities, it broadened the exemption in 1972.[97] This expanded exemption was challenged on Establishment Clause grounds, and the *Amos* Court upheld the exemption for all nonprofit activities.[98] According to the Court, legislatures do not violate the Establishment Clause by seeking to lift significant regulatory burdens on the ability of religious groups to define and carry out their religious missions.[99] Even where it seems that only secular activities are involved, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[100] The line between religious and secular activities is not clear, and an organization would "understandably be concerned that a judge would not understand its religious tenets and sense of mission."[101] The resulting "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[102]

The *Amos* Court conceived of burdens on religious belief and practice broadly. Indirect interference with religious activity burdens a group's religious mission just as direct intrusion on religious matters does. The Court also observed that the inability of judges to fully understand different religious beliefs may limit their capacity to

94. 483 U.S. 327 (1987).

95. *See id.* at 329–30. This exemption appears in section 702 of the Act, 42 U.S.C. § 2000e-1(a).

96. *See* 42 U.S.C. § 2000e-1(a).

97. *See Amos*, 483 U.S. at 332 n.9.

98. *See id.* at 330, 339.

99. *See id.* at 335–39.

100. *Id.* at 336.

101. *Id.*

102. *Id.*

identify burdens on religious activity, and the Court concluded that broad legislative exemptions are permissible under the Establishment Clause. However, the Court did not address the scope of mandatory accommodations under the Free Exercise Clause; indeed, the Court expressly left the scope of free exercise protection unresolved.[103] *Amos* tells us what government may do to alleviate government interference with religious groups, but it does not tell us what the government must do.

For many commentators, the Supreme Court's decision in *Smith* provides the most relevant guidance when neutral government regulation impacts the internal affairs of religious groups.[104] Just as individuals are no longer entitled to special exemptions when neutral laws burden individual religious practice, religious groups also receive no special protections. When read in conjunction with *Jones v. Wolf*, *Smith* permits government regulation of churches where the regulations are neutral and generally applicable and their application would not entangle government bodies in religious questions.

However, while this interpretation of *Smith* is certainly plausible, it is not the only possible reading, and the ambiguities discussed above remain. *Smith* addressed the free exercise rights of individuals. The Court held that the Free Exercise Clause does not "relieve an *individual* of the obligation to comply with a 'valid and neutral law of general applicability.'"[105] Under this reading, *Smith* simply did not address the scope of free exercise protections for religious groups. Thus, while *Smith* may mean a lot for religious group rights, it may also mean little or nothing at all.

B. Lower Court Decisions

These multiple interpretations of Supreme Court precedent are reflected in lower-court opinions. My discussion will focus on two related lines of cases. One line addresses the constitutionality of applying federal antidiscrimination statutes to the employment decisions of religious organizations. The second addresses the constitutionality of requiring religious organizations to bargain

103. *See id.* at 335–36.

104. *See* Brant, *supra* note 64, at 276–77, 280–81; Hamilton, *supra* note 64, at 1193–96.

105. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (emphasis added) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

collectively under federal and state labor laws. I have chosen these cases for several reasons. First, many of the important scholarly works examining government regulation of religious groups have drawn upon decisions in these areas to develop and illustrate their arguments.[106] Focusing on the same case law facilitates engagement with these scholars. Second, these cases reflect the full range of approaches to government regulation discussed above. Lower courts usually choose one of the three approaches that can be found in Supreme Court case law, and one can find lower-court cases illustrating all three approaches.

Lower-court decisions addressing employment discrimination statutes generally support relief where these laws impinge upon the religious beliefs or practices of the organization. These cases usually reject a broad right of church autonomy that would extend to all aspects of church operations, and none favors the type of rule developed in *Smith* for individuals. They agree that religious groups are entitled to special protection under the Free Exercise Clause, but only where religious matters are actually at stake.

Most lower-court litigation challenging the application of employment discrimination laws to religious organizations involves allegations of gender or race discrimination under Title VII or allegations of age discrimination under the Age Discrimination in Employment Act (ADEA).[107] While Congress has exempted religious groups from prohibitions against religious discrimination in

106. *See, e.g.*, Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99; Laycock, *supra* note 16; Lupu, *supra* note 64; Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002); William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293 (1986).

107. Cases have also involved claims under the Americans with Disabilities Act, *see* Werft v. Desert Southwest Annual Conference of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999), the Equal Pay Act, *see* Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986), violations of the reporting requirements of Title VII, *see* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), and increasingly, sexual harassment suits under Title VII, *see* Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); Dolquist v. Heartland Presbytery, No. CIV.A.03-2150-KHV, 2004 WL 2429978 (D. Kan. Oct. 28, 2004).

employment,[108] federal statutes contain no exemptions for discrimination based on gender, race, age, or other factors unrelated to religion. Because almost all lower courts to address the issue have found that Congress expressed an affirmative intent to cover religious organizations within these prohibitions,[109] the courts have been unable to avoid constitutional questions on statutory grounds, as the Supreme Court did in *Catholic Bishop*.

Beginning with the Fifth Circuit's decision in *McClure v. Salvation Army*,[110] lower federal courts have uniformly carved out what has become known as the "ministerial exception" to employment discrimination statutes.[111] The *McClure* court describes the relationship between a church and its minister as its

108. *See* 42 U.S.C. § 2000e-1(a) (exempting religious organizations from Title VII's prohibition against religious discrimination in employment).

109. *See, e.g.*, Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 331 (3d Cir. 1993); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172–73 (2d Cir. 1993); *Shenandoah*, 899 F.2d at 1394–95; *Fremont*, 781 F.2d at 1365–66; Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166–67 (4th Cir. 1985); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1981).

The exception is the Fifth Circuit, which has held that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister." McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972). Later Fifth Circuit decisions have found that Congress intended to cover other employment relationships within religious groups. *See* EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980). In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), the Eighth Circuit assumed without deciding that Congress intended coverage of religious institutions under the ADEA. *Id.* at 361 & n.2; *cf.* Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1041, 1045 (8th Cir. 1994) (finding that congressional intent to cover religious organizations under the ADEA is unclear, but application of the Act to a temple administrator raises no serious constitutional questions).

110. 460 F.2d 553 (5th Cir. 1972).

111. For cases treating this exception, see *Werft*, 377 F.3d 1099; *Elvig*, 375 F.3d 951; Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); *Starkman*, 198 F.3d 173; *Bollard*, 196 F.3d 940; Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); *Scharon*, 929 F.2d 360; Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); *Rayburn*, 772 F.2d 1164; *Pacific Press*, 676 F.2d 1272; *Southwestern Baptist*, 651 F.2d 277; *Miss. Coll.*, 626 F.2d 477; *McClure*, 460 F.2d 553; Patsakis v. Greek Orthodox Archdiocese of Am., 339 F. Supp. 2d 686 (2004); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

"lifeblood,"[112] an area of "prime ecclesiastical concern,"[113] and a matter "both basic and traditional."[114] Later courts have described this relationship as "close to the heart of church administration,"[115] a "critically sensitive position,"[116] a "quintessentially religious" matter,[117] a "pervasively religious relationship,"[118] and a "strictly ecclesiastical matter[]."[119] Employment decisions regarding clergy are a "core matter of ecclesiastical self-governance with which the state may not constitutionally interfere."[120] Lower courts also agree that the ministerial exception applies even if there is no doctrinal basis for the discrimination.[121] As the Fourth Circuit stated in *Rayburn v. General Conference of Seventh-Day Adventists*,[122] in

112. *McClure*, 460 F.2d at 558; *see also Gellington*, 203 F.3d at 1304 (same); *Bollard*, 196 F.3d at 946 (same); *Minker*, 894 F.2d at 1357 (same).

113. *McClure*, 460 F.2d at 559; *see also Minker*, 894 F.2d at 1357 (same).

114. *McClure*, 460 F.2d at 559.

115. *Whitney*, 401 F. Supp. at 1368; *see also Bollard*, 196 F.3d at 946 (stating that the ministerial relationship is "close to the heart of the church"); *id.* at 949 ("A religious organization's decision to employ or to terminate employment of a minister is at the heart of its religious mission."); *Pacific Press*, 676 F.2d at 1278 (stating that ministerial duties "go to the heart of the church's function"); *McClure*, 460 F.2d at 560 (stating that the minister is at "the heart" of the church).

116. *Pacific Press*, 676 F.2d at 1278; *see also Rayburn*, 772 F.2d at 1169 (explaining that the church-minister relationship is a "sensitive area[]").

117. *Rayburn*, 772 F.2d at 1169 (internal quotation marks omitted) (quoting Serbian Eastern Orthodox Diocese for the United States and Can. v. Milivojevich, 426 U.S. 696, 720 (1976)).

118. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993); *see also* Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1044 (8th Cir. 1994) (same).

119. Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1304 (11th Cir. 2000).

120. *Bollard*, 196 F.3d at 946. The First Amendment is violated when government "trespasses on the most spiritually intimate grounds of a religious community's existence." EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 (4th Cir. 2000).

121. *See e.g.*, Werft v. Desert Southwest Annual Conference of the United Methodist Church, 377 F.3d 1099, 1103 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003); *Raleigh*, 213 F.3d at 801; Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 464–65 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 186 (7th Cir. 1994); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990); *Rayburn*, 772 F.2d at 1169.

122. 772 F.2d 1164 (4th Cir. 1985).

"'quintessentially religious' matters, the free exercise clause . . . protects the act of a decision rather than a motivation behind it."[123]

No court has limited the ministerial exception to ordained clergy. The exception covers all employees with ministerial functions.[124] The determination of which employees perform ministerial functions has yielded more variation among the courts. The proper inquiry has been described differently by different courts, as some courts view ministerial functions more broadly than others. For example, in two early cases, the Fifth Circuit employed a narrow conception of clergy.[125] The court described ministers as intermediaries between the church and its congregation or instructors in the "whole of religious doctrine."[126] More courts have followed the broader definition suggested by Bruce Bagni, who has identified ministers as those whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[127] According to these courts, this inquiry is designed to "determine whether a position is important to the spiritual and pastoral mission of the church."[128] In other cases, the test used to determine who is a minister is much less clear.[129]

123. *Rayburn*, 772 F.2d at 1169 (citation omitted). The court continued: "In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Id.*

124. *See Alicea-Hernandez*, 320 F.3d at 703; *Raleigh*, 213 F.3d at 801; *Catholic Univ.*, 83 F.3d at 461; *Rayburn*, 772 F.2d at 1168.

125. *See* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980).

126. *Miss. Coll.*, 626 F.2d at 485; *Southwestern Baptist*, 651 F.2d at 283–85 (quoting and drawing on *Mississippi College*).

127. Bagni, *supra* note 106, at 1545, *quoted in Raleigh*, 213 F.3d at 801; *Catholic Univ.*, 83 F.3d at 461 (quoting *Rayburn*, 772 F.2d at 1169); *Rayburn*, 772 F.2d at 1169; Powell v. Stafford, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

128. *Rayburn*, 772 F.2d at 1169; *Raleigh*, 213 F.3d at 801 (quoting *Rayburn*); *Catholic Univ.*, 83 F.3d at 461 (quoting *Rayburn*).

129. For example, in a recent opinion, the Ninth Circuit seemed to envision clergy narrowly as those who are "representatives" of the church, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999), but the case did not require the court to examine the functions of any lay employees. In another recent decision, the Fifth Circuit employed a mélange of factors, including whether employment decisions are made largely on religious criteria, whether the employee performs ceremonies of the church, and whether the employee tends to the religious needs of the congregation. *See* Starkman v. Evans, 198 F.3d 173, 176–77 (5th Cir. 1999).

Initially, courts based the ministerial exception on two grounds. The first was the balancing approach that the Supreme Court applied to individual free exercise claims prior to *Smith*. According to the courts, interference with the choice of clergy heavily burdens religious practice, and this burden is not justified by a sufficiently compelling state interest.[130] Furthermore, employment decisions regarding clergy are quintessentially religious matters of church government protected from state interference under the Court's intrachurch dispute decisions.[131] Thus, the lower courts interpreted the Court's intrachurch dispute cases to provide relief where neutral government regulation interferes with important religious aspects of church affairs. After *Smith*, lower courts have continued to apply the ministerial exception based on these intrachurch dispute cases.[132] According to these courts, free exercise protections for individuals and groups must be distinguished.[133] Protections for individuals are now governed by *Smith* and are limited. Individuals are not entitled to exemptions from neutral, generally applicable laws that burden free exercise.[134] However, in its intrachurch dispute precedent, the Supreme Court has articulated a different basis for relief where government interferes with the internal operations of churches.[135] The courts emphasize the statement in *Kedroff* that churches have the right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[136]

In addition to the ministerial exception, lower courts have also acknowledged the possibility of relief where employment regulation

130. *See Rayburn*, 772 F.2d at 1168–69; *see also* Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994) (approving *Rayburn*'s analysis).

131. *See Rayburn*, 772 F.2d at 1167–68; *Southwestern Baptist*, 651 F.2d at 282; McClure v. Salvation Army, 460 F.2d 553, 359–60 (5th Cir. 1972).

132. *See Raleigh*, 213 F.3d at 800 n.*; Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1303–04 (11th Cir. 2000); *Bollard*, 196 F.3d at 945–46; Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348–50 (5th Cir. 1999); *Catholic Univ.*, 83 F.3d at 350–51.

133. *See Raleigh*, 213 F.3d at 800 n.*; *Gellington*, 203 F.3d at 1303–04; *Combs*, 173 F.3d at 348–49; *Catholic Univ.*, 83 F.3d at 348, 350–51.

134. *See Combs*, 173 F.3d at 348–49; *Catholic Univ.*, 83 F.3d at 350.

135. *See Raleigh*, 213 F.3d at 800 n.*; *Gellington*, 203 F.3d at 1303–04; *Combs*, 173 F.3d at 348–50; *Catholic Univ.*, 83 F.3d at 350–51.

136. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952), *quoted in Raleigh*, 213 F.3d at 800 n.*; *Gellington*, 203 F.3d at 1303; *Combs*, 173 F.3d at 350; *Catholic Univ.*, 83 F.3d at 350.

conflicts with specific religious doctrines or practices. Such conflicts are rarely found because courts usually conclude that church doctrine does not support discrimination,[137] but the courts have consistently affirmed the availability of such special protection. Initially, the courts' analyses proceeded under the pre-*Smith* balancing approach.[138] This same framework—indeed, the same balancing test—has been applied even after *Smith*.[139]

Stepping back from the details of these cases, what one observes among the lower courts is limited protection for religious groups where government regulation burdens religious belief or practice. Where government regulation interferes with the organization's choice of clergy, it, by definition, burdens religion. In the words of the D.C. Circuit, the "determination of 'whose voice speaks for the church' is *per se* a religious matter."[140] In cases involving nonministerial employees, a conflict between religious doctrine and secular employment standards must be established. In either case, however, courts have only granted relief in cases where religious matters are impinged. The courts have not recognized a broad right of church autonomy governing all aspects of church operations. They repeatedly distinguish regulations interfering with religious matters from those that touch only secular operations.[141] It is not

137. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1368 (9th Cir. 1986); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1981); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981); *see also* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (noting that the Catholic Church's Jesuit Order does not support sexual harassment prohibited by Title VII); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1397 (4th Cir. 1990) (noting that church members do not believe that the Bible mandates a pay differential based on gender).

138. *See, e.g.*, *Shenandoah*, 899 F.2d at 1397–98; *Fremont*, 781 F.2d at 1367–69; *Pacific Press*, 676 F.2d at 1279–81; *Southwestern Baptist*, 651 F.2d at 286–87.

139. *See, e.g.*, *Bollard*, 196 F.3d at 946, 948 (applying the *Sherbert* balancing test where the facts did not support the application of the ministerial exception); *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959, 963, 965 (9th Cir. 2004) (stating that even when the ministerial exception does not apply, a church may invoke First Amendment protections for actions based in religious doctrine).

140. Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (quoting district court below, 699 F. Supp. 954, 955 (D.D.C. 1988)); *see also Raleigh*, 213 F.3d at 805 (quoting *Minker*); *Bollard*, 196 F.3d at 949 (same); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (same).

141. *See e.g.*, *Bollard*, 196 F.3d at 947–48; *Shenandoah*, 899 F.2d at 1397–98; *Minker*, 894 F.2d at 1358; *Fremont*, 781 F.2d at 1368–69; Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985); *Pacific Press*, 676 F.2d at 1279–80; *Southwestern Baptist*, 651 F.2d at 284–85; Powell v. Stafford, 859 F. Supp. 1343, 1347 (D.

intrusion on church matters alone that is unconstitutional. The impact of regulation on the organization may be substantial but still permissible. The "relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs."[142] As the Ninth Circuit has explained, "while we recognize that applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws."[143] Rather, the employment decision at issue must involve either a "protected choice," such as the choice of clergy, or a "doctrinal" justification.[144]

One also observes that lower courts in the employment area have uniformly rejected the rule in *Smith* as the standard for religious group rights. The courts have limited *Smith* to cases involving individual free exercise rights, and they have turned instead to the Supreme Court's intrachurch dispute precedent for guidance.

By contrast, in cases addressing the application of labor statutes to religious organizations, courts have been more willing to adopt the approach in *Smith*. Lower-court case law in this area has been shaped significantly by the Supreme Court's decision in *Catholic Bishop*. Recall that the Court in *Catholic Bishop* construed the National Labor Relations Act to exclude lay teachers at religiously affiliated schools.[145] According to the Court, application of the Act in this context would give rise to serious constitutional questions, and in the absence of clear congressional intent to cover the teachers, the Court declined to construe the Act to include them. *Catholic Bishop* was decided in 1979, and in the decade following that decision, lower federal courts narrowed the scope of the Supreme Court's decision as they applied the Act to religiously affiliated social services organizations such as hospitals,[146] nursing homes,[147] homes for

Colo. 1994); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975).

142. EEOC v. Miss. Coll., 626 F.2d 477, 488 (5th Cir. 1980); *see also Fremont*, 781 F.2d at 1369 (quoting *Mississippi College*); *Pacific Press*, 676 F.2d at 1280 (same).

143. *Bollard*, 196 F.3d at 948.

144. *Id.*; *see also Elvig*, 375 F.3d at 956, 964 (following *Bollard*).

145. *See supra* notes 74–81 and accompanying text.

146. *See* St. Elizabeth Hosp. v. NLRB, 715 F.2d 1193 (7th Cir. 1983); St. Elizabeth Cmty. Hosp. v. NLRB, 708 F.2d 1436 (9th Cir. 1983).

147. *See* Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302 (3d Cir. 1982).

neglected and troubled children,[148] and day care centers.[149] According to these courts, no serious First Amendment problems arise in these contexts. Entanglement problems under the Establishment Clause are unlikely because the programs function just like secular charitable enterprises, and unlike schools, they do not involve the dissemination of religious doctrine.[150] While these programs may be religiously motivated, their activities are primarily and essentially secular.[151]

Lower federal courts also found that requiring these social services organizations to bargain collectively under the Act would not give rise to free exercise problems. All of these decisions pre-date *Smith*, and like courts in the employment discrimination context, courts in the labor area analyzed the free exercise rights of religious organizations under the balancing approach that the Court had developed for individual free exercise claims. The courts concluded that the primarily secular character of the social services organizations ensures that mandatory collective bargaining under the Act will only minimally impact religious practices.[152] The courts also observed that none of the churches operating these programs have religious objections to bargaining with unions.[153] Moreover, any minimal burden will be outweighed by the government's compelling

148. *See* Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir. 1985); NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981); *see also* Denver Post of the Nat'l Soc'y of the Volunteers of Am. v. NLRB, 732 F.2d 769 (10th Cir. 1984) (addressing church-operated programs for troubled children as well as programs providing shelter for women and children and a program for victims of crime).

149. *See* NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr., 763 F.2d 1 (1st Cir. 1985).

150. *See* Volunteers of Am., L.A. v. NLRB, 777 F.2d 1386, 1390 (9th Cir. 1985) (addressing church-operated detoxification and resident recovery programs); *Bar None Boys Ranch*, 752 F.2d at 348–49; *Denver Post*, 732 F.2d at 771–73; *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1140–42; *Tressler*, 677 F.2d at 305; *St. Louis Christian Home*, 663 F.2d at 64–65.

151. *See Volunteers of Am., L.A.*, 777 F.2d at 1390; *Bar None Boys Ranch*, 752 F.2d at 348; *Salvation Army*, 763 F.2d at 6; *Denver Post*, 732 F.2d at 772–73; *St. Elizabeth Hosp.*, 715 F.2d 1193, 1196; *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1441; *Tressler*, 677 F.2d at 305; *St. Louis Christian Home*, 663 F.2d at 64.

152. *See St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442–43; *see also Bar None Boys Ranch*, 752 F.2d at 349 (finding that impairment of sectarian objectives or practices is unlikely); *Tressler*, 677 F.2d at 306–07 ("Although recognition of the union will impose some constraints upon Tressler's operation of the [nursing] Home, direct religious conflict is neither inevitable nor probable.").

153. *See St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442–43; *Tressler*, 677 F.2d at 306.

interest in protecting worker rights and securing labor peace.[154] As in the employment area, the courts repeated that "the relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs."[155]

More recently, state and lower federal courts have gone even further and upheld the application of state labor laws to lay teachers at church-operated schools.[156] According to these courts, unlike the NLRA, the state labor provisions clearly cover teachers at religiously affiliated schools, and, thus, the constitutional issues avoided in *Catholic Bishop* must be addressed.[157] These courts have uniformly found that mandatory collective bargaining under state law would result neither in excessive entanglement prohibited by the Establishment Clause nor in a violation of the Free Exercise Clause.[158] In *Catholic High School Ass'n of the Archdiocese of New York v. Culvert*,[159] the only case addressing collective bargaining under state law decided prior to *Smith*, the Second Circuit analyzed the free exercise claim under the *Sherbert* balancing approach.[160] According to the Second Circuit, collective bargaining under New York's statute does not conflict with religious doctrine.[161] Indeed,

154. *See St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442–43; *Tressler*, 677 F.2d at 306–07.

155. *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442 (internal quotation marks omitted) (quoting and citing EEOC v. Miss. Coll., 626 F.2d 477, 488 (5th Cir. 1980); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1981)); *see also* NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1305–06 (9th Cir. 1991) (same) (upholding application of NLRA to nonfaculty employees at church-operated residential school for boys).

156. *See* Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161 (2d Cir. 1985); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709 (N.J. 1997); N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960 (N.Y. 1997); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992).

157. *See Culvert*, 753 F.2d at 1163, 1164 (noting that the New York State Labor Relations Act was amended in 1968 to bring employees of charitable, educational, and religious organizations within its scope); *St. Teresa*, 696 A.2d at 713, 714 (observing that the New Jersey constitution guarantees persons in private employment the right to organize and bargain collectively); *Hill-Murray*, 487 N.W.2d at 862 (stating that while the legislature did not consider application of the Minnesota Labor Relations Act to religious organizations, Minnesota's rules of statutory construction clearly support their coverage).

158. *See Culvert*, 753 F.2d at 1166–71; *St. Teresa*, 696 A.2d at 585–602; *Christ the King*, 682 N.E.2d at 963–66; *Hill-Murray*, 487 N.W.2d at 862–64.

159. 753 F.2d 1161 (2d Cir. 1985).

160. *See Culvert*, 753 F.2d at 1169.

161. *See id.* at 1170.

the court observed that the Catholic Church has long supported unions and worker rights.[162] The court also found that the state's compelling interest in protecting the rights of employees and preserving labor peace outweighs any minimal burden on free exercise rights.[163]

After *Smith*, courts addressing the application of state labor provisions to religiously affiliated schools have uniformly adopted the rule in *Smith*. According to these courts, labor laws are neutral laws of general applicability, and, thus, religious organizations are not entitled to any special exemptions unless their claims fall within one of the few categories of cases in which *Smith* preserved the balancing approach.[164] At first glance, the decision of lower courts to follow *Smith* in the labor area but not in cases involving employment discrimination may seem puzzling. However, this difference can, perhaps, be explained by the fact that the free exercise analysis in labor cases had always been narrower. Unlike cases involving employment discrimination laws, lower courts evaluating labor statutes never drew upon the Supreme Court's intrachurch dispute cases for guidance.[165] They relied entirely on the Court's pre-*Smith* balancing approach. Even the Supreme Court in *Catholic Bishop* made no reference to the Court's intrachurch dispute decisions when it found that the application of the NLRA to church-operated schools would give rise to serious First Amendment questions. Thus, when *Smith* was decided, it is not surprising that the abandonment of the Court's balancing test meant the adoption of the *Smith* rule. In the labor area, in contrast to the employment context, the lower courts did not have alternative precedent on hand to support continuing protections.

In none of these labor cases, however, does one find a whole-hearted commitment to the implications of *Smith*. For example, in *New York State Labor Relations Board v. Christ the King Regional*

162. *Id*.

163. *See id*. at 1170–71.

164. *See* South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 721–22 (N.J. 1997); N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963–64 (N.Y. 1997); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 862–63 (Minn. 1992).

165. The Seventh Circuit in *Catholic Bishop* had cited this line of precedent once, *see* Catholic Bishop of Chi. v. NLRB, 559 F.2d 1112, 1120 (7th Cir. 1977), but the Supreme Court did not draw upon this precedent, nor have subsequent lower court decisions.

High School,[166] the New York Court of Appeals purported to follow *Smith* when it rejected a Catholic high school's objection to coverage under New York's labor statute,[167] but the court left open the possibility that relief might be granted in situations where the collective bargaining process actually impinges upon religious belief or practice.[168] Likewise, in *Hill-Murray Federation of Teachers v. Hill-Murray High School*,[169] the Minnesota Supreme Court followed *Smith* when evaluating a Catholic high school's First Amendment challenge to coverage under Minnesota's labor statute,[170] but the court then applied a balancing approach under the state's constitution.[171] Noting the Catholic Church's traditional support for unions,[172] the court found no violation of state free exercise rights as long as mandatory subjects of bargaining are restricted to wages, hours, and other secular terms of employment.[173] In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*,[174] as well, the New Jersey Supreme Court followed *Smith* but also applied a balancing approach. The schools in that case had attempted to establish a "hybrid claim" involving the Free Exercise Clause in conjunction with the freedom of association and the right of parents to control the upbringing of their children.[175] Where such hybrid claims can be established, *Smith* preserves the balancing approach developed in *Sherbert*, but the New Jersey Court found no support for the schools' associational or parental rights claims.[176] Even so, the New Jersey court applied the *Sherbert* balancing test and found no free exercise violation.[177] According to the court, as long as mandatory bargaining is limited to

166. 682 N.E.2d 960 (N.Y. 1997).

167. *See id.* at 963–64.

168. *See id.* at 964, 966.

169. 487 N.W.2d 857 (Minn. 1992).

170. *See id.* at 862–63.

171. *See id.* at 864–65.

172. *See id.* at 865.

173. *See id.* at 866 ("While *Hill-Murray* may have demonstrated that the application of the MLRA [Minnesota Labor Relations Act] interferes with their authority as an employer, they have not established that this minimal interference excessively burdens their religious beliefs.").

174. 696 A.2d 709 (N.J. 1997).

175. *See id.* at 721–22.

176. *See id.*

177. *See id.* at 722–23.

secular terms and conditions of employment, the state's compelling interest in preserving labor peace and worker rights outweighs the burden on free exercise.[178]

While courts in the labor area have, perhaps, been reluctant to commit fully to the implications of *Smith,* lower courts in other contexts have more readily embraced *Smith.* While this Article focuses on legislative regulation in the labor and employment contexts, examples of such readiness may be found in cases applying secular tort standards to religious entities. Increasingly, courts are adopting the *Smith* rule in cases involving tort claims against churches whose clergy have engaged in sexual abuse of children or sexual misconduct involving adults. These courts have held that claims for negligent hiring and supervision of clergy and breach of fiduciary duty do not violate the Free Exercise Clause because the applicable tort principles are neutral rules of general applicability.[179] The Supreme Court's intrachurch dispute cases are distinguished on the ground that they prohibit entanglement with religious doctrine, not application of neutral government rules.[180] According to a recent decision by the Florida Supreme Court, "[t]o hold otherwise and immunize the Church Defendants from suit could risk placing religious institutions in a preferred position over secular institutions, a concept both foreign and hostile to the First Amendment."[181]

So far my discussion of labor and employment cases has included illustrations of two of the three approaches to government regulation of religious groups that can be found in Supreme Court precedent. Courts addressing employment discrimination statutes have provided relief where the government burdens religious belief and practice. In the labor context, courts after *Smith* have taken a different approach and have held that religious organizations are not entitled to special exemptions from neutral regulation even if the government interferes

178. *See id.* at 712, 716–17, 722–23.

179. *See, e.g.*, Doe v. Norwich Roman Catholic Diocesan Corp., 268 F. Supp. 2d 139, 144–45 (D. Conn. 2003); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66, 73–74 (D. Conn. 1995); Doe v. Evans, 814 So. 2d 370, 376 (Fla. 2002); Malicki v. Doe, 814 So. 2d 347, 354, 361, 364 (Fla. 2002). *But see* Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 445 (Me. 1997) ("To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control denominational governance. Pastoral supervision is an ecclesiastical prerogative.").

180. *See Doe*, 268 F. Supp. 2d at 144; *Malicki*, 814 So. 2d at 363–64.

181. *Malicki*, 814 So. 2d at 365.

with religious matters. No case has yet to adopt the third approach and establish a broad right to autonomy over all internal operations. There are, however, several decisions approving the ministerial exception that have used language consistent with such a right.

Indeed, when the Fifth Circuit first carved out the ministerial exception in *McClure v. Salvation Army*,[182] the court used broad language to describe the rights of religious organizations. The court began by recalling that the First Amendment "has built a 'wall of separation' between church and State."[183] The court then turned to the Supreme Court's intrachurch dispute cases, which, in the court's words, "place matters of church government and administration beyond the purview of civil authorities."[184] The court repeated the statement from *Kedroff* that this line of cases "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[185] The Fifth Circuit expressly limited its decision to the church-minister relationship,[186] and it never stated that all matters of church administration, no matter how secular or mundane, are protected by the First Amendment. However, the court left open that possibility, and its broad language easily lends support.

Subsequent Fifth Circuit cases decided shortly after *McClure* interpreted *McClure* and the ministerial exception narrowly.[187] According to these cases, only where there is an actual burden on religious beliefs and practice is protection warranted.[188] However, broad language reappears in later cases, most prominently in the D.C. Circuit's opinion in *EEOC v. Catholic University of America*[189]

182. 460 F.2d 553 (5th Cir. 1972).

183. *Id.*

184. *Id.* at 559.

185. Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952), *quoted in McClure*, 460 F.2d at 560.

186. *See McClure*, 460 F.2d at 555.

187. *See* EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); *see also supra* text accompanying notes 125–26.

188. *See Miss. Coll.*, 626 F.2d at 488 ("[T]he relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs.").

189. 83 F.3d 455 (D.C. Cir. 1996).

and the Fifth Circuit's recent decision in *Combs v. Central Texas Annual Conference of the United Methodist Church*.[190] Within the Supreme Court's intrachurch dispute cases, the D.C. Circuit found a "constitutional right of a church to manage its own affairs free from government interference"[191] and "affirmation of a church's sovereignty over its own affairs."[192] The court "agree[d] with the Fifth Circuit [in *McClure*] that 'throughout these opinions there exists a spirit of freedom for religious organizations, an independence from secular control or manipulation.'"[193] Churches have the "freedom to decide how [they] will govern [themselves]"[194] and a "constitutional right of autonomy in [their] own domain."[195] Likewise, the Fifth Circuit in *Combs* wrote of the "fundamental right of churches to be free from government interference in their internal management and administration."[196] Secular authorities may not "insert[]" themselves into "the internal management of a church," which is "a realm where the Constitution forbids [them] to tread."[197] Like the *McClure* court, the court in *Combs* recalled the "constitutional mandate to preserve the separation of church and state."[198]

Neither the D.C. Circuit in *Catholic University* nor the Fifth Circuit in *Combs* stated that the protected realm of church affairs extends to all matters, secular and religious alike, and their holdings were limited to affirming the right of churches to make employment decisions regarding ministers free from government interference. However, neither court restricted the protected area to the choice of clergy, and the language and spirit of these opinions seems to go much further. These cases leave open the possibility of a broad right of church autonomy and, indeed, provide the supporting framework.

190. 173 F.3d 343 (5th Cir. 1999).

191. *Catholic Univ.*, 83 F.3d at 460.

192. *Id.* at 463.

193. *Id.* at 462 (internal quotation marks omitted) (quoting McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (quoting Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952))).

194. *Id.* at 463.

195. *Id.* at 467.

196. Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999).

197. *Id.* at 350.

198. *Id.* at 351.

C. Scholarly Views

The same split that appears among lower court opinions is also found in scholarly literature addressing the rights of religious organizations. The most prominent defense of a broad right of church autonomy has been made by Douglas Laycock.[199] According to Laycock, the Supreme Court's intrachurch dispute cases, its decision in *Catholic Bishop*, and its commitment to nonentanglement all support a strong "right of church autonomy" under the Free Exercise Clause.[200] Laycock argues that "churches have a constitutionally protected interest in managing their own institutions free of government interference,"[201] and this right "extends to every aspect of church operations," including "to routine administrative matters."[202] According to Laycock, government regulation need not burden religious beliefs or practices to violate the First Amendment;[203] any interference with "church control of church institutions"[204] is prohibited. The right of church autonomy is essentially a right "to be left alone."[205]

Of course, Laycock recognizes that a right to church autonomy cannot be absolute.[206] There must be some limits to protect nonmembers and even members in truly compelling circumstances. While I will be defending a broad right of church autonomy in this Article, I will not be tackling the difficult issue of where these limitations lie. However, some general observations are helpful. First, any limitations on the right of church autonomy must be drawn narrowly and must identify with specificity the permissible areas of government regulation. As is seen from the labor cases discussed above, courts applying the pre-*Smith* balancing approach readily found compelling state interests to justify government regulation. Lower federal courts upholding the application of labor statutes to

199. *See* Laycock, *supra* note 16; *see also* Douglas Laycock, *The Right to Church Autonomy as Part of Free Exercise of Religion*, *in* GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, II, at 28 (Dean M. Kelley ed., 1986).

200. Laycock, *supra* note 16, at 1394–98; Laycock, *The Right to Church Autonomy*, *supra* note 199, at 32–34.

201. Laycock, *supra* note 16, at 1373.

202. *Id*. at 1398.

203. *See id*. at 1373, 1398.

204. *Id*. at 1394.

205. *Id*. at 1376.

206. *See id*. at 1394.

religious employers identified the government's interest in preserving labor peace and protecting worker rights.[207] Given the small number of religious employers in the overall economy and the fact that the National Labor Relations Board had for decades declined jurisdiction over nonprofit institutions, religious and nonreligious alike,[208] the existence of such a compelling state interest in the context of religious employers was doubtful.

Thus, instead of a general compelling state interest test that leaves outcomes uncertain, limitations on the right of church autonomy should take the form of narrowly tailored restraints in specific areas where government regulation is appropriate. When identifying these areas and restrictions, the strong presumption must be in favor of freedom for religious groups. For example, one area of appropriate regulation would be protections for outsiders. Religious organizations can be held liable upon their valid contracts, and tort liability is also appropriate where there are injuries to outsiders.[209] Contracts between religious groups and their members or employees should also be enforceable if the language and circumstances of the agreement would clearly lead the promisee to believe that the contract was civilly enforceable.[210] However, the contract terms must be clear and capable of interpretation without involving the courts in religious questions. In addition, courts should avoid adjudicating contract claims involving ministers unless the agreement expressly provides for such secular enforcement.

Regulations designed to protect the health and safety of members and employees would also be appropriate where death or serious bodily harm is threatened.[211] Slightly broader protections

207. *See supra* notes 154, 163, 178, and accompanying text.

208. The Board began asserting jurisdiction over nonprofit organizations in the early 1970s and shortly thereafter adopted the same jurisdictional standards for nonprofit and for-profit organizations. *See* Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 152 & n.450, 162–63 (2004).

209. Laycock agrees. *See* Laycock, *supra* note 16, at 1406.

210. Laycock would require clear evidence that the church desires secular adjudication. *See* Laycock, *supra* note 16, at 1404 & n.238; Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1468 (1988). My suggestion is slightly different. Even if organizational consent to secular adjudication cannot be established, contracts with members or employees would be civilly enforceable if the language and circumstances of the agreement would clearly lead the promisee to believe that such adjudication was contemplated.

211. Again, Laycock agrees. *See* Laycock, *supra* note 16, at 1406, 1417.

may be permissible for children and for adults whose impaired mental or physical condition makes them especially vulnerable to exploitation. Thus, tort liability for inadequate supervision of church employees would be appropriate where clergy engage in sexual abuse of minors or sexual misconduct with vulnerable adults. However, in keeping with the strong presumption in favor of organizational freedom, such liability for inadequate supervision should probably be limited to cases in which church officials acted recklessly rather than merely negligently,[212] and liability with respect to the hiring or retention of clergy should be prohibited altogether. Protection of child welfare may also justify regulation in the context of church-operated schools, but such regulations must also be narrow and limited. States might, for instance, require church-operated schools to demonstrate that students achieve at minimum levels of proficiency on standardized tests, but direct regulation of educational programs should be prohibited. In addition, where religious organizations hold themselves out as providers of professional services such as legal advice or medical care, they can be required to meet generally applicable professional standards.

These examples are not designed to be definitive or exhaustive. My purpose, rather, has been to illustrate several important points. First, the right of church autonomy is strong, but it is not absolute. In some circumstances, regulations protecting church members and nonmembers are appropriate, but these circumstances are narrow and limited. Second, there is no simple test to identify when regulations are permissible and when they are not. Depending on the area of government regulation, the appropriate restrictions on the right of church autonomy may be different. Vigorous protection of religious organizations requires careful delineation of the rules appropriate in each context.

Whether the receipt of government aid justifies greater regulation is a separate but very important question. Certainly,

212. If claims for negligent supervision are permitted, the result will be the imposition of secular standards of care on organizations that may have their own highly developed procedures and practices for clergy oversight and discipline. Where such secular standards displace practices that reflect the group's religious values or traditional understandings of organizational structure and responsibility, the interference will be great. Such interference is appropriate where the organization's leaders have acted recklessly, but organizational freedom should, arguably, prevail where the group's leaders have been well-intentioned and have not acted recklessly.

lawmakers and funding agencies can require religious organizations to account for their expenditures of public funds in order to ensure that these funds are spent for the intended purposes and programs. Scholars debate whether the government may go further and apply regulations designed to shape the internal practices of funded organizations in the direction of public values.[213] This question has become more pressing in recent years. While the social services programs of many religious denominations have long received significant amounts of government aid, until recently, Supreme Court precedent placed substantial limitations on aid to programs suffused with religious purpose and function. In the last few years, however, the Supreme Court has revised its Establishment Clause doctrine to permit greater aid to these types of religious organizations,[214] and the current Bush administration has been pushing hard for increased funding for faith-based organizations, including organizations with significant religious identity and activity.[215]

The extent to which government funding may justify greater regulation of religious groups is beyond the scope of this Article, but the basic principles I develop here provide the necessary foundation for addressing this issue. If, as I argue, a broad right of church autonomy benefits not only religious groups but also the larger community by protecting alternative visions for social and political life, regulations designed to shape internal practices according to prevailing public values would be shortsighted and illegitimate. Permissible regulations would instead focus largely on ensuring

213. For articles engaging this debate, see Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003); *see also* Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002); Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 972–82 (2003).

214. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding voucher aid to religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (holding that church-operated schools may receive secular educational equipment and materials under a neutral direct aid program).

215. *See* Mike Allen, *Bush Presses "Faith-Based" Agenda; President Proposes Regulations To Ease Federal Funding*, WASH. POST, Sept. 23, 2003, at A10; Alan Cooperman, *Grants to Religious Groups Top $1.1 Billion; Administration Lauds Initiative*, WASH. POST, Mar. 10, 2004, at A27; *see also* IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2003: DEVELOPMENTS IN THE LAW CONCERNING GOVERNMENT PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS i–ii (2003).

accountability when public funds are expended and protecting recipients from coercion, abuse, and exploitation.

While Laycock and a few other scholars have supported a broad right of church autonomy,[216] a greater number of scholars have favored the path taken by lower courts in the employment discrimination area. Like courts that have carved out the ministerial exception, some of these scholars have identified certain aspects of church administration that should receive special protection under the First Amendment. For example, Bruce Bagni has argued that the "purely spiritual" matters at the "core or heart" of the church should be protected from government regulation except where the state's interest is truly compelling.[217] According to Bagni, these matters are the "spiritual epicenter" of the church, and within this epicenter, Bagni includes the relationship between church and minister, membership policies, religious education, worship, and ritual.[218] Where activities lie outside this epicenter, they can be regulated in proportion to their degree of secularity.[219]

Carl Esbeck supports a similar distinction under the Establishment Clause. Esbeck envisions the Establishment Clause as a "structural restraint on governmental power"[220] that bars the government from intruding on "inherently religious"[221] matters. These matters include those "exclusively religious activities" at the core of the organization's religious identity,[222] such as worship, teaching, propagation of the faith, doctrine, ecclesiastical polity,

216. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 27–28; Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 158–61 (1986); *cf.* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1018 (1989) (arguing that the institutional separation required by the Establishment Clause prohibits government from interfering in the internal affairs of religious organizations).

217. Bagni, *supra* note 106, at 1539.

218. *Id.*

219. *See id.* at 1540.

220. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2 (1998).

221. *Id.* at 109; Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 309 (1999).

222. Esbeck, *supra* note 220, at 109; *see also* Esbeck, *supra* note 106, at 381 (arguing that government may not interfere with "matters central to [the] religious identity and mission" of religious societies); *id.* at 402 (arguing that "core religious activities" should receive special protection).

church discipline, membership rules, and personnel decisions regarding clergy and other employees chosen on the basis of religion.[223] According to Esbeck, within this "domain," churches have a "sphere of autonomy" that is outside the competence and jurisdiction of the state.[224] With respect to matters that are not inherently religious, such as some aspects of social services work, the Establishment Clause permits regulation,[225] though even here "[a] special wariness should characterize the relationship."[226]

Ira Lupu and Robert Tuttle also draw upon the Establishment Clause and envision a "zone"[227] of religious activity that is beyond the competence and jurisdiction of government.[228] This area of "ecclesiastical immunity"[229] consists of the "aspects of the behavior of religious institutions that are bound up with the sacred,"[230] and includes matters such as the employment of clergy,[231] worship,[232] and organizational polity.[233] According to Lupu and Tuttle, when "religious institutions act in uniquely religious ways, making connections with the world beyond the temporal and material concerns . . . of the state," they are protected from government interference.[234] On the other hand, where the functions of religious institutions resemble other nonprofit organizations, Lupu and Tuttle favor a rule of neutrality that treats religious and nonreligious institutions alike.[235]

Each of these scholars draws a line between specially protected religious activities and activities that do not receive special treatment.

223. *See* Esbeck, *supra* note 220, at 10–11, 44–45, 109; Esbeck, *supra* note 106, at 376, 397, 420; Esbeck, *supra* note 221, at 308.

224. Esbeck, *supra* note 220, at 77.

225. *See* Esbeck, *supra* note 221, at 304–05; Esbeck, *supra* note 220, at 79; Esbeck, *supra* note 106, at 377–78.

226. Esbeck, *supra* note 106, at 378.

227. Lupu & Tuttle, *supra* note 106, at 83.

228. *See* Lupu & Tuttle, *supra* note 106, at 83–84, 91–92; Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1807 (citing Lupu & Tuttle, *supra* note 106, at 92).

229. Lupu & Tuttle, *supra* note 228, at 1807.

230. Lupu & Tuttle, *supra* note 106, at 84; *see also* Lupu & Tuttle, *supra* note 228, at 1806.

231. *See* Lupu & Tuttle, *supra* note 106, at 91; Lupu & Tuttle, *supra* note 228, at 1810.

232. *See* Lupu & Tuttle, *supra* note 228, at 1806–07.

233. *See id.* at 1808.

234. Lupu & Tuttle, *supra* note 106, at 92.

235. *See id.* at 78–79, 92.

Those matters that are quintessentially or inherently religious are accorded strong protection from government intervention, but other practices can be regulated. Thus, religious organizations receive some relief from state regulation, but the areas of relief are limited.

Other scholars favor the balancing approach developed by the Supreme Court prior to *Smith*. For example, in an article written in 1986, William Marshall and Douglas Blomgren favored free exercise protections where government regulation interferes with religious practices or conflicts with matters of church doctrine.[236] Regulation of core religious activities like the employment of clergy would infringe upon free exercise,[237] but so would other types of government interference with religious doctrine and practice. Marshall and Blomgren do not draw distinctions between quintessentially religious activities and those that are less religiously significant.

The final approach to government regulation of religious institutions also has supporters in the academy. According to these scholars, religious organizations are not entitled to special protections from neutral government regulation even when religious practice is burdened. For example, Marci Hamilton argues that the rule in *Smith* should be extended to cases involving religious groups.[238] In his earlier work, Ira Lupu also rejected special exemptions for religious organizations.[239] Lupu's defense of this approach predated *Smith*, and he drew upon the Supreme Court's intrachurch dispute cases for support. In *Jones v. Wolf*, Lupu argued, the Court "made clear that the constitutional evil to be avoided" is not interference with organizational free exercise but entanglement with religious doctrine.[240] While the *Wolf* Court did argue that the neutral-principles method it approved is consistent with free exercise values, religious organizations are afforded no special freedoms under this approach.[241] The ability of religious organizations to

236. *See* Marshall & Blomgren, *supra* note 106, at 327. In more recent years, Marshall has been a leading opponent of free exercise exemptions, and he has defended the Court's *Smith* decision. *See* Marshall, *The Case Against*, *supra* note 7; Marshall, *In Defense of* Smith, *supra* note 7.

237. *See* Marshall & Blomgren, *supra* note 106, at 327–28.

238. *See* Hamilton, *supra* note 64, at 1176–77.

239. *See* Lupu, *supra* note 64, at 395, 399, 431.

240. *Id.* at 407.

241. *See id.* at 407–08.

structure legal documents and transactions to ensure desired outcomes in the event of disputes is no different than the freedoms enjoyed by other corporate bodies.[242]

Lupu also observes that special protections for religious organizations would result in advantages that favor religious associations over secular ones.[243] Many other scholars have found this type of favoritism troubling,[244] and some scholars have also, like the Florida Supreme Court, discussed above, found such a "preferred position" problematic under the Establishment Clause.[245] In addition, many scholars observe that the trend of the Supreme Court's decisions is towards a neutralism that treats religious and nonreligious entities equally for Free Exercise and Establishment Clause purposes.[246] *Smith* embraced this neutralism in the free exercise field, and the Supreme Court's recent decision in *Zelman v. Simmons-Harris*[247] permitting religiously affiliated schools to participate in voucher programs embraced neutralism in the Establishment Clause field.[248]

Lupu makes an additional observation. The behavior of religious organizations, including a group's internal practices, affects society at large. Religious institutions, "like other important social institutions, are influential in shaping behavior and moral convictions."[249] Thus, what goes on inside the institution has consequences for those outside of the organization, and exemptions from neutral, generally

242. *See id.*

243. *See id.* at 401–03.

244. *See, e.g.*, Eisgruber & Sager, *supra* note 7, at 1248; Gedicks, *An Unfirm Foundation*, *supra* note 7, at 556, 574; Gedicks, *Defensible Free Exercise Doctrine*, *supra* note 7, at 927; Marshall, *In Defense of* Smith, *supra* note 7, at 319–23.

245. Malicki v. Doe, 814 So. 2d 347, 365 (Fla. 2002). For a discussion of *Malicki*, see *supra* notes 179–81 and accompanying text. For an example of scholarship that argues that special exemptions for religious organizations and individuals violate the Establishment Clause, see Marshall, *In Defense of* Smith, supra note 7, at 320; Marshall, *The Case Against*, *supra* note 7, at 388–94.

246. Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1235–36 (1997); Greenawalt, *supra* note 67, at 1870; Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 252–53 (2000); Lupu & Tuttle, *supra* note 106, at 68–71; Lupu & Tuttle, *supra* note 213, at 918–919.

247. 536 U.S. 639 (2002).

248. *See* Lupu & Tuttle, *supra* note 213, at 918–19; Lupu & Tuttle, *supra* note 106, at 70. *But see* Locke v. Davey, 124 S. Ct. 1307, 1313 (2004) (reaffirming the distinctive treatment of religion under the First Amendment).

249. Lupu, *supra* note 64, at 408.

applicable government policies, such as antidiscrimination policies, may harm those outside the group.[250] Church members are not the only ones who have an interest in internal church affairs,[251] and special protections often come at the expense of the larger community.[252]

III. LESSONS FROM *SMITH*

As the previous section demonstrates, Supreme Court precedent, lower-court case law, and scholarly writing leave us with three very different approaches to neutral government regulation that interferes with the internal affairs of religious organizations. In this section, I will identify the approach that I believe to be the most appropriate. As I noted in the introduction, I will be using the *Smith* decision as a prism through which to analyze the rights of religious organizations under the Free Exercise Clause. For some courts and scholars, *Smith* has nothing to say about free exercise protections for religious groups. *Smith* addresses only the rights of individual believers, and other precedents, such as the Court's intrachurch dispute cases, provide the standard for religious groups. For other courts and scholars, *Smith* means the same thing for religious groups as it does for individuals. Neither receive special protection when neutral regulation interferes with religious practice. In my view, neither interpretation is correct. The rule in *Smith* for individual believers is not the same standard that should apply to government regulation of religious groups. However, the analysis in *Smith* is not irrelevant to assessing the scope of religious group rights. To the contrary, *Smith* raises a number of issues that help to clarify what is at stake in choosing among the different options. When these issues are examined closely, the results are surprising. *Smith* supports a broad right of autonomy for religious groups that extends to internal matters with clear religious significance as well as activities that appear more mundane or secular.

250. *See id.* at 408–09.

251. *See id.* at 409.

252. *See id.* at 403.

A. Religious Groups and Freedom of Belief

The first guidepost that *Smith* provides lies in the first few lines of the Court's analysis where the Court draws a distinction between protections for religious beliefs and protections for religious action. According to *Smith*, the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[253] *Watson v. Jones* expressed a similar view. In America, the "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[254] Action receives less protection. While an individual is free to believe whatever he or she chooses, the Free Exercise Clause does not guarantee the right to act on these beliefs where neutral laws of general applicability stand in the way.[255] An individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[256]

According to the Court, greater protection for action under the balancing approach developed in *Sherbert* is problematic for several reasons. First, if a religious believer is entitled to an exemption whenever the government burdens religious conduct and the state's interest is not compelling, the believer will "become a law unto himself,"[257] and chaos will ensue.[258] Such a rule is especially dangerous in a nation that includes and values diverse religious beliefs.[259] Furthermore, the *Sherbert* balancing test unfairly privileges religious liberty over other constitutional rights.[260] In other contexts such as the Equal Protection and Speech Clauses, compelling state interest analysis produces "equality of treatment and an unrestricted flow of contending speech"; here it would "produce a private right to ignore generally applicable laws[, which] is a constitutional anomaly."[261] In addition, limiting free exercise protection to burdens on religious practices that are central to the believer's faith is

253. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

254. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872).

255. *See Smith*, 494 U.S. at 878–79.

256. *Id.* at 879.

257. *Id.* at 885 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

258. *See id.* at 888.

259. *See id.*

260. *See id.* at 886.

261. *Id.*

unworkable.[262] Judges are not fit to investigate and determine which beliefs are central in different religious traditions.[263]

While the Free Exercise Clause does not require individual exemptions from neutral laws of general applicability, *Smith* does envision legislative relief.[264] The Free Exercise Clause reflects a solicitude for religious liberty that can be expected from the democratic processes as well.[265] The *Smith* Court points to and approves of the frequency of reasonable legislative accommodations.[266] While the Court admits that minority religious practices will be at a "relative disadvantage" in this process, this is unavoidable and preferable to the anarchy that is threatened under the *Sherbert* approach.[267]

Thus, in the world that *Smith* envisions, the beliefs and actions of religious individuals are treated very differently. In the realm of ideas, *Smith* envisions unrestricted freedom. The Free Exercise Clause entitles individuals to believe and profess whatever doctrines they desire, and *Smith* expects that individuals will hold a wide range of different religious views, orthodox as well as unorthodox, popular and unpopular. Restrictions on religious practice are, by contrast, unavoidable, but *Smith* hopes that legislatures will make accommodations where reasonable. Moreover, *Smith* does not expect restrictions on action to affect the complexity and diversity of opinion. Religious individuals will continue to hold whatever religious beliefs they desire even if the beliefs are not actionable. In many cases, religious adherents will be successful in petitioning the legislature for relief from burdensome laws. Adherents of minority religions will be at a disadvantage in the legislative process, but they will not be absent. Their actions may be circumscribed, but their beliefs will be free.

The *Smith* Court says little about the conditions that would be necessary to maintain the type of unrestricted freedom of belief that it envisions. The Court does state that the government may not regulate religious beliefs as such,[268] and it also assumes that

262. *See id.* at 886–87.
263. *See id.*
264. *See id.* at 890.
265. *See id.*
266. *See id.*
267. *Id.*
268. *Id.* at 877.

government regulation that impairs individual practice will not undermine the individual's choice of belief. However, the Court does not elaborate further. Nor does *Smith* address the proper treatment of religious groups under the Free Exercise Clause. Further examination of both these issues reveals an important link between them. Religious groups play an indispensable role in shaping and fostering the freedom of belief that *Smith* envisions and is committed to.

Numerous scholars have observed the connection between religious groups and individual religious convictions. Individuals express and exercise their beliefs in religious communities,[269] and religious organizations also play an essential role in shaping the beliefs that individuals hold.[270] As Frederick Gedicks has written, "[g]roups are ongoing and independent entities that influence in their own right how individuals think, express themselves, and act."[271] Thus, "[a]lthough in some respects groups are aggregations of their individual members, in other respects, groups are prior to and independent of their members."[272] Justice Brennan draws the same connection between individual religious belief and group activity in his concurrence in *Amos*.[273] According to Justice Brennan, "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community."[274] These religious groups do not simply express individual religious beliefs, but the "community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[275]

269. According to Carl Esbeck, "religious belief nearly always is expressed in some sort of communal way." Esbeck, *supra* note 106, at 374. Similarly, Douglas Laycock observes that "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations." Laycock, *supra* note 16, at 1389.

270. *See* John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 580–81 (1990); *see also* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1842–43 (2001) (arguing that religious groups are among the intermediate institutions that shape and form individuals).

271. Gedicks, *supra* note 106, at 107.

272. *Id.*

273. For discussion of *Amos*, see *supra* notes 94–103 and accompanying text.

274. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

275. *Id.*

Groups play yet another important role in the formation of individual belief. Religious communities are the vehicle for the development of doctrine. It is through religious communities that individuals jointly develop religious ideas and beliefs. Thus, the very formulation of religious opinions takes place within religious groups, as does the transmission and exercise of beliefs. Religious groups do not simply shape their members, nor do fellow congregants simply exercise preexisting convictions with like-minded believers. Rather, religious communities are part of an ongoing conversation that both shapes individuals and is shaped by them. In the sometimes rough and tumble of congregational and denominational life, individuals work together to define, refine, and reform religious ideas. Indeed, this process is not limited to single congregations or even single denominations. It takes place in a larger environment where religious groups and their members constantly interact with and influence one another. As communities face new circumstances and experiences, they may look to other groups for guidance, or they may sharply distinguish themselves, or they may do some of both. Individuals and subgroups may split, new communions may be formed, and old ones reformed. The lines that separate group from group are porous, and individuals, subcommunities, and ideas cross back and forth.

Nor is the development of religious ideas and doctrine an abstract affair. Religious organizations do not simply teach or formulate doctrine in the abstract. They also seek to live out their beliefs in their relationships with fellow communicants. They seek to put their beliefs into action in shaping organizational structure, developing rules for church discipline, clarifying the rights and duties of members and employees, and fostering more informal social expectations and standards. Indeed, it is through this process of living beliefs in community that ideas are tested and, again, refined and reformed. It is also through this process that beliefs are preserved. Without the ability to put ideas into practice within the community, it would be difficult for the group to maintain its commitments and convictions. Indeed, without the opportunity to practice their convictions in community life, church members may not be able to fully understand what their beliefs mean and require. Restrictions on individual action outside the community may not undermine religious belief if these opportunities are present, but restrictions on internal group life could be devastating.

If religious groups play an essential role in shaping individual religious belief and, indeed, in the very formulation of religious ideas, the freedom of belief that *Smith* envisions requires protections for religious organizations. If religious communities are not able to teach, develop, and live out their ideas free from state interference, individual belief will also be suppressed. The diversity of religious beliefs that *Smith* envisions presupposes a diversity of religious communities, each of which is able to structure its own internal life according to its own unique religious views and perspectives. Supreme Court precedent under the Speech Clause of the First Amendment provides support for such protection. The Supreme Court has long held that the individual's freedom to engage in speech activities under the First Amendment requires a "corresponding right" to associate with others for those ends.[276] The right of association is "implicit" in First Amendment protections for freedom of speech.[277] Similarly, protections for religious groups are implicit in the Free Exercise Clause's commitment to freedom of religious belief and profession. Full freedom of belief is not possible without a corresponding right of religious groups to teach, develop, and practice their doctrines and ideas.

Thus, of the three approaches to government regulation of religious groups that can be found in existing Supreme Court precedent, the rule in *Smith* for individual religious exercise is, surprisingly, the least compatible with the decision's underlying principles. Special protections for religious organizations are necessary at least where government regulation interferes with religious belief or practice. Such protections would not give rise to the same risk of chaos that the *Smith* Court feared in the context of individual religious exercise.[278] The exemption of individuals from neutral laws of general applicability whenever a burden is proved and a compelling state interest is absent may, indeed, be "courting anarchy."[279] However, the same danger does not arise when religious organizations are exempted from compliance with regulations that interfere with internal community life. Permitting religious groups to

276. Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000); Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

277. *Dale*, 530 U.S. at 647; *Jaycees*, 468 U.S. at 622.

278. *See supra* notes 257–59, 267 (discussing *Smith*).

279. Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

shape community practice according to shared norms may have a great impact upon the lives of members and employees, but any direct effect on the larger society will usually be minimal. Where outsiders would be harmed, limitations can be imposed as discussed above. Federal courts holding that the ministerial exception survives *Smith* agree. According to the D.C. Circuit, "the ministerial exception does not present the dangers warned of in *Smith*."[280] Protections for the internal affairs of religious organizations do not "empower a member of that church, 'by virtue of his beliefs, to become a law unto himself.'"[281]

Nor would special protections for religious organizations be inconsistent with the equality that *Smith* prescribes for individuals. For many scholars, *Smith* reflects the trend toward neutralism in the Court's recent case law. In both the free exercise and establishment areas, the Supreme Court is increasingly treating religious individuals and entities like nonreligious ones.[282] However, it is important not to read too much into the *Smith* decision. The Court in *Smith* did hold that the Free Exercise Clause does not require special exemptions for believers when neutral government regulations burden religious practice. However, the Court did not hold that believers and nonbelievers must always be treated alike. To the contrary, the Court permits and, indeed, encourages legislatures to make special accommodations when religious practice is burdened.[283] *Smith* does not reject all special or favorable treatment of religion. Indeed, it

280. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996).

281. *Id.* (internal quotation marks omitted) (quoting *Smith*, 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879))); *see also* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999) (quoting and approving *Catholic University*, 83 F.3d 455). The Eleventh Circuit has made a similar distinction:

> The Court's concern in *Smith* was that if an individual's legal obligations were contingent upon religious beliefs, those beliefs would allow each individual "'to become a law unto himself.'" The ministerial exception does not subvert this concern; it was not developed to provide protection to individuals who wish to observe a religious practice that contravenes a generally applicable law. Rather, the exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration.

Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1303–04 (11th Cir. 2000) (internal citations omitted) (quoting *Smith*, 494 U.S. at 885 (quoting *Reynolds*, 98 U.S. at 167)).

282. *See supra* notes 246–48 and accompanying text.

283. *See supra* notes 264–66 and accompanying text.

expects and approves of such favoritism. Protections for religious groups would be consistent, not inconsistent, with *Smith*.

B. Misunderstandings and Temptations

If special protections for religious groups are necessary to preserve the freedom of belief that *Smith* envisions, the next step is to determine how far these protections should extend. Does *Smith* call for a broad right of church autonomy, or should protections be limited to situations in which religious belief or practice is actually burdened?

Certainly, religious groups should be entitled to relief where government regulation conflicts with specific doctrines or practices. The application of secular standards where such a conflict exists would impede the organization's ability to preserve and develop doctrine. Indeed, in some cases, the effect of such application would be to inject the government directly into religious disagreements and decision making. For example, if Title VII's prohibition against gender discrimination in employment were applied to ministerial decisions by religious groups, the government would be lending its support to one side in a long-running struggle within American congregations over the proper role of women in ministry. Those who favor female clergy would be heavily favored over those with more conservative views. Indeed, any time that government regulation addresses difficult social or moral issues that also divide church members, the imposition of the secular standard will disrupt the process by which the religious group develops its own doctrine and beliefs. Many Americans may approve of the results in cases where religious groups hold unpopular or outdated views. However, the First Amendment protects the freedom of individuals to hold these views, and religious groups are entitled to the protections that make such freedom possible.

Protections for religious organizations could also be extended to areas of activity that scholars have identified as quintessentially or inherently religious.[284] Placing matters such as the church-minister relationship, religious education, and worship outside the competence of government makes sense insofar as these aspects of church administration are closely related to the group's religious

284. *See supra* notes 217–35 and accompanying text.

mission. As federal courts carving out the ministerial exception have argued, interference with such core religious matters by definition burdens religion.[285]

Whether courts should go further and recognize a broad right of church autonomy over all internal affairs is a more difficult issue. If religious organizations receive relief whenever there are identifiable burdens on religious exercise or whenever quintessentially religious matters are involved, would further protection be gratuitous favoritism that unfairly advantages religious groups over nonreligious ones? On the other hand, is a broad right of church autonomy necessary to fully protect the ability of religious groups to preserve and transmit their unique beliefs and ways of life?

To answer these questions, one must look at another issue raised in *Smith*. One of the reasons given by the *Smith* majority for its rule regarding individual religious practice is the difficulty that judges would have in identifying which beliefs are central in different religious traditions. Providing relief whenever a believer's religious conduct is burdened by government action would produce chaos, but limiting exemptions to situations involving practices central to the individual's faith is unworkable. Judges do not have the ability to make such determinations: "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[286] If this concern is explored further in the group context, it becomes clear that limiting judicial relief to actual burdens on group belief or practice may be preferable in theory, but it is unworkable in fact. Judges are no more fit to make the types of inquiries required under such an approach than they are to identify which beliefs are central in different religious traditions. The danger that judges will misunderstand an organization's beliefs and practices or be tempted to distort these beliefs in order to reach desired outcomes is considerable, whether the judge is trying to carve out specially sensitive areas of church life or attempting to ascertain whether government regulation conflicts with specific religious teachings. For both types of inquires, it is possible to point to numerous cases in which judges have inadvertently, and sometimes willfully,

285. *See supra* note 140 and accompanying text.

286. *Smith*, 494 U.S. at 887 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

misunderstood organizational belief. The result is significant impingement on religious doctrine and practice. The only reliable way to protect the religious beliefs and activities of religious groups is a broad right of church autonomy that extends to all aspects of church affairs, even the most routine and mundane.

The difficulty that courts have in ascertaining whether government regulation burdens specific religious beliefs or practices is illustrated well by cases in the labor and employment area. These cases demonstrate that judicial efforts to identify burdens fail for several reasons. For example, two federal circuit court opinions addressing instances of gender discrimination in church-operated schools illustrate the temptation that judges experience to misread church doctrine in order to reach desired outcomes. In *EEOC v. Fremont Christian School*,[287] the EEOC sought to enforce Title VII and the Equal Pay Act against a conservative Christian school that offered health insurance to single employees and married men but not to married women.[288] Fremont Christian School ("Fremont") grounded its policy on biblical teaching that the husband is the head of the household in a marriage and is required to provide for the family.[289] The Ninth Circuit rejected Fremont's free exercise argument because it found that application of Title VII and the Equal Pay Act would not have a "significant impact"[290] on the school's beliefs and only minimal impact on practice.[291] The court pointed to a statement made by the pastor of the church that operated Fremont. According to the pastor, "the Church, believing as it does, in the God-given dignity and the special role of women, could not, without sin, treat women according to unfair distinctions."[292] The court drew a connection between this statement and the facts of an earlier case in which it had applied Title VII to a religious organization that denied endorsing gender discrimination in employment.[293] The court also noted that the school had abandoned its earlier practice of paying married men more than

287. 781 F.2d 1362 (9th Cir. 1986).

288. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1364–65 (9th Cir. 1986).

289. *Id.* at 1364.

290. *Id.* at 1368.

291. *Id.* at 1369.

292. *Id.* at 1368.

293. *See id.* (drawing on EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1981)).

married women and that it now offered the same life and disability insurance to both men and women.[294]

The court's argument that application of the federal statutes would not significantly burden Fremont's religious beliefs and practice is strained if not disingenuous. Application of these statutes would prohibit a practice with clear religious grounding and would prevent Fremont from recognizing the different roles of men and women in its employment policies. The court twists the words of Fremont's pastor when it suggests that the church's teaching does not support pay and benefit differentials between men and women. The pastor never stated, and indeed the church denied,[295] that men and women should be treated equally in all respects. "Unfair distinctions" are prohibited, but not all distinctions. Fremont clearly believed that different roles for men and women in marriage make employment distinctions based on the husband's role as head of the household both fair and appropriate. While Fremont chose to give women equal pay and insurance benefits, it had religious reasons for differential treatment regarding health benefits. For Fremont, the Bible provides clear support for a policy that is now prohibited by government regulation. The court essentially second-guessed the school's understanding of its own beliefs and minimized the burden of government regulation on the school.

The Fourth Circuit in *Dole v. Shenandoah Baptist Church*[296] made a similar mistake. Like *Fremont*, *Shenandoah* involved a conservative Christian school that gave special benefits to married men based on the biblical belief that the husband is the head of the household.[297] The school was operated by the Shenandoah Baptist Church. Before salaries were increased across the board, Shenandoah paid married male teachers a salary supplement that was not provided to married women.[298] The federal department of labor, joined later by the EEOC, sought to enforce the Equal Pay Act,[299] and the Fourth Circuit held that application of the Act would not violate the

294. *Id.* at 1368.

295. *Id.* at 1364 ("Among the doctrinal beliefs held by the Church is the belief that, while the sexes are equal in dignity before God, they are differentiated in role.").

296. 899 F.2d 1389 (4th Cir. 1990).

297. *Id.* at 1391–92.

298. *Id.* at 1392.

299. *Id.* at 1392–93.

Free Exercise Clause.[300] As in *Fremont*, the court found that any burden on Shenandoah's beliefs would be minimal.[301] According to the court, "[t]he pay requirements at issue do not cut to the heart of Shenandoah beliefs."[302] Shenandoah did not claim that the Bible mandates a pay differential between men and women, and it had voluntarily phased out the supplement on its own.[303] The court's conclusion that application of the federal statute would not cut to the heart of Shenandoah's beliefs ignores the effect of its holding. Shenandoah believes that men and women have different roles in the marriage relationship and that these different roles authorize differential treatment in employment settings. Application of the federal statute would prohibit such differential treatment. While Shenandoah no longer pays men and women differently, it believes that such differential treatment is biblically based, and after the court's ruling, it no longer has the freedom to use pay differentials. The court has, in effect, prohibited the church from living out beliefs with clear religious grounding.

In *Fremont* and *Shenandoah*, the temptation to reach desirable results almost certainly contributed to judicial second-guessing of church doctrine and to minimization of the impact of government regulation on church life. In other cases, failure of courts to identify burdens on group practices and belief results from an unfamiliarity with church doctrines. The complexity of church doctrine and its development over time often makes ascertaining conflicts between government regulation and church doctrine particularly difficult. State and lower federal court cases upholding the application of labor statutes to church institutions illustrate these problems.

Many of these cases have involved social services organizations or schools operated by the Catholic Church, and courts have repeatedly found that collective bargaining is consistent with Church doctrine.[304] Indeed, in several cases, the courts have observed that

300. *Id*. at 1397–99. The court also rejected Shenandoah's Establishment Clause claim. *Id*. at 1399.

301. *Id*. at 1397 (concluding that "any burden would be limited").

302. *Id*.

303. *Id*. at 1397–98.

304. *See, e.g.*, Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1170 (2d Cir. 1985); St. Elizabeth Cmty. Hosp. v. NLRB, 708 F.2d 1436, 1442–43 (9th Cir. 1983); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992).

the Catholic Church has long supported unionization and collective bargaining. According to the Second Circuit in *Catholic High School Ass'n of the Archdiocese of New York v. Culvert*, "the Encyclicals and other Papal Messages make clear that the Catholic Church has for nearly a century been among the staunchest supporters of the rights of employees to organize and engage in collective bargaining."[305] The court continued with the additional observation that the Church's "strong commitment to social and economic justice and collective bargaining was recently affirmed in the . . . Catholic Bishops' Pastoral Letter" on the economy.[306] However, a more thorough analysis of the Catholic Church's social teaching reveals that the Church's views are far more complicated than these courts assume. While the Catholic Church strongly supports worker rights and collective bargaining, the Church's vision of collective bargaining is very different from the framework established in the NLRA and state labor laws that resemble the federal statute.[307]

While secular statutes presuppose and entrench an adversarial relationship between management and labor, the Catholic Church's goal is a cooperative relationship based on charity, mutual respect and concern, and the common good. In an earlier article on religious organizations and mandatory collective bargaining, I have discussed differences between the NLRA and the Church's model in great detail and have identified several aspects of the national framework that conflict with Church teaching.[308] For example, whereas the availability, threat, and actual use of economic weapons such as strikes and lockouts is "part and parcel"[309] of the system that the NLRA sets up, the Church envisions a process of reasoned discussion

305. *Culvert*, 753 F.2d at 1170.

306. *Id*. The court was referring to NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (10th anniversary ed. 1997) (1986).

307. The first state labor statutes were modeled on the NLRA as originally adopted in 1935. *See* CHARLES C. KILLINGSWORTH, STATE LABOR RELATIONS ACTS: A STUDY OF PUBLIC POLICY 1–2 (1948). The original version of the NLRA is commonly referred to as the Wagner Act, and these first state statutes are known as "little" or "baby" Wagner Acts. *See* SANFORD COHEN, STATE LABOR LEGISLATION 1937–1947: A STUDY OF STATE LAWS AFFECTING THE CONDUCT AND ORGANIZATION OF LABOR UNIONS 4 (1948). Later state statutes anticipated the amendments to the Wagner Act in the Taft-Hartley Act of 1947 and helped to shape these changes. *See* KILLINGSWORTH, *supra*, at 2–5. For the mutual influence of state and federal labor statutes upon one another, see generally KILLINGSWORTH, *supra*.

308. *See* Brady, *supra* note 208.

309. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 489 (1960).

and cooperation based upon a desire for mutual understanding, reconciliation, and achievement of the common good.[310] In the Catholic Church's view, strikes are permissible as an "extreme"[311] or "ultimate"[312] means for defending worker rights, but they may never be abused for the purposes of narrow self-interest,[313] and the parties must "resume negotiations and the discussion of reconciliation" as soon as possible.[314] Likewise, the National Labor Relation Board's interpretation of the Act to prohibit promises and grants of benefits made by employers during an election campaign in order to discourage a pro-union vote also frustrates the Church's vision.[315] Such a prohibition impedes the genuine attempts at reconciliation that the Catholic Church encourages as well as the threatening and misleading gestures feared by the Board.[316] Moreover, provisions in the Act designed to channel all bilateral dealings over working conditions into collective bargaining or other arms-length relationships restrict the type of collaboration between labor and management that the Catholic Church envisions.[317] Forcing workers

310. *See* Brady, *supra* note 208, at 114–15, 119–122.

311. POPE JOHN PAUL II, LABOREM EXERCENS ¶ 20 (1981), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 352, 381 (David J. O'Brien & Thomas A. Shannon eds., 1992).

312. SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 68 (1965), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 166, 212.

313. *See* LABOREM EXERCENS, *supra* note 311, ¶ 20, at 381; POPE PAUL VI, OCTOGESIMA ADVENIENS ¶ 14 (1971), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 265, 270.

314. GAUDIUM ET SPES, *supra* note 312, ¶ 68, at 212.

315. *See* Brady, *supra* note 208, at 122–28. The Board has held that such promises and grants of benefits violate section 8(a)(1) of the Act. *See, e.g.*, Hudson Hosiery Co., 72 N.L.R.B. 1434, 1436–37 (1947); *see also* NLRB v. Exchange Parts Co., 375 U.S. 405, 408–09 (1964) (describing and approving the Board's position). Section 8(a)(1) is codified at 29 U.S.C. § 158(a)(1) (2001).

316. According to the Board, promises and grants of benefits during an election campaign will interfere with employee free choice. In *NLRB v. Exchange Parts Co.*, the Supreme Court explained that employees will interpret promises or grants of benefits as the equivalent of a threat of reprisal should they choose the union. *See Exchange Parts*, 375 U.S. at 409. In addition, when employers make promises or grants of benefits, they are not to be trusted, and any benefits will be fleeting. *See id.* at 410.

317. *See* Brady, *supra* note 208, at 128–38 (discussing section 8(a)(2) of the Act). Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (2001). The Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing

and employers into independent camps on opposite sides of the bargaining table fosters distrust and division, not the unity that the Church seeks.[318] Thus, while the Church clearly supports collective bargaining and worker rights, courts upholding the application of secular labor statutes to Catholic institutions have not recognized the deep differences between the Church's vision and the legal frameworks that these courts have imposed.

The lessons from these cases go even further. If one examines cases in which Catholic organizations have objected to mandatory collective bargaining on First Amendment grounds, one will not find reference to the differences I have described. Church institutions have not argued that the Catholic vision of collective bargaining is incompatible with secular regimes. Indeed, in a few cases, Catholic institutions had been voluntarily bargaining with unions under secular law for years.[319] The absence of the type of argument I have sketched may, in part, have been strategic. After the Supreme Court's decision in *Catholic Bishop*, Catholic institutions understandably chose to emphasize the types of issues that the Court raised in that case.[320] However, in many cases, Catholic employers were probably not aware of the differences that I have described. Employers may simply not have given the relationship between secular bargaining regimes and Catholic social teaching extended examination, or they may have been unfamiliar with secular labor statutes and, thus, unaware of potential conflicts. Indeed, in my

with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Id.* § 152(5). The Board has construed the term "dealing with" broadly; covered interactions go beyond actual collective bargaining and include any bilateral processes in which employees make proposals to management and these proposals are considered by management. *See* Brady, *supra* note 208, at 129.

According to the Board, the purpose of section 8(a)(2) is to ensure that labor organizations that deal with management on working conditions are independent of management. *See id.* at 130–31. Section 8(a)(2) is violated whenever an employer dominates, interferes with, or supports such an organization, such as by creating and structuring the organization. The effect of section 8(a)(2) is to funnel all bilateral dealing between employers and employees over working conditions into collective bargaining or some other arm's-length relationship. *See id.* at 130–32.

318. *See* Brady, *supra* note 208, at 131–32, 135–38.

319. *See* Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert, 753 F.2d 1161, 1163 (2d Cir. 1985); *see also* South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 716 (N.J. 1997) (explaining that the diocese had a "past history of collective bargaining with lay high-school teachers").

320. For further discussion, see Brady, *supra* note 208, at 140–41.

earlier article on religious organizations and mandatory collective bargaining, I discuss several cases in which Catholic employers unwittingly violated labor statutes when following basic principles of Catholic social thought in interactions with union members.[321] For these employers, the conflicts between secular law and Catholic teaching only became apparent as their relationship with union members unfolded over time.

Thus, courts may have difficulty determining whether government regulations burden group beliefs or practices because the religious group itself may be unaware of potential conflicts. Conflicts between religious doctrine and secular law may exist, but they may not be visible at the outset to either the church or the courts. In other cases, courts may be stymied by multiple interpretations of church doctrine. There are, for example, Catholic scholars who genuinely believe that collective bargaining under federal and state law is compatible with the Church's vision for labor relations.[322] They and I disagree about the proper interpretation of Catholic social teaching. Sometimes multiple interpretations of church doctrine are a sign that the group's beliefs are changing or developing. In either case, there may be no single authoritative view but many legitimate positions, all of which represent permissible interpretations of existing beliefs. Where multiple interpretations of church doctrine exist, any choice among them will entangle the courts in religious questions and interfere with the free development of doctrine. Indeed, the fact that religious doctrine is not static but develops over time means that government regulation which imposes no burden today may do so tomorrow, and views which are unorthodox today or even barely articulable may be authoritative tomorrow. It will be difficult for courts to recognize and keep up with such changes particularly where new doctrines are in the early stages of development or adoption.

Courts may try to address these problems by deferring to the religious organization regarding its beliefs and burdens on those beliefs. In theory, courts that exercise such deference will not become embroiled in religious questions and will give sufficient

321. *See id.* at 141–44.

322. *See, e.g.*, David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 67 (1992); David L. Gregory & Charles J. Russo, *Overcoming* NLRB v. Yeshiva University *by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55, 63 (1990).

protection when beliefs or practices are infringed. However, while such deference may reduce the difficulties that courts face, it will not eliminate them. As discussed above, religious organizations may not be aware of the ways in which government regulation will impede their doctrine and practices. Simply deferring to the organization regarding burdens on religious exercise will not provide sufficient protection where the organization itself does not fully understand the relationship between government regulation and church practice. Moreover, when burdens are later experienced after the application of secular law, the organization may find it difficult to obtain relief from the courts particularly if there has been prior unsuccessful litigation. The reviewing court may be tempted to view later complaints as a mere pretext for unwillingness to incur the monetary costs of regulation or other intrusions unrelated to religious matters. Moreover, because religious doctrine is constantly changing, courts must be willing to recognize new conflicts where none existed previously. Courts may be tempted to believe that regulation that is permissible today will be permissible tomorrow, but this may not be true. To the extent that courts are slow to recognize change, they may impede the free development of doctrine and chill the behavior of members and leaders who will understandably hesitate to promote changes that will result in prolonged and uncertain litigation.[323] Unless courts are truly prepared to defer whenever the religious organization claims that government regulation interferes with

323. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court recognized that similar concerns about judicial misunderstanding may chill the activities of religious organizations. As discussed above, the Court in *Amos* addressed Title VII's exemption for religious organizations from the statute's prohibition on religious discrimination in employment. *See supra* text accompanying notes 94–102. While an earlier exemption extended only to the organization's religious activities, the current exemption extends to nonreligious activities as well. *See id.* Those challenging the exemption argued that the broader provision cannot be justified as an attempt to alleviate government interference with religious practice because the earlier exemption had already provided adequate protection. *Amos*, 483 U.S. at 335–36. The Supreme Court disagreed. *Id.* at 336. According to the Court, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id.* The Court pointed out that the line between the group's religious and nonreligious activities "is hardly a bright one" and that "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* Were this to happen, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.*; *see also id.* at 343–44 (Brennan, J., concurring in the judgment) (arguing that the prospect of litigation and judicial misunderstanding "create the danger of chilling religious activity").

religious belief or doctrine, there is a significant chance that judges will become entangled in religious doctrine and either miss, or be slow to recognize, substantial burdens.

These examples from cases involving labor and employment regulation illustrate a basic lesson that is repeated over and over again in the Supreme Court's intrachurch dispute decisions and yet again in *Smith*. Courts are not fit to interpret religious doctrine and engage in religious questions. As the Court in *Watson v. Jones* observed, where civil courts resolve religious questions, the appeal is "from the more learned tribunal . . . to one which is less so."[324] Thus, whether mandatory collective bargaining conflicts with Catholic doctrine is not a question that the Second Circuit or any other court is competent to answer. Nor are courts competent to measure the burden on religious doctrine when federal antidiscrimination laws are applied to the employment policies of conservative Christian schools. Judicial inquiry into the centrality of religious beliefs as prohibited in *Smith* is just one impermissible form of entanglement in church doctrine. The determination of whether government regulation places a burden on organizational belief and practice is another.

Indeed, the problem is even more basic. When judges become entangled in doctrinal questions involving religious denominations different from their own, they lack the concepts and experiences necessary to fully understand what is at stake. Faith is not irrational or nonrational as some scholars have suggested, nor is it completely impenetrable to outsiders.[325] However, faith sheds a light that allows the believer to see things differently and anew. Where judges do not share this perspective, they are likely to miss matters of religious or spiritual significance, and they will also have difficulty recognizing where their own limitations lie.

Efforts by courts and scholars to carve out special areas of protection for quintessentially religious matters are no less problematic. As noted above, courts addressing the application of antidiscrimination statutes to religious organizations have developed a ministerial exception that protects the church-minister relationship

324. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872).

325. *See* Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help To Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 575 (1999).

from state interference regardless of whether the organization has a religious basis for its actions.[326] The church-minister relationship is an area of "prime ecclesiastical concern"[327] so "close to the heart of the church"[328] that the state may not interfere even if there is no doctrinal reason for the discrimination. Interference in the church-minister relationship, by definition, burdens religious practice. Scholars such as Bagni and Esbeck would expand the sphere of special protection to include other core religious matters. Bagni's "spiritual epicenter" includes membership policies, religious education, worship, and ritual as well as the relationship between church and minister.[329] For Esbeck, "inherently religious" matters also include ecclesiastical polity, church discipline, and personnel decisions where employees are chosen on the basis of religion.[330] For Lupu and Tuttle, the protected zone consists of those aspects of religious organizations that are "bound up with the sacred"[331] and uniquely distinctive from the temporal and material concerns of the state.[332]

At first glance, this approach seems to avoid the concerns raised in *Smith*. If it is possible to identify a set of activities that are inherently or quintessentially religious, judges can protect these areas from government interference without having to engage in religion-specific analyses that would entangle the courts in religious doctrine and belief.[333] However, there are several difficulties with this approach. First, the aspects of church life which are uniquely or quintessentially religious are not obvious. Courts may readily agree

326. *See supra* notes 111–23 and accompanying text.

327. Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990); *see also* McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

328. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999).

329. *See supra* text accompanying notes 217–19.

330. *See supra* text accompanying notes 220–26.

331. Lupu & Tuttle, *supra* note 106, at 84.

332. *See id.* at 92.

333. Indeed, Lupu and Tuttle have defended their approach on this ground. Citing *Smith*, Lupu and Tuttle argue that the protected aspects of religious organizations "cannot rest upon the subjective perceptions of the governed concerning what constitutes the inviolable core of their faith." *Id.* at 83. The majority in *Smith* recognized that "issues of what lies, or does not lie, at the centrality of faith for particular believers is beyond judicial competence." *Id.* Instead, Lupu and Tuttle begin with a "political concept of religion," *id.*, and define protected matters as those which relate to the "world beyond the temporal and material concerns that are the proper jurisdiction of the state," *id.* at 92.

that the selection of clergy belongs within this protected zone, and probably worship and ritual as well, but there will surely be disagreement about what other matters merit special protection. For example, while Esbeck has identified church discipline as an inherently religious matter,[334] the Ninth Circuit recently refused to extend the same protection to disciplinary matters, even decisions involving clergy. In *Bollard v. California Province of the Society of Jesus*,[335] the Ninth Circuit addressed a sexual harassment claim by a Jesuit seminarian under Title VII.[336] The seminarian alleged that he had been sexually harassed on several occasions by his superiors, and that when he reported the harassment, the order did nothing about it.[337] The court allowed the claim and distinguished disciplinary decisions regarding clergy from the selection of clergy.[338] At least where a church does not offer a religious reason for the harassment, the court found that "it stray[ed] too far from the rationale of the Free Exercise Clause to extend constitutional protection to this sort of disciplinary inaction simply because a minister is the target as well as the agent of the harassing activity."[339] Other courts disagree. For example, in *Swanson v. Roman Catholic Bishop of Portland*,[340] the Maine Supreme Court held that "[p]astoral supervision is an ecclesiastical prerogative."[341] The litigation in *Swanson* involved a claim against a Catholic diocese for negligent supervision of a priest who had engaged in sexual misconduct during marital counseling.[342] The court held that the claim violated the Free Exercise Clause because the imposition of secular tort standards on the church's relationship with its ministers interferes with "denominational governance."[343] Thus, in many cases it will not be easy to get agreement among courts about which aspects of church life should be specially protected, and when there is controversy and

334. *See* Esbeck, *supra* note 221, at 308; Esbeck, *supra* note 220, at 44–45; Esbeck, *supra* note 106, at 397, 420.

335. 196 F.3d 940 (9th Cir. 1999).

336. *See id.* at 944.

337. *Id.*

338. *See id.* at 946–47.

339. *Id.* at 947; *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955–58 (9th Cir. 2004) (following *Bollard*, 196 F.3d 940).

340. 692 A.2d 441 (Me. 1997).

341. *Id.* at 445.

342. *Id.* at 442.

343. *Id.* at 445.

uncertainty, courts will almost certainly get drawn into an examination of religious beliefs and practice.

Another difficulty is that the aspects of church administration that are quintessentially religious differ from group to group. There is, in fact, no single category of church functions that is of prime importance in all traditions. Different religious traditions lodge their core religious functions in different places, and sensitivity to the diversity of America's religious traditions would involve courts in the type of religion-specific inquiry prohibited in *Smith*.[344] This problem is illustrated well by federal court decisions applying the ministerial exception in employment discrimination cases. Courts employing this exception envision the role of the minister in the church as of supreme religious importance. The minister is the "lifeblood"[345] of the church and at the "heart of church administration."[346] While this special status may seem obvious to many in mainline denominations, it does not fit well with churches that either have no ministers at all or where the category of minister goes well beyond a select group of church leaders. For example, in *EEOC v. Southwestern Baptist Theological Seminary*,[347] the seminary viewed its faculty and administrative staff as ministers.[348] The Fifth Circuit agreed that the seminary's faculty should be considered ministers[349] but refused to extend the ministerial exception to include the staff.[350] According to the court, the seminary's administrative staff does not perform traditional ecclesiastical functions.[351] While the seminary's designation of its staff as ministers reflected its belief that they played a critical role in the school's religious mission, the court did not attach the same importance to their jobs. The court was working with a much narrower conception of minister than the seminary.

344. *See supra* notes 262–63, 286 and accompanying text.

345. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); *see also* Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1304 (11th Cir. 2000) (same); *Bollard*, 196 F.3d at 946 (same); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990) (same).

346. Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975).

347. 651 F.2d 277 (5th Cir. 1981).

348. *Id*. at 284–85.

349. *Id*. at 283–84.

350. *Id*. at 285.

351. *Id*. at 284–85.

Likewise, when teachers in the Christian school operated by the Shenandoah Baptist Church identified themselves as ministers, the Fourth Circuit rejected their characterization and distinguished them from "pastoral staff," employees with "sacerdotal functions," and "church governors."[352] While the teachers in this case taught from a pervasively religious perspective,[353] viewed their jobs as a "personal ministry,"[354] and were employed at an institution that played a critical role in the church's evangelizing mission,[355] the Fourth Circuit had a much different picture of the clergy role. Schools like Southwestern Baptist Theological Seminary and the elementary and secondary school operated by Shenandoah Baptist Church reflect a common belief about ministry in evangelical Protestant communities. For evangelical Protestants, all church members who use their gifts to serve the religious mission of the church play a ministerial role. The roots of this doctrine go back to the Reformation's insistence upon "the priesthood of all believers." Within this evangelical perspective, protecting only ordained clergy or employees whose role is similar to those who have been ordained misunderstands basic church polity. All members who serve the church are its lifeblood; all play an essential role in its religious mission.

To be sure, federal courts have been careful to expand the category of minister beyond ordained clergy to others who perform ministerial functions. Many courts have adopted the definition suggested by Bruce Bagni and include any employee whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[356] This inquiry is designed to "determine whether a position is important to the spiritual and pastoral mission of the church."[357] However, Bagni's definition is still relatively narrow and reflects a familiar, but by no means

352. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990).

353. *Id.*

354. *Id.*

355. *Id.* at 1391–92.

356. Bagni, *supra* note 106, at 1545, *quoted in* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985); Powell v. Stafford, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

357. *Rayburn*, 772 F.2d at 1169; *see also Raleigh*, 213 F.3d at 801 (quoting *Rayburn*); *Catholic Univ.*, 83 F.3d at 461 (same).

universal, view of ministers as employees with leadership or worship roles, or direct responsibilities for the spread of the church's message. The administrative staff at Southwestern Baptist Theological Seminary would not be included even if their work is essential to the success of the institution's religious mission. Nor would other employees who serve religious organizations in nonsupervisory and nonteaching roles.

Such a narrow understanding of essential ecclesiastical functions is also incompatible with Roman Catholic polity. While the Catholic Church is one of the most hierarchical of all Christian denominations, the Catholic Church does not limit essential religious functions to ordained clergy or those with similar leadership, teaching, or worship roles. For example, in the Catholic Church's social mission, those who feed and counsel the needy also proclaim the Church's message just as much as do preachers from the pulpit.[358] For many scholars, the social services activities of religious organizations are viewed as less purely or quintessentially religious than teaching and worship. For example, Bagni places social services operations outside the spiritual epicenter and closer to the secular world than core religious functions.[359] Esbeck has also described social services activities as a "second tier of religious ministry" that is "more the outgrowth of truths held by religious faiths than they are centrally dealing with the particulars of one's perception of ultimate truth."[360] For the Catholic Church, this is a misunderstanding of the Christian message. When Christ reveals God's love for humanity on the cross, he invites others to share in

358. POPE PAUL VI, EVANGELII NUNTIANDI §§ 15, 21 (1975), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 303, 307–08, 310–11; ECONOMIC JUSTICE FOR ALL, *supra* note 306, §§ 45–47, at 25–26.

359. *See* Bagni, *supra* note 106, at 1539–40.

360. Esbeck, *supra* note 106, at 377. In its recent decision in *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004), the California Supreme Court went much further and found that the relationship between a Catholic social services agency and its employees, many of whom were non-Catholics, was not a matter of internal church governance protected under the U.S. Supreme Court's intrachurch dispute precedents. *Id.* at 77. The court distinguished Catholic Charities of Sacramento from a church and described it as a "nonprofit public benefit corporation." *Id.* While lower courts in the labor and employment area have routinely described the operations of religiously affiliated social services agencies as essentially secular, they have not suggested that these organizations fall outside the ambit of the Court's intrachurch dispute cases.

his life by imitating this love.[361] Serving the poor and needy is not a second tier expression of one's faith. It is part and parcel of the Gospel message. Indeed, it is the Christian message in deed as well as word. When church members serve their neighbors in need, they follow, model, and witness the love of God. Thus, within the work of the counselor, the administrator, and even the cook there is the essence of the Catholic Church's teaching.[362]

Even if the ministerial exception is appropriately limited to leadership, worship, and teaching roles, the courts have had difficulty in expanding their vision beyond familiar clergy jobs to include all employees with primary responsibilities for teaching the church's message. If one examines the outcomes of federal circuit court opinions involving the ministerial exception, one will find that the courts have not strayed far from traditional clerical positions. Employees identified as ministerial have included ordained clergy,[363] seminary faculty,[364] a pastoral associate,[365] a diocesan

361. *See* Kathleen A. Brady, *Catholic Social Thought and the Public Square: Deconstructing the Demand for Public Accessibility*, 1 VILL. J. CATHOLIC SOC. THOUGHT 203, 208–09 (2004).

362. According to the California Supreme Court in *Catholic Charities*, Catholic Charities acknowledged in its complaint that "[t]he corporate purpose of [the organization] is not the direct inculcation of religious values." *Catholic Charities*, 85 P.3d at 75. See *supra* note 360 for a discussion of this case. This statement is misleading, and it contributed to the court's misunderstanding. While Catholic social services agencies may not teach religious values *explicitly*, they do so by example. Indeed, Catholic Charities recognized its central responsibility for fostering the Church's values when it described its purpose as to "promote a just, compassionate society" that supports human dignity. *Catholic Charities*, 85 P.2d at 75. Moreover, the fact that Catholic Charities has invited non-Catholics to join its work and receive its services does not undermine this religious purpose or its expression of the Catholic faith. According to the California court, the relationship between Catholic Charities and its employees, most of whom do not belong to the Catholic Church, is not an internal church matter. *Id.* at 76–78. The court misunderstands. While Catholic Charities has invited non-Catholics to share in its religious mission, it retains the authority to decide what this mission is and to ensure that all relationships within the organization appropriately reflect its religious values.

363. *See* Werft v. Desert Southwest Annual Conference of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *cf.* Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (probationary minister).

364. *See* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981).

communications manager,[366] a professor of canon law at a Catholic university,[367] and music directors and teachers.[368] Excluded from the ministerial exception have been faculty at a pervasively religious Christian college[369] and lay teachers in church-operated elementary and secondary schools.[370] Indeed, except for theology and music teachers,[371] no federal court has included lay teachers at religiously affiliated schools within the ministerial exception.[372] In its landmark Establishment Clause decision, *Lemon v. Kurtzman*,[373] the Supreme Court found that lay teachers in parochial schools play a critical role in disseminating religious beliefs and doctrine and that religion is intertwined with secular instruction.[374] The Court in *Catholic Bishop* repeated these observations.[375] Nevertheless, lower courts applying the ministerial exception have largely bypassed these precedents as they have concluded that the educational responsibilities of lay teachers are not sufficiently religious to qualify them as ministers.

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

366. *See* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003).

367. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

368. *See* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (music director and music teacher at a church-operated school); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999) (choirmaster and director of music).

369. *See* EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980).

370. *See* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986).

371. In *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994), a federal district court held that a theology teacher at a Catholic school is covered by the ministerial exception. *Cf.* Curay-Cramer v. Ursuline Acad. of Wilmington, No. CIV.A.03-1014-KAJ, 2004 WL 2632958 (D. Del. Nov. 16, 2004) (suggesting but not deciding that a religion teacher at a parochial school falls within the ministerial exception). In *Raleigh*, the Fourth Circuit found that a music teacher at a Catholic school functioned as a minister. *Raleigh*, 213 F.3d at 804–05. State courts have also identified school principals as ministerial employees. *See, e.g.*, Sabatino v. Saint Aloysius Parish, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996); Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., No. 02-5459, 2003 WL 21753776 (D.C. Super. Ct. July 29, 2003).

372. *But see* Gabriel v. Immanuel Evangelical Lutheran Church, 640 N.E.2d 681 (Ill. App. Ct. 1994). In *Gabriel*, a lower state court addressed a claim for breach of contract brought by a kindergarten teacher against a church-operated school, and the court held that the teacher was a ministerial employee whose employment was an ecclesiastical issue into which civil courts could not intervene. I have found no other case, state or federal, which has held that lay teachers in church-operated schools fall within the ministerial exception or otherwise qualify as ministerial employees.

373. 403 U.S. 602 (1971).

374. *See id.* at 616–19.

375. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501–03 (1979).

The difficulty with any judicial or scholarly line drawing between core religious matters and less sensitive functions goes even further. For some denominations, there is simply no line that can be drawn between religious and nonreligious functions. Everything that goes on within the organization is suffused with religious significance. Where the outsider sees routine or secular matters, the church members see important religious activity. Again, the Catholic Church provides a good example. In state and lower federal court cases upholding the application of labor statutes to religiously affiliated social services programs and schools, the courts have been confident that collective bargaining requirements will not interfere with religious practice. According to these courts, because religiously affiliated social services organizations function just like nonreligious charitable enterprises and are essentially secular in their operations, any intrusion on religious matters will be minimal.[376] In the context of church-operated schools, the courts have held that interference with religious matters can be avoided if bargaining is limited to wages, hours, and other secular terms of employment.[377]

However, where Catholic organizations are involved, such a division between secular and religious activities is not possible. For the Catholic Church, the entire inner life of the religious community must model and witness the Gospel principles of charity, cooperation, and mutual concern.[378] The Catholic Church and its institutions are to be an example and an instrument of a new kind of social life built upon the love of Christ and unifying all persons with God and one another.[379] Thus, while the operations of Catholic social services organizations may appear to be essentially secular, they are, in fact, suffused with religious significance. Not only are the activities of service programs a response to and imitation of God's love demonstrated on the cross, but the very internal life and social relations within the community are a sign and witness of this love. Catholic communities proclaim the Gospel message through their work and their communal life. Justice Brennan recognized the quintessentially religious character of such social services programs in

376. *See supra* notes 150–55 and accompanying text.

377. *See supra* notes 173, 178, and accompanying text.

378. *See* Brady, *Catholic Social Thought*, *supra* note 361, at 219–20; Brady, *supra* note 208, at 112–13.

379. *See* Brady, *Catholic Social Thought*, *supra* note 361, at 219–20; Brady, *supra* note 208, at 112–13.

his concurrence in *Amos*. According to Justice Brennan, "[c]hurches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster."[380] For the Catholic Church, social services activities are no more secular than worship and preaching.

Nor will limiting collective bargaining to wages, hours, and other secular terms of employment solve the problem. In labor-management relations, like all social relations, the Catholic Church seeks collaboration and cooperation and rejects adversarialism.[381] Requiring the Church to bargain under secular bargaining regimes that presuppose and entrench an adversarial relationship between labor and management will undermine the Church's ability to live out its religious beliefs. Even if bargaining is limited to secular terms of employment, the process of bargaining under secular regimes remains incompatible with the church's doctrine and practice. Where all the relationships within a religious organization are suffused with religious significance as in the Catholic context, disentangling the secular from the religious is simply not possible.

Thus, the only effective and workable protection for the ability of religious groups to preserve, transmit, and develop their beliefs free from government interference is a broad right of church autonomy that extends to all aspects of church affairs. While in theory it may be preferable to grant relief only in situations where religious doctrine or practice is actually burdened, *Smith* prohibits the type of judicial inquiry that such an approach would require, and existing case law demonstrates that judges are not able to identify such burdens accurately. Line drawing between quintessentially religious activities and activities that are less critical to the religious mission is similarly problematic. It is by no means clear where such a line should be drawn, and, moreover, there is no single line that fits all religious organizations. For some organizations, like the Catholic Church, no such line exists at all. Thus, the only approach to government regulation of religious groups that is fully consistent with the lessons in *Smith* is a right of autonomy that extends to all matters of church administration, not just those with core religious significance and not just those that are demonstrably burdened by the state.

380. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in the judgment).

381. *See supra* notes 308–18 and accompanying text.

C. Religious Belief and Democratic Government

At this point, the reader might object to the direction of my argument. If limiting relief to identifiable burdens on religious belief and practice is not possible and no line can be drawn between quintessentially religious matters and less significant practices, the lesson of *Smith* is to abandon special protections for religious groups altogether. The *Smith* Court reached that conclusion in the context of individual religious exercise when it found that judges were unfit to determine when government action burdens practices central to individual believers.[382] Why should the outcome be different with respect to religious groups? I have argued above that full freedom of religious belief requires at least some special protections for groups, but perhaps that was the wrong starting point. After all, *Smith* does not guarantee a diversity of religious perspectives or that religious belief will be unaffected by government action. *Smith* states that government may not regulate beliefs as such, but the decision requires nothing further. The *Smith* Court may envision a world of diverse religious beliefs unimpeded by government action, but it did nothing to ensure such an environment. Moreover, while it might be desirable, in the abstract, to provide strong protections for religious belief and the groups that shape and sustain belief, there are countervailing state policies at stake when neutral laws of general applicability are involved. At this point, the reader should recall Ira Lupu's observation that the internal affairs of religious groups can have substantial effects upon the larger society, sometimes quite negative, and, thus, the state has important interests in extending neutral regulation to religious groups.[383] While the internal affairs of religious groups may not affect the external affairs of the larger community directly, they often do so indirectly. When religious organizations shape attitudes, moral convictions, and behavior in the larger society, as they frequently do, what goes on within the organizations has important consequences for those outside the group.[384] A broad right of church autonomy provides little protection when these consequences are harmful, and the religious organization prevails even in situations where there is no burden on religious belief and practice. Why should protections for religious

382. *See supra* notes 262–63 and accompanying text.

383. *See* Lupu, *supra* note 64, at 408–09.

384. *See id.*

belief necessarily trump countervailing state policies except in narrow cases where the group's behavior directly harms outsiders? Perhaps the readiness of lower courts to find compelling state interests when employment and labor laws burden group belief and practice reflects an important reality that supporters of a broad right of church autonomy ignore. Church autonomy comes at a cost, and given this cost, why is such a right desirable?

On this question as well, *Smith* provides important guidance. In the framework that *Smith* establishes for individual religious exercise, democratic processes play the central role in protecting religious liberty. The Free Exercise Clause does not guarantee relief where individual practice is burdened by neutral state action, but citizens can and, when reasonable, should extend such protection through legislative accommodations.

The faith that *Smith* places in democratic government invites consideration of the conditions that are necessary for its flourishing. If strong protections for individual religious belief and the groups that nurture and sustain belief are critical for successful democratic government, a broad right of church autonomy should certainly be preferred over the alternative of no special protections at all. Many scholars in recent years have emphasized the importance of religious groups and other voluntary associations for sustaining a well-functioning democratic order. Religious groups are among the "mediating structures" or institutions of "civil society" that stand between the individual and the state and transmit the values, skills, and attitudes necessary for self-government.[385] As the source of moral values, they function as "seedbeds of civic virtue."[386] As training grounds for the exercise of democratic skills and

385. Peter Berger and Richard John Neuhaus popularized the term "mediating structures." PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 158 (Michael Novak ed., 2d ed. 1996). The term "civil society" is also very common in recent literature. *See, e.g.*, Linda C. McClain & James E. Fleming, *Foreword: Legal and Constitutional Implications of the Calls To Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 289 (2000).

386. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991); Linda C. McLain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 309–10 (2000); Yael Tamir, *Revisiting the Civic Sphere*, *in* FREEDOM OF ASSOCIATION 214, 218 (Amy Gutmann ed., 1998); *see also* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

responsibilities, they are "schools for democracy."[387] However, for many scholars who have emphasized the importance of associational life in the democratic order, this critical role does not call for strong protections against state interference. To the contrary, the state has an important role in shaping the internal affairs of religious and other civic groups so that they are congruent with democratic norms and shared public values.[388] These scholars fear minority groups who teach "illiberal" values that will destabilize rather than strengthen democratic government.[389] Too much diversity in associational life is not a good thing when this diversity undermines our common civic culture.[390]

For those who desire congruence between the internal affairs of civil society institutions and shared public values, full freedom of religious belief is not desirable nor are strong protections for religious group autonomy. These scholars do not want to "bend over backwards" to protect minority religious groups from state interference where these groups do not support common civic

387. BERGER & NEUHAUS, *supra* note 385, at 194; *see also* McClain & Fleming, *supra* note 386, at 309–11; Tamir, *supra* note 386, at 218.

388. As Amy Gutmann has written:

> A government that is constitutionally dedicated to liberal democratic principles has a strong interest in supporting a vast assortment of associational activities among its citizens. But it also has a strong interest in regulating associations so that they support a liberal democratic form of government and public policies that are consistent with liberal democratic principles.

Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASSOCIATION, *supra* note 386, at 18; *see also* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 108, 151, 134–35, 277 (2000) [hereinafter MACEDO, DIVERSITY AND DISTRUST]; Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & L. SOC'Y 393, 394–95 (1992); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 428, 432, 440–41, 451 (2000); Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1573–74, 1592–93 (2001). For discussions of scholarship advocating this position, see NANCY ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 36–41 (1998), and Tamir, *supra* note 386, at 220–22. Both Rosenblum and Tamir disagree with those who favor using the power of the state to achieve congruence between the internal values of groups and public values. *See* ROSENBLUM, *supra*, at 47–65, 349–50; Tamir, *supra* note 386, at 215, 222–26. For others criticizing the demand for congruence, see William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75 CHI.-KENT L. REV. 603, 604–05 (2000).

389. *See* MACEDO, DIVERSITY AND DISTRUST, *supra* note 388, at 197; *see also* Tamir, *supra* note 386, at 222 (discussing such fear).

390. *See* MACEDO, DIVERSITY AND DISTRUST, *supra* note 388, at 2, 34, 134–35, 146–47, 219.

values.[391] Like Lupu in his earlier work,[392] they emphasize the ways in which the internal affairs of religious groups can have harmful effects on the larger society, and rather than broad autonomy, they welcome regulation that shapes, molds, and constitutes religious and other groups according to shared public values. A number of legal scholars who have written about religious group rights in the context of labor and employment laws share this position. Pointing to the role that religious groups play in shaping culture and transmitting values,[393] these scholars have argued that employment discrimination within religious organizations threatens a "culture of subordination" that harms outsiders as well as members.[394] Discrimination by religious institutions "send[s] a powerful social message"[395] and "imbeds . . . prejudice in American culture."[396] Labor conflicts, particularly in educational institutions, also impart the wrong values.[397] The state's interest in enforcing labor and employment regulation is, therefore, very strong.[398] The Fifth Circuit in *EEOC v. Mississippi College*[399] summarized this view well when it held that the state's interest in eradicating discrimination justified application of Title VII to faculty positions at a pervasively religious Christian college.[400] According to the court,

> Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will

391. *Id.* at 147, 197.

392. *See supra* notes 249–52 and accompanying text.

393. *See* Brant, *supra* note 64, at 277–78; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1091–93, 1114 (1996).

394. Rutherford, *supra* note 393, at 1114, 1123.

395. Brant, *supra* note 64, at 277.

396. Rutherford, *supra* note 393, at 1091.

397. *See* Evelyn M. Tenenbaum, *The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry*, 64 ALB. L. REV. 629, 671, 674 (2000).

398. *See* Brant, *supra* note 64, at 278; Rutherford, *supra* note 393, at 1116, 1121–23; Tenenbaum, *supra* note 397, at 671, 673–74.

399. 626 F.2d 477 (5th Cir. 1980).

400. *Id.* at 488–89.

> be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated.[401]

All of these scholars misunderstand the proper relationship between religious groups and democratic government. Democratic government is not supported best by homogeneity of beliefs and values, even beliefs whose correctness seems unassailable and values that seem essential for democratic life. Shaping associational life so that the internal practices and values of religious groups and other mediating institutions match shared public norms stifles new ideas that could challenge prevailing perspectives in progressive directions. Where government regulation inhibits the preservation, transmission, and development of minority beliefs within religious communities and other civic groups, it disserves democracy, not serves it. Full freedom of belief, even unpopular and unorthodox belief, is essential to the health of democratic society as are the groups that make such beliefs possible. If democratic majorities were permitted to entrench prevailing values by intruding upon the internal practices of institutions that promote alternative views, improvements in the status quo would be difficult to make and errors would go unchallenged. Without unorthodox ideas, society will stagnate. The dangers are especially grave when democratic majorities are given primary responsibility for protecting individual liberties as they are in *Smith*.[402] While it may be preferable in theory to protect only positive alternatives and new ideas that are helpful rather than harmful, humility requires us to admit that we do not always know where today's errors lie or where tomorrow's advances are hidden.

A number of other scholars have also defended the importance of religious group freedom in a democratic society. Religious groups and other civic associations are buffers against overweening state power.[403] Religious groups enhance individual autonomy by providing the context for personal development and expression.[404] Religious groups can also provide a realm of privacy, intimacy, and

401. *Id*. at 489.

402. *See supra* notes 264–67 and accompanying text.

403. *See* Esbeck, *supra* note 220, at 53, 67–68; Garnett, *supra* note 270, at 1853; Gedicks, *supra* note 106, at 115, 158; Lupu & Tuttle, *supra* note 106, at 40, 84.

404. *See* Gedicks, *supra* note 106, at 115–16, 158; *see also* Tamir, *supra* note 386, at 215.

supportive social bonds.[405] In addition, religious groups mark the limits of state jurisdiction by addressing spiritual matters that lie beyond the temporal concerns of government.[406]

My view goes further. Religious groups do not just check the power of the state, provide a context for individual development and communal support, or address extratemporal matters. Nor do they simply transmit important values and skills essential for democratic self-government, though they certainly do play all of these roles. Rather, for many religious groups, spiritual matters have much to say about the shape of the temporal order. Religious communities with prophetic traditions speak to the state and its citizens about the content of laws, the distribution of wealth and power, and the requirements of justice. Gerard Bradley has written that "[i]t is precisely the lot of a church to live by norms unsuited to organize a polity acting in history."[407] This is only partly true. Of course, no political system can mirror the relationships and structures appropriate within a church. However, for many religious traditions, including the Catholic tradition discussed above, the norms of the church are viewed as a guide for the norms of politics. The Catholic Church, as I observed, views its own internal life as a model for social relationships in the larger community, including relationships between labor and management. For the Catholic Church, the cooperative vision of collective bargaining that it advocates is not intended solely for its own institutions. To the contrary, it promotes this vision as the standard that should guide political decision makers and commercial actors as well. Indeed, the Church's contemporary teaching on social issues began with a document designed to address the desperate condition of the working classes and the clash between capital and labor at the height of the industrial revolution.[408] The Church believes that only the Gospel message can provide the

405. *See* Eisgruber & Sager, *supra* note 7, at 1311–13; Galston, *supra* note 388, at 604; Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1072–75 (1983); Tamir, *supra* note 386, at 215.

406. *See* Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1084–87 (1989); Lupu & Tuttle, *supra* note 106, at 40, 84, 92; Smith, *supra* note 216, at 1017–18.

407. Bradley, *supra* note 406, at 1087.

408. This document, *Rerum Novarum*, was issued in 1891 by Pope Leo XIII and inaugurated the contemporary Catholic social thought tradition. *See* POPE LEO XIII, RERUM NOVARUM ¶¶ 1–3 (1891), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 14–15.

"genuine solution" to these and other social problems.[409] Indeed, "the new command of love" displayed on the cross, modeled in the communal life of the church, and imitated in the Church's works of mercy is not only "the basic law of human perfection" but also "of the world's transformation."[410] The Church looks forward to a renewed social order that reflects[411] and foreshadows[412] the kingdom of God.

Indeed, it is activist religious traditions such as these that have contributed much to the development of America's political culture over the course of its history. Judge John Noonan has observed that religious "crusades" played an indispensable role in ending slavery and in the fight for civil rights a century later.[413] Nothing guarantees that religious crusades will be for the good, writes Judge Noonan.[414] Nor have any succeeded without conflict.[415] However, much would have been lost without their contributions to the formation of American civic culture and political values. Though the ideals of religious crusades were at one time unpopular and unorthodox, and even abhorrent to many,[416] many were, in fact, seeds of progress.

Thus, democratic government flourishes best when religious communities are free to develop, teach, and practice their religious beliefs and doctrines without government interference, no matter how unpopular or even repugnant their ideas may seem. The alternative perspectives and ways of life that religious groups communicate and model are the source of new ideas that make change and progress possible. Diversity of religious belief and associational life are good things in a democracy, and they would not be possible without strong protections for religious groups. Lupu

409. POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 5 (1991), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 439, 443. For further discussion, see Brady, *supra* note 361, at 215–21.

410. GAUDIUM ET SPES, *supra* note 312, ¶ 38, at 188.

411. *See* JOHN PAUL II, SOLLICITUDO REI SOCIALIS ¶ 48 (1987), *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 311, at 395, 430.

412. *See* GAUDIUM ET SPES, *supra* note 312, ¶ 39, at 189; LABOREM EXERCENS, *supra* note 311, ¶ 27, at 389; OCTOGESIMA ADVENIENS, *supra* note 313, ¶ 37, at 278.

413. *See* JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 250–52, 256–58 (1998).

414. *See id.* at 250.

415. *See id.* at 258–60.

416. *See id.* at 251 (discussing the "antislavery crusade" that "angered and alienated and frightened the slaveholding South into rebellion"); *id.* at 257–58 (describing resentment generated by the civil rights movement).

and others are correct to point out that religious groups play an important role in shaping the larger public culture and values. It is for this reason that these groups must be protected from state interference rather than molded according to majoritarian values. Anything else would be shortsighted and harmful not only to the religious community but also to the larger society.

At this point the reader might raise a further concern. I may have demonstrated that strong protections for religious belief and the groups that nourish these beliefs are important for democratic self-government, but my argument applies equally well to nonreligious associations. Just like religious groups, nonreligious organizations may advocate and model new perspectives for social and political life. Why, then, the reader may ask, should religious groups receive greater protection from government interference than nonreligious groups enjoy? Indeed, as I observed above, many scholars in recent years have questioned the fairness of special protections for religious organizations. If religious and nonreligious groups both provide important benefits to individuals and society, why should religious groups receive more favorable treatment?[417]

The proper response to this concern is not to diminish protections for religious organizations but to expand them for secular associations that play similar roles in the lives of individuals and the larger community. Currently, the right of association under the Speech Clause provides considerable protections for groups that engage in expressive activities, including the transmission of values.[418] The Supreme Court has consistently stated that where a law interferes with the internal structures or affairs of expressive associations and, as a result, significantly impairs the ability of the group to advocate its chosen message, the First Amendment requires relief unless application of the law is justified by a compelling state interest.[419] According to the Court, government interference need not be intentional to violate the Constitution.[420] In either case,

417. *See* Eisgruber & Sager, *supra* note 7, at 1283; Gedicks, *An Unfirm Foundation*, *supra* note 7, at 574; Gedicks, *Defensible Free Exercise Doctrine*, *supra* note 7, at 926–27; Lupu & Tuttle, *supra* note 106, at 39–40, 67–68 (describing this position).

418. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–50 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609, 622–23 (1984). The Supreme Court precedent also provides strong protections for "intimate" associations that provide supportive contexts for personal development and social bonds. *See Jaycees*, 468 U.S. at 617–20.

419. *See Dale*, 530 U.S. at 648; *Jaycees*, 468 U.S. at 622–23.

420. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

protections are necessary to "preserv[e] political and cultural diversity"[421] and to prevent the majority from "imposing its views on groups that would rather express other, perhaps unpopular, ideas."[422] While most of the Court's decisions have dealt with laws affecting membership and leadership choices,[423] impermissible intrusions on internal affairs may take other forms as well. Regulation of leadership or membership decisions is just an "example," though a "clear[]" example, of unconstitutional interference.[424]

The protection that nonreligious groups currently receive under the right of association is considerable, but it is not as expansive as the broad right of autonomy that I have defended for religious organizations. Indeed, the Court's approach to the right of association strongly resembles the more moderate option for religious group rights that I have rejected above as unworkable. Just as religious groups under this option receive relief from government regulation only when the regulation burdens religious belief or practice, expressive associations are currently entitled to exemptions from government regulation only when it significantly affects or alters the group's message.

In my view, a broad right of autonomy should be extended to nonreligious associations where possible. Just as religious groups play an important role in democratic government, so do nonreligious associations with expressive purposes. Moreover, some of the same problems that make limiting relief to actual burdens unworkable in the religious context also arise where the group's beliefs are nonreligious. Under the Court's current approach to freedom of association, judges must determine when government action significantly impairs or alters the group's message. Unfamiliarity with the message and the temptation to reach desirable results can lead to misunderstanding and error in a secular context just as in a religious one.

421. *Jaycees*, 468 U.S. at 622.

422. *Dale*, 530 U.S. at 647–48.

423. *See Dale*, 530 U.S. at 640; N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988); Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); *Jaycees*, 468 U.S. at 609.

424. *Jaycees*, 468 U.S. at 623; *see also Dale*, 530 U.S. at 648 ("Government actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" (quoting *Jaycees*, 468 U.S. at 623)).

The Court's recent decision in *Boy Scouts of America v. Dale*[425] illustrates these dangers well. In *Dale*, the Boy Scouts sought exemption from a New Jersey statute prohibiting discrimination based on sexual orientation in places of public association.[426] The litigation in *Dale* arose when the Boy Scouts revoked the adult membership of James Dale, an openly homosexual assistant scoutmaster.[427] The Boy Scouts argued that Dale's readmittance would interfere with its expression because homosexual conduct is not consistent with the values it seeks to teach young people.[428] The majority gave deference to the Boy Scouts' description of its message and its views about what would impair this message[429] and concluded that application of the law would violate the group's associational rights.[430] Four justices, led by Justice Stevens, dissented and strongly disagreed with the majority's conclusion and its deference to the Boy Scouts' claims.[431] According to the dissent, the majority should have engaged in an "independent analysis" of the group's message and the burden imposed by the New Jersey law,[432] and it should have required the Boy Scouts to demonstrate a "clear, unequivocal" position regarding homosexuality.[433] Delving into the Boy Scouts' internal and public statements regarding homosexuality in great detail, the dissent found no clear, shared stance regarding homosexuality.[434] To the contrary, the dissent found it "exceptionally clear" that the Boy Scouts did not have a shared message disapproving of homosexuality.[435]

The dissenting opinion in *Dale* is a masterful deconstruction of the Boy Scouts' argument. Turning the Boy Scouts' statements against one another, the dissent goes far in undermining the Boy Scouts' description of its own beliefs and in convincing the reader that the Boy Scouts does not really endorse the position that the

425. 530 U.S. 640 (2000).
426. *Id.* at 643–46.
427. *Id.* at 644.
428. *Id.*
429. *Id.* at 653.
430. *Id.* at 659.
431. *Id.* at 685–86 (Stevens, J., dissenting).
432. *Id.* at 686.
433. *Id.* at 687–88.
434. *Id.* at 684–85.
435. *Id.* at 684.

group has adopted consistently since 1978 and advocated publicly in litigation and other settings.[436] The dissent's opinion is as troubling as it is brilliant. Giving no deference to the association's assertions regarding its own beliefs and expression, the dissenting justices essentially turn the Boy Scouts' position on its head, and one is left wondering whether the justices' true motivation was reaching a desirable result. The majority stops short of making such an accusation, but the suggestion lies just beneath the surface. Criticizing the New Jersey Supreme Court for reaching the same conclusion as the dissent, the Court stated that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[437] We must not, the majority later cautions, be

> guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.[438]

Regardless of whether the dissent did succumb to that temptation, the danger was clearly present, and the dissent's claim that its conclusions were "exceptionally clear" was certainly wrong. The disagreement between the majority and dissent in this case demonstrates that it is not always easy for judges to interpret the messages of expressive associations or ascertain when government action burdens those messages. This is especially so where the group's beliefs are uncommon or unpopular, not fully logical or coherent, in the process of development, or otherwise lacking the clarity and consistency that the dissent would like to see. The deference that the majority supports would be helpful, but opportunities for misunderstanding will remain, as will temptations to misconstrue. When mistakes are made, the costs are high for both the group and the larger society. When government suppresses or alters the messages of its expressive associations, the diversity of voices in the community is diminished.

436. For a short chronology of the Boy Scouts' internal and public statements regarding homosexuality, see *id.* at 651–53 (majority opinion).

437. *Id.* at 651.

438. *Id.* at 661.

How far protections for group autonomy should extend under the right of association is a more difficult issue. Special problems arise in the context of nonreligious associations that are not present in the case of religious organizations. Except in the rare case where a religious organization operates a commercial enterprise,[439] most, if not all, of the activities of religious groups are bound up with First Amendment purposes. By contrast, the range of nonreligious associations that engage in some sort of expressive activity is extensive and includes many groups with significant commercial activities or other nonexpressive functions. Chapters of the United States Jaycees and Rotary Clubs, which were the subject of two important Supreme Court decisions under the right of association in the 1980s, are examples.[440] Thus, if all secular associations engaging in expressive activities were exempted from government regulation whenever it affects internal group affairs, much of the economic life of the community would be beyond state control, including the nonexpressive activities of organizations with significant commercial purposes. For this reason, a broad right of autonomy for all nonreligious organizations that engage in expressive association may not be feasible.

How an expanded right of expressive association might be structured and which organizations should be covered is beyond the scope of this paper. Justice O'Connor has suggested drawing a distinction between organizations that are primarily engaged in expressive activities and those in which commercial or other nonexpressive purposes predominate, and she would accord the former broad protections unavailable to the latter.[441] One might follow Justice O'Connor's lead and extend a broad right of autonomy to those associations in which expressive purposes predominate. Other organizations would still have to show a burden on their expression to receive relief. Such an approach seems promising, and it would target strong protections to the type of group most likely to supply new perspectives to public discussion and

439. Such operations are beyond the scope of this Article. Greater regulation would be permissible where religious groups operate commercial enterprises.

440. *See* Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 539–41, 548–49 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 612–14 (1984); *id.* at 638–40 (O'Connor, J., concurring in part and concurring in the judgment).

441. *See Jaycees*, 468 U.S. at 631–40 (O'Connor, J., concurring in part and concurring in the judgment).

debate. However, whether this approach is, in fact, fair and workable would require further analysis. My purpose here is simply to point us in the right direction. Our goal should, indeed, be greater equality for religious and nonreligious associations, but this goal should be achieved by expanding protections for nonreligious groups rather than diminishing protections for religious groups.

To the extent that some differences remain between the treatment of religious and nonreligious groups, these differences need not be troubling. I have argued that the similar roles that religious and nonreligious groups play in democratic society justify strong protections for both, but these protections need not be exactly the same. The right of association under the Speech Clause is a different constitutional guarantee than the Free Exercise Clause, and the structure and details of the freedoms afforded under these two clauses will reflect that fact.

Moreover, the Court has never required identical treatment for religion and nonreligion. For many contemporary scholars, religious belief and activity are no longer distinguishable from strongly-held nonreligious convictions.[442] However, our constitutional regime reflects a contrary view. As many scholars have pointed out, the very existence of constitutional provisions dedicated exclusively to religion demonstrate that religion is distinctive in our constitutional framework.[443] The Supreme Court's decisions also support this distinctiveness. For example, in *Smith*, the Court permitted and, indeed, encouraged special legislative accommodations where

442. *See* Eisgruber & Sager, *supra* note 7, at 1262–66; Gedicks, *Defensible Free Exercise Doctrine*, *supra* note 7, at 926–27; *see also* Lupu & Tuttle, *supra* note 106, at 39, 67–68 (describing this development).

443. *See* Kent Greenawalt, *Freedom of Association and Religious Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 386, at 109, 122; Laycock, *Religious Liberty as Liberty*, *supra* note 7, at 314; Laycock, *Remnants of Free Exercise*, *supra* note 7, at 16; Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 717 (1992); McConnell, *Singling Out Religion*, *supra* note 7, at 9. Laycock writes:

> Religion is unlike other human activities, or at least the founders thought so. The proper relation between religion and government was a subject of great debate in the founding generation, and the Constitution includes two clauses that apply to religion and do not apply to anything else. This debate and these clauses presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.

Laycock, *Remnants of Free Exercise*, *supra* note 7, at 16.

government action burdens individual religious exercise.[444] In *Amos*, the Court held that similar legislative accommodations for religious groups do not violate the Establishment Clause even if nonreligious groups do not receive the same benefits. According to the Court, "it has never indicated that statutes that give special consideration to religious groups are *per se* invalid."[445] Rather, "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."[446] While the Court's decisions in recent years may be more "neutralist" than in the past, they do not embrace a thoroughgoing neutralism that treats religion and nonreligion exactly alike. Indeed, just last term in *Locke v. Davey*,[447] the Court rejected such a view and expressly reaffirmed the distinctive treatment of religion under the First Amendment.[448]

So far, I have offered a justification for protecting religious groups that should appeal to believers and nonbelievers alike. Religious groups and the ideas they generate are an important source of new perspectives for social and political life, and the same role played by nonreligious groups justifies strong protections for them as well. For many scholars, a defense of free exercise protections that is based, instead, on the special value of religious convictions or the special authority of religious commands in the lives of believers would be unconvincing to nonbelievers.[449] Whereas in the founding era, supporters of religious liberty may have defended protections on the ground that religion is, in Madison's words, a "duty towards the Creator" and "precedent, both in order of time and in degree of

444. *See supra* notes 264–67 and accompanying text.

445. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).

446. *Id.*

447. 124 S. Ct. 1307 (2004).

448. *Id.* at 1313 ("[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other [secular] callings or professions.").

449. *See* Eisgruber & Sager, *supra* note 7, at 1248, 1261–66; Gedicks, *Defensible Free Exercise Doctrine*, *supra* note 7, at 950–52.

obligation, to the claims of Civil Society,"[450] this type of argument is not persuasive today. As Lupu and Tuttle have written, "Madison's confident assertion of the supremacy of religious duties over secular ones no longer seems self-evident."[451]

Before I close, I hope the reader will indulge me in such an argument. If the reader will permit, I will show that a view that takes seriously the ultimate importance of religious belief supports the same conclusions as the more ecumenical approach taken above. For those in the founding era and many believers today, the Free Exercise Clause reflects a faith in a transcendent reality that grounds, guides, and communicates with the temporal world. It is this transcendent point of reference that is the source of truths for individual conduct, social relationships, and political life, and these truths are, in turn, the basis for legal and political legitimacy. However, the Free Exercise Clause also reflects the fact that our understanding of this divinity is limited. We see but in a "mirror dimly."[452] Despite the many truths manifest in creation and even with the added light of revelation, the God we seek is yet partly hidden, and out of this mystery different traditions develop. These traditions all bear insights, though partial and incomplete, of a greater reality that remains always beyond our ken even as it continually beckons us to draw nearer. Without freedom to grow and develop unimpeded by the state, much of value within these faiths would be lost and our understanding would be diminished. Valuable insights are not limited to believers. God's grace extends to those who do not know Him by name. The Christian tradition teaches that the world is fallen and correct understanding requires the assistance of revelation, but God has not abandoned His creation and good remains. Indeed, much can be known through human reason and experience, even unaided by faith, and believers can learn much from those outside their faith. True progress requires humility by all. Believers and nonbelievers need one another, and only together can they draw closer to the reality that orders, sustains, redeems, and perfects the world and those within it. Thus, unless broad freedoms are extended to nonreligious groups as well as

450. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ESTABLISHMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 299 (Robert A. Rutland & William M.E. Rachal eds., 1973).

451. Lupu & Tuttle, *supra* note 106, at 39–40.

452. 1 *Corinthians* 13:12.

religious ones, the entire community will suffer, believers and nonbelievers alike.