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Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church

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CIVIL PROCEDURE AND THE ESTABLISHMENT CLAUSE: EXPLORING THE MINISTERIAL EXCEPTION, SUBJECT-MATTER JURISDICTION, AND THE FREEDOM OF THE CHURCH

Gregory A. Kalscheur, S.J.*

ABSTRACT

What sort of defense is provided by the ministerial exception to employment discrimination claims? The ministerial exception bars civil courts from reviewing the decisions of religious organizations regarding the employment of their ministerial employees. While the exception itself is widely recognized by courts, there is confusion with respect to the proper characterization of the defense provided by the exception: should it be seen as a subject matter jurisdiction defense, or as a challenge to the legal sufficiency of the plaintiff's claim? This Article argues that articulating the right answer to this question of civil procedure is crucial to a proper understanding of the role that the ministerial exception plays as a constitutional protection for the religious freedom of churches and other religious institutions. The Article explores the ministerial exception to anti-discrimination law as a case study of the extent to which the U.S. Constitution adequately protects the freedom of the church. The ministerial exception is best understood as a subject matter jurisdiction defense, and getting the right answer to this civil procedure question is not just a matter of citing the right procedural rule in the defendant's motion to dismiss. Instead, careful attention to this question leads to a better understanding of the foundations of our constitutional order. When courts clearly and consistently treat the ministerial exception as a limitation on their subject matter jurisdiction, they make a powerful statement about the foundations of limited government—they affirm the penultimacy of the state. Yet, even though the jurisdictional approach to the ministerial exception does provide crucial protection for one dimension of institutional religious freedom, this Article suggests that the jurisdictional approach alone cannot provide an adequate constitutional foundation for robust protection of the freedom of the church.

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INTRODUCTION

What sort of defense is provided by the ministerial exception to employment discrimination claims? The ministerial exception “bars civil courts from reviewing decisions of religious organizations relating to the employment of their ministers.”¹ Invoking this doctrine, courts routinely dismiss claims of race and sex discrimination brought by ministers against their religious employers under Title VII and other federal and state anti-discrimination laws.² The doctrine serves to protect religious

¹ *Hollins v. Methodist Healthcare, Inc.*, 379 F. Supp. 2d 907, 911 (W.D. Tenn. 2005), *aff'd*, 474 F.3d 223 (6th Cir. 2007). The Seventh Circuit, in an opinion by Judge Posner, recently suggested that the doctrine might better be characterized as the “internal affairs” doctrine, because “[t]he assumption behind the rule . . . is that Congress does not want courts to interfere in the internal management of churches.” *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). The doctrine protects churches from courts telling them “whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic. . . . That is why the ministers exception is better termed the ‘internal affairs’ doctrine.” *Id.* (quoting *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006)). While Judge Posner’s suggestion accurately reflects the fundamental purpose of the doctrine, this Article will follow the practice of most courts in referring to the doctrine as the “ministerial exception.”

² See, e.g., *Boggan v. Miss. Conference of the United Methodist Church*, 222 F. App’x 352 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 63 (2007) (dismissing Title VII and § 1981 race discrimination claims); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (dismissing a Title VII sex discrimination claim); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (dismissing Title VII race and sex discrimination claims); *Cronin v. S. Ind. Annual Conference, United Methodist Church*, No. 1:05-cv-1804-LJM-WTL, 2007

organizations from secular control or manipulation in the choice of employees who perform spiritual functions by “preclud[ing] any inquiry whatsoever into the reasons behind a church’s ministerial employment decision.”³ Rooted in the First Amendment’s protection for religious freedom, the exception recognizes that the Constitution protects “the unfettered right”⁴ of a church to make such employment decisions.

While the protection recognized by the exception has itself been widely accepted by the federal and state courts, the proper characterization of the defense provided by the exception is a question on which courts disagree.⁵ Is the ministerial exception a subject matter jurisdiction bar to consideration of the plaintiff’s claim, or is it a challenge to the legal sufficiency of the plaintiff’s claim? I will argue in this Article that articulating the right answer to this question of civil procedure is crucial to a proper understanding of the role that the ministerial exception plays as a constitutional protection for the religious freedom of churches and other religious institutions. This technical question of civil procedure thus implicates a foundational principle of constitutional order.⁶

Citizens with a commitment to religious freedom might reasonably assume that institutional religious freedom—the freedom of the church to be the church—lies at the heart of the religious freedom protected by the First Amendment.⁷ Yet constitutional protection for the freedom of religious institutions to carry out their institutional religious missions seems to be under assault today.⁸ This assault draws constitutional

WL 2258762 (S.D. Ind. Aug. 3, 2007) (dismissing a claim under Title VII and the Americans with Disabilities Act); *O’Connor v. Church of St. Ignatius Loyola*, 779 N.Y.S.2d 31 (App.Div. 2004), *appeal denied*, 820 N.E.2d 292 (N.Y. 2004), *cert. denied*, 544 U.S. 1017 (2005) (dismissing employment discrimination claims).

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

⁴ *Rayburn*, 772 F.2d at 1169.

⁵ *See, e.g., Rweyemamu v. Cote*, 520 F.3d 198, 206 n.4 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 302–03 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007); *see also* Petition for Writ of Certiorari, *Petruska*, 462 F.3d 294 (No. 06-985), 2007 WL 128608, at *17 n.3 (noting an emerging split on whether ministerial exception claims present a jurisdictional bar); *cf. Schleicher*, 518 F.3d at 478 (arguing that the exception should be understood as a merits defense that should be resolved on a motion for judgment on the pleadings, *see* FED. R. CIV. P. 12(c), rather than a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

⁶ *See* discussion *infra* Part II.

⁷ Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America’s Church State Proposition*, 23 J.L. & RELIGION 15, 41 (2007–08) (“The central value of the First Amendment is, then, freedom in two senses—not only in the cause of conscience in spiritual matters, but also . . . the necessity of having the government step back so as to let the church be the church.”).

⁸ *See, e.g.,* Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J. L. & PUB. POL’Y 387, 450 (2005); Michael P. Moreland, *Religious Free Exercise and Anti-Discrimination Law*, 70 ALB. L. REV. 1417 (2007).

support from the United States Supreme Court's decision in *Employment Division v. Smith*, where the Court held that neutral laws of general application do not run afoul of the Free Exercise Clause even when those laws impose significant burdens on religious practice.⁹ The Court in *Smith* refused to recognize any constitutionally required free exercise exemption from Oregon's drug laws for the religiously inspired use of peyote, even though the ingestion of peyote for sacramental purposes is a central component of worship in the Native American Church.¹⁰

Following *Smith*, courts have held that states are empowered to tell religious entities that their religiously motivated activities in society must comply with prevailing notions of morality that are embodied in the law, even when those laws come into conflict with the religious entities' doctrinal commitments.¹¹ Thus, for example, relying on *Smith*, courts have required religiously affiliated social service agencies to comply with legislative mandates to include contraceptive coverage in their employees' prescription drug benefits.¹² In light of *Smith*, these rulings come "as no great surprise,"¹³ but they have implications extending beyond mandatory contraceptive coverage statutes. As Professor Susan J. Stabile has noted, the legislation unsuccessfully challenged by religious employers in these cases establishes a "dangerous precedent":

[It] fails to respect the integrity of religious institutions, [thus] threatening the Church's autonomy and right of self-definition. . . . The legislation in question raises a fundamental question of who decides what a religious institution is, and who defines the institution's mission. It also sets a dangerous precedent for even greater intrusions on religion in the future.¹⁴

⁹ 494 U.S. 872, 878–82 (1990).

¹⁰ *Id.* at 874; *see also id.* at 903–04 (O'Connor, J., concurring) ("Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. . . . Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution." (citation omitted)).

¹¹ *See Catholic Charities of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied sub nom. Catholic Charities of Albany v. Dinallo*, 128 S. Ct. 97 (2007); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004).

¹² *See Serio*, 859 N.E.2d at 465 ("Smith is an insuperable obstacle to plaintiffs' federal free exercise claim."); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81–90 (Cal. 2004) (discussing the applicability of *Smith*), *cert. denied*, 543 U.S. 816 (2004).

¹³ Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 744 (2005).

¹⁴ *Id.* at 745–46. The issues raised by these legislative mandate cases are not, of course, unique to Catholicism. Baptist institutions, for example, joined with Catholic Charities and other Catholic entities in challenging the New York contraception coverage mandate. *See Serio*, 859 N.E.2d at 462–63. Yet the extensive network of Catholic social service institutions makes the question of institutional religious freedom particularly acute for the Catholic Church. The

In contrast to these recent contraceptive mandate decisions, courts have uniformly held that a religious institution's ministerial employees cannot invoke federal or state statutes that forbid employment discrimination on the basis of race and sex in order to challenge the employment decisions made by their religious employers.¹⁵ Yet such anti-discrimination statutes are neutral laws of general application.¹⁶ *Smith*, therefore, can be read to support the conclusion that ministers seeking to bring sex or race discrimination claims against the religious institutions that employ them should not be barred from doing so.¹⁷ If the Court in *Smith* was willing to allow a state to

stakes are high:

The Catholic Church understands itself to be at the service of the human family, and the most tangible expression of that spirit is the network of charitable and social service institutions run by the church[:] schools, shelters, clinics, hospitals, counseling centers, and so on. That service, however, takes place in a pluralistic, secular culture governed by laws which do not always reflect the social and moral doctrine of Roman Catholicism. One perennial issue for Catholic institutions, therefore, is the extent to which they can adapt themselves to secular mores in order to serve the largest population possible, without losing their Catholic identity. . . . The open question is to what extent the secular culture will be willing to bend to accommodate the deeply held moral beliefs of religious groups; and to what extent the Catholic Church, riding a strong wave of identity concerns, will feel the need to disentangle its institutions from partnerships with humanitarian groups or government agencies for fear of complicity in values at odds with church teaching.

John L. Allen, Jr., Vatican Correspondent, National Catholic Reporter, Keynote Address, Symposium on the Jurisprudential Legacy of John Paul II, in 45 J. CATHOLIC LEGAL STUD. 229, 239 (2006). This need to avoid complicity in values at odds with church teaching led Catholic Charities in the Archdiocese of Boston to discontinue providing adoption services under a contract with the state's Department of Social Services, because Massachusetts law prohibits discrimination according to sexual orientation in the placement of adopted children. The Archdiocese concluded that Catholic Charities could not cooperate with the placement of children with same-sex couples without violating the church's teaching against legal recognition of same-sex unions. *Id.* In the absence of a legislative exemption from the general state law prohibiting discrimination on the grounds of sexual orientation, Catholic Charities chose to cease providing an important social service, which it had been providing for over 100 years. Patricia Wen, "They Cared for the Children"; *Amid Shifting Social Winds, Catholic Charities Prepares to End its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1. Since its founding, Catholic Charities had placed more children in homes than any other agency in the state, and it was widely respected as the "top private provider of adoptive homes for hard-to-place foster children." *Id.*; Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, March 11, 2006, at A1 (noting that "[t]he agency was especially adept at finding homes for so-called 'special needs' adoptions, which include children who are older or who have significant physical or emotional disabilities").

¹⁵ See *infra* notes 29–33 and accompanying text.

¹⁶ See, e.g., 42 U.S.C. § 20003-2 (2000).

¹⁷ See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial*

criminalize the sacramental ingestion of peyote in the context of worship within the Native American Church, why should the government be prevented from requiring religious employers to bring their ministerial selection criteria into line with the requirements of neutral and generally applicable anti-discrimination law?¹⁸ Isn't "[e]nding centuries of discrimination"¹⁹ on the basis of sex at least as important a goal as stemming the dangers that flow from the use of peyote? Nonetheless, even in the wake of *Smith*, "courts and commentators still find it unimaginable that the Catholic Church or [the] Southern Baptist Convention might be required to comply with anti-discrimination law. At some visceral level, it is considered an impossibility."²⁰

The ministerial exception is the legal doctrine invoked to protect religious institutions from the requirements of anti-discrimination law in the ministerial employment context. First recognized by the Fifth Circuit in *McClure v. Salvation Army*,²¹ the exception has been widely adopted by the state and federal courts—although the U.S. Supreme Court itself has neither recognized nor rejected the ministerial exception.²² In order for the exception to apply, the employer must be a religious institution and the employee must function as a minister.²³ The employer need not, however, be a church, diocese or synagogue, or an entity operated by such a religious organization.²⁴ Instead, a religious employer is any entity "whose mission is marked by clear or obvious religious characteristics."²⁵

Exemption from Antidiscrimination Law, 75 FORDHAM L. REV. 1965, 1983 (2007) ("Under *Smith* . . . the free exercise clause should not shield religious practices from Title VII."); *id.* at 1984 (criticizing attempts made by courts and commentators to distinguish *Smith* in the ministerial exception context). In contrast, Kathleen Brady argues that *Smith* should be understood to support a broad right to church autonomy extending to *all* aspects of church affairs. See Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1636, 1649–56, 1672–79; see also Chopko & Moses, *supra* note 8, at 404 ("*Smith* preserved church autonomy claims from its doctrinal revision.").

¹⁸ See Corbin, *supra* note 17, at 2003.

¹⁹ *Id.*; see also Sarah Fulton, Note, *Petruska v. Gannon University: A Crack in the Stained Glass Ceiling*, 14 WM. & MARY J. WOMEN & L. 197 (2007); Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007); Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom* (Univ. of Chi. Public Law and Legal Theory, Working Paper No. 167, 2007), available at http://ssrn.com/abstract_id=995325; cf. Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005 (2007).

²⁰ Corbin, *supra* note 17, at 2003.

²¹ 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

²² Corbin, *supra* note 17, at 1966.

²³ *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 134 (2007).

²⁴ *Id.*

²⁵ *Id.* at 226 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299,

Thus, religiously affiliated schools and hospitals are religious employers for purposes of the ministerial exception.²⁶ In addition, the category of ministerial employee is not limited to those who are ordained ministers.²⁷ Instead, ministerial status is determined by considering the employee's function within the religious institution.²⁸ The ministerial exception applies if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."²⁹ The exception has been applied to bar claims under Title VII of the Civil Rights Act of 1964,³⁰ the Americans with Disabilities Act,³¹ the Age Discrimination in Employment Act,³² as well as state common law claims.³³

While many courts have recognized and applied the ministerial exception, they have adopted a range of positions regarding the constitutional foundation for the doctrine.³⁴ Prior to *Smith*, the exception was often thought to be rooted in the Free Exercise Clause.³⁵ Many courts continue to adopt a free exercise rationale, even though the reasoning of *Smith* would seem to undermine that approach.³⁶ Other courts and commentators see the exception as rooted in a right to church autonomy that is protected by the Establishment Clause, or in some combination of the First Amendment's two religion clauses.³⁷ Some level of constitutional protection for ministerial

310 (4th Cir. 2004) (holding that a predominantly Jewish nursing home is a religious employer that can invoke the ministerial exception)).

²⁶ *Id.* at 225.

²⁷ *Id.* at 226.

²⁸ *Id.*

²⁹ *Id.* (quoting *Rayburn v. Gen. Conference Of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); see Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979) (articulating the functional understanding of ministerial employees).

³⁰ 42 U.S.C. §§ 2000e–2000e-16c (2000).

³¹ 42 U.S.C. §§ 12101–12117 (2000).

³² 29 U.S.C. §§ 621–634 (2000).

³³ *Hollins*, 474 F.3d at 225 (citing cases).

³⁴ See discussion *infra* Part IV; see also *Rweyemamu v. Cote*, 520 F.3d 198, 206 (2d Cir. 2008) ("Wherever its doctrinal roots may lie, the 'ministerial exception' is well entrenched; it has been applied by circuit courts across the country for the past thirty-five years.").

³⁵ See, e.g., *Rayburn v. Gen. Conference Of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69; see also Corbin, *supra* note 17, at 1977–79; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1396 (1981).

³⁶ See, e.g., *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800–01, 800 n.* (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347–50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–63, 467 (D.C. Cir. 1996); see also Brady, *supra* note 17, at 1649–56.

³⁷ See, e.g., Corbin, *supra* note 17, at 1979–80; Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 34 n.162 (2005) (noting that the ministerial exception is "born of both Establishment and Free Exercise considerations"); see

employment decisions might also be rooted in the Court's precedents recognizing a First Amendment right of expressive association.³⁸

To what extent might a doctrine like the ministerial exception provide a constitutional foundation for the freedom of the church to be the church? Some scholars, including the Jesuit theologian John Courtney Murray, have suggested that protection for the freedom of the church was "codified" in the First Amendment.³⁹ Murray argued that the religion clauses of the First Amendment "sufficiently achieved" the important objective of guaranteeing the church "a full independence in the fulfillment of her divine mission."⁴⁰ Others, including Professor Richard Garnett, are "not so sure."⁴¹ Garnett questions whether "there actually is, in American constitutional law, a commitment to—or even room for"—a rich understanding of the freedom of the church.⁴² While there are a variety of constitutional doctrines, including the ministerial exception, that have the effect of protecting various dimensions of institutional religious freedom, Garnett suggests that constitutional doctrines like the ministerial exception "do not, in fact, evidence a robust, underlying commitment in our law to the *libertas ecclesiae* principle."⁴³

Even the ministerial exception may be difficult to square with the Court's recent religion clause jurisprudence.⁴⁴ While some form of the ministerial exception might well be grounded in the Court's expressive association precedents,⁴⁵ the right of expressive association can be overcome by a compelling governmental interest.⁴⁶ Given the anemic fashion in which courts often engage in compelling interest analysis when faced with a claim of religious freedom,⁴⁷ freedom of expressive association may not

also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 44, 49, 50 n.201 (1998–99); cf. *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (stating that while "the ministers exception is a rule of interpretation, not a constitutional rule," it is derived from policies that "come from the establishment clause rather than from the free-exercise clause").

³⁸ See Corbin, *supra* note 17, at 1981, 2032–38; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 517, 522, 528–30 (2007); Richard W. Garnett, *John Courtney Murray on the "Freedom of the Church"*, 4 J. CATHOLIC SOC. THOUGHT 59, 86 & n.145 (2007).

³⁹ Garnett, *Freedom of the Church*, *supra* note 38, at 60–61; see JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 69–71 (1960).

⁴⁰ MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 39, at 70.

⁴¹ Garnett, *Freedom of the Church*, *supra* note 38, at 63.

⁴² *Id.*

⁴³ *Id.* at 64; see also *id.* at 73 (questioning whether the constitutionally protected religious liberty of believers expressing their beliefs in and through communities "is the same thing, and up to the same 'revolutionary' task," as Murray "meant by the freedom of the Church").

⁴⁴ See discussion *infra* Parts III & IV.

⁴⁵ See *supra* note 38 (citing Corbin and Garnett).

⁴⁶ Corbin, *supra* note 17, at 2032–38.

⁴⁷ See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 91 (Cal. 2004) (noting that a California contraceptive coverage mandate statute passes strict scrutiny

end up providing robust protection to the freedom of the church, even when the church invokes religious doctrine in support of its ministerial selection criteria. In the face of this doctrinal indeterminacy, Garnett asks a provocative question: does the *libertas ecclesiae* principle survive in the First Amendment, as Murray argued, and did it ever do “any real work, in Religion Clause theory and doctrine?”⁴⁸ Garnett’s question prompts another, equally provocative, question: To what extent is it even possible to talk successfully about a theological principle like “the freedom of the church” in the language of the law?⁴⁹

This Article endeavors to explore these questions by examining the ministerial exception to anti-discrimination law as a case study of the extent to which the U.S. Constitution adequately protects the freedom of the church. The focus of this exploration will be the question of the nature of the defense provided by the ministerial exception: should the ministerial exception be characterized as a subject matter jurisdiction defense, or as a challenge to the legal sufficiency of the plaintiff’s claim? And how is the answer to this procedural question related to the idea of the freedom of the church?

Part I will briefly describe the confusion that currently exists regarding the nature of the defense provided by the ministerial exception. Part II will discuss the theological principle of the freedom of the church, and argue that a proper understanding of this principle includes a jurisdictional distinction between church and state. Part III will outline Professor Carl Esbeck’s theory of the structural Establishment Clause and suggest that his understanding of the Establishment Clause has important points of contact with Murray’s understanding of the jurisdictional implications of the freedom of the church. Esbeck’s structural understanding of the Establishment Clause demonstrates that the principle of the freedom of the church is not an idea entirely foreign to the U.S. Constitution. Part IV will then explain why the ministerial exception is best understood as a subject matter jurisdiction defense. Getting the right answer to this civil procedure question is not just a matter of citing the right procedural rule in the defendant’s motion to dismiss; rather careful attention to this question will lead to a better understanding of the foundations of our constitutional order. When courts clearly and consistently treat the ministerial exception as a limitation on the subject matter jurisdiction of the civil courts, they make a powerful statement about the foundations of limited government: Such statements affirm the penultimacy of the state. Yet, even though it provides crucial protection for a dimension of institutional religious freedom, the jurisdictional approach alone cannot provide an adequate constitutional foundation for robust protection of the freedom of the church.

under the free exercise clause of the California Constitution).

⁴⁸ Garnett, *Freedom of the Church*, *supra* note 38, at 73.

⁴⁹ See James Boyd White, *Talking About Religion in the Language of the Law: Impossible But Necessary*, 81 MARQ. L. REV. 177 (1998).

I. *PETRUSKA'S MISTAKE*

In *Petruska v. Gannon University*, the Third Circuit wrongly concluded that the ministerial exception defense should be characterized as a challenge to the legal sufficiency of the plaintiff's claim.⁵⁰ Lynette Petruska, a former university chaplain at Gannon University, filed an employment discrimination action in federal court against Gannon, a private Catholic diocesan college.⁵¹ Her claim alleged that she had been demoted as the result of a restructuring of the University Chaplain's office, and that this action had been taken by the university on the basis of her gender.⁵²

The university responded to her lawsuit by invoking the ministerial exception and filing a motion to dismiss her claim for lack of subject matter jurisdiction, or in the alternative, for failure to state a claim on which relief could be granted.⁵³ The district court granted the university's motion to dismiss for lack of jurisdiction, and Petruska appealed.⁵⁴ While the Third Circuit agreed that the ministerial exception required the district court to dismiss Petruska's sex discrimination action, the court did not believe that the ministerial exception should be understood as a jurisdictional bar.⁵⁵ Instead, the court noted that the ministerial exception is properly raised in a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.⁵⁶

The *Petruska* court maintained that the ministerial exception should not be considered a matter of subject matter jurisdiction, because, in its view, the exception does not take away a federal court's very power to hear this sort of case.⁵⁷ The court explained that "it is beyond cavil that a federal district court has the authority to review claims arising under federal law,"⁵⁸ and Petruska had asserted a sex discrimination

⁵⁰ 462 F.3d 294, 295 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

⁵¹ *Id.* at 302.

⁵² *Id.* at 300–01.

⁵³ *Id.* at 302.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 303.

⁵⁸ *Id.* at 302; *see also* *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir. 2004) ("Federal question jurisdiction is statutorily established, giving district courts 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331.") (holding that the ministerial exception should not be understood as a matter of subject matter jurisdiction); *cf.* *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) ("Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits. . . ."); *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . . [T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

claim arising under Title VII of the Civil Rights Act of 1964. Because the claim arose under a federal statute, the district court had subject matter jurisdiction over the case.

Rather than seeing the exception as a constitutionally mandated limit on the subject matter jurisdiction of civil courts, the *Petruska* court drew on precedent from the Ninth and Tenth Circuits in support⁵⁹ of its conclusion that the ministerial exception is best characterized as a challenge to the legal sufficiency of the plaintiff's claim.⁶⁰ While a federal court does have subject matter jurisdiction to hear this sort of claim arising under a federal employment discrimination statute, the First Amendment bars a court from granting relief to a ministerial employee asserting such a claim.⁶¹ In this respect, the court explained, the ministerial exception is like a government official's defense of qualified immunity.⁶² The court noted that defendants often raise the issue of qualified immunity in a Rule 12(b)(6) motion to dismiss for failure to state a claim; it is not a matter of subject matter jurisdiction.⁶³ As in the case of qualified immunity, the ministerial "exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them."⁶⁴

While the Third, Ninth, and Tenth Circuits⁶⁵ view the ministerial exception as a challenge to the legal sufficiency of the plaintiff's claim, other courts characterize it as a subject matter jurisdiction bar. As the Sixth Circuit recently explained:

The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees.⁶⁶

Thus, to raise the ministerial exception as a defense to an employment discrimination claim is to challenge the court's very power to hear and decide a ministerial

⁵⁹ *Id.*

⁶⁰ *Petruska*, 462 F.3d at 302 (citing *Elvig*, 375 F.3d at 955; *Bryce v. Episcopal Church of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002)).

⁶¹ *Id.*

⁶² *Id.* (citing *Bryce*, 289 F.3d at 654) ("If the church autonomy doctrine applies to the statements and materials on which plaintiffs have based their claims, then the plaintiffs have no claim for which relief may be granted. In this sense, the assertion that the First Amendment precludes the sexual harassment suit is similar to a government official's defense of qualified immunity. . . .").

⁶³ *Id.*

⁶⁴ *Id.* at 303.

⁶⁵ The Tenth Circuit in *Bryce* was considering the related "church autonomy doctrine," rather than the ministerial exception itself. *See id.* at 302.

⁶⁶ *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 134 (2007).

employee's claim against a religious institution.⁶⁷ A large number of courts share this jurisdictional understanding of the ministerial exception.⁶⁸ As the Seventh Circuit

⁶⁷ See Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 42–43 (noting that a “jurisdictional dismissal is a concession that the issue in dispute . . . is not within the court’s constitutional power” to decide, and “[j]urisdiction, of course, concerns the scope of a court’s power as defined by the Constitution”).

⁶⁸ See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999); *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (rejecting minister’s assertion “that lay courts have jurisdiction to hear his age discrimination claims”); *Gomez v. Evangelical Lutheran Church in Am.*, No.1:07CV786, 2008 WL 3202925, at *6, *10 (M.D.N.C. Aug 7, 2008) (granting Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction); *Cronin v. S. Ind. Annual Conference, United Methodist Church*, No.1:05-cv-1804-LJM-WTL, 2007 WL 2258762, at *6 (S.D. Ind. Aug. 3, 2007) (stating that because plaintiff’s position falls under the ministerial exception, “the Court cannot exercise subject matter jurisdiction in this case”); *Rweyemamu v. Cote*, No.3:05CV00969WWE, 2006 WL 306654, at *4 (D. Conn. Feb. 8, 2006) (holding that “pursuant to the constitutional mandate of the Free Exercise Clause, we lack subject matter jurisdiction”), *aff’d*, 520 F.3d 198 (2d Cir. 2008); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 692–93 (W.D. Pa. 2004) (“The propriety of asserting the ‘ministerial exception’ defense through a 12(b)(1) motion . . . is well-established.”); *Musante v. Notre Dame of Easton Church*, No. Civ.A.301CV2352MRK, 2004 WL 721774, at *5 (D. Conn. Mar. 30, 2004) (“When the ministerial exception applies, courts lack subject matter jurisdiction over the case.”); *Van Osdol v. Vogt*, 908 P.2d 1122, 1134 (Colo. 1996) (finding that the ministerial exception precludes courts “from taking jurisdiction” over the claims); *Rweyemamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319, 324 (Conn. App. 2006) (“It bears emphasis that the ministerial exception is jurisdictional rather than evidentiary. Religious institutions need not rely on proof of affirmative defenses in employment discrimination suits but may categorically resist the judicial intrusion implicit in inquiry into their employment practices and relationships.”); *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 674 (D.C. 2005) (“Our own decisions most analogous to this case teach that the Archdiocese’s motion to dismiss on First Amendment grounds is properly analyzed as a challenge to subject matter jurisdiction under [Rule] 12(b)(1).”); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526, 528 (Fla. Dist. Ct. App. 2006) (“[C]ivil courts lack subject-matter jurisdiction . . . to consider Appellant’s claim because it constitutes an internal employment dispute between a priest and his church.”); Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 49 & 50 n.201; Lupu & Tuttle, *Faith-Based Initiative and the Constitution*, *supra* note 37, at 34 n.162 (explaining that the limitations of the ministerial exception “go to subject-matter jurisdiction of the civil courts”); see also *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 998–99 (D. Kan. 2004) (noting that some courts have characterized the ministerial exception as jurisdictional, while others have held that it is more appropriately characterized as a challenge to the sufficiency of the plaintiff’s claim under Rule 12(b)(6)); cf. *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (explaining that while federal courts “do not have jurisdiction to decide ecclesiastical controversies,” in the context of an action brought to enforce the Fair Labor Standards Act, the “internal affairs” doctrine provides a merits defense that should be raised in a Rule 12(c)

noted in another recent ministerial exception case, secular courts have no power to speak—*i.e.*, no jurisdiction—with respect to the issues surrounding a religious body’s choice of ministerial employees.⁶⁹

II. JURISDICTION AND THE FREEDOM OF THE CHURCH

John Courtney Murray was confident that the important objective of safeguarding the freedom of the church was “sufficiently achieved by the religious provisions of the First Amendment.”⁷⁰ Murray argued that a jurisdictional “distinction between church and state”⁷¹ was affirmed by the Constitution, and this distinction was adequate to protect the freedom of the church:

This affirmation is made through the imposition of limits on government, which is confined to its own proper ends, those of temporal society. . . . [T]he American Constitution does not presume to define the Church or in any way to supervise her exercise of authority in pursuit of her own distinct ends. The Church is entirely free to define herself and to exercise to the full her spiritual jurisdiction. It is legally recognized that there is an area which lies outside the competence of government. This area coincides with the area of the divine mission of the Church, and within this area the Church is fully independent, immune from interference by political authority.⁷²

Murray concluded that “[i]n the United States the freedom of the church was completely unfettered; she could organize herself with the full independence which is her native right.”⁷³

What is the extent of the area of “spiritual jurisdiction” that lies beyond the interference of political authority? The Second Vatican Council’s *Declaration on Religious Freedom*, a document on which Murray’s thought exercised significant influence,⁷⁴ characterized the theological principle of the freedom of the church in this way: the “freedom of the church is the fundamental principle in what concerns the

motion for judgment on the pleadings).

⁶⁹ *Tomic*, 442 F.3d at 1037.

⁷⁰ MURRAY, WE HOLD THESE TRUTHS, *supra* note 39, at 70.

⁷¹ *Id.*; see also *id.* at 65 (noting that the “distinction [between] the spiritual and temporal orders and their respective jurisdictions” was a “key principle” for Roger Williams).

⁷² *Id.* at 70.

⁷³ *Id.* at 71.

⁷⁴ See Leslie Griffin, *Commentary on Dignitatis humanae (Declaration on Religious Freedom)*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 249, 250–54, 257 (Kenneth R. Himes ed., 2005).

relations between the church and governments and the whole civil order.”⁷⁵ The church claims for herself that “full measure of freedom which her care for the salvation of men requires,” and she bases that claim “in her character as a spiritual authority, established by Christ the Lord,” and given by divine mandate “the duty of going out into the whole world and preaching the gospel to every creature.”⁷⁶

The *Declaration on Religious Freedom* also articulates an alternative rationale for the principle of the freedom of the church that is *not* rooted in the unique mandate given by Christ to his Church: the church “also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith.”⁷⁷ “Religious bodies are a requirement of the social nature both of man and of religion itself.”⁷⁸ Thus, the freedom from coercion in religious matters that flows from the dignity of the human person gives rise to a freedom from coercion when individuals act in community.⁷⁹ Understood in this way, the freedom claimed by the Catholic Church is a freedom shared by *all* churches and religious communities, and the content or object of the right protected by the principle of the freedom of the church is the same for the Catholic Church and all other religious bodies.⁸⁰

The content of the institutional freedom demanded by the principle of the freedom of the church is spelled out in Article 4 of the *Declaration on Religious Freedom*.⁸¹ As the first words of the relevant text make clear, the principle of the freedom of the church does not demand an absolute freedom from any legal regulation:

Provided the just requirements of public order are observed, religious bodies rightfully claim freedom in order that they may govern themselves according to their own norms, honor the

⁷⁵ *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 675, 693 (Walter M. Abbott ed., 1966) (Declaration No. 13).

⁷⁶ *Id.* at 693–94.

⁷⁷ *Id.*

⁷⁸ *Id.* at 682 (Declaration No. 4).

⁷⁹ See discussion *infra* Part IV.E.1.

⁸⁰ See *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II, *supra* note 75, at 682 n.9 (commentary by John Courtney Murray) [hereinafter Murray, *Commentary and Notes on the Declaration of Religious Freedom*]. The foundation of the freedom claimed by the Catholic Church is the unique mandate of Christ. “In the case of other religious Communities, the foundation of the right is the dignity of the human person, which requires that men be kept free from coercion, when they act in community, gathered into Churches, as well as when they act alone.” *Id.*; see also *Declaration on Religious Freedom*, *supra* note 75, at 694 (Declaration No. 13) (stating that because all people “possess the civil right not to be hindered in leading their lives in accordance with their conscience . . . a harmony exists between the freedom of the Church and the religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law”).

⁸¹ See *Declaration on Religious Freedom*, *supra* note 75.

Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles.⁸²

The freedom of the church also gives rise to freedom from coercion in the areas of church life most directly relevant to the ministerial exception:

Religious bodies also have *the right not to be hindered, either by legal measures or by administrative action on the part of government, in the selection, training, appointment, and transferal of their own ministers*, in communicating with religious authorities and communities abroad, in erecting buildings for religious purposes, and in the acquisition and use of suitable funds or properties.⁸³

The freedom of the church also protects the freedom of the church to speak in the public square, both in order to spread the faith and in order to influence public policy:

Religious bodies also have the right not to be hindered in their public teaching and witness to their faith, whether by the spoken or by the written word. . . . In addition, it comes within the meaning of religious freedom that religious bodies should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity.⁸⁴

As Murray notes, by affirming the right to bring the insights of faith to bear on the whole of human activity—including questions of public policy—the principle of the freedom of the church stands against any attempts to argue that religion is a purely private affair that must be kept confined to the sacristy.⁸⁵ Instead, the

⁸² *Declaration on Religious Freedom*, *supra* note 75, at 682 (emphasis added) (Declaration No. 4).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* at 682–83. The Declaration also explains that “the social nature of man and the very nature of religion afford the foundation of the right of men freely to hold meetings and to establish educational, cultural, charitable, and social organizations, under the impulse of their own religious sense.” *Id.* at 683.

⁸⁵ See Murray, *Commentary and Notes on the Declaration of Religious Freedom*, *supra* note 80.

Declaration insists that “[r]eligion is relevant to the life and action of society. Therefore religious freedom includes the right to point out this social relevance of religious belief.”⁸⁶ This aspect of the freedom of the church is indeed “a core religious function”; it is an “integral part of the practice of religion to speak to the moral and spiritual dimensions of social issues.”⁸⁷ The effective exercise of this aspect of the freedom of the church empowers the church to be the church by serving as a voice speaking out to protect the dignity and transcendence of the human person in the face of state efforts to assert omnipotent omniscience over all areas of human life and human activity.⁸⁸

The Declaration confidently asserts that where these components of the principle of the freedom of the church are taken seriously in law and in practical application, “there the Church succeeds in achieving a stable situation of right as well as of fact and the independence which is necessary for the fulfillment of her divine mission. This independence is precisely what the authorities of the Church claim in society.”⁸⁹ Taken as a whole, the *Declaration on Religious Freedom* teaches that the freedom of the church—the independence necessary for the fulfillment of the church’s divine mission—is not an absolute freedom.⁹⁰ Instead, it is an assertion of internal institutional autonomy and freedom from arbitrary regulation.⁹¹ As Article 4 of the Declaration makes clear, the just demands of public order (the promotion of justice, peace, and public morality) may give rise to reasonable regulation of the activity of the church in the temporal sphere without violating the principle of the freedom of the church.⁹²

⁸⁶ *Id.* at 683 n.11.

⁸⁷ Robert T. Kennedy, *Contributions of Dignitatis Humanae to Church-State Relations in the United States*, in *RELIGIOUS LIBERTY: PAUL VI AND DIGNITATIS HUMANA* 103 (John T. Ford ed., 1995); see also *Pastoral Constitution on the Church in the Modern World*, in *THE DOCUMENTS OF THE VATICAN II*, *supra* note 75, at 199, 288-89 (“[I]t is always and everywhere legitimate for [the Church] to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance.”).

⁸⁸ See MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 39, at 68 (noting that the American understanding of separation of church and state rejects “the juridical omnipotence and omniscience of the state”).

⁸⁹ *Declaration on Religious Freedom*, *supra* note 75, at 694 (Declaration No. 13).

⁹⁰ See *supra* text accompanying notes 82-89.

⁹¹ Kennedy, *supra* note 87, at 96, 97 (arguing that church and state “[e]ach must enjoy internal autonomy; each must respect the freedom of the other to fulfill its function in service to the larger society of which each is a part; neither may assume the role nor responsibilities of the other”).

⁹² *Id.* at 96 (“[The] independence ‘necessary for the fulfillment of the Church’s divine mission,’ [is] not an absolute independence denying all regulatory authority in civil government.”). The components of public order—justice, peace, and public morality—are outlined in no. 7 of the Declaration. See *Declaration on Religious Freedom*, *supra* note 75, at 685-87 (Declaration No. 7); see also Gregory A. Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 14-30 (2006) (discussing the role played by the concept of public order in the

That assertion, of course, begs a critical question: who is to determine when regulation of the activity of the church is a reasonable response to the just demands of public order, and how is that determination to be made? In other words, “when, and to what extent, may civil government place restrictions upon the exercise of religious freedom?”⁹³ Current U.S. constitutional doctrine provides a distressingly expansive answer to this question. The Court in *Employment Division v. Smith* held that the Free Exercise Clause provides no protection for religious freedom when a neutral law of general application incidentally imposes a burden on religiously motivated activity—no matter how significant that burden might be, and no matter how insignificant a threat to the government’s interest in promoting public order might be posed by judicial recognition of an exception to the regulation.⁹⁴

The *Declaration on Religious Freedom* did provide some specificity regarding the elements of the public order component of the common good: the state acts properly through law when its objective is to promote justice, public peace, and public morality.⁹⁵ The Declaration did not, however, specify what sort of legal framework ought to be employed in order to determine when the demands of public order justify placing a particular restriction on the exercise of religious freedom, nor did it take a position on what institution—the judiciary or the legislature—should have the primary role in determining whether a particular restriction is reasonable in light of the demands of public order.⁹⁶ As John Courtney Murray himself recognized, “the criterion of public order remains general, in need of further specification, and *subject to abuse*.”⁹⁷ The *Smith* rule seems to enhance dramatically the possibility that the public order criterion will be abused by legislatures insensitive to the demands of religious freedom or opposed to the sort of challenge that the robust recognition of the freedom of the church presents to the ideology of state monism.

Acknowledging the potential for abuse of the public order criterion, Murray argued that the state, through law, could restrict “religious expression (in public rites, teaching, observance, or behavior), *only* when such forms of public expression *seriously* violate either the public peace or commonly accepted standards of public morality, or the rights of other citizens.”⁹⁸ Murray recognized that a practical problem arises

Declaration).

⁹³ Kennedy, *supra* note 87, at 107. John Courtney Murray saw this question as the “‘crucial issue’ in the care of religion by government.” *Id.* (citing John Courtney Murray, *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 519, 527, 528 (1964)).

⁹⁴ See *Employment Div. v. Smith*, 494 U.S. 872 (1990); Garnett, *Freedom of the Church*, *supra* note 38, at 77–78.

⁹⁵ See Francis P. Canavan, *Dignitatis Humanae, The Catholic Concept of the State and Public Morality*, in CATHOLICISM AND RELIGIOUS FREEDOM 81 (Kenneth L. Grasso & Robert P. Hunt eds., 2006).

⁹⁶ See *supra* text accompanying notes 82–93.

⁹⁷ Kennedy, *supra* note 87, at 108 (emphasis added).

⁹⁸ Murray, *The Problem of Religious Freedom*, *supra* note 94, at 530 (emphasis added).

in trying to apply this general principle to particular cases—how to avoid arbitrary application of the public order principle by the public power? Murray responded to this problem by outlining four fundamental requirements that should be adhered to in the casuistry that necessarily develops as the principle is applied in practice:

[T]hat the violation of the public order be really serious; that legal or police intervention be really necessary; that regard be had for the privileged character of religious freedom, which is not simply to be equated with other civil rights; that the rule of jurisprudence of the free society be strictly observed, scil., as much freedom as possible, as much coercion as necessary.⁹⁹

The *Smith* rule takes none of these requirements into account.¹⁰⁰ In contrast, Robert T. Kennedy argues that “Murray’s four requirements come close to expressing the essence of a legal doctrine used for many years by American courts [prior to *Smith*] to assess the constitutionality of legislation” that substantially burdened the free exercise of religion.¹⁰¹ Under the compelling interest test articulated by the Court in *Sherbert v. Verner*,¹⁰² the government was prohibited from burdening religious exercise “unless the government is able to demonstrate that the restriction is necessary to further a paramount or compelling governmental interest and is the least restrictive means of doing so.”¹⁰³ Kennedy contends that this pre-*Smith* constitutional rule of strict scrutiny of laws that burden religious freedom was “entirely consistent” with the teaching of the Declaration, presumably including its teaching on the freedom of the church.¹⁰⁴ Prior to *Smith*, then, it might not have been so hard to identify within the

⁹⁹ *Id.* at 530. Murray further explained that the issues of casuistry will call for a continual dialogue between the public powers and the personal and political consciousness of the citizenry, with a view to finding equitable solutions. . . . What chiefly matters is that the free exercise of religion should always be responsible. . . . What further matters is the spirit of tolerance, as a moral attitude, among the citizenry—a spirit of reverence and respect for others, which issues in an abhorrence of coercion in religious matters.

Id. If this moral attitude of tolerance is weak among the citizenry, and especially if this attitude is weak among their legislative representatives, the *Smith* rule seriously erodes robust constitutional protection for religious freedom.

¹⁰⁰ See *supra* text accompanying note 9.

¹⁰¹ Kennedy, *supra* note 87, at 108.

¹⁰² 374 U.S. 398, 403 (1963).

¹⁰³ Kennedy, *supra* note 87, at 108.

¹⁰⁴ *Id.* at 110. Thus, Kennedy concludes that the teaching of the *Declaration on Religious Freedom* “calls to the American legal system to return to one of the more resplendent of its constitutional features.” *Id.* But see *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990) (noting that, outside the *Sherbert* context of the denial of unemployment compensation, the

Free Exercise Clause of the First Amendment adequate constitutional protection for the freedom of the church. After *Smith*, greater attention must be paid to other constitutional foundations for that freedom.¹⁰⁵ It may be time to take more seriously the dimension of the principle of the freedom of the church that finds expression in the jurisdictional distinction between church and state.

The principle of the freedom of the church finds its origins in a jurisdictional conflict. The eleventh century papal call for “the freedom of the church” was a call for “the liberation of the clergy from imperial, royal, and feudal domination and their unification under papal authority.”¹⁰⁶ Thus, the cry for the “freedom of the church” was a cry for “its freedom from control by ‘the laity.’”¹⁰⁷ The plurality of jurisdictions and legal systems coexisting and competing within one community that Harold Berman argues is “[p]erhaps the most distinctive characteristic of the Western legal tradition” was itself the product of the church’s medieval insistence on its institutional freedom from lay, imperial domination: “The church declared its freedom from secular control, its exclusive jurisdiction in some matters, and its concurrent jurisdiction in other matters. . . . The very complexity of a common legal *order* containing diverse legal *systems* contributed to legal sophistication.”¹⁰⁸

Murray characterized the dual jurisdiction flowing from the “ancient distinction between church and state”—“[t]he dualism of mankind’s two hierarchically ordered forms of social life”—as “Christianity’s cardinal contribution to the Western political tradition.”¹⁰⁹ And Murray understood the limitations on governmental power articulated in the First Amendment as the constitutional vehicle that brought this strand of the Western political tradition into the American constitutional order.¹¹⁰ As Murray explained:

Court has “always found the [*Sherbert*] test satisfied”).

¹⁰⁵ See *supra* notes 11–12.

¹⁰⁶ HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 103–04 (1983). The “principal aim of the [Papal] [R]evolution” was “expressed in the slogan, ‘the freedom of the church.’” *Id.* at 105. Berman notes that the freedom of the church

was not something that could be achieved overnight—indeed, in its deepest significance it was not something that could be achieved ever—yet the very depth of the idea, its combination of great simplicity and great complexity, was a guarantee that the struggle to achieve it would be, on the one hand, a prolonged one, over decades and generations and even centuries, and on the other hand, a cataclysmic one, with drastic and often violent changes occurring in rapid succession.

Id.

¹⁰⁷ *Id.* at 108. Berman argues that it was out of this controversy that “the first modern Western theories of the state and secular law . . . were born.” *Id.* at 111.

¹⁰⁸ *Id.* at 10.

¹⁰⁹ MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 39, at 64.

¹¹⁰ *Id.*

The juridical result of the American limitation of governmental powers is the guarantee to the Church of a stable condition of freedom. . . . It should be added that this guarantee is made not only to the individual . . . but to the Church as an organized society *with its own law and jurisdiction* . . . Within society, as distinct from the state, there is room for the independent exercise of authority which is not that of the state.¹¹¹

An incident from the early history of the American republic recounted by Leo Pfeffer in his book, *Church, State, and Freedom*, indicates that the founders themselves understood the jurisdictional separation that is part of the “ancient distinction between church and state” and recognized the limits of civil authority with respect to the pre-existing, organized society that is the church:

In 1783 the papal nuncio at Paris addressed a note to Benjamin Franklin suggesting that, since it was no longer possible to maintain the previous status whereunder American Catholics were subject to the Vicar Apostolic in London, the Holy See proposed to Congress that a Catholic bishopric be established in one of the American cities. Franklin transmitted the note to the [Continental] Congress, which directed Franklin to notify the nuncio that “the subject of his application to Doctor Franklin being purely spiritual, it is without the jurisdiction and powers of Congress, who have no authority to permit or refuse it, these powers being reserved to the several states individually.” (Not many years later the several states would likewise declare themselves to “have no authority to permit or refuse” such a purely spiritual exercise of ecclesiastical jurisdiction.)¹¹²

¹¹¹ *Id.* at 70–71 (emphasis added), *quoted in* Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 55 n.228. Murray notes that the U.S. Supreme Court affirmed this principle of church freedom in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). The *Kedroff* case is discussed *infra* notes 213–17. *See also* Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATHOLIC SOC. THOUGHT 231, 245–48, 265–66 (2004) (discussing the distinction between state and society as a central feature of Catholic social thought).

¹¹² LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 108 (1967), *quoted in* MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 39, at 71; *see also* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385 (describing the disestablishment process in the states).

Commenting on this incident, Murray noted that it had been “centuries [since] the Holy See [had] been free to erect a bishopric and appoint a bishop without the prior consent of government [and] all the legal formalities with which Catholic states had fettered the freedom of the Church.”¹¹³ This led Murray to conclude that “[i]n the United States the freedom of the Church was completely unfettered; she could organize herself with the full independence which is her native right.”¹¹⁴ For Murray, jurisdictional independence was evidence of the “stability of the Church’s condition at law” that is “the root of the matter” of the freedom of the church.¹¹⁵ The ancient recognition of a sphere of jurisdiction reserved to the church that is beyond the authority of civil government finds its American constitutional analog in what Professor Carl Esbeck describes as the jurisdictional nature of the structural Establishment Clause.¹¹⁶ The structural Establishment Clause protects a reserved sphere in which the freedom of the church is secure; a sphere “in which religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission.”¹¹⁷

III. JURISDICTION AND THE STRUCTURAL ESTABLISHMENT CLAUSE

Rather than trying to demonstrate why *Smith* does not eliminate a free exercise foundation for the ministerial exception,¹¹⁸ commentators like Carl Esbeck, Ira Lupu, and Robert Tuttle argue that the ministerial exception is best understood as a jurisdictional bar rooted in the Establishment Clause.¹¹⁹ Esbeck, for example, maintains that the line of Supreme Court precedent that gives rise to the ministerial exception “is more easily understood when the Establishment Clause is conceptualized as a structural restraint on the government’s power to act on certain matters pertaining to religion.”¹²⁰ As a structural principle, the Establishment Clause operates by policing a jurisdictional boundary. Indeed, the structural Establishment Clause is a “model of dual jurisdictions”¹²¹—the clause separates “two spheres of competence,”¹²² government and religion, and orders the relationship that exists between those two spheres. Some

¹¹³ MURRAY, WE HOLD THESE TRUTHS, *supra* note 39, at 71.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 2.

¹¹⁷ *Id.* at 55–56; *see also supra* notes 80–83 and accompanying text (discussing the Catholic Church’s understanding of its divine origin and mission and the general issue of the freedom of religious institutions).

¹¹⁸ *See Brady*, *supra* note 17.

¹¹⁹ *See Esbeck, Establishment Clause as a Structural Restraint*, *supra* note 37, at 3–4; Lupu & Tuttle, *Faith-Based Initiative and the Constitution*, *supra* note 37.

¹²⁰ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 3–4.

¹²¹ *Id.* at 28.

¹²² *Id.* at 10.

matters fall within the competence of civil government; others remain in the exclusive sphere of religion; and others might be shared by religion and government.¹²³

Understood in this way, the structural Establishment Clause serves as a powerful witness to a fundamental commitment of American constitutionalism: the government as an entity of limited authority.¹²⁴ Esbeck draws on the work of William Clancy and Max L. Stackhouse to illustrate this point.¹²⁵ Clancy, for example, explains that the logical distinction between government and religion as two separate orders of competence shows that

Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.¹²⁶

Max Stackhouse sees the distinction between government and religion that is recognized in the Establishment Clause as governmental recognition of religion as a sort of co-equal, competing sovereign, outside the state's control with respect to religious matters:

[The First] [A]mendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, *religion is an arena that, when it is doing its own thing, is off limits*. This is not only an affirmation of the freedom of individual belief or practice, nor only an acknowledgement that the state is noncompetent when

¹²³ *Id.* at 14, 31. It should be noted that Esbeck's structural Establishment Clause thesis is not a claim about the original meaning of the Clause. Instead, Esbeck argues that the Supreme Court has treated the Establishment Clause as a structural restraint on government power in a way that parallels "the dual-authority relationship of state and church that is deeply entrenched in the Western legal tradition." Esbeck, *60th Anniversary of the Everson Decision*, *supra* note 7, at 27.

¹²⁴ See *infra* text accompanying note 129; *infra* Part IV.E.1.

¹²⁵ See *infra* text accompanying notes 126–29.

¹²⁶ William Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 27–28 (1958), *quoted in* Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 10 n.34.

it comes to theology, *it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.*¹²⁷

How to define the sovereign arena in which religion “is doing its own thing” may present us with significant challenges, but the fundamental point is clear.¹²⁸ The structural Establishment Clause affirms limited government by recognizing that some matters lie within an exclusive sphere of religion that is off limits to governmental regulation.¹²⁹

Like John Courtney Murray,¹³⁰ Esbeck notes that this sort of jurisdictional division of authority has deep roots in the Western jurisprudential tradition. Esbeck, for example, quotes Roscoe Pound’s description of the jurisdictional division that prevailed in the Middle Ages: “In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental.”¹³¹ This sort of division of authority and jurisdiction reflects the conviction that the temporal power is “not the sole possessor of sovereignty.”¹³² The freedom of the church within the religious realm is aptly described as a “sovereign authority.” Government and religion might be seen as “cosovereigns” in this sense: there is a territory beyond civil affairs that is “reserved to the churches.”¹³³ To characterize government and religion as cosovereigns is to recognize that the churches are not simply voluntary organizations that exist at the sufferance of the state. They are not simply “jural entities, and not mere creatures of the law deriving their existence from the state. Rather, churches preexisted the state, are transnational, and would continue to exist if the state were suddenly dissolved or destroyed.”¹³⁴

¹²⁷ Max L. Stackhouse, *Religion, Rights, and the Constitution*, in AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990), quoted in Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 10 n.34 (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *supra* text accompanying notes 72–118.

¹³¹ Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933), quoted in Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 50 n.206; see also MURRAY, WE HOLD THESE TRUTHS, *supra* note 39, at 64 (noting that the “ancient distinction between church and state”—“[t]he dualism of mankind’s two hierarchically ordered forms of social life”—“had been Christianity’s cardinal contribution to the Western political tradition”).

¹³² Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 54 n.225 (quoting Mark DeWolfe Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 92–95 (1953)).

¹³³ *Id.*

¹³⁴ *Id.* at 55.

Acknowledging the churches as social actors possessing independent authority that is not that of the state places a powerful limit on the power of the state. Such an acknowledgment affirms that the state's assertion of sovereignty is not absolute. The protection of the freedom of churches as "sovereigns" not created by the state points to the existence of another sovereignty (the only true sovereignty)—that of a God (or gods)—existing "beyond, before, and superior to the state."¹³⁵ Esbeck explains that "theistic religion posits a Sovereignty that sits in judgment over the state, its ambitions to temporal power, and its pretensions of infallibility. It is for this reason that at crucial points in Western history the institutional church had a 'pivotal role in guarding against political absolutism.'"¹³⁶

As institutions that give public witness, each in their own way, to absolute truths that transcend politics, the churches relativize politics. Religion has political implications simply by asserting that political truth does not encompass the totality of all that humans can desire and know. By "[r]elativizing the political," religion "operates to expand that social space that is nongovernmental."¹³⁷ Those matters that fall under the exclusive sovereignty of religion are beyond the jurisdiction of government.¹³⁸ The resulting social space "give[s] breathing room to individuals, families,

¹³⁵ *Id.* at 67; cf. Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 217 (2006) ("[A]fter all, [God] is sovereign if anyone be."). Drawing on the work of Judge John T. Noonan, Jr., Brennan notes that the American commitment to constitutional protection for religious freedom can be understood as a recognition of God's sovereignty:

[I]t allows us human subjects to meet our indefeasible duty to inform conscience and freely follow the will of the sovereign God. . . . We must resist the Court's and others' claims on behalf of false sovereigns, . . . not because we ourselves are individual sovereigns, but because, with respect to seeking and instantiating the good, personal and common both, we operate under an obligation that is nothing short of sovereign. The natural law that gives birth to this right of ours to self-government is itself our intelligent participation as human subjects in the Eternal Law, the mind of the sovereign God sweetly disposing all things to their proper ends.

Id. at 224 (citation omitted).

¹³⁶ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 67 (quoting *Gerard v. Bradley*, *Church Autonomy in the Constitutional Order: The End of Church and State*, 49 LA. L. REV. 1057, 1072 (1989)); see also MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 39, at 204–05 ("[T]he freedom of the Church as the spiritual authority served as the limiting principle of the power of government."); Garnett, *The Freedom of the Church*, *supra* note 38, at 82 ("[T]here are reasons to think that the *libertas ecclesiae* principle has mattered and does matter for the development and sustaining of constitutionally limited government.").

¹³⁷ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 68.

¹³⁸ *Id.* at 109.

neighborhoods, schools, and other mediating groups.”¹³⁹ All this, Esbeck maintains, follows from a structural, jurisdictional understanding of the Establishment Clause.¹⁴⁰

How does the structural Establishment Clause define the boundary between the sphere of government and that of religion? This, Esbeck notes, “resolves itself down to a question of jurisdiction,”¹⁴¹ and he judges the conclusion of Max Stackhouse to be apt: when religion “is doing its own thing,” it is off limits.¹⁴² The government exceeds its jurisdiction as limited by the Establishment Clause when it attempts to regulate matters “in the exclusive sphere of religion”¹⁴³ or matters that are “inherently religious.”¹⁴⁴ Esbeck points to several Supreme Court cases to illustrate what he means by these terms.¹⁴⁵ In *Tony and Susan Alamo Foundation v. Secretary of Labor*, for example, the Court held that application of the requirements of the Fair Labor Standards Act to the ordinary commercial activities of a religious organization did not violate the religion clauses of the First Amendment.¹⁴⁶ Because the Act’s requirements “apply only to commercial activities undertaken with a ‘business purpose,’” they have “no impact on [the religious organization’s] own evangelical activities or on individuals engaged in volunteer work for other religious organizations.”¹⁴⁷ The record-keeping requirements of the Act, like “such secular governmental activity as fire inspections and building and zoning regulations,” did not unconstitutionally intrude into religious affairs.¹⁴⁸ Insofar as it seeks to regulate the wages of employees involved in the ordinary commercial activities of a religious entity, the FLSA is legislation operating within the civil government’s proper sphere of action; it does not invade the protected religious sphere.¹⁴⁹

¹³⁹ *Id.* at 68.

¹⁴⁰ *Id.* at 75.

¹⁴¹ Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 325 (2000).

¹⁴² *Id.*

¹⁴³ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 78.

¹⁴⁴ *Id.* at 77.

¹⁴⁵ *Id.* at 78–81.

¹⁴⁶ 471 U.S. 290, 305–06 (1985).

¹⁴⁷ *Id.* at 305.

¹⁴⁸ *Id.*

¹⁴⁹ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 79; cf. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503–04 (1979) (finding that because of the unique mission-sensitive role played by teachers in a church-operated school, “serious First Amendment questions” would follow from the NLRB’s exercise of jurisdiction over teachers in such schools). The Court in *Catholic Bishop* avoided deciding the constitutional question by assuming, in the absence of clear intent to the contrary, the Congress intended to exempt church-operated schools from regulation under the NLRA. *Id.* at 504–07. Esbeck argues that under the structural Establishment Clause, the outcome would be the same, “but with ecclesiastical autonomy protected without any timidity in stating that such a result is required by the Establishment Clause.” Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 79.

In contrast, when the government sponsors prayer in schools and religious displays in government buildings, it has improperly entered the realm of the exclusively religious.¹⁵⁰ Thus, Esbeck suggests that cases like *Lee v. Weisman*,¹⁵¹ where the Court held that inviting clergy to offer prayers at graduation ceremonies for public middle schools and high schools violated the Establishment Clause, and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,¹⁵² where the Court held that a crèche displayed on the grand staircase of the county courthouse violated the Establishment Clause, can be understood as “structural determinations by the Court that government exceeded its power by involving itself in a matter beyond its authority.”¹⁵³

Deciding where to draw the line between the sphere of governmental competence and the sphere of religious competence where government is not sovereign has been a contentious task for 2,000 years.¹⁵⁴ It would, Esbeck argues, “be naïve to suppose that there is an easy formula for determining ‘what is Caesar’s and what is God’s.’”¹⁵⁵ At the same time, however, Esbeck warns against exaggerating the difficulty involved in drawing the line.¹⁵⁶ Paying attention to what the Supreme Court has decided in its Establishment Clause cases “indicate[s] that government does not exceed the restraints of the Establishment Clause unless it is acting on topics that are ‘inherently religious.’”¹⁵⁷ Examples of such topics include prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical narrative of creation taught as science.¹⁵⁸ These topics are “off limits” as objects of purposeful governmental action.¹⁵⁹ In contrast, subject matters that are not “inherently religious” are legitimate objects for governmental action, even when the governmental action reflects a moral judgment about the social good that might coincide with the theological judgment of some religions.¹⁶⁰

Governmental action that would “involve government in the ‘essentially religious activities’ of religious institutions” would cross the line into the sphere of the inherently religious.¹⁶¹ In contrast, “where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the

¹⁵⁰ See *infra* text accompanying notes 159–62.

¹⁵¹ 505 U.S. 577 (1992).

¹⁵² 492 U.S. 573 (1989).

¹⁵³ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 98 n.421.

¹⁵⁴ See MURRAY, WE HOLD THESE TRUTHS, *supra* note 39, at 64 (“The distinction [between the spiritual and temporal orders] had always been difficult to maintain in practice, even when it was affirmed in theory.”).

¹⁵⁵ Esbeck, *Establishment Clause as a Structural Restraint*, *supra* note 37, at 104–05.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 105.

¹⁵⁸ *Id.* at 105–06.

¹⁵⁹ *Id.* at 106.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 108 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan, J., concurring)).

realm of the sectarian,” then the government has not crossed the boundary into the exclusive realm of religion.¹⁶² Esbeck contends that “inherently religious” activities are “those exclusively religious activities of worship and the propagation or inculcation of the sort of tenets that comprise confessional statements or creeds common to many religions.”¹⁶³ The term “inherently religious” also embraces the supernatural claims of religious communities “around which religion (*religare*) identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts.”¹⁶⁴ These matters fall under the exclusive sovereignty of religion; they are beyond the jurisdiction of government.¹⁶⁵

The selection of ministers would seem to fall squarely within the sphere of exclusive religious sovereignty, and the ministerial exception seems, therefore, to rest upon a firm constitutional foundation under Esbeck’s structural/jurisdictional theory of the Establishment Clause. The selection of ministers is an activity that implicates the supernatural claims of religious communities, including the claims around which a religion identifies and defines itself, conducts its worship, develops and teaches doctrine, and propagates the faith. In this sense, the selection of ministers is an inherently religious activity that falls within the exclusive competence of religion.

IV. THE MINISTERIAL EXCEPTION, SUBJECT-MATTER JURISDICTION, AND THE FREEDOM OF THE CHURCH

The prevailing understanding of what the ministerial exception means and how it operates leads to the conclusion that the exception should be characterized as a subject-matter jurisdiction defense, not as a challenge to the legal sufficiency of the plaintiff’s claim. Unlike the Third Circuit in *Petruska*, most courts do understand the ministerial exception as a constitutionally mandated limitation on a court’s power to hear a particular category of cases brought against religious employers.¹⁶⁶ Subject-matter jurisdiction concerns “the courts’ statutory or constitutional *power* to adjudicate [a] case,”¹⁶⁷ and the label “jurisdictional” properly applies to “prescriptions delimiting the classes of cases . . . falling within a court’s adjudicatory power.”¹⁶⁸ As a

¹⁶² *Id.* (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring)).

¹⁶³ *Id.* at 109.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See cases cited *supra* note 68.

¹⁶⁷ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998); *id.* at 94 (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”) (quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869))).

¹⁶⁸ *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); see also *Rweyemamu v. Comm’n on Human Rights & Opportunities*, 911 A.2d 319, 322, *cert. denied*, 916 A.2d 51 (Conn. 2007), *cert. denied*, 128 S. Ct. 206 (2007) (“Jurisdiction of the subject-matter is the power [of the

constitutional limitation that removes a class of cases from the court's adjudicatory power, the ministerial exception is best understood as giving rise to a subject-matter jurisdiction objection.¹⁶⁹ In other words, the First Amendment denies courts the authority to adjudicate a particular type of legal controversy—claims that seek to impose secular standards on a religious institution's employment of its ministers.¹⁷⁰ Thus, civil courts lack subject-matter jurisdiction over such claims.

A. The Difference Between Subject-Matter Jurisdiction and Failure to State a Claim

The Third Circuit's confusion in *Petruska* regarding the distinction between a subject-matter jurisdiction defense and the defense of failure to state a claim is not unique.¹⁷¹ As the Supreme Court noted in a recent Title VII case, *Arbaugh v. Y & H Corp.*, courts often confuse or conflate two concepts that must be distinguished: "federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief."¹⁷² The Court in *Arbaugh* held that the statutory employee-numerosity requirement for establishing employer status under Title VII was not a matter of subject-matter jurisdiction.¹⁷³ Instead, that numerosity requirement was an element of the plaintiff's claim for relief, and thus was properly raised in a 12(b)(6) objection (which cannot be raised after trial), rather than as a 12(b)(1) objection (which, pursuant to Rule 12(h)(3), can be raised at any time).¹⁷⁴

The *Arbaugh* Court explained:

On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. 'Subject-matter jurisdiction in federal question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove

court] to hear and determine cases of the general class to which the proceedings in question belong. . . . ' A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (quoting *Figueroa v. C & S Ball Bearing*, 675 A.2d 845, 847 (Conn. 1996)); *id.* at 325 ("The ministerial exception prevents courts or government agencies from exercising jurisdiction over a religious institution's actions regarding the employment of its ministers.").

¹⁶⁹ See discussion *supra* Part I.

¹⁷⁰ See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (explaining that the ministerial exception is "judicial shorthand" for the conclusion that "the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion").

¹⁷¹ *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

¹⁷² 546 U.S. 500, 503 (2006).

¹⁷³ *Id.* at 504.

¹⁷⁴ *Id.*

the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.’¹⁷⁵

Because Title VII actions are civil actions arising under the laws of the United States, subject-matter jurisdiction in the case before the Court in *Arbaugh* existed pursuant to 28 U.S.C. § 1331.¹⁷⁶ Subject-matter jurisdiction “involves a court’s power to hear a case,”¹⁷⁷ and § 1331 gave the court the power to hear this Title VII case.¹⁷⁸ Whether Y & H Corporation employed enough people to be bound by the prohibitions of Title VII was a question of the merits, an element of the plaintiff’s claim, and not a matter of subject-matter jurisdiction.¹⁷⁹ If the employer does not employ the statutorily required number of employees, the employer is not bound to comply with Title VII and the plaintiff is not entitled to any relief under the statute. A court has the power to hear such a case, but it lacks power under the statute to provide the plaintiff with any relief, because the plaintiff is unable to establish one of the essential predicates for obtaining relief.¹⁸⁰

At first blush, the Court’s analysis in *Arbaugh* would seem to validate the Third Circuit’s approach to the ministerial exception defense in *Petruska*. The *Petruska* court reasoned that it had the power to hear Petruska’s case, because she had raised a claim arising under federal law.¹⁸¹ The ministerial exception defense, in the court’s view, did not bar “the court’s ‘very power to hear the case.’”¹⁸² Instead, the exception allows the defendant to argue that “the First Amendment bars Petruska’s claims. . . . The exception may serve as a barrier to the success of a plaintiff’s claims, but it does not affect the court’s authority to consider them.”¹⁸³ Section 1331 allows the court to hear Petruska’s claim, but the First Amendment bars the court from providing her with any relief under Title VII.¹⁸⁴ Thus, the Third Circuit concluded, the ministerial exception gives rise to a 12(b)(6) objection, not a 12(b)(1) objection.¹⁸⁵

Yet the reason why the plaintiff’s claim was barred in *Petruska* made that case quite different from the case before the Court in *Arbaugh*. In *Arbaugh*, the question boiled down to this: is the plaintiff entitled to relief under the terms of the statute

¹⁷⁵ *Id.* at 511.

¹⁷⁶ *Id.* at 503.

¹⁷⁷ *Id.* at 514.

¹⁷⁸ *Id.* at 513 (“A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim ‘arising under’ the Constitution or laws of the United States.”).

¹⁷⁹ *Id.* at 516.

¹⁸⁰ See *supra* note 58.

¹⁸¹ *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

¹⁸² *Id.*

¹⁸³ *Id.* at 302–03.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

that the plaintiff has asserted as the predicate for relief?¹⁸⁶ If the defendant employs the requisite number of employees, Title VII applies, and the plaintiff can state a claim for relief under the statute. In *Petruska*, in contrast, the plaintiff would seem to be able to state a claim establishing all the essential elements for relief under Title VII.¹⁸⁷ As the Fourth Circuit explained in *Rayburn v. General Conference of Seventh-Day Adventists*, while Title VII does allow religious organizations to take religion into account in hiring, the statute does not authorize religious organizations to make ministerial hiring decisions on the basis of race or sex.¹⁸⁸ Instead, both the text and history of the statute led the court to “conclude that Title VII, by ‘the affirmative intention of the Congress, clearly expressed,’ applies to [ministerial] employment decision[s].”¹⁸⁹ Moreover, the *Petruska* court explicitly referenced *Rayburn* in its discussion of the jurisdictional question: “[W]e agree with the Fourth Circuit that Congress intended Title VII to apply to cases involving sexual discrimination and retaliation by religious institutions. We must therefore reach the constitutional question—i.e., whether application of Title VII to a ministerial employment relationship violates the First Amendment.”¹⁹⁰ This constitutional question, however, would seem to lead back to the issue of subject-matter jurisdiction. The First Amendment bars relief in ministerial exception cases precisely because courts lack the “very power” to hear the employment discrimination cases brought by ministerial employees.¹⁹¹ Courts cannot hear and decide such cases without violating the First Amendment.¹⁹² In other words, the First Amendment removes such cases from the adjudicatory power of the courts.

B. The Ministerial Exception as a Limitation on Adjudicatory Power

A careful reading of the cases that provide the foundation for the ministerial exception reveals that the exception should be understood as a matter of subject matter jurisdiction. In the first case to recognize the ministerial exception, *McClure v. Salvation Army*, the Fifth Circuit characterized the exception in jurisdictional terms.¹⁹³ Billie B. McClure brought a Title VII sex discrimination action against the Salvation Army, after the Salvation Army terminated her status as an officer.¹⁹⁴ She alleged that she had received a lower salary and fewer benefits than similarly situ-

¹⁸⁶ 546 U.S. 500 (2006).

¹⁸⁷ *Petruska*, 462 F.3d 294.

¹⁸⁸ 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

¹⁸⁹ *Id.* at 1167 (quoting *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979)).

¹⁹⁰ *Petruska*, 462 F.3d at 304 n.4.

¹⁹¹ See *supra* text accompanying notes 1–6.

¹⁹² *Id.*

¹⁹³ 460 F.2d 553, 560 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) (affirming the district court’s order “sustaining The Salvation Army’s motion to dismiss the complaint for want of jurisdiction”).

¹⁹⁴ *Id.* at 555.

ated male officers and that she had been discharged because of her complaints about that adverse treatment to her superiors and to the Equal Employment Opportunity Commission.¹⁹⁵ Mrs. McClure conceded that the Salvation Army should be considered a religion and that, as an officer, she was a minister “engaged in the religious or ecclesiastical activities of the church.”¹⁹⁶ At the same time, she argued that the Salvation Army was not exempt from prohibition of sex discrimination in employment established by Title VII.¹⁹⁷

Section 702 of Title VII does allow religious organizations to take religion into account when hiring employees to perform work connected to the organization’s religious activities.¹⁹⁸ The text of the statute does not, however, exempt religious employers from complying with its prohibitions of discrimination on the basis of race, color, sex, or national origin, and efforts to exempt religious organizations entirely from compliance with Title VII were rejected by Congress.¹⁹⁹ Thus, the Fifth Circuit, explained:

The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.²⁰⁰

Having reached this conclusion, the Fifth Circuit had to face this constitutional question: can Title VII be applied to the employment relationship between a church and its minister without violating the religion clauses of the First Amendment? The court began by explaining that, under then-prevailing free exercise doctrine, the government must establish a compelling interest in support of “state action which imposes even an ‘incidental burden’ on the free exercise of religion.”²⁰¹ Indeed, “[i]n this highly sensitive constitutional area ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’”²⁰² The court then focused

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 556.

¹⁹⁷ *Id.*

¹⁹⁸ Section 702 of Title VII provides “[t]his subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e-1(a) (2000) (emphasis added).

¹⁹⁹ *McClure*, 460 F.2d at 558.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398 (1963)).

attention on the critical nature of the church-minister relationship that would be threatened by the application of Title VII in this case:

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.²⁰³

Characterizing the terms of employment between a church and its ministers as "a matter of church administration and government" allowed the Fifth Circuit to connect Mrs. McClure's Title VII action to a series of Supreme Court precedents that had described the boundary between governmental authority and church authority in jurisdictional terms.²⁰⁴ The court explained that, beginning with its opinion in *Watson v. Jones*,²⁰⁵ "the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities."²⁰⁶ *Watson* involved a church property dispute between rival factions of the Presbyterian Church.²⁰⁷ The U.S. Supreme Court affirmed a lower court ruling enjoining one faction in the dispute from interfering with the use of the property in ways that conflicted with the decision reached on the matter by the highest ecclesiastical governing body of the Presbyterian Church.²⁰⁸ At the time of the *Watson* decision, the First Amendment had not yet been held applicable to the states,²⁰⁹ but the Court understood the principle governing its decision as a component of the American commitment to religious freedom:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that,

²⁰³ *Id.* at 558–59.

²⁰⁴ *Id.* at 559.

²⁰⁵ 80 U.S. (13 Wall.) 679 (1871).

²⁰⁶ *McClure*, 460 F.2d at 559.

²⁰⁷ *Watson*, 80 U.S. (13 Wall.) at 717–18.

²⁰⁸ *Id.* at 699–700, 727, 734–35.

²⁰⁹ *Watson* was a diversity case decided on the basis of general federal common law in the era prior to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See 80 U.S. 13 (Wall.) at 694; *id.* at 736–37 (Clifford, J., dissenting).

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.²¹⁰

The Court recognized that judicial practice in England had been different, but the “full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles”²¹¹ demanded that the civil courts stay out of internal matters of church governance:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.²¹²

Eighty years later, in *Kedroff v. St. Nicholas Cathedral*, another church property dispute gave the Supreme Court the opportunity to tie the principle articulated in *Watson* to the Free Exercise Clause of the First Amendment.²¹³ In *Kedroff*, the Court struck down a New York statute that purported to transfer administrative control of the Russian Orthodox churches in North America from the Patriarch in Moscow to church authorities selected by a convention of Russian Orthodox groups in North America.²¹⁴ Under the statute, the bishop appointed by the Patriarch in Moscow was

²¹⁰ *Watson*, 80 U.S. (13 Wall.) at 727.

²¹¹ *Id.* at 728.

²¹² *Id.* at 728–29.

²¹³ 344 U.S. 94, 115–16 (1952) (noting that *Watson* had been decided “before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action”).

²¹⁴ *Id.* at 97–98.

denied access to the St. Nicholas Cathedral in New York.²¹⁵ In holding that the New York statute was an unconstitutional burden on the free exercise of religion, the Court drew on its prior opinion in *Watson*.²¹⁶ While *Watson* itself had not been decided under the Free Exercise Clause,

[t]he opinion radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.²¹⁷

In light of *Watson* and *Kedroff*, the Fifth Circuit in *McClure* concluded that Title VII could not be applied to the employment relationship between Mrs. McClure and the Salvation Army without violating the First Amendment.²¹⁸ The court explained that the issues raised by Mrs. McClure's employment discrimination claim—whether decisions made by the Salvation Army regarding her ministerial assignment, salary, and duties violated Title VII—were “matters of church administration and government and thus, *purely of ecclesiastical cognizance*.”²¹⁹ Adjudication of her claim would involve investigation and review of ecclesiastical practices and decisions and “would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.”²²⁰ This might easily and improperly allow control of “strictly ecclesiastical matters” to “pass from the church to the State,” depriving the church of the power to decide for itself matters of church administration and governance.²²¹ Finally, the investigation and review involved in adjudicating a minister's employment discrimination claim “could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.”²²²

In short, allowing Mrs. McClure's employment discrimination claim to proceed “would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.”²²³ The court, however, backed away from holding that the case involved a

²¹⁵ *Id.* at 96–97.

²¹⁶ *Id.* at 110.

²¹⁷ *Id.* at 116.

²¹⁸ *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

²¹⁹ *Id.* at 560 (emphasis added).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

conflict between a clearly applicable federal statute and a constitutional prohibition in which the statute must give way.²²⁴ The analysis up to this point seemed to demand that the court hold that the First Amendment prevented application of Title VII in this case. Yet, in the last paragraph of the opinion, the *McClure* court abruptly chose to frame its holding in terms of constitutional avoidance.²²⁵ “We . . . hold 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.”²²⁶ On this basis, the Fifth Circuit affirmed the district court’s dismissal for want of jurisdiction.²²⁷

Because of this avoidance strategy, the court’s actual holding might, in fact, be better understood as affirming dismissal of the action for failure to state a claim upon which relief can be granted, rather than for lack of subject-matter jurisdiction. The court interprets the statute itself not to apply to the church-minister relationship; in other words, the statute fails to create a cause of action that would allow the minister to obtain relief for employment discrimination against her church employer.²²⁸ Yet the more plausible reading of Title VII, as the court itself recognized earlier in its opinion, “compel[s] the conclusion that Congress did *not* intend”²²⁹ to exempt religious organizations from liability for discriminating on the basis of race, color, sex, or national origin.

If ministerial claims are to be excluded, it must be because the religion clauses of the Constitution bar the federal government and the states from interfering with matters of purely ecclesiastical cognizance like the employment relationship between a church and its ministers. The government cannot regulate the relationship and the courts cannot adjudicate claims that implicate the relationship. Thus, the First Amendment removes disputes regarding church governance and administration from the subject-matter jurisdiction of the civil courts, federal or state.²³⁰

The Fourth Circuit adopted the more plausible reading of Title VII and addressed the constitutional issue head-on in *Rayburn v. General Conference of Seventh-Day Adventists*.²³¹ In *Rayburn*, the court held that the First Amendment barred a woman denied a pastoral position in the Seventh-Day Adventist Church

²²⁴ *Id.* at 560–61.

²²⁵ *Id.* at 560 (“[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring))).

²²⁶ *Id.* at 560–61; *see also* *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (characterizing the ministerial exception as an interpretive rule, not a constitutional rule).

²²⁷ *McClure*, 460 F.2d at 561.

²²⁸ *Id.* at 560.

²²⁹ *Id.* at 558 (emphasis added).

²³⁰ *See supra* text accompanying notes 1–6.

²³¹ 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). The Seventh Circuit’s recent reversion to the interpretive rule understanding of the ministerial exception, *see Schleicher*, 518 F.3d at 475, makes no reference to the Fourth Circuit’s analysis in *Rayburn*.

from raising a Title VII sex and race discrimination claim against the Church.²³² Unlike the Fifth Circuit in *McClure*, the *Rayburn* court concluded that it could not “impose upon a statute a limiting construction where to do so would strain congressional intent.”²³³ Here, the “language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent.”²³⁴ Thus, Ms. Rayburn’s claim produced a collision between Title VII and the First Amendment that the court could not avoid.

The Fourth Circuit in *Rayburn* was able to draw on an additional precedent in the Supreme Court’s *Watson-Kedroff* line of church autonomy cases.²³⁵ In *Serbian Eastern Orthodox Diocese v. Milivojevic*, decided four years after *McClure*, the Court held that the Illinois Supreme Court violated the First and Fourteenth Amendments by issuing a decision that invalidated a reorganization plan adopted by the American-Canadian Diocese of the Serbian Eastern Orthodox Church.²³⁶ The case arose after the Holy Assembly of Bishops and Holy Synod of the Serbian Orthodox Church (the Mother Church) removed Dionisije Milivojevic as bishop of the American-Canadian diocese.²³⁷ The removal followed Milivojevic’s refusal to accept the reorganization plan adopted by the Holy Assembly and to turn administration of the Diocese over to a new bishop appointed by the Holy Assembly.²³⁸ Milivojevic sought an injunction in Illinois state court to prevent the Mother Church from interfering with diocesan assets and to have himself declared the true Diocesan Bishop.²³⁹ The Illinois Supreme Court ultimately held that Milivojevic’s removal had to be set aside as “arbitrary,” because the removal was “not conducted according to the Illinois Supreme Court’s interpretation of the Church’s constitution and penal code.”²⁴⁰ The court further held that “the Diocesan reorganization was invalid because it was beyond the scope of the Mother Church’s authority to effectuate such changes without Diocesan approval.”²⁴¹

The U.S. Supreme Court reversed.²⁴² The Court explained that “[t]he fallacy fatal to the judgment of the Illinois Supreme Court” was that court’s “impermissible rejection of the decisions of the highest ecclesiastical tribunals” of the hierarchical Mother Church on the disputed issues.²⁴³ The Illinois court “impermissibly substitute[d] its own inquiry into church polity” in resolving the dispute between Milivojevic and

²³² *Rayburn*, 772 F.2d 1164.

²³³ *Id.* at 1167.

²³⁴ *Id.* at 1166.

²³⁵ *Id.*

²³⁶ 426 U.S. 696 (1976).

²³⁷ *Id.*

²³⁸ *Id.* at 703–05.

²³⁹ *Id.* at 707.

²⁴⁰ *Id.* at 708.

²⁴¹ *Id.*

²⁴² *Id.* at 698.

²⁴³ *Id.* at 708.

the Mother Church.²⁴⁴ Allowing civil courts to “‘probe deeply enough into the allocation of power’” within a hierarchical church to allow it to decide disputes regarding church polity and administration violates the First Amendment “‘in much the same manner as civil determination of religious doctrine.’”²⁴⁵ When civil courts try to decide such disputes, “‘the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.’”²⁴⁶

Drawing on the principles first articulated in *Watson*, the Court explained that any inquiry into whether a church’s decisions complied with its own church laws and regulations violated “the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”²⁴⁷ The Court’s precedents established a “general rule that religious controversies are not the proper subject of civil court inquiry, and . . . a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.”²⁴⁸ By ordering Milivojevich’s reinstatement as a bishop, even though the Mother Church considered him to be a schismatic, the Illinois Supreme Court had “unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals” of the Mother Church.²⁴⁹ The diocesan reorganization undertaken by the Mother Church was a matter of “internal church governance, an issue at the core of ecclesiastical affairs,” and, as the U.S. Supreme Court said in *Kedroff*, “religious freedom encompasses the ‘power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”²⁵⁰

The protection for church autonomy established by the Supreme Court in the *Watson-Kedroff-Milivojevich* line of cases led the Fourth Circuit in *Rayburn* to conclude that adjudicating Ms. Rayburn’s employment discrimination claim was prohibited by the religion clauses of the First Amendment.²⁵¹ A church’s free exercise rights are burdened by any attempt “to restrict a church’s free choice of its leaders.”²⁵² This is a substantial burden on religious freedom, because “[t]he right to choose ministers without government restriction underlies the well-being of religious community.”²⁵³

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 709 (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

²⁴⁶ *Id.* at 710 (quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969)).

²⁴⁷ *Id.* at 713.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 720.

²⁵⁰ *Id.* at 721–22 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

²⁵¹ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

²⁵² *Id.* at 1168.

²⁵³ *Id.* at 1167.

Indeed, “perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.”²⁵⁴ While the elimination of employment discrimination is an interest whose magnitude is “difficult to exaggerate,”²⁵⁵ introducing government standards into the selection of ministers is a burden that is too substantial to permit: it “would significantly, and perniciously, rearrange the relationship between church and state.”²⁵⁶

In order to maintain the constitutionally mandated relationship between church and state, churches must possess “the unfettered right . . . to resolve certain questions.”²⁵⁷ Therefore, “[i]n ‘quintessentially religious’ matters, the free exercise clause protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.”²⁵⁸ The question of who is to serve as a minister is one of those quintessentially religious matters that the Constitution places beyond the legitimate authority of the state.

The Fourth Circuit also explained that subjecting a church’s ministerial choices to Title VII scrutiny would violate the Establishment Clause by “giv[ing] rise to ‘excessive governmental entanglement’ with religious institutions.”²⁵⁹ The Establishment Clause operates to keep government out of the sphere reserved to religion:

Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church’s own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise “that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere.”²⁶⁰

Yet, to affirm that the church has freedom in the religious sphere is not to claim for the church complete freedom from the law:

Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for

²⁵⁴ *Id.* at 1168.

²⁵⁵ *Id.* at 1168–69; *see also id.* at 1169 (“As Title VII is an interest of the highest order, courts have held that Title VII properly applied to the secular employment decisions of a religious institution But courts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where the ‘inroad on religious liberty’ is too substantial to be permissible.” (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981))).

²⁵⁶ *Id.* at 1169.

²⁵⁷ *Id.*

²⁵⁸ *Id.* (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976)).

²⁵⁹ *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

²⁶⁰ *Id.* at 1171 (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)).

their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.²⁶¹

The case of a ministerial employment decision, however, is different. Such a decision does involve the church's spiritual functions, and thus, the Constitution *does* place the decision beyond the reach of the law. With respect to the question of who a church selects to serve as its minister, "the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected."²⁶² To say that the Constitution requires civil authorities to "decline to review" a particular class of cases seems to be another way of saying that the Constitution removes that class of cases from the subject-matter jurisdiction of the civil courts.²⁶³

C. Subject-Matter Jurisdiction Characteristics of the Ministerial Exception

The case of *Bell v. Presbyterian Church*²⁶⁴ provides a clear example of the way in which this jurisdictional bar operates—even when the federal jurisdictional statutes provide a textual basis for the exercise of federal jurisdiction. James M. Bell was an ordained minister who was called by Interfaith Impact to serve as its executive director.²⁶⁵ Four national religious organizations (including the Presbyterian Church, U.S.A.) created and funded Interfaith Impact, which was a non-profit corporation whose mission was "to advance the jointly shared religious purposes of its members, namely, to carry out their theological imperative to increase the possibilities for peace, economic and social justice."²⁶⁶ In the engagement letter that outlined the terms of Rev. Bell's service, Interfaith noted that this service "would be an extension of his ministry" as an ordained minister in the United Church of Christ.²⁶⁷ Three years after Rev. Bell began his service with Interfaith, a financial crisis in the organization arose, and the Presbyterian Church decided not to allocate any funds to Interfaith for the coming year.²⁶⁸ This led Interfaith's board of directors to continue Interfaith's ministry with a volunteer staff, and it terminated Rev. Bell's service as executive director as part of a complete reduction in force.²⁶⁹

²⁶¹ *Id.* 1171.

²⁶² *Id.* at 1172.

²⁶³ *Id.*

²⁶⁴ 126 F.3d 328 (4th Cir. 1997).

²⁶⁵ *Id.* at 330.

²⁶⁶ *Id.* at 329.

²⁶⁷ *Id.* at 330.

²⁶⁸ *Id.* at 329.

²⁶⁹ *Id.* at 330.

Rev. Bell then filed suit against the principal contributing religious organizations.²⁷⁰ His complaint alleged a number of state-law tort and contract claims in an effort to challenge the defendants' "expressed reason for ending the program and terminating his employment."²⁷¹ The action was filed in the U.S. District Court for the Eastern District of Virginia, and the complaint invoked diversity of citizenship as the basis for federal jurisdiction.²⁷² While the defendants did not contest the existence of diversity of citizenship,²⁷³ the district court granted the defendants' 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction on the ground that the "'essential core of the case' involved the Churches' decisions to allocate their funds as they saw fit."²⁷⁴ Because "Reverend Bell's lawsuit intruded into internal church matters over which civil courts do not have subject-matter jurisdiction," the court dismissed the action with prejudice.²⁷⁵

The Fourth Circuit affirmed.²⁷⁶ Drawing on *Watson*, *Kedroff*, and *Milivojeovich*, the court explained that "civil courts have long taken care not to intermeddle in internal ecclesiastical disputes."²⁷⁷ "In keeping with the First Amendment's" protection of religious freedom,²⁷⁸ it has "become established that the decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts."²⁷⁹ The court, therefore, articulated the key question in the case in this way: was the lawsuit between Rev. Bell and the four national churches an ecclesiastical dispute about "'discipline, faith, internal organization, or ecclesiastical rule, custom or law,'"²⁸⁰ or, was this "a case in which we should hold religious organizations liable in civil courts for 'purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization'?"²⁸¹

The court concluded that the lawsuit was best characterized as an ecclesiastical dispute.²⁸² While the complaint was framed in terms of tort and contract claims, Bell's allegations, "[a]t bottom, . . . focuse[d] on how the constituent churches spen[t] their

²⁷⁰ *Id.* at 329.

²⁷¹ *Id.* at 330.

²⁷² Brief for the Plaintiff-Appellant at v, *Bell*, 126 F.3d 328 (No. 96-1297) (noting that jurisdiction in the action against the corporate defendants was based on 28 U.S.C. § 1332(a)(1)).

²⁷³ *Id.*

²⁷⁴ Brief for the Appellees, *Bell*, 126 F.3d 328 (No. 96-1297) (Statement of the Case).

²⁷⁵ *Id.*

²⁷⁶ *Bell*, 126 F.3d at 333.

²⁷⁷ *Id.* at 330; *see also id.* at 330-31 (discussing *Watson*, *Kedroff*, and *Milivojeovich*).

²⁷⁸ *Id.* at 330.

²⁷⁹ *Id.* at 331.

²⁸⁰ *Id.* (quoting *Serbian E. Orthodox Diocese v. Milivojeovich*, 426 U.S. 696, 713 (1976)).

²⁸¹ *Id.* (quoting *Gen. Council on Finance & Admin. of the United Methodist Church v. Cal. Super. Ct.*, 439 U.S. 1369, 1373 (1978)).

²⁸² *Id.* at 332-33.

religious outreach funds.”²⁸³ Judicial resolution of that question would “interpose the judiciary” into decisions at the heart of how the defendant churches governed their spiritual mission, decisions “relating to how and by whom they spread their message and specifically their decision to select their outreach ministry through the granting or withholding of funds.”²⁸⁴ These decisions “about the nature, extent, administration, and termination of a religious ministry fall[] within the ecclesiastical sphere that the First Amendment protects from civil court intervention.”²⁸⁵ Accordingly, even though the diversity statute purported to authorize federal jurisdiction over Rev. Bell’s lawsuit, the court concluded that his claim fell within the category of cases that the First Amendment removes from the subject-matter jurisdiction of the civil courts.²⁸⁶

Unlike the defense of failure to state a claim upon which relief can be granted, the issue of subject-matter jurisdiction can be raised at any point in the course of judicial proceedings,²⁸⁷ and the subject-matter jurisdiction issue can be raised by the court *sua sponte*.²⁸⁸ Judge Oberdorfer of the U.S. District Court for the District of Columbia treated the ministerial exception in just this way in *Equal Employment Opportunity Commission v. Catholic University of America*.²⁸⁹ The case was brought by the EEOC and Sister Elizabeth McDonough, who alleged that Catholic University had engaged in sex discrimination and retaliation in violation of Title VII when it denied Sister McDonough’s application for tenure in the university’s Department of Canon Law.²⁹⁰

After the trial concluded, and the parties had submitted proposed findings and conclusions in the case, Judge Oberdorfer requested that the parties file briefs “addressing the question [of] whether the First Amendment precludes maintenance and adjudication of Sister McDonough’s claims.”²⁹¹ The judge had begun to question his constitutional authority to hear the case in the midst of the trial, because much of the testimony con-

²⁸³ *Id.* at 332.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 333.

²⁸⁶ *Id.*

²⁸⁷ Compare FED. R. CIV. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”) with FED. R. CIV. P. 12(h)(2) (“A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.”).

²⁸⁸ See FED. R. CIV. P. 12(h)(3) (the appearance of lack of subject-matter jurisdiction can be raised “by suggestion of the parties or otherwise”).

²⁸⁹ 856 F. Supp. 1 (D.D.C. 1994), *aff’d*, 83 F.3d 455 (D.C. Cir. 1996); see also Lupu & Tuttle, *Faith-Based Initiative and the Constitution*, *supra* note 37, at 34 n.162 (2005) (“Because the limitations [of the ministerial exception], born of both Establishment and Free Exercise considerations, go to subject matter jurisdiction of the civil courts, judges can and do raise them *sua sponte*.”); *id.* (noting that the court of appeals in *Catholic University* “approv[ed] of the district court’s refusal to proceed with adjudication of [the plaintiffs’ Title VII] claim against Catholic University, despite the parties’ willingness to proceed on the merits”).

²⁹⁰ *Catholic Univ.*, 856 F. Supp. at 2.

²⁹¹ *Id.*

cerned the quality of Sister McDonough's canon law scholarship, especially as compared to the work of the two most recent applicants for tenure in the department, both of whom were men.²⁹² This caused Judge Oberdorfer to express "his uneasiness at 'sitting on the qualifications of an expert in canon law'" and to suggest that "the line of inquiry was 'getting awful[ly] close to entangling the government and the judiciary in religious matters.'"²⁹³ After hearing post-trial oral argument on the constitutional question, the judge concluded that Sister McDonough's role in the Canon Law department required her to be characterized as a ministerial employee of a religious institution.²⁹⁴ Accordingly, applying Title VII to the facts and relationships in her case "would violate both the Free Exercise and the Establishment Clauses by entangling government in a primarily religious function and relationship,"²⁹⁵ and the district court dismissed the case without reaching the merits.²⁹⁶ Both the court's *sua sponte* introduction of the First Amendment question *after trial*²⁹⁷ and the court's conclusion that it was without constitutional authority to decide the action on the merits demonstrate that the court understood the ministerial exception to be an issue of subject-matter jurisdiction, rather than a matter of the sufficiency of the plaintiff's claim.²⁹⁸

These cases support the conclusion reached by the district court in *Petruska*: "the ministerial exception partakes of jurisdictional qualities, as it implicates constitutionally mandated restraints on [a court's] power to adjudicate certain types of employment disputes."²⁹⁹ This sort of "constitutionally compelled limitation on

²⁹² *Id.* at 8.

²⁹³ *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 459 (D.C. Cir. 1996) (quoting Transcript of Record, at 9–10, *Catholic Univ.*, 83 F.3d 455); *see also id.* ("I've got to pass on people's judgment about colleagues in a religious setting . . . and when I hear this . . . aggressive examination of a priest about what is at least partly his clerical duties, I've got a problem.") (quoting Transcript of Record, at 147, *Catholic Univ.*, 83 F.3d 455).

²⁹⁴ *Catholic Univ.*, 856 F. Supp. at 12–13.

²⁹⁵ *Id.* at 9.

²⁹⁶ *Catholic Univ.*, 83 F.3d at 460. Judge Oberdorfer explained that the investigation and proceeding "ha[d] impermissibly entangled the civil authorities in religious decision-making." Such entanglement impairs "a religious institution's choice of those who teach its doctrine and participate in church governance. Therefore, the religion clauses of the First Amendment preclude decision of this Title VII action on its merits." *Catholic Univ.*, 856 F. Supp. at 13.

²⁹⁷ *See* FED. R. CIV. P. 12(h)(3).

²⁹⁸ *See* 2 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 12.34[6][a] (3d ed. 2005) ("A dismissal for failure to state a claim is a judgment on the merits, unlike dismissals for lack of subject matter or personal jurisdiction . . ."); *see also* *Kirkham v. Societe Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005) (holding that a court can render a decision on the merits "only after jurisdiction has been established"); *Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) ("Seeking summary judgment on a jurisdictional issue . . . is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur.").

²⁹⁹ *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666, 682 (W.D. Pa. 2004), *aff'd in part on other grounds*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

civil authority”³⁰⁰ with respect to a particular category of disputes—a particular subject matter—is best described as a limitation on a court’s subject-matter jurisdiction. The limitation on the scope of civil jurisdiction manifest in the ministerial exception “ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community’s existence.”³⁰¹ As the Seventh Circuit explained in *Tomic v. Catholic Diocese of Peoria*,³⁰² the courts are “secular agencies” that do not possess the power to “exercise jurisdiction over the internal affairs of religious organizations.”³⁰³ Intra-ecclesial doctrinal disputes “ha[ve] never been justiciable in the federal courts,”³⁰⁴ and lawsuits that implicate the governance structure of a church, even when they do not raise a question of religious doctrine, *lie outside the power of the courts*. Secular “courts will not assume jurisdiction if doing so would interfere with the church’s management.”³⁰⁵

D. Qualified Immunity or Sovereign Immunity?

The ministerial exception cases sometimes describe the exception as protecting a sphere in which religion is sovereign. In *Catholic University*, for example, the D.C. Circuit explained its conclusion that the ministerial exception doctrine still survives after the Supreme Court’s decision in *Employment Division v. Smith*³⁰⁶ in these terms: “[W]e cannot believe that the Supreme Court in *Smith* intended to qualify

³⁰⁰ EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 (4th Cir. 2000).

³⁰¹ *Id.*

³⁰² 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006).

³⁰³ *Id.* at 1037.

³⁰⁴ *Id.* at 1038.

³⁰⁵ *Id.* While the court in *Tomic* was addressing limits on the power of the federal courts, state courts also recognize that they lack the power to adjudicate lawsuits implicating a church’s ministerial employment relationships and internal governance structures. *See, e.g.*, *Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007) (holding that a professional-negligence claim against a minister must be dismissed for lack of subject-matter jurisdiction because it “unconstitutionally impinges upon internal matters of church governance in violation of the First Amendment”); *Callahan v. First Congregational Church of Haverhill*, 808 N.E.2d 301, 303–04, 308–09 (Mass. 2004) (holding that the constitutional rights of religious freedom prohibit trial court from exercising subject-matter jurisdiction over pastor’s employment discrimination claims against church employer); *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 824 (Mass. 2002) (finding that Massachusetts case law “firmly establishe[s]” the principle that the First Amendment’s protection of religious freedom “precludes jurisdiction of civil courts over church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships”); *McDonnell v. Episcopal Diocese of Ga.*, 381 S.E.2d 126, 127 (Ga. App. 1989), *cert. denied*, 493 U.S. 935 (1989) (affirming summary judgment for the diocese in an action brought by priest alleging breach of an employment contract: “The civil court cannot take jurisdiction of an ecclesiastical issue even if the parties present it for resolution, because the First Amendment prohibits such action by the civil judicial system”).

³⁰⁶ 494 U.S. 872 (1990).

th[e] century-old affirmation of a church's sovereignty over its own affairs."³⁰⁷ The Constitution recognizes that churches have sovereignty over their own internal affairs with respect to ministerial employment—in other words, the Constitution protects a church's "right of autonomy in its own domain"³⁰⁸—and this sovereignty overrides even the state's strong interest in eliminating employment discrimination.³⁰⁹ Similarly, the Fourth Circuit in *Rayburn* understood the ministerial exception as a manifestation of the Supreme Court's assertion that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."³¹⁰ Thus, the ministerial exception follows from the proposition that "the First

³⁰⁷ EEOC v. Catholic Univ., 83 F.3d 455, 463; *see also* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (quoting *Catholic Univ.*). The "century-old affirmation of a church's sovereignty over its own affairs" refers to the line of church autonomy cases that find their foundation in *Watson v. Jones*, 80 U.S. 679 (1871), *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Every circuit to have addressed the question of the post-*Smith* survival of the ministerial exception has recognized the exception's continued validity. *See* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 n.* (4th Cir. 2000) (citing cases). One circuit, over a strong dissent, seems to have avoided the question of the post-*Smith* validity of the ministerial exception by pointing to the Religious Freedom Restoration Act (RFRA), not the ministerial exception, as the proper defense to be raised in a Methodist minister's action against the church under the Age Discrimination in Employment Act. *See* *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *id.* at 109–19 (Sotomayor, J., dissenting) (rejecting the court's RFRA analysis in favor of a statutory ministerial exception); *see also* *Rweyemamu v. Cote*, 520 F.3d 198, 203 n.2 (2d Cir. 2008) (expressing "doubts about *Hankins*'s determination that RFRA applies" in this context); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 190 (2006) (criticizing *Hankins* as "unsound" because RFRA is applicable only to suits in which the government is a party). As the *Tomic* court explained,

It is hardly to be imagined . . . that in seeking to broaden the protection of religious rights [after *Smith*], Congress, dropping nary a hint, wiped out a long-established doctrine that gives greater protection to religious autonomy than RFRA does. Indeed, a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required courts to decide religious questions. The exception is based on the establishment and free-exercise clauses of the First Amendment, which place tight limits on governmental authority to regulate religion.

Id. at 1042 (citations omitted).

³⁰⁸ *Catholic Univ.*, 83 F.3d at 467.

³⁰⁹ *Id.*

³¹⁰ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948), *quoted in* *Rayburn v. Gen. Conference Of Seventh-Day Adventists*, 772 F.2d 1104, 1171 (4th Cir. 1985).

Amendment recognizes two spheres of sovereignty”³¹¹ that structure the institutional relationship between government and religion.

Rooting the ministerial exception in the First Amendment’s recognition of a protected sphere of religious sovereignty provides further support for understanding the exception as a matter of subject-matter jurisdiction. The Third Circuit in *Petruska* used an analogy to qualified immunity in support of its conclusion that the ministerial exception should be understood as a defense challenging the sufficiency of the plaintiff’s claim, rather than as a challenge to the court’s subject-matter jurisdiction.³¹² But the better analogy may be to the jurisdictional defense of sovereign immunity, rather than the defense of qualified immunity. While it is appropriate to raise the defense of qualified immunity in a 12(b)(6) motion to dismiss for failure to state a claim,³¹³ the defense of sovereign immunity is generally understood to be an issue of subject matter jurisdiction³¹⁴ properly raised in a 12(b)(1) motion to dismiss.³¹⁵

³¹¹ *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007); *see also* Esbeck, *Dissent and Disestablishment*, *supra* note 112, at 1392 (noting that the non-establishment principle presupposes “the existence of dual authorities, each with its sphere of proper jurisdiction and each with some jurisdiction held to the exclusion of the other”; “[S]ince the fourth century Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other subject matter areas in which each is noncompetent to perform the tasks of the other.”); *supra* Part II (explaining that the structural establishment protects a sphere of sovereignty for the church).

³¹² *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 2098 (2007).

³¹³ *See, e.g.,* *Goodman v. Town of Golden Beach*, 988 F. Supp. 1450, 1455 (S.D. Fla. 1997) (“A government official’s entitlement to qualified immunity is a question of law that is appropriately determined before trial in one of three ways: (1) on a [Rule 12(b)(6)] motion to dismiss for failure to state a claim . . . ; (2) in a [Rule 12(c)] request for judgment on the pleadings . . . ; or (3) on [Rule 56] motion for summary judgment.”).

³¹⁴ *See, e.g.,* *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (“[T]he Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court’s judicial power, and therefore can be raised at any stage of the proceedings”); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”) (referring to federal sovereign immunity); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (“[T]his Court has recognized that [the] greater significance [of the Eleventh Amendment] lies in its affirmation that the fundamental principle of [state] sovereign immunity limits the grant of judicial authority in Art. III.”); *United States v. Tex. Tech Univ.*, 171 F.3d 279, 285 (5th Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000) (“The Eleventh Amendment’s admonition is jurisdictional in nature”; it accomplishes its purpose of “preserving state [sovereign immunity] . . . through jurisdictional limitation”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3654 (“The natural consequence of the sovereign immunity principle is that the absence of consent by the United States is a fundamental defect that deprives the court of subject matter jurisdiction.”); *cf. Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 391 (1998) (stating that “we have not decided” the question of whether “Eleventh Amendment immunity is a matter of subject-matter jurisdiction”); *id.* at 394 (Kennedy, J., concurring) (noting that because it can be waived and courts need not raise it *sua sponte*, “the jurisdictional bar erected by the Eleventh Amendment” has a “hybrid nature”); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267 (1997) (unlike Article III limits on judicial power which altogether disqualify

The ministerial exception exists because the Constitution denies courts the authority to decide a defined category of cases.³¹⁶ Similarly, the various aspects of the doctrine of sovereign immunity deny courts the authority to hear and decide a defined category of cases: claims against governmental sovereigns, which are barred unless the sovereign has consented to suit,³¹⁷ or, in the case of foreign sovereigns, unless Congress has granted the federal courts authority to hear the case.³¹⁸ Unlike foreign sovereign immunity, which is a “matter of grace and comity on the part of the United States, . . . not a restriction imposed by the Constitution,”³¹⁹ the ministerial exception is a constitutionally imposed restriction on the power of courts. Thus, when the ministerial exception applies, the religion clauses of the First Amendment limit the Article III power of the federal courts in a way similar to the limit imposed on federal judicial power by the Eleventh Amendment and the doctrine of state sovereign immunity. While the Eleventh Amendment has been interpreted as “an exemplification” of a “fundamental rule” of state sovereignty,³²⁰ the line of cases stemming from *Watson* teach that the First Amendment stands as an exemplification of a fundamental rule of church autonomy. Like the Eleventh Amendment, the jurisdictional bar raised by the First Amendment ministerial exception “operates as an additional boundary on [judicial] power, supplementing the restraints on judicial power already implicitly provided in Article III of the Constitution.”³²¹

federal court from deciding cases outside the reach of Article III, Eleventh Amendment sovereign immunity can be waived; “The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction”).

³¹⁵ See, e.g., *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (because sovereign immunity is jurisdictional in nature, where a waiver of sovereign immunity does not apply, a suit should be dismissed under Rule 12(b)(1), not 12(b)(6)); *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 476 (6th Cir. 2006) (threshold defense of state sovereign immunity is usually invoked “by way of a motion to dismiss under Rule 12(b)(1)”; *Kirkham v. Societe Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005) (“[P]arties seeking [Foreign Sovereign Immunity Act] immunity do so through Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.”); *WRIGHT & MILLER*, *supra* note 314, at § 1350 (the 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is appropriate “when the plaintiff’s claim is barred by one of the various aspects of the doctrine of sovereign immunity”).

³¹⁶ See *supra* text accompanying notes 299–305.

³¹⁷ See *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” (citations omitted)).

³¹⁸ *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352, 2355 (2007) (noting that the Foreign Sovereign Immunities Act “provides the sole basis for obtaining jurisdiction over a foreign state in federal court” (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989))).

³¹⁹ *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

³²⁰ See *In re State of New York*, 256 U.S. 490, 497 (1921).

³²¹ *United States v. Tex. Tech Univ.*, 171 F.3d 279, 285 (5th Cir. 1999) (referring to the Eleventh Amendment).

The defense of qualified immunity is quite different. Qualified immunity is not a limitation on judicial power to hear and decide a certain category of cases.³²² Instead, qualified immunity protects certain categories of defendants from having to defend a suit under certain factual conditions.³²³ “The defense of ‘qualified immunity’ requires courts to enter judgment in favor of a government employee unless the employee’s conduct violates ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”³²⁴ The subject matter of the lawsuits against government officials are clearly within the judicial power of the court, and if the relevant factual conditions do not exist, the defendant will be required to defend the action and the court has the power to enter judgment against them.³²⁵

This protection afforded governmental officials by the defense of qualified immunity is not mandated by the Constitution. Instead, the Supreme Court has created the existing doctrine of qualified immunity in order to foster particular policy goals: providing immunity from suit for “all but the plainly incompetent or those who knowingly violate the law”³²⁶ is intended to reduce the social costs of litigation against governmental officials, which include “the increased expense to the government, the diversion of official attention from official duties, and the deterrence of able citizens from pursuing public office.”³²⁷ Because this particular structure of immunity protection is not required by the Constitution, Congress could, if it wished, create a different sort of immunity defense in actions against governmental employees that allege violations of constitutional or statutory rights.³²⁸ In contrast, the ministerial exception is a constitutionally compelled limitation on the power of civil authorities.³²⁹ Thus, the analogy to qualified immunity invoked by the Third Circuit in *Petruska* is not persuasive.³³⁰ The ministerial exception seems more closely akin to the jurisdictional

³²² *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985).

³²³ *Id.*

³²⁴ *Morse v. Frederick*, 127 S. Ct. 2618, 2640 (2007) (Breyer, J., concurring in part and dissenting in part) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

³²⁵ See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 10–11 (1997) (describing the availability of damages in *Bivens* actions and under 42 U.S.C. § 1983).

³²⁶ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

³²⁷ Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1161 (2005) (citing *Harlow*, 457 U.S. at 814); see also Chen, *supra* note 325, at 11–12 (immunity law arises out of the Supreme Court’s struggle to balance the benefits of compensating individuals harmed by official misconduct against the competing social policy concerns that arise from lawsuits against public officials).

³²⁸ See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 461–63, 461 n.59 (1978).

³²⁹ See *supra* text accompanying notes 1–6.

³³⁰ *Petruska v. Gannon Univ.*, 462 F.3d 249 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

defense of sovereign immunity, rather than to the conditional immunity from suit defense established by the doctrine of qualified immunity.³³¹

E. Does It Matter?

It may seem as though the question of whether the ministerial exception should be characterized as a jurisdictional defense or as a defense challenging the legal sufficiency of the plaintiff's claim is a question without practical significance.³³² Whether the exception is asserted as a 12(b)(1) defense or as a 12(b)(6) defense, the plaintiff's claim will be dismissed at the outset of the litigation if the ministerial exception applies.³³³ If there "is no realistic possibility" that dismissing the action for failure to state a claim "will expand the Court's power beyond the limits that the jurisdictional restriction has imposed,"³³⁴ why spend much energy thinking about

³³¹ The ministerial exception is more closely analogous to sovereign immunity than it is to qualified immunity, but the jurisdictional character of the ministerial exception is not identical to that of sovereign immunity. Unlike sovereign immunity, which can be waived, *see supra* notes 313, 317, the ministerial exception cannot be waived and should be raised by the court *sua sponte*. *See supra* notes 296–305 and accompanying text (discussing *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1 (D.D.C. 1994), *aff'd* 83 F.3d 455 (D.C. Cir. 1996)).

³³² *Cf. Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (characterizing dismissal under Rule 12(b)(1) rather than under Rule 12(c) as a "mistake, though a harmless one").

³³³ *See supra* note 5 and accompanying text.

³³⁴ *Cf. Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 779 (2000). The Court in *Vermont Agency* was faced with a case that raised two questions: (1) whether the federal False Claims Act should be interpreted to create a cause of action that permits an individual to bring an action on behalf of the United States against a state, and (2) whether such a suit by an individual against a state would be barred by the Eleventh Amendment. *Id.* at 778. The Court concluded that the question of statutory interpretation was logically antecedent to the Eleventh Amendment question and that there was

no realistic possibility that addressing the statutory question [would] expand the Court's power beyond the limits that the jurisdictional restriction has imposed. The question whether the statute provide[d] for suits against the States . . . d[id] not, as a practical matter, permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway.

Id. at 779. The Court explained that "[t]his combination of logical priority and virtual coincidence of scope makes it possible, and indeed appropriate, to decide the statutory issue first." *Id.* at 779–80. In the context of the ministerial exception, however, the court is not faced with the logically prior question of whether or not the law creates a cause of action allowing a particular employment discrimination claim to be asserted against a religious institution. The ministerial plaintiff typically has raised a claim under a statute that creates a cause of action for employment discrimination that (as the Fourth Circuit held in *Rayburn*, in the Title VII context) creates no statutory exception excluding religious employers from the coverage of the statute. The constitutional question of whether the First Amendment limits the judicial authority to decide this class of cases must, therefore, be confronted directly. Such "[q]uestions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority

this question? There are at least two reasons why it is important to get the answer to this question right.

1. Clear Affirmation of the Penultimacy of the State

Limits on the subject-matter jurisdiction of courts are a manifestation of limitations on governmental power.³³⁵ This is the most important reason why a proper understanding of the jurisdictional character of the ministerial exception makes a difference in the law. When federal and state courts clearly and consistently treat the ministerial exception as a limitation on their subject-matter jurisdiction, they make a powerful statement about the foundations of limited government: such statements affirm the penultimacy of the state.³³⁶ The ministerial exception is rooted in this fundamental principle of limited government: civil authorities, including the courts, have “a constitutionally prescribed sphere of action,” and this civil sphere of authority is separate from the sphere of action reserved to religion.³³⁷

As the Supreme Court noted in *Steel Co.*:

Much more than legal niceties are at stake here. The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.³³⁸

Thus, because the ministerial exception recognizes a constitutional limit to authorized judicial action, it has a “separation and equilibration of powers” function.³³⁹ It keeps the power of government separate from the sphere of action exclusively reserved for

to sit in judgment of anything else.” *Id.* at 778 (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–102 (1998)).

³³⁵ See discussion *supra* Part III.

³³⁶ The phrase, “penultimacy of the state,” is drawn from Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 867, 923 (2000). Cf. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 77 (2003) (“‘Under God’ in the Pledge of Allegiance is a means for the state to declare that it is a limited institution that is subject to, and does not interfere with, higher commitments and norms. In a religiously pluralistic society, however, ‘under God’ is an imperfect way of making that declaration. But if ‘under God’ is removed from the Pledge, the state must . . . make other efforts to declare and respect its own limits.”).

³³⁷ *Steel Co.*, 523 U.S. at 102 n.4 (subject-matter jurisdiction limitations keep courts “within their constitutionally prescribed sphere of action”).

³³⁸ *Id.* at 101–02 (citations omitted).

³³⁹ *Id.*

religion. When a court fails to recognize that limitation on its power, the court acts *ultra vires*, and offends the fundamental constitutional principle of non-establishment.³⁴⁰

Paying careful attention to the limits of governmental power is about much more than “legal niceties.”³⁴¹ The way in which courts speak about the character of the ministerial exception shapes the way judges, lawyers, and citizens understand the relationship between government and religion. The law has a pedagogical function, and the ways in which the law speaks to us (and the ways in which we speak about the law) shape the way we look at the world.³⁴² As Cathleen Kaveny explains, “[a]lways and everywhere, law teaches a moral lesson—it imbues a vision of how the members of a particular society should live their lives together.”³⁴³ We should attend to the jurisdictional character of the ministerial exception, because the ministerial exception teaches an important lesson. The ministerial exception serves as a critical institutional reminder of what Robert Tuttle has called “government’s penultimacy—government’s reticence, and even respect, in the face of its citizens’ obligations to the transcendent.”³⁴⁴

Professor Tuttle argues that the distinctive place occupied by religious institutions in the American constitutional order serves to highlight the state’s reticence before the transcendent.³⁴⁵ When the First Amendment bars application of otherwise neutral employment discrimination laws to the ministerial choices of religious institutions, the Constitution “testifies to the limited nature of its own authority.”³⁴⁶ For Tuttle, “this testimony lacks a clear secular justification—precisely because it is a theological

³⁴⁰ Cf. *id.* at 94 (for a court to decide a merits question before addressing the jurisdictional question of standing “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers”).

³⁴¹ *Id.* at 101.

³⁴² See, e.g., JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28, 35 (1985) (law is a form of “constitutive rhetoric”; the study of law is an inquiry into the ways in which “we constitute ourselves as individuals, as communities, and as cultures, whenever we speak” as lawyers and judges); M. Cathleen Kaveny, *Assisted Suicide, the Supreme Court, and the Constitutive Function of the Law*, 27 HASTINGS CENTER REP. 29 (1997) (“[T]hose who play a role in the legal enterprise are engaged in a type of ‘constitutive rhetoric’ that actually helps shape the moral identity of the community in which they participate. The community-constituting character of law does not inhere solely in the results that issue in particular cases, but also in the very way the questions are framed for decision.”); Patrick McKinley Brennan, *Against Sovereignty: A Cautionary Note on the Normative Power of the Actual*, 82 NOTRE DAME L. REV. 181, 191–92, 215, 218–19 (2006) (noting that how we talk about the law, and how we hear courts talking about the law, has an effect on who we become as people).

³⁴³ M. Cathleen Kaveny, *Autonomy, Solidarity and Law’s Pedagogy*, 27 LOUVAIN STUD. 339, 341 (2002). Once we “acknowledge the fact that law teaches,” we can “take responsibility for what it teaches.” *Id.*

³⁴⁴ Tuttle, *How Firm a Foundation?*, *supra* note 336, at 867.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 923.

argument. . . . The exceptional nature of religious belief and conduct depends on a religious justification: that God is God, and the state is not.”³⁴⁷

Tuttle and his colleague Ira Lupu have tried to articulate a justification for the distinctive role of religion in the Constitution that they argue is rooted in a political concept of religion, rather than in a theological starting point.³⁴⁸ Their argument, however, resonates with both Professor Esbeck’s theory of the structural Establishment Clause and John Courtney Murray’s understanding of the freedom of the church. Lupu and Tuttle begin with the proposition that the founders established a new political order that was distinguished by its “limited horizons.”³⁴⁹ “[I]ts powers would be restricted to the temporal welfare of its citizens.”³⁵⁰ This limit on the jurisdiction of government, precluding government from having a religious confession of its own, “avoid[s] both conflict among religious factions for political authority and the inevitable despotism of the religious faction that won out.”³⁵¹ Pursuant to this political concept of religion, “‘religion’ represents that which the new order disclaims: jurisdiction over ultimate truths, a comprehensive claim to undivided loyalty, and a command to worship.”³⁵²

The constitutional distinctiveness of religion—“a sense of boundary between state and some aspects of institutional [religious] behavior”—is rooted in this recognition of the limited nature of the state.³⁵³ There are certain aspects of human life that the state simply has no right to control. The constitutional distinctiveness of religion thus serves as a check on totalitarianism, insulating from state control those aspects of the behavior of religious institutions that nurture the spirit directly.³⁵⁴

For Lupu and Tuttle, this political doctrine of religion creates a relatively restricted distinctive sphere for religious institutions:

The role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life’s ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions. Most importantly, [this] approach is consistent with the duality of roles of religious institutions in contemporary America. When [religious] institutions perform functions indistinguishable from other segments of the nonprofit world, the law

³⁴⁷ *Id.*

³⁴⁸ Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order*, 47 VILL. L. REV. 37, 83 (2002).

³⁴⁹ *Id.* at 84.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

should treat them as their secular counterparts are treated. When, however, religious institutions act in uniquely religious ways, making connections with the world beyond the temporal and material concerns that are the proper jurisdiction of the state, the legally distinctive qualities of such institutions begin to emerge. It is only by exploring the intrinsic limit on state power to affect these ultimate concerns, rather than by mining the desires, activities or teachings of religious organizations, that the distinctive place of religious entities in our constitutional order can be located.³⁵⁵

The ministerial exception finds a secure home within this understanding of the constitutionally protected sphere in which religious institutions function insulated from state control. But can the law articulate principled, workable jurisdictional boundaries for this sphere? And does a workable understanding of religion's sovereign sphere provide adequate protection for the theological principle of the freedom of the church as it is understood by Murray and in the Vatican II *Declaration on Religious Freedom*?³⁵⁶

A jurisdictional line that tries to draw a distinction between claims that implicate "inherently religious activities" and those that do not is not workable—for a theological reason.³⁵⁷ There is a "religious density" to all things,³⁵⁸ and the whole world "is charged with the grandeur of God."³⁵⁹ It is, therefore, not possible to draw precise jurisdictional lines between the sacred and the secular, or between the

³⁵⁵ *Id.* at 92.

³⁵⁶ See *supra* text accompanying notes 78–92.

³⁵⁷ See *supra* text accompanying notes 157–60.

³⁵⁸ See Gregory A. Kalscheur, *Ignatian Spirituality and the Life of the Lawyer: Finding God in All Things—Even in the Ordinary Practice of the Law*, 46 J. CATHOLIC L. STUD. 7, 19–20 (2007).

³⁵⁹ Gerard Manley Hopkins, "God's Grandeur," in GERARD MANLEY HOPKINS (THE OXFORD AUTHORS) 128 (Catherine Phillips ed., 1986). As Karl Rahner explains, Because God is greater than everything, God can be found if one flees away from the world, but God can come to meet one on the streets in the midst of the world. For this reason Ignatius acknowledges only one law in his restless search for God: to seek God in all things; and this means: to seek God in that spot where at any particular time God wants to be found, and it means, too, to seek God in the world if God wants to show God's self in it. . . . Ignatius is concerned only with the God above the whole world, but he knows that this God, precisely by being really above the whole world and not merely the dialectical antithesis to the whole world, is also to be found *in the world*, when God's sovereign will bids us to enter upon the way of the world.

Karl Rahner, *Ignatian Mysticism of Joy in the World*, in KARL RAHNER: THEOLOGIAN OF THE GRACED SEARCH FOR MEANING 93–94 (Geffrey B. Kelly ed., 1992).

spiritual and the temporal.³⁶⁰ All human activity can be understood as having an “inherently religious” dimension.

Accordingly, the constitutionally mandated jurisdictional line must be articulated in other terms. The protected sphere of religion that is beyond the jurisdiction of civil authority might be better defined as the realm of “uniquely religious” activities (Lupu & Tuttle)³⁶¹ or the realm of exclusively religious activities (Esbeck).³⁶² In this realm, religion is sovereign and exercises sole jurisdiction. When religion is doing its own thing, its activities are off limits.³⁶³ But when religious institutions—as they must—embody their religious mission through temporal social service activities that are not uniquely religious (even though they *are* inherently religious), they are engaged in activity that the civil authority has jurisdiction to regulate for public order reasons.³⁶⁴

What sorts of claims are jurisdictionally barred by a constitutionally mandated jurisdictional line drawn to protect uniquely or exclusively religious activities? The ministerial exception cases establish a realm of autonomy for church polity and administration, for matters of internal church governance and administration.³⁶⁵ The selection and dismissal of ministers, and the terms of ministerial service, fall squarely within this sovereign religious realm.³⁶⁶ The employment of ministers is a uniquely religious activity; it lies at the core of religion’s own thing.³⁶⁷

The constitutionally mandated jurisdictional line exemplified by the ministerial exception does provide significant constitutional protection to the theological principle of the freedom of the church. The question of the appointment of ministers is at the heart of church autonomy; indeed the question of the role to be played by secular authorities in the investiture of bishops was at the heart of the medieval controversy in which the “freedom of the church” became a revolutionary slogan.³⁶⁸

³⁶⁰ See BERMAN, *supra* note 106, at 111 (suggesting that the actual boundaries between the realm of secular authority and that of spiritual authority can not, “by the very nature of the problem, be defined abstractly”); *id.* at 107 (there are likely always to be “disputes at the boundaries of the ecclesiastical and secular powers”); see also Brady, *supra* note 17, at 1697–98 (noting that some denominations, including the Catholic Church, understand the activities of church social service organizations to be “suffused with religious significance”); Leslie Griffin, *The Integration of Spiritual and Temporal: Contemporary Roman Catholic Church-State Theory*, 48 THEOLOGICAL STUD. 225, 251 (1987).

³⁶¹ See *supra* text accompanying note 355.

³⁶² See *supra* text accompanying notes 110–12.

³⁶³ See *supra* text accompanying note 127.

³⁶⁴ See *supra* note 93.

³⁶⁵ See *supra* text accompanying notes 354–57.

³⁶⁶ See *supra* text accompanying notes 354–57.

³⁶⁷ See *supra* text accompanying notes 354–57.

³⁶⁸ See BERMAN, *supra* note 106, at 94–113 (discussing the investiture controversy at the heart of the “papal revolution” of the eleventh and twelfth centuries); *id.* at 99 (“The separation, concurrence, and interaction of the spiritual and secular jurisdictions [that was the result of the papal revolution] was a principal source of the Western legal tradition.”).

In order for the jurisdictional line that defines the constitutionally protected exclusive jurisdiction of religion to be a workable principle of law, however, it may need to be drawn in a way that limits the sovereign sphere of religion to activities that can be described as uniquely or exclusively religious activity.³⁶⁹ Under this jurisdictional framework, much inherently religious activity will inevitably be subject to civil regulation.³⁷⁰ In order for the church to be the church, it must be able to engage in social service activity in the world. As Murray noted nearly fifty years ago, the freedom of the church must include the freedom to fulfill her “spiritual mission of social justice and peace.”³⁷¹ More recently, in his first encyclical, entitled *Deus Caritas Est* (God is Love), Benedict XVI forcefully affirmed that love of God grounds a love of neighbor that must be expressed through ecclesial service to the community.³⁷² Indeed, such social service activity is a constitutive element of what it means for the church to be the church:

[T]he exercise of charity became established as one of [the church's] essential activities, along with the administration of the sacraments and the proclamation of the word: love for widows and orphans, prisoners, and the sick and needy of every kind, is as essential to her as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word. . . . These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.³⁷³

The social welfare services provided by a religious entity like Catholic Charities cannot, therefore, be understood as a simply secular or temporal activity. Instead the concrete human services provided by Catholic Charities are an inherently religious undertaking that expresses the “deepest nature” of the church.³⁷⁴ At the same time, while the church cannot simply leave this activity to others, there are a range of non-religious groups, as well as the government itself, that provide similar services for non-religious reasons. Thus, the church's inherently religious ministry of social

³⁶⁹ See *supra* text accompanying notes 78–82.

³⁷⁰ See *supra* text accompanying notes 78–82.

³⁷¹ MURRAY, WE HOLD THESE TRUTHS, *supra* note 39, at 75.

³⁷² Benedict XVI, *Deus Caritas Est*, 35 ORIGINS 541 (2006).

³⁷³ *Id.* at 549–50 (2006) (Nos. 22, 25, 35); see also Brady, *supra* note 17, at 1697–98 (arguing that the activities of Catholic social services agencies may appear secular, but they are “suffused with religious significance”; “For the Catholic Church, social services activities are no more secular than worship and preaching”).

³⁷⁴ Benedict XVI, *supra* note 372, at 550 (No. 25).

welfare service falls outside the sphere of the uniquely or exclusively religious. As activity outside of that sphere, it may find itself subject to civil regulation that applies generally to social service providers or to secular employers, and these regulations may be justified by governmental interests that are properly characterized as public order concerns providing a legitimate basis for governmental action.³⁷⁵

2. Issues Related to Removal and Supplemental Jurisdiction

The question of the jurisdictional status of the ministerial exception can become an issue of practical significance with respect to removal and supplemental jurisdiction. Religious institutions that have been sued in state court by ministers who raise employment discrimination claims that include alleged violations of federal anti-discrimination statutes have on occasion removed those actions to federal court and then invoked the ministerial exception as grounds for dismissal of the action.³⁷⁶ Because assertion of the ministerial exception is a way of asserting that a court has no subject-matter jurisdiction over a ministerial employment discrimination claim, this removal is improper, because there is no basis for original federal jurisdiction over such a claim.³⁷⁷ The federal court, therefore, has no power to dismiss an improperly removed case; the federal court has power *only* to remand the case to state court for dismissal of the barred claim.³⁷⁸

³⁷⁵ See *supra* text accompanying note 82.

³⁷⁶ See *infra* text accompanying notes 381–86.

³⁷⁷ See 28 U.S.C. § 1441(a) (2000) (“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”); 16 MOORE ET AL., *supra* note 298, at § 107.14[1] (“An action filed in state court may not be removed unless the federal district courts have original jurisdiction of the action.”). Removal might conceivably be proper if the plaintiff’s claims included some ground for original jurisdiction in the district court *other than* the barred federal employment discrimination claim, such as state-law contract claims against completely diverse defendants. Cf. *Wis. Dep’t Of Corr. v. Schacht*, 524 U.S. 381, 386 (1998) (“[T]he presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction *that would otherwise exist*.” (emphasis added)).

³⁷⁸ See 28 U.S.C. § 1447(c) (2000) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); *Int’l Primate Prot. League v. Adm’s of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991), *superseded by statute*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3850 (“Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c).”); *id.* at 89 (“The literal words of § 1447(c) . . . on their face, give . . . no discretion to dismiss rather than remand an action.” (quoting *Me. Assn. of Interdependent Neighborhoods v. Me. Dept. of Human Services*, 876 F.2d 1051, 1054 (1st Cir. 1989))); *Parker v. Della Rocco*, 252 F.3d 663, 666 (2d Cir. 2001) (“[Section 1447(c)] addresses the consequences of a jurisdictional flaw, *i.e.*, it mandates a remand rather than a dismissal.”);

Confusion regarding the nature of the ministerial exception seems to have led the court to overlook this consequence of the jurisdictional character of the exception in *Ross v. Metropolitan Church of God*.³⁷⁹ Mr. Ross, an African-American, the former Pastor of Worship Arts of the Metropolitan Church of God, filed an action against the church in Georgia state court after he was fired by the church's pastor.³⁸⁰ The action alleged wrongful termination on the basis of race in violation of 42 U.S.C. § 1981, along with three state law causes of action: breach of contract, breach of implied-in-fact contract, and promissory estoppel.³⁸¹ The church then removed the action to federal court, arguing that the § 1981 claim gave the court federal-question jurisdiction over the case.³⁸²

After removal, the church moved to dismiss Mr. Ross's complaint under Rule 12(b)(6), on the ground that his § 1981 claim was barred by the ministerial exception.³⁸³ The court agreed, and dismissed Mr. Ross's § 1981 claim.³⁸⁴ Because the applicability of the ministerial exception means that the court had no jurisdiction over the subject-matter of the claim, the court erred in dismissing the claim, rather than remanding the case to state court.³⁸⁵ The court then compounded its error by going on to determine

16 MOORE ET AL., *supra* note 298, at § 107.14[3][b][ii] ("Section 1447(c) means that if it is discovered that federal jurisdiction is lacking, at any stage in the proceedings, a removed case must be remanded to state court rather than dismissed."); *id.* at § 107.41[1][d][ii] ("[T]he district court may not dismiss the case for lack of subject matter jurisdiction, but, rather, must remand the case to state court, even when the district court believes that pursuing the case in state court is futile on the merits.").

³⁷⁹ 471 F. Supp. 2d 1306 (N.D. Ga. 2007).

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.* at 1307.

³⁸³ *Id.* at 1306.

³⁸⁴ *Id.* at 1312.

³⁸⁵ See 28 U.S.C. § 1447(c) (2000); *supra* note 377. The same error is evident in *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004). In *Werft*, a Methodist minister resigned his position after his church employer refused to accommodate his attention deficit disorder, dyslexia, and heart problems. He filed an action against the church in state court in Arizona. The complaint alleged violations of three federal statutes (Title VII, the Rehabilitation Act, and the Americans with Disabilities Act), and the Arizona Civil Rights Act. The church removed the case to federal district court and then filed a 12(b)(6) motion to dismiss for failure to state a claim on the ground that "the First Amendment precluded civil court review of the Church's ministerial employment decisions." *Id.* at 1100. The district court granted the motion, and the Ninth Circuit affirmed. Because the claims implicated the employment relationship between church and minister, the district court "properly dismissed" the claims. *Id.* at 1104. If, however, the ministerial exception is properly understood to deprive civil courts of jurisdiction over ministerial employment discrimination claims, this removed action was not properly dismissed; pursuant to 28 U.S.C. § 1447(c) it should have been remanded to state court, and once back in state court, the action should have been dismissed for lack of subject-matter jurisdiction.

whether it should exercise supplemental jurisdiction over Mr. Ross's remaining state-law claims, which, as contract claims, were not barred by the ministerial exception.³⁸⁶ The court concluded that the state-law claims should be remanded to state court, but it analyzed the issue as if retaining jurisdiction over the state-law claims was within its power as a matter of discretion under the supplemental jurisdiction statute, 28 U.S.C. § 1367.³⁸⁷ Under the statute,

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so *related to claims in the action within such original jurisdiction* that they form part of the same case or controversy under Article III of the United States Constitution.³⁸⁸

If, however, the district court dismisses all the claims over which it had original jurisdiction, § 1367(c) provides that the court “may,” in its discretion, “decline to exercise supplemental jurisdiction” over the remaining state-law claims.³⁸⁹ Because the only federal-law claim in the case had been dismissed in the early stages of the litigation, the court in *Ross* concluded that considerations of comity, judicial economy, fairness, and convenience all favored remanding the contract claims to state court for resolution.³⁹⁰ Yet in reaching this decision the court seemed to assume that it retained the power under § 1367 to hear and decide the state-law claims if doing so made sense in the interests of judicial economy, convenience, fairness to the litigants, and comity.³⁹¹ This power only exists, however, when the court at one point had before it a civil action over which it had original jurisdiction. Because the ministerial exception deprived the district court in *Ross* of original jurisdiction over the § 1981 claim, the court never had supplemental jurisdiction over the related state-law claims,

³⁸⁶ *Ross*, 471 F. Supp. 2d at 1309 n.2 (“While the ministerial exception generally applies to bar state tort claims that require an inquiry into church administrative decisionmaking, it has generally not been held to bar state law contract claims, because ‘application of state contract law does not involve government-imposed limits on [a church’s] right to select its ministers,’ but rather seeks to enforce a purely voluntary promise.” (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007))); *see also* *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1360–61 (D.C. Cir. 1990) (minister’s contract claim not barred by First Amendment so long as adjudication of the claim would not create excessive entanglement with religion).

³⁸⁷ *Ross*, 471 F. Supp. 2d at 1312–13.

³⁸⁸ 28 U.S.C. § 1367(a) (2000) (emphasis added).

³⁸⁹ 28 U.S.C. § 1367(c).

³⁹⁰ *Ross*, 471 F. Supp. 2d at 1312–13.

³⁹¹ *Id.* at 1312.

and, therefore, the court never possessed the power, in its discretion, to hear and decide those claims.³⁹² Its *only* choice was to remand the state-law claims to state court.

A similar situation may arise when a plaintiff chooses to file an action in federal court, joining state-law claims to the federal employment discrimination claim that purports to give the federal court original jurisdiction. In *Petruska* for example, the plaintiff joined several state-laws claim to her Title VII sex discrimination claim against Gannon University.³⁹³ The district court dismissed all of her claims for lack of subject-matter jurisdiction.³⁹⁴ On appeal, the Third Circuit concluded that the ministerial exception did not bar her breach of contract claim; unlike her Title VII claim, the breach of contract claim did not involve government imposed limits on the university's right to select its ministerial employees.³⁹⁵ Thus, the Third Circuit held that the claims barred by the ministerial exception should be dismissed for failure to state a claim, while the contract claim should be remanded to the district court.³⁹⁶ That court, the Third Circuit seemed to assume, possessed the power to hear and decide the contract claim *so long as* resolution of the claim would not unduly entangle the court with religious matters in violation of the Establishment Clause by requiring the court to decide doctrinal issues or engage in any inquiry regarding ecclesiastical issues.³⁹⁷

If this contract claim is to go forward, however, it should (in the absence of complete diversity) be in state court, not federal court. Because the ministerial exception excluded her Title VII claim from the original jurisdiction of the district court, that court never had supplemental jurisdiction over Petruska's state-law claims. Thus the district court cannot now retain supplemental jurisdiction to give any further consideration to her contract claim, even if it is not barred by the ministerial exception.³⁹⁸ The Third Circuit's mistake with respect to the jurisdic-

³⁹² Cf. 16 MOORE ET AL., *supra* note 298, at § 107.14[3][b][ii]. If federal question jurisdiction exists at the time of removal, but the federal question claim is defeated *on the merits*, district courts retain discretion to exercise supplemental jurisdiction over state law claims arising from the same case or controversy. "*Once supplemental jurisdiction exists, it remains, subject to the discretionary provision for remand.*" *Id.* (emphasis added).

³⁹³ *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007).

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 310 ("Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to Petruska's contract claim would not violate the Free Exercise Clause.").

³⁹⁶ *Id.* at 268.

³⁹⁷ *Id.* at 312.

³⁹⁸ See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 210 (2d Cir. 2008) (after dismissing plaintiff's federal discrimination claim pursuant to the ministerial exception, the district court "had no reason to exercise supplemental jurisdiction over his state-law claims"). A claim dismissed for lack of subject-matter jurisdiction due to the applicability of the ministerial excep-

tional character of the ministerial exception led it incorrectly to assume that the district court had power to decide this remaining claim on remand.

CONCLUSION

When neutral regulations of general application justified by a public order rationale impose upon the church requirements that conflict with the church's doctrinal commitments, the church's freedom to engage in its ministry is burdened. Because the ministry of social service takes place outside of the exclusive sphere of religion, the freedom of the church seems to collide with the nature of the free exercise analysis established by the Court in *Smith*.³⁹⁹ Thus, current constitutional doctrine seems to allow government to impose restrictions on the freedom of the church when the church is engaged in activity outside of the exclusively religious sphere. Even in the context of state constitutional claims where *Smith* may not apply, the freedom of the church is not entirely secure. Thus, even a return to the pre-*Smith* analysis under the Federal Constitution's Free Exercise Clause may not provide robust protection to the freedom of the church when it is acting outside its sovereign sphere.⁴⁰⁰

The jurisdictional analysis that this Article examines will not solve that problem. But, given the religious density of *all* things, perhaps it is asking too much to expect the legal principles that flow from the Constitution to provide a simple, clear-cut, easy-to-apply doctrinal rule protecting the theological principle of the freedom of the church. It may not be possible to translate completely that theological principle into the language of constitutional law.⁴⁰¹ This difficulty, however, makes it all the more critical that we understand and apply the necessarily imperfect translation of that principle that *is* found in the constitutionally mandated jurisdictional limits on civil authority exemplified by the ministerial exception.⁴⁰² This jurisdictional limit implements our Constitution's recognition that the state is not the ultimate authority

tion will be dismissed without prejudice. *See, e.g.,* Cronin v. S. Ind. Annual Conference, United Methodist Church, No. 1:05-cv-1804-LJM-WTL, 2007 WL 2258762, at *6 (S.D. Ind. Aug. 3, 2007). In any subsequent litigation, however, the plaintiff will be precluded from relitigating the issue of the applicability of the ministerial exception itself. *See* Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1248 (D.C. Cir. 1999) (“[U]nder principles of issue preclusion, even a case dismissed without prejudice has preclusive effect on the jurisdictional issue litigated.”); WRIGHT & MILLER, *supra* note 314, at § 4436 (“Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question.”).

³⁹⁹ *See supra* notes 9–10 and accompanying text.

⁴⁰⁰ *See supra* notes 105–06 and accompanying text.

⁴⁰¹ *Cf.* White, *supra* note 49, at 180 (“[O]ne can think of every act of judicial interpretation as a kind of translation, necessarily imperfect, from one world to another, one mind to another.”).

⁴⁰² *See supra* text accompanying notes 1–6.

in all things—it embodies the constitutionally mandated principle that some things are above or beyond the jurisdiction of the law precisely because the First Amendment stands as an affirmation of the penultimacy of the state.⁴⁰³ Thus, clearly and consistently acknowledging this jurisdictional limit might teach us all to treat the claims of religious institutions with respect and sensitivity,⁴⁰⁴ even when those institutions pursue their missions through inherently religious activity in the jurisdictional sphere that lies outside of the realm of exclusive religious sovereignty.

⁴⁰³ See discussion *supra* Part IV.E.1.

⁴⁰⁴ White, *supra* note 49, at 189 (noting that “in talking in a certain way about the Constitution we make it real”). White explains that the First Amendment calls for:

[A] set of attitudes that will enable us to face and live with the problem it insists upon putting before us, the impossible but necessary task of talking about religion in the language of the law. . . . [O]ur hope at the end might be that we could achieve a condition of ‘religious concord’ based not, . . . upon contempt, credulity, or cynicism, but upon respect.

Id. at 201–02.