
NOTES

CLOSING A LOOPHOLE: *HEADLEY V. CHURCH OF SCIENTOLOGY INTERNATIONAL* AS AN ARGUMENT FOR PLACING LIMITS ON THE MINISTERIAL EXCEPTION FROM CLERGY DISPUTES

MOLLY A. GERRATT*

ABSTRACT

In 2009, Marc and Claire Headley sued the Church of Scientology International and its affiliate, Religious Technology Center, for violating the Trafficking Victims' Protection Act ("TVPA") and for forcing Claire to undergo two abortions. The case was thrown out at the summary judgment phase because the Headleys were considered "ministers" of the Church of Scientology. Under the judicially created "ministerial exception"—an exemption never explicitly endorsed by the U.S. Supreme Court—ministers are barred from suing their religious employer for disputes arising during the course of their employment. Because of the ministerial exception, the

* Class of 2012, University of Southern California Gould School of Law; A.B. Classical Studies, A.B. English 2009, Georgetown University. I am humbly indebted to Professor Nomi Stolzenberg; her expertise and wisdom has guided not only this Note but also my intellectual development and curiosity. I also owe a tremendous amount of thanks to the staff and editors of the Southern California Law Review, particularly Wen Shen, Audrey Tan, and Kimberley Church; United States Magistrate Judge Margaret A. Nagle; the unwavering Shaun Brayton-Gerratt & Bruce Gerratt; and the continually astounding Patrick Kennedy.

Headleys' accusations have gone uninvestigated, potentially allowing the Church to continue to inflict horrific treatment on other "ministers" in its ranks. This Note begins by analyzing the current state of the exemption and its limits. Utilizing Headley as a case study, this Note concludes that the current limits on the ministerial exception are inadequate and proposes that courts consider the "harm principle" as a limiting doctrine on the exemption. This limiting principle would force the courts to consider physical and societal injuries caused by religious institutional behavior in the ministerial employment relationship in their constitutional inquiries. During the production of this Note, the U.S. Supreme Court heard argument and decided a case concerning the ministerial exception. A brief epilogue addresses the decision and its implications on the limitation set forth in this Note.

TABLE OF CONTENTS

I. INTRODUCTION.....	143
A. THE FACTS OF <i>HEADLEY</i>	143
B. THE MINISTERIAL EXCEPTION	150
C. THE PROBLEM IN THE MINISTERIAL EXCEPTION'S APPLICATION	151
II. ARGUMENTS IN FAVOR OF THE MINISTERIAL EXCEPTION'S EXISTENCE.....	153
A. ORIGIN OF THE MINISTERIAL EXCEPTION.....	153
B. CONSTITUTIONAL ARGUMENTS FOR THE MINISTERIAL EXCEPTION	157
1. Free Exercise Clause Justifications.....	157
a. Church Autonomy.....	158
b. The Ministerial Exception Survives <i>Smith</i>	161
2. Establishment Clause Justifications.....	163
III. CONSTITUTIONAL ARGUMENTS AGAINST THE EXISTENCE OF THE MINISTERIAL EXCEPTION.....	166
A. FREE EXERCISE	166
B. ESTABLISHMENT CLAUSE	168
IV. LIMITS ON THE SCOPE OF THE MINISTERIAL EXCEPTION	170
A. DEFINITION OF "MINISTER"	170
B. THE "RELIGIOUS" MOTIVATION REQUIREMENT	172
C. NON-CRIMINAL LAW REQUIREMENT	176
V. A PROPOSED LIMIT: THE "HARM PRINCIPLE"	177

2011]	<i>LIMITING THE MINISTERIAL EXCEPTION</i>	143
	A. RECENT SUPREME COURT JURISPRUDENCE WEIGHS IN FAVOR OF APPLYING THE HARM PRINCIPLE TO THE MINISTERIAL EXCEPTION	183
	1. The Movement from Strict Separation to Neutrality	184
	2. Establishment Analysis Under the Neutrality Principle	185
	3. Free Exercise Analysis Under the Neutrality Principle	186
	B. THE “HARM PRINCIPLE” AS APPLIED TO THIRD PARTY HARM CASES AND CHURCH CHILD ABUSE CASES.....	193
VI.	APPLYING THE “HARM PRINCIPLE” TO THE MINISTERIAL EXCEPTION	195
	A. <i>HEADLEY</i> AS A CASE STUDY.....	195
	B. THE “HARM PRINCIPLE” APPLIED.....	197
	1. The Harm Principle Should Apply to the Ministerial Relationship.....	197
	2. Free Exercise Concerns	198
	3. Establishment Concerns.....	199
	4. The Current Limits on the Ministerial Exception Are Ineffective.....	200
	5. Potential Abuse of the Harm Principle: Pluralism and Measurement Concerns	200
VII.	CONCLUSION.....	204
VIII.	EPILOGUE.....	204

I. INTRODUCTION

A. THE FACTS OF *HEADLEY*

Marc and Claire Headley each signed a billion-year employment contract with the Church of Scientology before they were adults. Marc Headley became involved with the Church of Scientology when he was around ten years old.¹ At fifteen, he signed a contract to become a member of Scientology’s Sea Organization (“Sea Org”).² Claire Headley was raised in the Church of Scientology.³ She joined the Sea Org in 1991 at age

1. Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant Church of Scientology Int’l’s Motion for Summary Judgment at 2, *Headley v. Church of Scientology Int’l*, 2010 U.S. Dist. LEXIS 84869 (C.D. Cal. Aug. 5, 2010) (No. CV09-3986), 2010 WL 2915814 at *4 [hereinafter Plaintiff’s Memorandum].

2. *Id.*

3. *Headley v. Church of Scientology Int’l*, No. CV09–3987, 2010 U.S. Dist. LEXIS 80807, at *1 (C.D. Cal. Aug. 5, 2010).

sixteen.⁴ In 2009, they sued the Church for various abuses they claim they endured while they were members of the Sea Org.

The allegations in their Complaints are, if true, horrific. This Note, however, recognizes that they are just that—allegations. For the purposes of denying summary judgment, a court must assume the truth of the allegations presented to it; this means that the facts' actual veracity will be tested later at trial if the case is allowed to proceed that far. Because summary judgment was the stage reached in *Headley v. Church of Scientology International*, this Note will assume the truth of the allegations presented against the defendant Church, but does not pass judgment on their actual veracity.

The Sea Org is a group of the Church of Scientology's staff, and all of the senior leaders of the Church belong to the Sea Org.⁵ It is the "church's equivalent of a religious order."⁶ Members are required to sign a one-billion-year contract promising service to the religion in their subsequent lives, and often are enlisted into the organization as children.⁷ The Sea Org originated as a maritime group whose members worked on ships.⁸ Today, the organization is headquartered in Gilman Hot Springs, California,⁹ and its members wear Navy-style uniforms as a nod to the organization's roots.¹⁰ The purpose of the Sea Org is to "clear the planet" of negative

4. Joe Childs & Thomas C. Tobin, *Inside Scientology: No Kids Allowed*, ST. PETERSBURG TIMES, June 12, 2010, available at <http://www.tampabay.com/news/scientology/article1101759.ece>. The *St. Petersburg Times* released a three-part exposé on the Church of Scientology entitled *Scientology: The Truth Rundown*. The interview with Claire Headley is a part of a collection of many articles about the religion available online.

5. *Headley*, 2010 U.S. Dist. LEXIS 80807, at *1.

6. Lawrence Wright, *The Apostate: Paul Haggis vs. the Church of Scientology*, NEW YORKER, Feb. 14, 2011, at 84, 93.

7. *Id.*

8. Laurie Goodstein, *Defectors Say Church of Scientology Hides Abuse*, N.Y. TIMES, Mar. 6, 2010, http://www.nytimes.com/2010/03/07/us/07scientology.html?_r=1&pagewanted=1. This term is derived from Scientology founder L. Ron Hubbard's activities at sea. The *New Yorker* reports, through defector and screenwriter Paul Haggis, that Hubbard preferred being at sea because it was a "distraction-free environment" where he could "continue his research into the upper levels of spiritual awareness." Wright, *supra* note 6, at 93. Hubbard used to take a staff of young people, who called themselves the Sea Organization, on a boat through the Mediterranean to find treasure he had purportedly hidden in a past life. *Id.* See also *Wollersheim v. Church of Scientology of Cal.*, 66 Cal. Rptr. 2d 1, 4 (Ct. App. 1989) (describing the plaintiff's experience working for Scientology aboard a ship, on which he claims he was "forced to undergo a strenuous regime which began around 6 a.m. and continued until 1 a.m. the next morning . . . [and] to sleep nine deep in the ship's hold").

9. MARC HEADLEY, *BLOWN FOR GOOD: BEHIND THE IRON CURTAIN OF SCIENTOLOGY* 371 (2010). The title of this book, written by the plaintiff in the *Headley* case, refers to the term "blown," meaning a departure from the Scientology religion that is not sanctioned by the religion. *Id.* at 359.

10. Goodstein, *supra* note 8.

influences by bringing Scientology to its inhabitants.”¹¹ The organization currently consists of around six thousand members who counsel other members and prospective Scientologists,¹² care for maintenance of the headquarters (“Int Base”),¹³ and publish official Scientology literature.¹⁴ Members may marry, but may not have children.¹⁵

The Scientology religion is based on the goal of obtaining “[a] civilization without insanity, without criminals and without war, where the able can prosper and honest beings can have rights, and where man is free to rise to greater heights.”¹⁶ Based on the teachings in L. Ron Hubbard’s book *Dianetics*, the religion espouses the view that people are Thetans, or “immortal spiritual being[s] that live[] through countless lifetimes.”¹⁷ Thetans have “reactive mind[s]” in which painful and damaging memories called “engrams” are stored.¹⁸ Engrams are the “source of nightmares, insecurities, irrational fears, and psychosomatic illnesses.”¹⁹ Through a process called “sec checking,” Sea Org members use a tool called an “e-meter” to locate engrams and remove their negative qualities. When this is done, the reactive mind will be wiped out and the person will be “clear.”²⁰ Another mode for obtaining clarity is the “auditing” process, which consists of “spiritual counseling.”²¹ Through auditing, members embark on “the Bridge,” or the process of obtaining various “levels” within the Church;²² this is an incentive for purchasing more auditing. Clarity for the world is the goal of the Scientology religion.

But this mission, it would seem, often has the opposite consequence.

11. *Id.*

12. Wright, *supra* note 6, at 93.

13. “This refers to the large property located in Gilman Hot Springs, California that houses all of the international management organizations of Scientology All of the staff that work here are also housed on the property and seldom leave for any reason.” HEADLEY, *supra* note 9, at 371. The term is also interchangeable with “Gold Base.” Marc Headley’s book includes a glossary of the many terms and abbreviations used by Scientologists with which outsiders are unfamiliar (“It could be said that if two Scientologists were talking to each other about Scientology it would almost seem they were speaking a different language”). *Id.* at xv.

14. Wright, *supra* note 6, at 93.

15. *Id.*

16. *Id.* at 87 (quoting L. Ron Hubbard).

17. *Id.* at 87, 93. This belief underlies the practice of signing billion year contracts.

18. *Id.* at 93.

19. *Id.*

20. *Id.*

21. *Id.* at 88. Auditing costs money, and it is estimated by a Carnegie Mellon University professor that it can cost more than \$500,000; the church denies this. *Id.* at 88–89.

22. HEADLEY, *supra* note 9, at 359. The Bridge is also known as the “Bridge to Total Freedom.” *Id.*

Defectors from the Church, including Marty Rathbun,²³ Paul Haggis,²⁴ and Marc Headley,²⁵ have recently published stories about their stints in the Church. Their stories center around the common experience of witnessing (or themselves enduring) episodes of violence by Church leaders. Rathbun, one of Church leader David Miscavige's closest associates when he was a Sea Org member, reports having seen Miscavige beat multiple members and was himself instructed to beat other members. "Staffers are disciplined and controlled by a multilayered system of 'ecclesiastical justice.' It includes publicly confessing sins and crimes to a group of peers, being ordered to jump into a pool fully clothed, facing embarrassing 'security checks' or, worse, being isolated as a 'suppressive person.'"²⁶ Rathbun also claims that in 1995, he was instructed to dispose of incriminating evidence after a Sea Org member, Lisa McPherson, died after being taken out of a hospital by fellow Scientologists and kept in a hotel room for seventeen days.²⁷ Lawrence Wollersheim, another former Sea Org member, claimed that he was forced to stay in a docked ship for eighteen hours a day without enough sleep or food, and he successfully sued the Church for this treatment and won a two-and-a-half-million-dollar judgment.²⁸ Female ex-Scientology members also report being forced to have abortions in order to remain a part of Sea Org.²⁹

It is difficult to imagine how a person willingly withstands these atrocities. One defector said the primary motivator was fear: "You don't have any money. You don't have job experience. You don't have anything.

23. See Joe Childs & Thomas C. Tobin, *Scientology: The Truth Rundown*, ST. PETERSBURG TIMES, June 21, 2009, available at <http://www.tampabay.com/news/article1012148.ece> ("Mark C. 'Marty' Rathbun left the Church of Scientology staff in late 2004, ending a 27-year career that saw him rise to be among the organization's top leaders. For the past four years, he has lived a low-profile life in Texas. Some speculated he had died Contacted by the *St. Petersburg Times*, Rathbun agreed to tell the story of his years in Scientology and what led to his leaving.").

24. See Wright, *supra* note 6, at 84 ("Haggis forwarded his resignation letter to more than twenty Scientologist friends, including Anne Archer, John Travolta, and Sky Dayton, the founder of EarthLink. 'I felt if I sent it to my friends they'd be as horrified as I was, and they'd ask questions as well'").

25. See HEADLEY, *supra* note 9, at xv ("When I eventually left [the Sea Org] in 2005, it took me over a year to speak out about my experiences as a Scientology staff member, the abuse and the inner workings of the Sea Organization. After writing several of my accounts on different internet sites, I was flooded with hundreds of requests to put them all in a book.").

26. Childs & Tobin, *supra* note 23. A "suppressive person" blocks the spiritual progress of Scientologists and therefore must be avoided. Wright, *supra* note 6, at 88.

27. Childs & Tobin, *supra* note 23.

28. Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d 1, 4 (Ct. App. 1989). See also Wright, *supra* note 6, at 93.

29. See *infra* note 37 and accompanying text.

And [Miscavige] could put you on the streets and ruin you.”³⁰ And why not call the police? One reason is doctrinal: “Only by going through Scientology will you reach spiritual immortality If you don’t go through Scientology, you’re condemned to dying over and over again in ignorance and darkness, never knowing your true nature as a spirit.”³¹ Another reason is that “if a Sea Org member sought outside help he would be punished, either by being declared a Suppressive Person or by being sent off to do manual labor.”³² The Church forbids members from leaving Sea Org. In a practice known as a “blow drill,” which the Church denies exists but is described by both Marc Headley and the *New Yorker*, Sea Org members who try to escape are pursued and brought back to the organization through “emotional, spiritual, or psychological pressure [or sometimes] physical force.”³³ Moreover, in order to prevent Sea Org members from leaving in the first place, the base is enclosed by high perimeter fences.³⁴ People who show indications that they might “blow” or are not properly performing their duties are put into the Rehabilitation Project Force (“RPF”), a program in which members work long hours, spend at least five hours in counseling to find their crimes and evil purposes, and may not speak unless spoken to.³⁵ The *New Yorker* reported that the Church has been under investigation by the FBI for human trafficking violations since 2009 in relation to these practices.³⁶ These same experiences formed the complaints by Marc and Claire Headley in *Headley*.

Claire Headley claimed that she was forced to have two abortions by the Church of Scientology, one at age nineteen, and the other at age twenty-one.³⁷ Mrs. Headley notes in an interview with the *St. Petersburg Times*

30. Wright, *supra* note 6, at 101.

31. *Id.* at 102 (quoting former Sea Org member Jefferson Hawkins).

32. *Id.*

33. *Id.* at 104. See also HEADLEY, *supra* note 9, at 359 (“Several staff are dispatched to bus stations, airports, local hotels, etc. to locate the person. Major airline flight records are searched for tickets being purchased under the staff member’s name and the person is generally hunted down until ‘recovered’ or they have been declared officially blown and not able to be found. Blow drills have taken anywhere from 3 hours to 3 weeks, and involves anywhere from 20 to 50 staff.”).

34. Wright, *supra* note 6, at 101.

35. HEADLEY, *supra* note 9, at 379. See also Wright, *supra* note 6, at 105. Another similar practice is that of disconnection, in which a Sea Org member is not allowed to have contact with friends or family that could have negative effects on them. It is similar to the shunning practices of the Amish and Orthodox Jewish communities. *Id.* at 84, 98.

36. Wright, *supra* note 6, at 104–05.

37. Childs & Tobin, *supra* note 4. See Laura Dieckman, ST. PETERSBURG TIMES, <http://www.tampabay.com/specials/2009/reports/project/dieckman.shtml> (last visited Oct. 28, 2011) and Sunny Pereira, ST. PETERSBURG TIMES, <http://www.tampabay.com/specials/2009/reports/project/>

that, having been raised in the Church, she did not know much about the real world, and with a salary of forty-six dollars a week, birth control was not a part of her budget.³⁸ In 1994, when she became pregnant for the first time, Sea Org members were not allowed to be pregnant or to carry a child to term.³⁹ If a Sea Org member decided to do this, she would be sent to a non-Sea Org location and would be separated from her spouse.⁴⁰ Mrs. Headley reported that she had seen the Church subject women who had made the decision to keep a child to heavy labor.⁴¹ She did not know what the Church's policy was regarding the child born to a member.⁴²

Before Mrs. Healey was taken to the clinic to get her first abortion, senior members of the Church told her the questions the doctor would ask her and instructed her about how to answer these questions.⁴³ The second time she found out she was pregnant, she was working at the Religious Technology Center in Clearwater, Florida,⁴⁴ where she was separated from

pereira.shtml (last visited Oct. 28, 2011) for discussions by other women with similar stories. Laura Dieckman joined Sea Org when she was twelve years old. *Laura Dieckman, supra*. She was seventeen when she became pregnant in 1996. *Id.* Having been a Scientologist all of her life, she felt entirely dependent on the religion. *Id.* She had no education or money, and her husband was a Sea Org member as well. *Id.* She recounts conversations with superiors who told her she would need to have the abortion, but not to worry because the fetus was "just tissue." *Id.* In 2001 she was assigned to the RPF, where she was separated from her husband, family, and friends for almost three years. *Id.* She felt as if there would be no way out of RPF for her; she knew that there was a second tier to the RPF in which RPF members who did not behave were sent and kept out of contact with the regular RPF members. *Id.* Knowing that if she did something suicidal she would be removed from RPF and the Sea Org within twenty-four hours without being forced into the second RPF tier, she drank bleach within the eyeshot of another member. *Id.* She was removed from the Sea Org and started a life outside of the religion. *Id.* Sunny Pereira joined the Sea Org at age fifteen in 1988 and left in 2004. *Sunny Pereira, supra*. According to her, the pressure to have an abortion was instilled in her by being told to weigh the lives Sea Org's members they were supposedly saving by their actions against this "one little tiny speck of nuisance that's growing inside of you." *Id.* After completing the RPF program, she became pregnant for a second time and endured a botched abortion. *Id.* After the second abortion, she reports that she had countless miscarriages, but at the time of her interview, she was happily six months pregnant and living in Texas. *Id.* The Church of Scientology responded to the St. Petersburg Times with sworn declarations by former Sea Org members who chose to have children detailing the aid given to them by the Church. Childs & Tobin, *supra* note 4.

38. Childs & Tobin, *supra* note 4.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* ("If they ask you if you want to talk to a psychologist about your decision, say no.' 'If they ask you if you want to discuss it, say no.'").

44. "[The Religious Technology Center] owns the Scientology trademarks and advanced technology. It licenses these trademarks to [the church] for sublicense to subordinate organizations and directly licenses the advanced technology to appropriate Advanced Organizations." HEADLEY, *supra* note 9, at 379.

her husband. The Church did not allow her to contact her husband.⁴⁵ She was not able to tell him about the pregnancy or the termination thereof until six months after it occurred.⁴⁶

Marc Headley claimed that he suffered physical abuse at the hands of Miscavige and other leaders, including Rathbun.⁴⁷ This included kicking and punching in order to force Headley to submit to their authority. He also witnessed abuse of other Sea Org members and was in constant fear that he would be assaulted.⁴⁸ Both Marc and Claire claimed that they and others were subjected to verbal abuse and degrading punishments.⁴⁹ They also claimed that they were not free to communicate with people outside of Scientology⁵⁰ and were subjected to extensive security measures designed to prevent them from leaving.⁵¹ If they did leave, they would be subjected to “blow drills.”⁵² They did not believe they had the freedom to come and go.⁵³ Based on these claims, the Headleys sued the Church for violations of the Trafficking Victims’ Protection Act (“TVPA”) and for forced abortions.⁵⁴

45. Childs & Tobin, *supra* note 4.

46. *Id.*

47. See Plaintiff’s Memorandum, *supra* note 1, at 4–5.

48. Scientology spokesman Tommy Davis admitted at a deposition that from 2001 until 2004, at least fifty instances of physical abuse of Sea Org members occurred. *Id.* at 4.

49. *Id.* at 5–6 (“Mr. Headley [was required] to clean human excrement out of an aeration pond by hand [without gloves] for two days from early in the morning until midnight. This task consisted of emptying human excrement out of a football size field about six feet deep. Mr. Headley dry heaved for the first few hours that he was performing this task, and recalls that he had human excrement in his nose, mouth, and eyes . . . Security guards were stationed at the pond to prevent Mr. Headley and his coworkers from leaving . . . Mr. Headley also was required to live in tents on a portion of the property for several months. During this time, he slept on trash bags and was given trash bags to use as blankets. The sprinklers routinely were turned on during the middle of the night while he and his coworkers attempted to sleep . . . Mr. Headley was assigned to clean the floor of the kitchen facility at Gold Base with a toothbrush for several days.” (citations omitted)).

50. Marc and Claire did not have access to the internet or phone without obtaining permission. *Id.* at 7. Their mail and phone calls were censored. *Id.* It was a “high crime” to call the police. *Id.*

51. The Base was surrounded by a fence that was lined with security cameras, motion detectors, flood lights, shake sensors, and spikes that faced in and out. *Id.* at 7–8. Security guards with handguns were present, along with attack dogs. *Id.* at 8.

52. See *supra* note 33.

53. Plaintiff’s Memorandum, *supra* note 1, at 13 (“Mr. Headley believed that he could not leave because he thought he would be recaptured, that he would lose all contact with his wife and family members, and that he would be subjected to a significant freeloader debt.”). “A freeloader tab [is a charge] for all the coursework and counseling [Sea Org members] have received; the bill can amount to more than a hundred thousand dollars. Payment is required in order to leave in good standing.” Wright, *supra* note 6, at 103.

54. See *infra* note 286.

B. THE MINISTERIAL EXCEPTION

The *Headleys*' case hit a roadblock in the form of the "ministerial exception." Under this exemption, people considered ministers cannot successfully sue their religious employer for employment disputes. The exemption is derived in part from statute,⁵⁵ but is mostly developed by the courts as a means of protecting the guarantees of the Free Exercise and Establishment Clauses of the First Amendment.⁵⁶ From a free exercise standpoint, the exemption exists because our government respects the impulse or necessity (or both) of religious organizations to be partly autonomous—to exist in our society and to choose their modes of operation. Inherent in this grant is the right to choose and manage their clergy.⁵⁷ The Catholic Church, for example, has a right to hire only men to become Catholic priests; religious institutions that do not believe women can be ordained should not be forced to hire female ministers.⁵⁸

As is the case with most employer-employee relationships, however, disagreements arise in minister-church relationships. But unlike regular employees who can obtain relief for unfair or discriminatory employment practices under Title VII and other similar statutes, ministers cannot easily seek relief under the same statutes. From an Establishment Clause perspective, lawsuits brought by former ministers against their religious employers run the risk of implicating the government in the internal religious operations of those institutions. This would run afoul of this country's longstanding respect for the separation of church and state.⁵⁹

As a result, courts have determined that religious institutions must be granted an exemption from judicial scrutiny into the ministerial employment relationship. But, as is the case with all religious exemptions and accommodations, the ministerial exception must have limits. First, the

55. See *infra* notes 71–72 and accompanying text.

56. Collectively these are known as the Religion Clauses, and they read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

57. See *infra* Part II.B.1.

58. Kent Greenawalt explains why this would be troublesome to the religious institution and to the female: "what status would a woman priest have if few members of a church acknowledge that she possesses valid religious authority?" KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 379 (2006). He adds a footnote: "However, if the members themselves are divided, she may function effectively for those members who think she does have religious authority; and the law might, thus, strengthen the hand of some members who are not in positions of leadership." *Id.* at 379 n.6.

59. See *infra* Part II.B.2.

person suing must be a minister.⁶⁰ Moreover, the Free Exercise or Establishment Clause values that created the footing for the exemption must be implicated in the law under which a suit is brought.⁶¹ Courts consider that suits brought under Title VII for different sorts of discrimination—religious, sexual, and racial—are properly barred by the ministerial exception because often times the behavior that constitutes this sort of discrimination is either doctrinally motivated or at least protected under the religion clauses. Many courts presented with a case brought under Title VII assume the validity of the exemption under that statute without looking at the facts of such a case. In some jurisdictions, however, courts inquire into whether the behavior the plaintiff complains of is doctrinally motivated. For example, in the Ninth Circuit, the exemption would not bar a suit by a female who alleged that during her employment a priest had sexually harassed her, on the grounds that no Catholic doctrine instructs priests to sexually harass women.⁶² Finally, the ministerial exception does not apply to criminal laws.⁶³

Courts have been unclear, however, in delineating these limits. Although courts mention in passing that the exemption does not preclude suits brought under criminal laws, they have not spelled out which laws are considered “criminal.”⁶⁴ Moreover, even though some courts have determined that the exemption does not apply to Title VII sexual harassment suits when the harassing behavior was not religiously motivated, they have not indicated whether this reasoning extends to civil cases that do not concern sexual harassment.⁶⁵ As the case law currently stands, however, the limits on the exemption are free floating, unresolved, and clumsy.

C. THE PROBLEM IN THE MINISTERIAL EXCEPTION’S APPLICATION

The vagueness of the limits in place on the ministerial exception has produced holdings that seem contrary to the values inherent in our system of justice and the rule of law. Consider, for example, the *Headley* case, in which Sea Org members alleged that they suffered grave abuses that were

60. See *infra* Part IV.A.

61. See *infra* note 86 and accompanying text.

62. See *infra* Part IV.B.

63. See *infra* Part IV.C.

64. See *infra* Part IV.C. Additionally, no appellate court has ever ruled on whether the ministerial exception bars TVPA claims. *But cf.* *infra* note 295 (noting a district court opinion concerning claims of trafficking by ministers).

65. See *infra* Part IV.B.

motivated directly by the Scientology doctrine. Next, consider a female Methodist minister who was fired because of alleged sexual discrimination.⁶⁶ Before going on maternity leave, she questioned why her pay was lower than that of her male counterparts. After taking maternity leave, she suffered from post-partum complications and was hospitalized, requiring ongoing medical care. When she returned to work, she was fired and told that she needed to repay the church for her medical costs. She was unable to sue the church for sexual discrimination because of the ministerial exception. Consider also a homosexual church organist who was fired because the church he worked for believes that homosexuality is a sin.⁶⁷ When he was hired, the church had asked him if he was a Christian, and he replied that he was, but he was not asked about his sexual orientation. The church found out about his sexual orientation only after he had begun working there. He was not able to sue the church.

None of the limits set down by the courts—the “minister,” the “religious” motivation, or non-criminal law requirements—kept the ministerial exception from barring these lawsuits. In each of these cases, the plaintiffs were considered ministers by the court. Additionally, sex and sexual orientation discrimination, along with alleged abusive practices by the Church of Scientology, were considered too inseparable from religious doctrine to be adjudicated. The courts never considered the amount of harm imposed by the religious institutions on the individuals involved, or to society, in making their decisions.

These decisions are unsettling. They involve acts by religious institutions that are contrary to our notions of equality and fairness⁶⁸—surely, those employees mentioned above would have obtained relief were they not considered ministers who worked for religious institutions. On the other hand, our societal values—and the values of the Framers of the First Amendment—demand religious freedom and the freedom from government intervention in religious affairs.⁶⁹ As a result, ministerial exception cases are hard cases because constitutionally guaranteed

66. *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 344 (5th Cir. 1999).

67. 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, 1377 (1981) (citing *Walker v. First Orthodox Presbyterian Church of S.F.*, 22 Fair Empl. Prac. Cas. 762, 763 (Cal. Super. Ct. 1980)).

68. See *infra* notes 144–45 (discussing how the ministerial exception undermines the notion of equality inherent in the Fourteenth Amendment).

69. See *infra* Part III.A.

individual rights are pitted against longstanding and also constitutionally rooted religious institutional rights.⁷⁰

This Note does not argue that the ministerial exception does not or should not exist; indeed, it accepts the exemption's existence as a constitutional necessity in some cases. This Note does, however, argue that the limits courts have applied to the exemption have been sketched clumsily—to the detriment of individuals and to the benefit of institutional religious organizations. By addressing a grave misapplication of the exemption in *Headley*, this Note will argue for a method of constraining the exemption referred to as the “harm principle,” a doctrine that calls for executing a balancing test that would quell religious conduct when it harms individuals, even when such conduct would ordinarily be protected under the religion clauses. This principle combines modes of thought that are implicitly encompassed by the current limits on the exemption and makes those tenets explicit.

Part II outlines the arguments supporting the existence of the ministerial exception. Part III details the reasons opponents of the exemption find that it is not constitutionally mandated both from free exercise and establishment clause perspectives. Part IV evaluates particular limits on the exemption already used by courts, and argues that the “harm principle” is already implicitly relied on in some of these limits. Part V describes the “harm principle” and why its application as a limiting principle is permissible, given the move in religion clause jurisprudence away from strict separation toward neutrality; this part also demonstrates how the harm principle has been applied to other sorts of disputes like church child abuse cases. Part VI encourages adoption of the harm principle as a limit to the ministerial exception, using *Headley* as a case study.

II. ARGUMENTS IN FAVOR OF THE MINISTERIAL EXCEPTION'S EXISTENCE

A. ORIGIN OF THE MINISTERIAL EXCEPTION

While the ministerial exception for religious employers began statutorily, the courts have interpreted and applied the exemption, giving it its real teeth. Title VII of the Civil Rights Act of 1964 explicitly prohibits discrimination in employment on the basis of race, color, religion, sex, or

70. See *infra* notes 142–44 and accompanying text.

national origin.⁷¹ Notably, Congress has exempted, to a certain extent, religious employers from this important civil rights statute.⁷² Faced with the codification of this exemption for religious employers, courts have been shouldered with the task of interpreting the reach of the exemption, and in large part, they have done so in divergent ways.

The first circuit court to take up the task was the Fifth Circuit in *McClure v. Salvation Army*.⁷³ Mrs. Billie B. McClure, an “officer” in the Salvation Army, performed duties as a Corps Commander, a Welfare Casework Supervisor, and as a secretary before she was fired from the organization.⁷⁴ She sued the Salvation Army for discriminatory employment practices under Title VII.⁷⁵ While employed by the Salvation Army, Mrs. McClure made comments to superiors and corresponded with the Equal Employment Opportunity Commission (“EEOC”) regarding her concern that male employees with similar jobs and job qualifications were receiving higher salaries and more benefits than was she.⁷⁶ Mrs. McClure alleged that she was wrongfully discharged for this reason and sought relief for the additional compensation given to her male counterparts.⁷⁷

In order to resolve “whether Title VII of the Civil Rights Act of 1964 applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses

71. 42 U.S.C. §§ 2000e–2000e-17 (2006).

72. At the time it took effect, Title VII exempted religious institutions from liability, but only when discrimination occurred during the course of an employee’s religious work. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (“This title shall not apply to . . . a religious corporation, association, 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, or society of its *religious activities* . . .”) (emphasis added). However, in 1972, Congress amended Title VII to broaden the religious employer exemption. It now reads, “This 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) (emphasis added). In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 327–30 (1987), the Supreme Court upheld the constitutionality of the amended exemption, finding that applying the exemption to religious organizations’ secular activities does not violate the Establishment Clause. For further discussion of the statute and legislative history, see Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 486–99 (2001); Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571, 573–78.

73. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

74. *Id.* at 555.

75. *Id.*

76. *Id.*

77. *Id.*

of the First Amendment,” the court interpreted the language and history of the statute.⁷⁸ It highlighted that Congress did not intend to give a blanket exemption from Title VII—religious employers may not discriminate “on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.”⁷⁹ Even against this backdrop, however, the court found that an exemption was required in order to preserve the guarantees of the Free Exercise and Establishment Clauses of the First Amendment.⁸⁰ Highlighting the “wall of separation” between church and state⁸¹ and the sanctity of the church-minister relationship,⁸² the court interpreted the scope of the exemption broadly, touching on “the functions which accompany [the] selection [of a minister,] . . . [which] 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.”⁸³ As a result, the court found that it could not rule on the discrimination and retaliation against Mrs. McClure, creating a “ministerial exception” that barred the suit.

Since the Fifth Circuit took on the issue in 1972, all of the other circuits have followed in its path.⁸⁴ Moreover, the Supreme Court granted

78. *Id.* at 554–55 (citation omitted)

79. *Id.* at 558. The opinion presents a helpful discussion of the legislative history of the exemption. Originally, the House considered including a blanket exemption for religious employers, but the Senate introduced a more limited exemption that ultimately became law. *Id.* Note, also, the same analysis by the Fourth Circuit in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (“Title VII does not confer upon religious organizations a license to make . . . decisions on the basis of race, sex, or national origin.”) and the Ninth Circuit in *EEOC v. Pacific Press Publishing Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (“[R]eligious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.”).

80. *See infra* Part II.B.

81. *McClure*, 460 F.2d at 558 (“Though [the] ‘wall of separation’ between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, it does and must remain high and impregnable. In *Everson v. Board of Education*, it was said, ‘We could not approve the slightest breach.’”) (citation omitted).

82. *Id.* at 558–59 (“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.”). *Accord Rayburn*, 772 F.2d at 1168 (“The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty.”).

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

84. *See 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.”) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002); *EEOC v.*

certiorari in a case coming out of the Sixth Circuit for the 2011 October Term concerning the narrow question of whether a teacher at a religious school was a “minister” for the purposes of the ministerial exception,⁸⁵ implying that the Court has endorsed the ministerial exception even though it has never heard a case involving it.

In applying the ministerial exception, a court must employ a two-step inquiry: (1) Does the individual qualify as a minister, and (2) does the exemption apply to the law under which the lawsuit is brought?⁸⁶ All of the circuit courts have adopted the ministerial exception as it applies to many Title VII suits.⁸⁷ Types of Title VII complaints barred in ministerial exception cases include those concerning religion-based discrimination,

Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Scharon v. St. Luke’s Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989)). Though the ministerial exception differs by circuit, it is fair to say that its application is far-reaching and broad. The fact scenarios taken up by each circuit necessitate different holdings. For example, the Ninth Circuit has allowed sexual harassment suits to proceed where there is no religious justification for the harassment; other circuits have not been shouldered with ruling on such matters. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). A more in-depth discussion of these two cases may be found at *infra* notes 177–80 and accompanying text. The Fourth Circuit limits the reach of the exemption to hiring decisions, not to treatment after hiring. See *Rayburn*, 772 F.2d at 1166–67. The Fifth and Third Circuits read the exemption more broadly. See *McClure*, 460 F.2d at 559; *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (“Thus, it does not violate Title VII’s prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles”). Note, however, that the Ninth Circuit has expanded its interpretation of the ministerial exemption considerably since it first applied the exemption. Compare *Pac. Press Publ’g Ass’n*, 676 F.2d at 1276 (holding that the ministerial exception did not bar a Title VII suit against a nonprofit religious publishing house), *Bollard*, 196 F.3d 940, 947–48 (the ministerial exception did not bar a sexual harassment claim against a religious institution), and *Elvig*, 375 F.3d 951, 965 (same), with *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010) (en banc) (affirming, in part, the decision of the three-judge panel that the ministerial exception bars a suit by a minister under the Washington’s Minimum Wage Act). For a more expansive discussion of *Alcazar*, see *infra* notes 169–70 and accompanying text.

85. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011).

86. See, e.g., *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 672–73 (9th Cir.) (analyzing a suit brought by a seminarian under Washington’s Minimum Wage Act by first determining whether the Act implicated the Free Exercise Clause, and after finding that the Clause mandated the ministerial exception in this instance, the court analyzed whether the plaintiff was a “minister” within the meaning of the exemption), *vacated in part, adopted in part en banc*, 627 F.3d 1288 (9th Cir. 2010).

87. For an in-depth treatment of the structure of Title VII claims that have been barred and allowed under the ministerial exception, see Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86 (2002).

race discrimination, and sex discrimination.⁸⁸ Courts found that these types of cases are properly barred by the ministerial exception because often times the behavior that constitutes sex discrimination, for example, is doctrinally motivated—the Catholic Church may decline to hire women as priests because its religious teachings forbid it. For the same reasons, many circuits have applied the exemption to other antidiscrimination and employee protection laws such as Wage and Hour statutes, the Age Discrimination in Employment Act, the Americans with Disability Act, the Family and Medical Leave Act, 42 U.S.C. § 1981, the Fair Labor Standards Act, and other state human rights statutes.⁸⁹ The ministerial exception, however, never applies to criminal laws (although what constitutes “criminal laws” is not clear),⁹⁰ and the Ninth Circuit has declined to apply the exemption to Title VII sexual harassment cases.⁹¹

B. CONSTITUTIONAL ARGUMENTS FOR THE MINISTERIAL EXCEPTION

Courts and scholars who argue in favor of a ministerial exception agree on the legal reasons that compel such an exemption. The exemption is derived from the mandates of the Free Exercise and Establishment Clauses of the First Amendment.

1. Free Exercise Clause Justifications

The Free Exercise Clause guarantees the right to “freely exercise” one’s religion without government interference. The Supreme Court, however, has set down guidelines for deciding whether or not government action constitutes an infringement of the Free Exercise Clause. When the ministerial exception was laid out by the Fifth Circuit in 1972, *Sherbert v.*

88. *Id.* at 119–23.

89. See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1975–76 & nn.53–58 (2007) (citing, among others, *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (barring an age discrimination law suit); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) (barring a suit under the Fair Labor Standards Act); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (barring a claim for discrimination based on a disability); *Bogan v. Miss. Conference of the United Methodist Church*, 433 F. Supp. 2d 762 (S.D. Miss. 2006) (barring a suit under 42 U.S.C. § 1981, a statute guaranteeing “equal rights under the law”); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 U.S. Dist. LEXIS 22546 (E.D. Pa. Oct. 5, 2005) (barring a suit for discrimination under the Family and Medical Leave Act); *Pardue v. Ctr. City Consortium of the Archdiocese of Wash.*, 875 A.2d 669 (D.C. 2005) (barring a suit for race discrimination under the District of Columbia Human Rights Act)).

90. See *infra* Part IV.C.

91. See *infra* Part IV.B.

Verner was the precedent on point; that case demanded that claims involving sincere religious beliefs that were substantially burdened by government action be evaluated under a strict scrutiny standard.⁹² Applying this rationale, most minister-church employment disputes are ruled an unconstitutional burden on the free exercise rights of a religious institution because courts find that the “government interest” is not as compelling as is the right of the organization to religious liberty.⁹³ As will be discussed below, in 1990, *Employment Division, Department of Human Resources v. Smith* astronomically altered the free exercise jurisprudence, but courts have continued to analyze the ministerial exception under the *Sherbert* framework.⁹⁴

a. Church Autonomy

Courts balance free exercise rights according to the test announced in *Sherbert* in a way that is quite favorable to religious institutions largely because of the principle of “church autonomy.” This principle was championed by Bruce Bagni⁹⁵ and Douglas Laycock,⁹⁶ whose arguments were cited and relied on by the Fourth Circuit when the ministerial exception was developing.⁹⁷ Indeed, the church autonomy doctrine gives staunch support to the ministerial exception: “Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission.”⁹⁸

The principle of church autonomy is derived primarily from the Free Exercise Clause, although, as is the nature of the religion clauses, it is

92. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). “Strict scrutiny” requires that the state interest be compelling and that it is narrowly tailored to the law or restriction at issue. This necessitates balancing the government interest against the right to free exercise.

93. See, e.g., *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (“Here that balance weighs in favor of free exercise of religion. The role of an associate in pastoral care is so significant in the expression and realization of [Church] beliefs that state intervention in the appointment process would excessively inhibit religious liberty.”)

94. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as to state and local governments). See also *infra* Part III.A.

95. Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1515–19 (1979).

96. Laycock, *supra* note 67, at 1388–92.

97. *Rayburn*, 772 F.2d at 1167 nn.3–4. Courts before and after *Smith* have cited Laycock and Bagni. For a collection of cases, see Corbin, *supra* note 89, at nn.75, 77.

98. *Rayburn*, 772 F.2d at 1171.

invariably linked to the Establishment Clause.⁹⁹ From a free exercise perspective, church autonomy advocates argue that the principle follows from an understanding that there are two sorts of free exercise rights—individual and institutional—and church autonomy protects the institutional free exercise right. From an Establishment Clause perspective, church autonomy advocates argue that the principle reflects the Establishment Clause mandate that the jurisdiction of the government over activities of religions be limited.¹⁰⁰ Generally, the principle involves “the right of churches to . . . select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions,” and the more religiously motivated a belief or activity in an employment dispute is, the more protection the church autonomy doctrine lends that belief or behavior.¹⁰¹

Proponents of the church autonomy doctrine justify the doctrine by pointing specifically to Supreme Court jurisprudence related to disputes with or within religious institutions over contracts and property. Beginning with *Watson v. Jones*, the Court announced a “hands-off” approach to intra-church disputes.¹⁰² In that case, the Court deferred to the group of a divided Presbyterian Church that had been recognized as the highest ecclesiastical body when one faction sued for ownership of once-communal church

99. Douglas Laycock, *Church Autonomy Conference: Federalist Society Conference: “The Things That are not Caesar’s: Religious Organizations as a Check on the Authoritarian Pretensions of the State”*: *Church Autonomy Revisted*, 7 GEO. J.L. & PUB. POL’Y 253, 260–61 (2009) (“[The ministerial exception] is ultimately about who chooses the clergy. A Title VII discrimination claim brought by a minister ends, if the minister wins, in an order reinstating a religious leader at or near the head of a religious organization that no longer accepts that person’s religious leadership That is a free exercise problem even if the court is right that the plaintiff minister was discharged for discriminatory reasons.”). *But see* Corbin, *supra* note 89, at 1978 (arguing that the church autonomy argument is not “derive[d] exclusively from the free exercise clause, but from the establishment clause too and, perhaps, even the right to expressive association”). Laycock argues that the church autonomy doctrine flows less from the Establishment Clause than Corbin argues largely because that clause and its related concept of entanglement “is such a ‘blurred, indistinct, and variable’ term that it is useless as an analytical tool.” Laycock, *supra* note 67, at 1392 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

100. These arguments for the existence of the church autonomy principle recur in other arguments for the ministerial exception. The church autonomy principle pervades all arguments for the existence of the exemption. For a more in depth discussion of free exercise justifications, see *infra* Part II.B.1. For a more in depth discussion of Establishment Clause justifications, see *infra* Part II.B.2.

101. Laycock, *supra* note 67, at 1373, 1389 (citations omitted). *Accord* Bagni, *supra* note 95, at 1518.

102. *Watson v. Jones*, 80 U.S. 679, 727 (1871). The Church was divided over each group’s view of slavery and whether to support the Union during the Civil War. The General Assembly (the highest ecclesiastical body) supported the Union. Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1637–40 (2004). *See also* McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

property. Since that decision, the Court has generally followed the same approach, respecting the rights of religious institutions to operate according to decisions made by their leaders.¹⁰³ In 1979, however, the Court handed down *Jones v. Wolf*, which stands in stark contrast to its previous decisions that championed church autonomy.¹⁰⁴ In *Jones*, the Court held that “instead of automatically deferring to the decision of the highest tribunal in hierarchical polities, courts may use ‘neutral principles of law’ to resolve the dispute, or any other approach that does not require consideration of religious questions.”¹⁰⁵ Even against this change in jurisprudence, though, courts have continued to use the church autonomy doctrine as support for the application of the ministerial exception.

Church autonomy advocates argue that the scope of the ministerial exception is expanded when it is backed by a strong right to church autonomy.¹⁰⁶ Some argue that a broad right of church autonomy is required because employment disputes involving religious institutions will always turn on religious issues, which is why strong proponents of the exemption deny the possibility of a “religious motivation” limit. When the dispute is over a terminated employee, “[t]he church’s version [of the employment dispute] would normally be that the plaintiff . . . had not been doing that job satisfactorily. Litigation of that issue would come to focus on how good a religious job the plaintiff was doing,” which invariably would require the

103. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (holding that the unionization of teachers at Catholic high schools under the National Labor Relations Act would unconstitutionally burden the Catholic schools’ free exercise rights); *Serbian E. Orthodox Diocese for the United States & Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that courts must not interfere with decisions made by church tribunals affecting doctrine and governance); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969) (holding that the courts may not interpret religious doctrine in order to resolve intra-church property disputes); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), *holding aff’d after remand*, *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (constitutionalizing the holdings in *Watson* and *Gonzalez* in ruling that a New York City law that prevented appointees of the Patriarch of Moscow from using the St. Nicholas Cathedral by transferring power over the property from the Russian Orthodox Church in Moscow to American church officials was too much of a burden on the free exercise rights of the Russian Orthodox Church); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (declining to overrule the Archbishop of Manila’s refusal to appoint the plaintiff to the chaplaincy). For deeper analysis of these decisions, see Brady, *supra* note 102, at 1636–50 and *McClure*, 460 F.2d at 559–60.

104. *Jones v. Wolf*, 443 U.S. 595 (1979).

105. Brady, *supra* note 102, at 1642. For more discussion of how *Jones* changes the analysis of the ministerial exception, see *infra* Part III.A.

106. Although this section is concerned with the existence of the exemption, some mention of its scope is required because it is the argument for its existence that leads many proponents to claim that the exemption has no limits. See also *infra* text accompanying note 190.

court to judge the religion at issue.¹⁰⁷ Additionally, when the dispute is over failure to hire, “[t]he effect of imposing an unwanted spiritual leader on unwilling followers is never ‘trivial,’ even if the reasons for rejecting that leader are disreputable or illegal.”¹⁰⁸ Together, these concerns create a reason to read the exemption broadly so as to prevent the courts from evaluating any sort of religious issue or telling a church whom to employ.

Alternatively, other proponents of the church autonomy doctrine argue that a broad right to church autonomy is necessary as a preventative measure. “There is a serious risk of error when courts try to decide these cases, and the facts are not always clear We are especially likely to get erroneous results when there’s a culture clash between the litigants and the fact finder.”¹⁰⁹ The risk that courts would grant damages to a dishonest plaintiff could have immediate deleterious effects on that institution; worse yet, a court’s incorrect interpretation of institutional doctrine could have the long-standing effect of forcing a religious institution to follow doctrine that is contrary with its firmly held beliefs. According to some scholars, the weight of this risk to the institution outweighs the individual protections codified in Title VII and other human rights statutes.

b. The Ministerial Exception Survives *Smith*

Although it was unclear whether the Supreme Court’s decision in *Employment Division, Department of Human Resources v. Smith* would invalidate the ministerial exception, courts and scholars have made successful arguments as to why the exemption survives *Smith*.¹¹⁰ In *Smith*, two Native American men were terminated from their jobs after failing a drug test for which they tested positive because they had used peyote as part of a church ceremony.¹¹¹ The state refused to pay them unemployment benefits; consequently, they sued because this policy infringed on their free exercise right to partake in religious rites. Under *Sherbert*, the Oregon policy would have likely been struck down, as the law is a burden on free exercise and the state might not have had a compelling interest in instituting it.¹¹² But the *Smith* Court changed the free exercise analysis,

107. Laycock, *supra* note 99, at 261.

108. *Id.* at 261–62.

109. *Id.* at 261.

110. Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as to state and local governments).

111. *Id.* at 874.

112. Corbin, *supra* note 89, at 1982.

holding that courts must not reach the compelling interest test because religious motivations do not necessarily exempt individuals from complying with neutral laws of general applicability. “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”¹¹³

Under a broad reading of *Smith*, employment disputes between ministers and religious employers would *not* be summarily dismissed because the ministerial exception would not be operative. Title VII and other employment discrimination statutes are neutral laws of general applicability.¹¹⁴ Without having to balance a compelling government interest against a burden on free exercise, discrimination by religious institutions would be subject to the same restrictions as nonreligious employers.

The D.C. Circuit, however, explained why *Smith* did not abrogate the ministerial exception in *EEOC v. Catholic University of America*,¹¹⁵ and the Fifth Circuit followed suit in *Combs v. Central Texas Annual Conference of the United Methodist Church*.¹¹⁶ They explained that there are two free exercise rights—the right to personal free exercise and a right to organizational free exercise. *Smith* touched on the personal right and not the organizational right.¹¹⁷ For example, in discussing the principle that government can regulate conduct but never belief—the belief/conduct distinction¹¹⁸—the *Smith* Court focused only on the belief and conduct of *individuals*. The Fifth Circuit emphasized that meanwhile, “the Supreme Court has shown a particular reluctance to interfere with a church’s selection of its own clergy.”¹¹⁹ Since these announcements, all other lower courts have continued to apply the ministerial exception to employment disputes with religious institutions.¹²⁰

113. *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

114. Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 308–09 (1994) (arguing that Title VII and other employment discrimination statutes are neutral laws of general applicability because those “laws are not specifically directed at religious practice and do not prohibit conduct only when it is engaged in for religious reasons”).

115. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–63 (D.C. Cir. 1996).

116. *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 348–49 (5th Cir. 1999).

117. *See Catholic Univ. of Am.*, 83 F.3d at 462.

118. *See Smith*, 494 U.S. at 872, 882. For more discussion of the belief/conduct distinction, see *infra* Part V.A.3.

119. *Combs*, 173 F.3d at 348.

120. *See supra* note 84.

Courts and scholars have offered other reasons for the continuation of the ministerial exception post-*Smith*. First, *Smith* preserved strict scrutiny in free exercise cases when the plaintiff presents a claim composed of “hybrid rights.”¹²¹ When a free exercise claim is paired with a claim under another constitutional right, courts must look more inquisitively at the violations, in a sense returning to the *Sherbert* test. Because ministerial exception cases involve not only the Free Exercise Clause but also the Establishment Clause, it is argued that strict scrutiny applies.¹²² Second, *Smith* criticized the *Sherbert* approach because it is not “appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test.”¹²³ In ministerial exception cases, however, courts need not make such an assessment, so the reasons given in *Smith* to eliminate the strict scrutiny test are irrelevant.¹²⁴ Finally, *Smith* stood for the principle that religious belief deserves the utmost protection. Religious institutions are the groups that form and protect the very beliefs the Court spoke of, so they are untouched by the *Smith* holding.¹²⁵

2. Establishment Clause Justifications

Supporters of the ministerial exception also consider the Establishment Clause to be constitutional footing. Generally, the Establishment Clause prohibits government inculcation or endorsement of religion.¹²⁶ “The establishment clause is conventionally understood as precluding certain kinds of state-created *benefits* to religious institutions”¹²⁷ The current Supreme Court test used to analyze

121. See *Smith*, 494 U.S. at 881–85.

122. See Brant, *supra* note 114, at 311–20 (listing other types of hybrid rights available to religious employers like associational rights, free speech rights, and the right to parental control).

123. *Smith*, 494 U.S. at 887.

124. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996); Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1783 (2008) [hereinafter *The Case for a Deferential Primary Duties Test*] (“Once courts have recognized the exemption, they need not balance anew; rather, they must determine only whether the exception is triggered by an employee’s ministerial status.”).

125. Brady, *supra* note 102, at 1675–76 (“Religious communities are the vehicle for the development of doctrine. It is through religious communities that individuals jointly develop religious ideas and beliefs.”). *But see The Case for a Deferential Primary Duties Test*, *supra* note 124, at 1783, n.46 (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment) (“Solicitude for a church’s ability to [define itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.”)).

126. Corbin, *supra* note 89, at 2005.

127. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 409–10 (1987).

whether government action runs afoul of the Establishment Clause is spelled out in *Lemon v. Kurtzman*: “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹²⁸ The last prong of the *Lemon* test, however, changes the common understanding of the Establishment Clause. It focuses on burdens on religion caused by government intervention or regulation, rather than benefits.¹²⁹

Lemon is widely reviled by groups on both ends of the political spectrum, and many believe that the case will not remain good law. Moreover, conservative groups who advocate for a larger presence of religion in daily life call for an overruling of *Lemon* because they believe that it reflects a strict separationist approach to the Establishment Clause—the first two prongs of the *Lemon* test restrict the benefits that may be given to religious institutions. Secularists call for *Lemon* to be overruled largely because of the “excessive entanglement” prong—the concept of avoiding entanglement restricts the oversight government may have with respect to religion, in effect allowing religious organizations to pervade what they believe should be a secular world.

Courts have reacted in a way feared by secularist groups when it comes to the ministerial exception—in applying the *Lemon* test to ministerial exception cases, courts usually find issue with the “excessive entanglement” prong. The concept of entanglement is comprised of both procedural and substantive entanglement issues, and each issue provides reasons for courts to apply the exemption. Substantive entanglement involves a prohibition on a state’s endorsement of religion.¹³⁰ Procedural entanglement entails the view that “any extensive or prolonged state

128. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted). Note, however, that many doubt whether the Supreme Court will continue to use the *Lemon* test. See, e.g., Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 285 n.118 (1998) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 800 (1993)) (“In approaching Establishment Clause issues in many of its recent cases, the Supreme Court has not used the *Lemon* test, but rather has examined whether the government acted in a religiously neutral manner.”). But see *Agostini v. Felton*, 521 U.S. 203, 219–22, 231 (1997) (using both the neutrality test and the *Lemon* test).

129. See Lupu, *supra* note 127, at 409–10 (discussing entanglement as it relates to school aid cases).

130. Corbin, *supra* note 89, at 1980. Substantive entanglement is derived from the analysis in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

interaction with a religious entity is itself constitutionally problematic.”¹³¹ First, on a procedural level, the civil process itself poses entanglement risks because it involves “a protracted legal process pitting church and state as adversaries.”¹³² On a substantive level, courts may have to judge the employee’s and the religious institution’s religious justification for the employment decision. The very investigation into whether the decision was pretextual causes excessive entanglement.¹³³ Lastly, if a court finds that an employment decision was made on a pretextual basis, the remedy is an injunction; if a court instructs a religious institution to hire an employee the institution does not want to hire, the court could in effect be telling the institution how to operate its religious mission.¹³⁴

Even if *Lemon* is overruled, the ministerial exception will likely still be valid under an Establishment Clause analysis. This is because, given the current makeup of the Supreme Court and its members’ leanings toward a society in which religion pervades secular institutions, any new Establishment Clause test is likely to include an entanglement requirement and not include separationist requirements like the secular purpose and effects prongs that exist now in *Lemon*. As a result, the above mentioned substantive and procedural entanglement analyses will remain operative.

Arguments that the ministerial exception flows from the Establishment Clause focus on a reading of that clause as a sort of jurisdictional limitation.¹³⁵ In other words, this reading presents a threshold issue—the Establishment Clause prevents courts from hearing any claims that would cause any entanglement whatsoever. This reading focuses on

131. Corbin, *supra* note 89, at 1979.

132. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

133. Corbin, *supra* note 89, at 1980.

134. See *Rayburn*, 772 F.2d at 1170 (“The guidance of the Holy Spirit is always sought so that the one chosen can be God’s appointed, as well as the one who has the support of his/her fellow churchmembers.’ It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church’s determination of ‘God’s appointed.’”). See also *supra* note 107.

135. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42 (1998) (“Many courts, facing cases involving intrachurch disputes, determine that they cannot hear the matter because adjudication will inevitably entail resolving questions of religious doctrine. These courts dispose of the case by dismissing for lack of subject matter jurisdiction or otherwise abstaining.”); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1815 (“Ecclesiastical immunities, including the ministerial exception, are not the offspring of rights in the conventional sense. They are not the legal entitlements of religious entities in the way that, for example, authors and political advocates possess rights to communicate. Instead, ecclesiastical immunities are the entailments of the jurisdictional limitations that the Establishment Clause imposes upon the state’s role.”).

restrictions on the power of the state, rather than the special rights given to religious organizations that are the focus of the Free Exercise Clause.¹³⁶ Unlike in free exercise jurisprudence, there is no risk that a compelling government interest test will allow cases to proceed if the ministerial exception is derived from the Establishment Clause.¹³⁷ As a result, establishment discourse centers around the existence of the ministerial exception, not limitations on the exemption.¹³⁸

III. CONSTITUTIONAL ARGUMENTS AGAINST THE EXISTENCE OF THE MINISTERIAL EXCEPTION

Although courts accept the ministerial exception, it is not accepted by many scholars, who question the very existence of the exemption on free exercise and establishment clause grounds.

A. FREE EXERCISE

The simplest argument for opponents of the ministerial exception to mount is that the exemption flatly does not survive *Smith*. While there may be two free exercise rights—individual and institutional—ministerial exception cases turn just as much, if not more, on individual rights as they do on institutional free exercise rights. In other words, it can be argued that the employee suing a religious employer has as much a right to freely exercise religious beliefs as does the employer, and often these individual

136. See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J. L. & PUB. POL'Y 119, 120–21 (“[W]e believe that focus on the state side of the ledger is likely to prove far more fruitful than an inquiry that begins with the idea that religious entities have distinctive rights. Although the Free Exercise Clause has a rights-bearing function, the Religion Clauses are primarily jurisdictional, limiting government to the secular and temporal, and foreclosing government from exercising authority over the spiritual domain. It is that very basic premise that both explains and limits the legal autonomy of religious institutions.” (footnotes omitted)). Consider, however, that the investigation into whether a dispute is “religious” at all runs afoul of the Establishment Clause. See Corbin, *supra* note 89, at 2026–27; William S. Stickman, IV, Comment, *An Exercise in Futility: Does the Inquiry Required to Apply the Ministerial Exception to Title VII Defeat its Purpose?*, 43 DUQ. L. REV. 285, 297 (2005).

137. Lupu & Tuttle, *supra* note 135, at 1815–16.

138. Scholars also mention the right to freedom of association as an argument in support of the ministerial exception. See *The Case for a Deferential Primary Duties Test*, *supra* note 124, at 1785–86 (“The expressive association right provides a potential constitutional basis for the ministerial exception because, as many courts have recognized, ministers disseminate a church’s message.”). Cf. Corbin, *supra* note 89, at 2031 (“As a free speech right, the right is implicated only if expression is at risk. Religious organizations whose beliefs are consistent with the goals of Title VII, or even silent on the issue of discrimination, cannot complain that compliance interferes with their expression.”).

religious beliefs are the basis for the employee's termination.¹³⁹ In such a way, individual belief is implicated, and *Smith* should apply.¹⁴⁰

Another line of argument focuses on the fundamental unworkability of the distinction between organizational and individual rights. If the courts' understanding of ministerial exception cases post-*Smith* is accurate, this means that institutions have a broader free exercise right than do individuals.¹⁴¹ While proponents of the exemption argue that institutional rights protect democracy, diversity, and, in turn, the individual right,¹⁴² this amounts to "privileging the derivative right over the primary one."¹⁴³ Moreover, expansive institutional rights may impinge on the civil rights of individuals.¹⁴⁴ As Jane Rutherford explains, "Federal statutes [sic] prohibit [nonreligious] employers from discriminating on account of race, sex, creed, national origin, age, or disability. These statutes embody a constitutional value favoring equal protection that is explicit in the Fourteenth Amendment and implicit in the Fifth Amendment."¹⁴⁵

The more difficult argument for ministerial exception opponents concerns church autonomy. While proponents of the church autonomy doctrine argue that religious institutions deserve a sort of immunity from courts in order to protect their free exercise rights, opponents contend that such immunity is not constitutionally mandated. As a result, the ministerial exception should not exist in the first place. Opponents take issue with the proponents' analyses of church property and contract dispute cases. First, the difference between property disputes and employment discrimination is tremendous—church property dispute cases should not be applied by analogy to employment disputes because church property cases rarely hold

139. See Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1085–91 (1996) ("Civil rights laws that condone discrimination infringe the employees' right to freely exercise their religion in three different ways: (1) the laws discourage individuals from taking religious jobs by punishing religious employees with the loss of state conferred civil rights; (2) the laws encourage those excluded to change faiths; and (3) the laws exclude the viewpoints of disfavored groups from religious dialogue.").

140. Consider, however, this statement by the D.C. Circuit: "The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996).

141. Corbin, *supra* note 89, at 1988–89.

142. See *supra* note 125.

143. Corbin, *supra* note 89, at 1988–89.

144. Rutherford, *supra* note 139, at 1079–85.

145. *Id.* at 1080 (footnotes omitted). Rutherford argues that the Fourteenth Amendment is implicated because the court-imposed rules specifically authorizing discrimination amount to state action. *Id.* at 1079.

a state interest “beyond the omnipresent concern for a peaceful settlement of controversy,” while employment disputes center on individual civil rights.¹⁴⁶

Moreover, the Supreme Court’s approach to intra-church disputes changed in its decision in *Jones v. Wolf*. Although the Court had long followed a principle of strict separation in cases like *Watson*¹⁴⁷ and *Gonzalez v. Roman Catholic Archbishop*,¹⁴⁸ the *Jones* Court announced that courts could resolve religious disputes by applying “neutral principles of law” rather than deferring to the judgment of the highest ecclesiastical body.¹⁴⁹ This approach still allows religious organizations immunity from the government when it comes to legal transactions and intra-church governance (what Ira Lupu calls “ex-ante” decisions), but it removes the immunity from disputes that arise after these intra-church decisions have been executed (“ex-post” decisions).¹⁵⁰ As a result, Laycock’s church autonomy doctrine is less persuasive; churches are no longer guaranteed special treatment in ex-post intra-church disputes like employment disputes, so their status is no different from other corporate organizations that are also insulated from judicial scrutiny with respect to their intra-organization contract and property disputes.¹⁵¹

B. ESTABLISHMENT CLAUSE

It is difficult to refute the arguments in favor of the ministerial exception from an establishment perspective because, as discussed above, the Establishment Clause is a jurisdictional restriction on ministerial

146. Brant, *supra* note 114, at 295. *Accord* Rutherford, *supra* note 139, at 1079–85 (describing the effect of employment discrimination on the constitutional rights of religious employers).

147. See *Watson v. Jones*, 80 U.S. 679, 727 (1871).

148. See *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 15–17 (1929).

149. *Jones v. Wolf*, 443 U.S. 595, 604 (1979). See also Lupu, *supra* note 127, at 407 (“This approach ‘requires a civil court to examine certain religious documents . . . for language of trust in favor of the general church.’ So long as that inquiry can be made without requiring the court ‘to resolve a religious controversy,’ state courts are free to substitute this conventional dispute-resolution methodology in place of deference to ‘the authoritative ecclesiastical body.’” (quoting *Jones*, 443 U.S. at 604)).

150. See Lupu, *supra* note 127, at 407–08. *Accord* Brant, *supra* note 114, at 294–95.

151. See Lupu, *supra* note 127, at 407–08; Brant, *supra* note 114, at 294–95. Consider also the argument that employment disputes are not even properly categorized as *intra-church* disputes. Lupu, *supra* note 127, at 408–09 (“Religious institutions, like other important social institutions, are influential in shaping behavior and moral convictions. The way in which such institutions treat women or racial minorities is likely to have significant consequences in other spheres of life . . . [T]hese disputes cannot reasonably be perceived as ‘internal.’”). If Lupu is correct, the church autonomy argument would be irrelevant in ministerial exception cases.

exception cases.¹⁵² As a result, many scholars simply argue that *Lemon* and its entanglement prong are erroneous doctrines that have little place in our religion clauses jurisprudence: “it is oxymoronic to claim that a regulation restricting religion simultaneously establishes religion.”¹⁵³ Moreover, many argue that the *Lemon* test is on its way out; if this happens, much of the support for the ministerial exception will be lost.¹⁵⁴

On the other hand, Caroline Mala Corbin confronts the issue first by arguing that the Supreme Court has changed its position on procedural entanglement away from its strict separation stance in *Lemon*, so it poses altogether no obstacle to eliminating the ministerial exception.¹⁵⁵ Indeed, in *Agostini v. Felton*, the Court stated that “Interaction between church and state is inevitable, and [the Court] ha[s] always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”¹⁵⁶ Moreover, many ministerial exception proponents ignore the “excessive” aspect of the *Lemon* entanglement prong; *Agostini* held that “administrative cooperation” between church and state may constitute entanglement, but not “excessive entanglement.”¹⁵⁷

On the procedural entanglement front, Corbin argues that the risk of courts dictating what religious doctrine is “correct” is greatly exaggerated. She argues that in the Title VII context, cases are structured in such a way as to avoid entanglement problems. “Supporters of the ministerial exemption assume mistakenly that religious employers always defend a discrimination suit by asserting a religious reason such as ‘lack of spirituality’ or ‘misunderstanding theology.’ But some suits do not involve religious disputes at all, and in others, the religious reason can be

152. See *supra* note 135 and accompanying text.

153. Brant, *supra* note 114, at 298.

154. See Brant, *supra* note 114, at 299; Coon, *supra* note 72, at 490–91, nn.31–34; *supra* note 128. Also consider the argument that, in the face of *Lemon*, the ministerial exception fails the test. “The exemption for religious groups fails the *Lemon* test. An exemption created expressly for religious organizations clearly does not have a secular purpose. Similarly, it creates religious effects by promoting discriminatory religious beliefs Finally, it may entangle the government in religion if the state decides whether an employee is engaged in religious activities.” Rutherford, *supra* note 139, at 1110.

155. Corbin, *supra* note 89, at 2006.

156. *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citations omitted).

157. Corbin, *supra* note 89, at 2008 (citing *Agostini*, 521 U.S. at 233). Corbin also notes that the Court permits regulation of religious bodies now. *Id.* at 2008 (citing *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680 (1989); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985)).

objectively tested.”¹⁵⁸ Additionally, she argues that the application of the ministerial exception often necessitates entanglement in the first place; and thus, the proponents’ arguments are moot.¹⁵⁹

The issue that injunctions cause excessive entanglement is also irrelevant, in light of a proposed change to the remedy program for religious employment disputes.¹⁶⁰ Currently, many nonreligious employees cannot even be reinstated even with a favorable verdict in a Title VII suit. Even amid this concession, Corbin suggests a strategy to circumvent entanglement with regard to remedies: plaintiffs could be limited to monetary relief. Monetary awards “as an option for close cases helps ensure that courts reinstate only those ministers, teachers, music directors, and other ministerial employees that they are confident the religious organization itself would have selected in a discrimination-free decision-making process.”¹⁶¹

IV. LIMITS ON THE SCOPE OF THE MINISTERIAL EXCEPTION

Although it is possible that either the ministerial exception exists without question, or that it does not exist at all, this Note accepts that it exists but argues that it must be subject to certain limiting principles. Those already outlined by courts include whether or not the plaintiff is considered a “minister,” how “religious” the activity is at issue in the lawsuit, and whether the law under which the suit is brought is a “criminal” law. This Note accepts the “minister” requirement, but argues that the “religious motivation” and non-criminal law requirements are too clumsy to be of use.

A. DEFINITION OF “MINISTER”

By its own terms, the ministerial exception is limited to suits brought by ministers. Deciding what kind of person is a “minister” for the purposes of the exemption, however, is not straightforward. The Fourth Circuit created the “primary duties” test in *Rayburn v. General Conference of Seventh-day Adventists*,¹⁶² and this test is currently endorsed by most

158. *Id.* at 2013. Corbin also provides a detailed outline of the structure of Title VII cases and a table of the impact the scrutiny of courts will have on those different types of cases. *Id.* at 2010–13.

159. *Id.* at 2026–27. *Accord* *Stickman, IV*, *supra* note 136, at 297.

160. *See* Corbin, *supra* note 89, at 2025–26 (discussing various alternative remedies).

161. *Id.* at 2026.

162. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985).

circuits.¹⁶³ “As a general rule, if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, supervision of a religious order, or supervision of or participation in religious ritual and worship, he or she should be considered ‘clergy.’”¹⁶⁴ In making this determination, the court also inquires into whether the person serves in a position that is “important to the spiritual and pastoral mission of the church.”¹⁶⁵

This definition has proved to be especially broad. Using this definition, litigants whose jobs were not that of a “minister” in the typical sense of the word were barred from suing their religious employers. Indeed, the definition has precluded suits brought by a press secretary for the Catholic Church, a principal of a Catholic school, an organist, and a director of music.¹⁶⁶ In 2010, the Sixth Circuit confronted this issue with grave concern, noting that the proposition that a teacher at a religious school would not be able to sue the school for acts of discrimination that in

163. See *The Case for a Deferential Primary Duties Test*, *supra* note 124, at 1786–97 (discussing problems with the primary duties test and recommending a deferential approach to the test in which the court would “defer to a religious organization’s characterization of whether and how an employee contributes to the spiritual mission of the church.”).

164. *Rayburn*, 772 F.2d at 1169 (quoting *Bagni*, *supra* note 95, at 1545) (internal quotation marks omitted).

165. *Id.* at 1168–79 (citing *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981)). The Fifth Circuit, on the other hand, developed a slightly different test in *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999):

Under *Starkman*, to determine whether a person is a minister under the ministerial exception, the Fifth Circuit considers: (1) whether employment decisions regarding the position at issue are made largely on religious criteria; (2) whether the plaintiff was qualified and authorized to perform the ceremonies of the Church; and (3) whether the plaintiff engaged in activities traditionally considered ecclesiastical or religious.

Alcazar v. Corp. of the Catholic Archbishop of Seattle, 598 F.3d 668, 676 n.7 (9th Cir.) (citing *Starkman*, 198 F.3d at 176) (internal quotation marks omitted), *vacated in part, adopted in part en banc*, 627 F.3d 1288 (9th Cir. 2010).

166. See *Corbin*, *supra* note 89, at 1976–77 & nn.61–66 (citing *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (barring a discrimination suit for discrimination based on national origin and sex because a press secretary for the Catholic Church is responsible for disseminating the religious message of the church); *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 672, 675 (D.C. 2005) (holding that a racial discrimination case brought by a principal of a Catholic elementary school was barred because a principal is responsible for carrying out the religious mission for the school); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (holding that an age discrimination suit brought by a music director and organist could not proceed because in selecting the music to be played at mass, he exercised religious discretion); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (barring a suit by a director of music for a church because the job required her to have completed coursework specifically related to church music and to select religious music for the parishioners); *Coon*, *supra* note 72, at 507–19 (discussing the extension of the definition to school employees, administrative employees, and church musicians).

no way related to the religious mission of the school runs contrary to the constitutional motivations behind the ministerial exception.¹⁶⁷ The Sixth Circuit's decision, however, will not be the last word on the issue; the Supreme Court granted certiorari in this case, and its forthcoming decision may very well provide instruction on whether the "minister" requirement will remain broad or whether it should be narrowed.¹⁶⁸

The trend in the Ninth Circuit has shown a broadening of the definition of "minister." Although the Ninth Circuit, in 1982, allowed an editorial secretary to sue the Seventh-day Adventist organization she worked for because she was not considered a "minister,"¹⁶⁹ the Circuit recently held in *Alcazar v. Corp. of the Catholic Archbishop of Seattle* that a priest-in-training who conducted mostly janitorial work could not successfully sue the Catholic Church because he was considered a "minister."¹⁷⁰ Functionally, then, the trend has been to preclude more suits by more religious institution employees, watering down an important limiting doctrine.

B. THE "RELIGIOUS" MOTIVATION REQUIREMENT

Generally, courts inquire into whether the law under which the plaintiff has brought suit implicates the ministerial exception. Since most

167. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 781 (6th Cir. 2010), cert. granted 131 S. Ct. 1783 (2011) ("[T]he intent of the ministerial exception is to allow religious organizations to prefer members of their own religion . . . [A]pplying the exception to non-members of the religion and those whose primary function is not religious . . . would be both illogical and contrary to the intention behind the exception.").

168. The Supreme Court heard oral arguments in this case on October 5, 2011. Oral Argument, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-553), available at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-553. From the tone of the argument, it is unclear whether the Justices will speak only to the definition of "minister," reach a decision based on constitutional grounds, solely interpret the statute, or speak more broadly about the constitutional reach of the exemption. See Lyle Denniston, *Argument Recap: Blurry Line Between Church and State*, SCOTUSBLOG (Oct. 5, 2011, 3:41 PM), <http://www.scotusblog.com/?p=129054>.

169. *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1274, 1278 (9th Cir. 1982).

170. This determination was made by an en banc panel. In its three-person-panel opinion, the court enunciated a new test to make the determination. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir.) ("[W]e adopt a test similar to the Fifth Circuit's and hold that if a person (1) is employed by a religious institution, (2) was chosen for the position based largely on religious criteria, and (3) performs some religious duties and responsibilities, that person is a minister for purposes of the ministerial exception." (citing *Starkman*, 198 F.3d at 176), vacated in part, adopted in part en banc, 627 F.3d 1288 (9th Cir. 2010) (internal quotation marks omitted)). The en banc panel vacated this portion of the holding and instated the primary functions test, but still found that the plaintiff was considered a "minister." See *Alcazar*, 627 F.3d 1288, 1290–92. For a description of the test announced by the Fifth Circuit in *Starkman*, see *supra* note 165.

cases are brought under common employment discrimination statutes, courts have precedent as to the applicability of the exemption to these various statutes.¹⁷¹ If, however, a court is confronted with a matter of first impression in this regard, it will investigate whether the statute implicates the Free Exercise and Establishment Clauses.¹⁷² To determine if the Free Exercise Clause is implicated, courts examine whether the state's interest in the statute outweighs the infringement on religious liberty that would occur if a ministerial plaintiff were allowed to sue a religious institution;¹⁷³ to determine if the Establishment Clause is implicated, courts apply the *Lemon* test and apply the exemption if the statute would violate even one of the test's three prongs.¹⁷⁴

Another limit that has been utilized by some courts concerns whether or not the behavior at issue is primarily religiously motivated. Under such reasoning, sexual harassment cases have been allowed to proceed, surviving the exemption.¹⁷⁵ The Ninth Circuit has confronted the issue twice, in *Bollard v. California Province of the Society of Jesus*¹⁷⁶ and *Elvig v. Calvin Presbyterian Church*.¹⁷⁷ In both instances, the court found that the ministerial exception did not preclude sexual discrimination suits.¹⁷⁸ For example, in *Bollard*, the plaintiff, a seminary student, alleged that higher-ranking priests sent him pornographic material, subjected him to unsolicited sexual advances, and discussed inappropriate sexual matters with him.¹⁷⁹ The court noted that the ministerial exception did not apply because "the application of Title VII . . . will have no significant impact on [the defendants'] religious beliefs or doctrines," invalidating free exercise and establishment concerns.¹⁸⁰ The religious motivation requirement is different from the general inquiry into whether or not the ministerial exception applies to the statute at issue because the latter deals with the First Amendment clauses at a broad level. The religious motivation

171. See *supra* notes 87–89 and accompanying text.

172. See *supra* note 86.

173. See *Alcazar*, 598 F.3d at 672.

174. See *id.* at 672–73.

175. See *Belcove-Shalin*, *supra* note 87, at 102–05, 123–25 (discussing the structure of sexual harassment cases in the face of the ministerial exception, and noting that in her survey of five of these cases, all but one resulted in a ruling for the plaintiffs).

176. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999).

177. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 969 (9th Cir. 2004).

178. *Bollard*, 196 F.3d at 944; *Elvig*, 375 F.3d at 969.

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

180. *Id.* at 947. *Accord Elvig*, 375 F.3d at 964 (“[A]ccommodating Title VII’s mandate and the First Amendment’s strictures does not mean peremptorily dismissing all sexual harassment claims brought by ministers against churches.”).

requirement, on the other hand, examines the practices, policies, and beliefs of the defendant religious institutions in light of the religion clauses.

Although currently limited to sexual harassment cases, this limit nearly became the law in a sex discrimination suit in the Third Circuit in *Petruska v. Gannon University*.¹⁸¹ *Petruska* involved a claim by a chaplain at a religious university who claimed she was terminated because of her gender. In the first disposition of the case (*Petruska I*), the court held that “Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects.”¹⁸² Although this decision was later reversed, its reasoning aids in understanding religious motivation as a limiting principle on the ministerial exception.

The religious motivation requirement, whether applied purely to sexual harassment cases or to other cases, makes sense from a free exercise perspective. As noted in *Bollard*, under the *Sherbert* balancing test, there are many activities by religious institutions that can never be trumped by any state interest.¹⁸³ But “[w]here the church provides no doctrinal nor protected-choice based rationale for its alleged actions, and indeed expressly disapproves of the alleged actions,” the state interest may indeed trump the free exercise rights of the institution.¹⁸⁴

On the establishment front, the religious motivation requirement is valid because with no religious motivation, there is no violation of *Lemon*—particularly the entanglement prong. For example, in *Bollard* and *Elvig*, because there was no religious doctrine that compelled the sexual harassment, there would be no entanglement.¹⁸⁵ This implies that if the

181. *Petruska v. Gannon Univ. (Petruska I)*, 448 F.3d 615 (3d Cir.), vacated by 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006), *aff'd in part and remanded in part* by 462 F.3d 294 (3d Cir. 2006). This Note refers to the first Third Circuit opinion as “*Petruska I*.” The author of the majority opinion died before the opinion was published. The defendants applied for a rehearing en banc or before a reconstituted panel. The reconstituted panel was granted, and that panel’s opinion is the operative decision. See Elizabeth R. Pozolo, Note, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in Petruska v. Gannon University*, 57 DEPAUL L. REV. 1093, 1094 n.8, 1115 (2008).

182. *Petruska I*, 448 F.3d at 620. This position is also relevant to a discussion of arguments against the Establishment Clause justifications. See *infra* note 186.

183. *Bollard*, 196 F.3d at 946.

184. *Id.* at 948. Accord Coon, *supra* note 72, at 534–35.

185. See *supra* notes 177–80 and accompanying text. Although, arguably, the holding could have turned on the fact that the harm in those cases was graver than most because they involved sexual harassment claims.

harassment had been spurred by religious belief, the court might have come out the opposite way. As a result, a limited ministerial exception that requires defendants to demonstrate that the particular facts of their case involve employment decisions that are based on religious doctrine might most narrowly tailor the exemption to its purpose of avoiding entanglement.¹⁸⁶

The application of the religious motivation limit, however, demonstrates that there are inherent problems in its basic tenets. In cases with similar or identical facts as those in the cases above, courts have declined to use the religious motivation principle as a limit on the ministerial exception. When the Third Circuit granted rehearing of *Petruska I*, the reconstituted (*Petruska II*) panel disagreed with the first panel that there was a lack of religious motivation—to the *Petruska II* panel, the religious university's choice to fire the plaintiff was firmly rooted in religious doctrine.¹⁸⁷ Similarly, when confronted with a sexual harassment case in *Van Osdol v. Vogt*, the Supreme Court of Colorado reached the opposite conclusion from the Ninth Circuit.¹⁸⁸ Holding that the court could not separate the harassment claim from religious doctrine and beliefs, it applied the ministerial exception and affirmed the appellate court's decision to uphold the dismissal of the discrimination claims.¹⁸⁹

The tension between the courts on these issues reveals the difficulty in defining the boundaries of the ministerial exception; judges are not in accord about the very threshold issue of what activity constitutes “religious” motivation. The facts in these cases were nearly identical; what were different were the views of the judges as to the amount of autonomy the churches deserved. The Colorado Supreme Court and the *Petruska II* panel viewed any government scrutiny of religious activities as a violation of the First Amendment. They fall in the camp of staunch church autonomy advocates like Douglas Laycock and Bruce Bagni; the argument that church autonomy necessitates the existence of the exemption also requires

186. See Coon, *supra* note 72, at 539–45 (proposing a ministerial exception analysis that “would require religious organizations to articulate how a religious belief or practice would be implicated by judicial resolution of the particular employment dispute at hand for the ministerial exception to preclude adjudication of the plaintiff’s traditional employment discrimination or harassment claim”). See also *Petruska I*, 448 F.3d at 620 (“[I]n adjudicating suits that do not involve religious rationales for employment action, courts need not consider questions of religious belief, religious doctrine, or internal church regulation, a process that would violate the Establishment Clause by entangling courts in religious affairs.”); Pozolo, *supra* note 181, at 1110–13 (discussing rationale of *Petruska I*).

187. *Petruska v. Gannon Univ. (Petruska II)*, 462 F.3d 294, 307 (3d Cir. 2006).

188. *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996).

189. *Id.* at 1124, 1128–29.

that all actions taken by the church be inherently religious.¹⁹⁰ The Ninth Circuit, on the other hand, did not see a violation unless there was a clearly articulated religious justification for the activity in question, viewing church autonomy as degree-bound and not absolute.

C. NON-CRIMINAL LAW REQUIREMENT

The exemption is also limited when claims against religious institutions involve criminal laws.¹⁹¹ This Note's discussion of this particular limit is brief, however, because few cases that deal with criminal charges against religious institutions concern the ministerial employment relationship. One case that discussed the limit, but did not apply it, was *Minker v. Baltimore Annual Conference of United Methodist Church*.¹⁹² In *Minker*, the D.C. Circuit pondered the reach of the ministerial exception; it noted that a hypothetical church that selected its clergy members by forcing them to play Russian roulette would still be subjected to homicide statutes, even though this practice would be religiously motivated and would encompass the selection of ministers.¹⁹³ As a result, even though such a case would plainly violate the Free Exercise and Establishment Clauses, the court would forgive these trespasses in the name of preventing and regulating criminal behavior.

It should be noted that courts' explanations of the specifics of this limitation have been vague at best. For example, sexual harassment suits have a criminal counterpart in sexual assault charges, but courts do not treat these as "criminal laws" for the purposes of the non-criminal law limitation. Moreover, the TVPA has a criminal enforcement component in addition to its civil recovery purpose, but the *Headley* court applied the normal ministerial exception analysis anyway.¹⁹⁴ As a result, situations in which the hypothetical Russian roulette in *Minker* is replaced with a less obviously (yet still) dangerous conduct have merely demonstrated the difficulty in applying the criminal law limit, and we have yet to receive any

190. See *supra* notes 106–09 and accompanying text.

191. *The Case for a Deferential Primary Duties Test*, *supra* note 124, at 1779 (citing *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990); Eikenberry, *supra* note 128, at 287–92). See also *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) ("Restrictions on the free exercise of religion are allowed only when it is necessary 'to prevent grave and immediate danger to interests which the state may lawfully protect.'" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943))).

192. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990).

193. *Minker*, 894 F.2d at 1357.

194. See *infra* text accompanying note 287–94.

help from the courts in clarifying the boundaries of this limit.

In essence, the non-criminal law requirement is a clumsy way to get at the real issue—harm. The same is true in the sexual harassment cases discussed above. For instance, consider the possibility that a religious institution *did* prescribe sexual harassment doctrinally;¹⁹⁵ even under the Ninth Circuit’s analysis, a court would not be able to step in. As a result, this Note will analyze another limit it argues is implicit in the religious motivation and non-criminal law limits—the harm principle. Underlying the analysis of the sexual harassment cases is the avoidance of physical and emotional injury or harm. This theme is also present in the nebulous non-criminal law requirement. These two limiting principles, however, are strikingly deficient, leaving many factual scenarios (like the one in *Headley*) in legal limbo. Additionally, cases involving societal evils such as racism and bigotry but not physical harm are not covered by these limits.¹⁹⁶ As such, another principle is required to compensate for the lack of adequate limitations.

V. A PROPOSED LIMIT: THE “HARM PRINCIPLE”

A principle yet unapplied in the arguments against the ministerial exception is the “harm principle.” This principle takes as its baseline the assumption that “[t]he only legitimate goal of a republican form of government is the public good.”¹⁹⁷ To that end, religious belief must be protected; where religious conduct causes harm, however, it ought to be possible for the government to regulate it.¹⁹⁸ This principle subsumes part

195. Consider the Lord Our Righteousness Church (known as Strong City by members) in New Mexico, in which the church leader, Michael Travesser, called himself the Messiah and instructed female followers—many of them minors—to sleep with him or lay in bed with him naked. *Sect’s “Messiah” Arrested on Sex Charges*, CNN.COM (May 6, 2008), <http://edition.cnn.com/2008/CRIME/05/06/sect.leader.arrest/>.

196. See, e.g., *supra* notes 66–67 and accompanying text.

197. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU. L. REV. 1099, 1100 [hereinafter Hamilton, *Religious Institutions*] (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 131, 135 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690)). Marci Hamilton is a vociferous proponent of applying the harm principle to religious institutions. She refers to that principle as the “no-harm doctrine.” While she has examined the harm principle as it would relate to the ministerial exception, she has argued that it should not apply because ministers have “acquiesced in the religious entity’s governance and therefore is not harmed by the religious institution’s application of its religious principles to him or her.” *Id.* at 1196. See also MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 199 (2005) [hereinafter HAMILTON, GOD VS. THE GAVEL]. This argument is refuted in *infra* note 222 and Part VI.B.1.

198. Hamilton, *Religious Institutions*, *supra* note 197, at 1100. See also HAMILTON, GOD VS. THE GAVEL, *supra* note 197, at 189–99 (discussing the application of tort and criminal law to religious

of what was implicit in the Ninth Circuit's analyses of sexual harassment cases, but is not limited by whether or not institutions had a religious motivation for their actions in question. In fact, that notion is irrelevant to the harm principle.

Marci Hamilton explains that the harm principle was derived from statements made by the Framers of the Constitution and the First Amendment, and important political and religious philosophers throughout history. The Lockean argument that individuals could not "take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another" was rooted in the understanding that conduct, but not belief, could be regulated by the state.¹⁹⁹ This principle was in the minds of the Framers, such as Thomas Jefferson²⁰⁰ and James Madison.²⁰¹ Moreover, this principle runs throughout Justice Scalia's majority opinion in *Smith*.²⁰² As a result, Hamilton argues that the harm principle ought to be viewed as a vital tool for understanding the purpose of the religion clauses, and in particular the Free Exercise Clause.²⁰³

organizations). The belief/conduct distinction is explained in more detail in *infra* note 215.

199. Hamilton, *Religious Institutions*, *supra* note 197, at 1153–55 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1690), *reprinted in* TWO TREATISES OF GOVERNMENT 117 (Mark Goldie ed., 1993)).

200. See, e.g., Hamilton, *Religious Institutions*, *supra* note 197, at 1153 ("The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.") (quoting Thomas Jefferson, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS 285 (Merrill D. Peterson ed., 1984)); HAMILTON, GOD VS. THE GAVEL, *supra* note 197, at 261 ("[F]ree argument and debate' [are] essential human rights, but, when those 'principles break out into overt acts against peace and good order' it is 'the rightful purpose[] of civil government, for its officers to interfere.") (quoting Thomas Jefferson, *An Act for Establishing Religious Freedom*, in 12 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84, 85 (photo. reprint 1969) (William Waller Hening ed., Richmond 1823)).

201. See, e.g., Hamilton, *Religious Institutions*, *supra* note 197, at 1155 ("In some instances [ecclesiastical establishments] have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries.") quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 301, 302 (Robert A. Rutland et al. eds., 1973)). Hamilton also argues that the harm principle was not just accepted by the Framers during the Framing period but by such philosophers as John Stuart Mill, H.L.A. Hart, and Joel Feinberg. *Id.* at 1158–59.

202. See *id.* at 1159 (citing *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Cutler v. Wilkinson*, 544 U.S. 709 (2005)).

203. See *id.* at 1156 ("[N]either [the Framers] nor their fellow citizens ever contemplated absolute liberty for religious organizations. Indeed, absolute liberty (religious or otherwise) was anarchy and called licentiousness.").

The Supreme Court first employed the harm principle in the religious context in the 1878 case *Reynolds v. United States*.²⁰⁴ In *Reynolds*, the Court took up the issue of whether the Mormon practice of polygamy stood in contravention to social policy, and even criminal laws. Mormon religious law held that “it was the duty of male members of said church, circumstances permitting, to practise [sic] polygamy [T]he failing or refusing to practise [sic] polygamy by such male members of said church . . . would be punished, and . . . the penalty for such failure and refusal would be damnation in the life to come.”²⁰⁵ As a result, the Mormon people asked the Court for an accommodation—even though non-Mormons could not engage in polygamy, Mormons should be allowed to practice it because it is prescribed by their religious doctrine.²⁰⁶ Even though polygamy was firmly rooted in the Mormons’ belief set, however, the Court ruled that the practice of polygamy was illegal. This holding turned on the ability of the government to regulate religious *conduct* but not belief:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?²⁰⁷

The *Reynolds* Court defined the type of harm that would justify the regulation of conduct and activities—even when they would otherwise be protected under the Free Exercise clause—as trespasses against laws put in place to protect personal safety and private rights.²⁰⁸ In addition, harm

204. *Reynolds v. United States*, 98 U.S. 145 (1878). See also Hamilton, *Religious Institutions*, *supra* note 197, at 1159. Justice Scalia cites *Reynolds* in his *Smith* opinion, *Smith*, 494 U.S. at 879, even though it had fallen in disrepute in many legal circles. Keith Jaasma, Comment, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 211, 247 & n.248 (1995) (citing Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 340-341 (1964); Jeremy M. Miller, *A Critique of the Reynolds Decision*, 11 W. ST. U. L. REV. 165 (1984); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984)).

205. *Reynolds*, 98 U.S. at 161 (internal quotations omitted).

206. See *id.* at 166.

207. *Id.*

208. *Id.* at 164 (“Congress was deprived of all legislative power over mere opinion, but was left

caused by religious conduct need not be against a third party not associated with the religion; to the contrary, it would seem that *Reynolds* was concerned mostly with the harm religious believers could inflict on themselves as a result of their own beliefs.²⁰⁹

The harm principle was again applied in 1944 in *Prince v. Massachusetts*.²¹⁰ In *Prince*, a Jehovah's Witness was charged with violating child labor laws in allowing her children to pass out pamphlets containing religious materials.²¹¹ The mother argued, among other things, that the practice of proselytizing is part of the religious doctrine of Jehovah's Witnesses, and so she should be granted an accommodation from the law against child labor.²¹² The Court disagreed, holding that the state could validly apply the laws to people acting in accord with their religious beliefs because "[i]t is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."²¹³ The *Prince* Court defined harm as actions that at the very least threaten a person's welfare, in line with the *Reynolds* decision.²¹⁴

free to reach actions which were in violation of social duties or subversive of good order." Actions "which [are] in violation of social duties or subversive of good order" include criminal and civil laws put in place to protect the safety of the public, but also to maintain social order. *See id.* The concern that religion may prescribe conduct that could undermine our system of government and create anarchy looms in this opinion. This is not surprising given that *Reynolds* was decided at a time when Mormons had moved into the western territory of Utah and were subjected to mostly local, not federal, government control. *See SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 8–9 (2002). Thus, combating polygamy meant combating the unwieldy expansion of a group of people not subject to the United States' control, making sure individuals were not allowed to "become a law unto" themselves. *Reynolds*, 98 U.S. at 167.

209. Although, perhaps a motivating factor in *Reynolds* was to deter a community from leaving the control of the United States and later becoming an enemy thereof. *See supra* note 208.

210. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

211. *Id.* at 159–60.

212. *See id.* 166–67. She also argued that the laws could not trump her right to choose how to raise her children under *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Prince*, 321 U.S. at 164–66.

213. *Id.* at 167.

214. In *Reynolds*, the practice of polygamy might not be conceived as immediately dangerous to those who practice it, but over time, it could wear on the women involved (or lead to the United States government's loss of control over the territory of Utah). *See GORDON, supra* note 208, at 9. In *Prince*, while the child might not be subject to immediate harm, the state's job is to protect the long-term welfare of the child, and employment at a young age could impede this goal. 321 U.S. at 168 ("The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that

Just as the Mormon religion in *Reynolds* and the Jehovah's Witness religion in *Prince* crossed the line between permissible and impermissible actions, so have and will other religions. What accommodation cases such as these turn on is the basic understanding that belief must never be regulated, but conduct may be regulated.²¹⁵ Scholars disagree as to what extent conduct should or can be regulated. Michael McConnell has studied historical free exercise clauses in state constitutions, and notes that all of the eleven states that had adopted constitutions after the American Revolution included limits on religious conduct defined by whether those actions disturbed the peace.²¹⁶ "This indicates that a believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side."²¹⁷ Approaching the debate from a less accommodation-friendly perspective, Philip Hamburger argues that limits on religious conduct concerned more than nonpeaceful actions.²¹⁸ "[T]he disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."²¹⁹ Illegal actions need not have been judged by whether the act in question was criminal, but whether the act

implies. It may secure this against impeding restraints and dangers within a broad range of selection.").

215. The "belief/conduct distinction" seems straightforward, but it is actually quite complex. What is difficult about applying the distinction is the very definition of "belief" and "conduct." What some may consider a belief, others may consider conduct. For example, the Mormons likely believed that polygamy was firmly rooted in their belief set; after all, religious doctrine taught that males would be punished if they did not engage in polygamy. See *supra* text accompanying note 205 (discussing Mormon doctrine regarding polygamy). The Court viewed polygamy as purely "conduct"—if the Mormons could engage in it at will as an outward act, it could be regulated. See *supra* text accompanying note 207. It may be helpful to think of belief and conduct along a spectrum. (Consider this spectrum: inward individual belief; religious speech; religious acts or rites; acts in conformity with religious duties; religious culture; external religious institutional behavior.) While individual internal belief may be clearly outside of the realm of government regulation, as we move closer to acts by institutions, these acts are more clearly conduct and therefore are capable of being regulated. Along the spectrum, however, it is easy to imagine great discord in interpreting whether acts are properly categorized as conduct or belief.

216. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455, 1461–62 (1990) ("Nine of the states limited the free exercise right to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state. Four of these also expressly disallowed acts of licentiousness or immorality; two forbade acts that would interfere with the religious practices of others; one forbade the 'civil injury or outward disturbance of others'; one added acts contrary to 'good order'; and one disallowed acts contrary to the 'happiness,' as well as the peace and safety, of society.").

217. *Id.* at 1464.

218. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 918 (1992).

219. *Id.* at 918–19.

“infringe[d] the laws of morality, or injure[d] others in their natural, civil, or religious rights.”²²⁰ So while McConnell argues that religious conduct can be regulated within laws that encompass disruptions of peace, Hamburger contends that the limit need not be found in a certain category of laws, but rather in any law that protects public safety. Either way, both scholars base their arguments on the notion that simply relying on religion to instruct people to abstain from bad behavior is inadequate; there must be limits on religious liberty.

There are two major objections to the use of the harm principle in legal analysis. First, harm is not simple to measure. Not only is deciding what qualifies as harm as a threshold matter somewhat subjective, but more importantly, harm comes in many levels. Indeed, harm exists in mild, moderate, and severe forms, and the harm principle does not prescribe a uniform method for judges to use in deciding what level of harm justifies the principle’s invocation. Second, the harm principle cuts off activities that may be firmly grounded in religious beliefs based on whether or not those activities conform to our society’s notion of the common good. The harm principle often effectively imposes majoritarian views on minority groups and could be viewed as giving the government too much authority in deciding exactly what comprises the “common good.” To be sure, *Reynolds* had fallen into disrepute²²¹—until it was cited by Justice Scalia in his *Smith* decision—precisely for this reason.

This Note argues that the harm principle ought to be applied to the ministerial exception analysis and that the aforementioned objections can be well enough overcome. Just as a religion can cause harm to its own adherents or third parties, it can also cause harm to its own ministers.²²² The harm principle, as proposed by this Note, would not eliminate the ministerial exception. To the contrary, it would act as a boundary to the relatively unbounded exemption. The harm principle should be a part of a court’s free exercise analysis in determining whether a state’s interest in employment regulation laws is “compelling” and whether that state interest outweighs a religious institution’s free exercise rights.²²³ This is a

220. *Id.* at 918 (internal quotations omitted).

221. Jaasma, *supra* note 204, at 247 & n.248.

222. *See* Corbin, *supra* note 89, at 2001–02 (noting that Hamilton claims the ministerial exception is justified because it was “[an] adult’s decision to accept employment with a religious employer,” but that “this kind of reasoning would nullify all employment protections for everyone, from minimum wage to safety requirements, and was soundly rejected with the overruling of *Lochner v. New York*.”). *See also infra* Part VI.B.1.

223. *See supra* notes 92–93 and accompanying text.

balancing test, eliminating the need for a strict system of measurement; the balance would shift in favor of the government interest where the harm seeking to be protected against is graver than the loss of institutional free exercise rights.²²⁴ Even under the narrow definition of permissible limits on religious conduct proposed by McConnell,²²⁵ the ministerial exception free exercise analysis would change greatly under this proposed structure. The establishment issues explained above would not dissolve, but the entanglement concern might no longer be perceived as “excessive” in light of the *Jones v. Wolf* neutral principles approach and the newly elucidated compelling state interest. Additionally, although the proposed limit on the ministerial exception in cases like *Petruska I*, *Bollard*, and *Elvig* is better than no limit at all, it does not account for cases in which religious doctrine spurs harm. Moreover, the non-criminal law limitation is extremely narrow and at best hypothetical. As a result, this Note concludes that the harm principle is a better limiting doctrine, as it encompasses the tenets of other limiting principles.

A. RECENT SUPREME COURT JURISPRUDENCE WEIGHS IN FAVOR OF APPLYING THE HARM PRINCIPLE TO THE MINISTERIAL EXCEPTION

The current state of the Supreme Court jurisprudence lends support to the application of the harm principle to the ministerial exception. Although the Court approached the religion clauses from a strict separationist stance when the lower courts created the ministerial exception, its recent jurisprudence has shifted to a more neutrality-based approach.²²⁶ This change in paradigm means that the Court is far less likely to grant exemptions or accommodations on the basis of religion and will look more carefully at arguments like the church autonomy doctrine that grant religious institutions special immunities.²²⁷ The types of cases that exemplify how this shift should change the analysis of ministerial exception cases and facilitate the application of the harm principle include establishment cases²²⁸ and free exercise cases.²²⁹

224. See Laycock, *supra* note 67, at 1402 (“A church’s legitimate interest in autonomy has few natural limits, but at some point that interest becomes sufficiently attenuated [sic], and the government’s interest in regulation sufficiently strong, that neutral regulation for secular purposes becomes consistent with free exercise.”).

225. See *supra* note 216 and accompanying text.

226. Corbin, *supra* note 89, at 1990.

227. See William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000).

228. See *infra* Part V.A.2.

1. The Movement from Strict Separation to Neutrality

The principle of separation takes as its goal the prevention of intrusion of religion into the state and the state into religion. Corbin describes three reasons why separationists believe that principle should be applied to interpretation of the religion clauses: (1) religious belief is of such great importance that religious freedom should be valued over other interests;²³⁰ (2) the state is not fit to deal with or interpret religious doctrine;²³¹ and (3) both religion and the state will be worse off if they come together.²³² Free exercise cases decided under the separationist principle frequently gave accommodations to individuals who could prove a law burdened their exercise of religious belief;²³³ Establishment Clause cases decided from a separationist perspective held both that the Court should not resolve church property disputes²³⁴ and that the government should give no aid to religious institutions, even where it gives aid to nonreligious institutions performing the same public service.²³⁵ Neutrality, on the other hand, is based on the premise that religion should not be treated as “special.” By treating religious and secular organizations as equals, concerns about discriminating in favor of religion are eliminated, as are concerns about discrimination based on nonreligious grounds.²³⁶

Even though analyzing potential free exercise and establishment

229. See *infra* Part V.A.3.

230. See Corbin, *supra* note 89, at 1990 (citing Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1263–64 (describing research by Douglas Laycock and Michael McConnell)).

231. See *id.* at 1990 (citing Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 53 (2002)) (“The core of the Separationists’ message is a claim of institutional differentiation. Secular matters belong to civil authorities and sacred matters belong to religious authorities.”).

232. See *id.* at 1990–91 (“Church and state must remain separate in order to ‘protect[] the garden of the church from the encroaching wilderness of the world and insulate[] the political process from the jealousy and divisiveness caused by religious strife.’” (quoting Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1469 (1984) (internal quotation marks omitted))).

233. See Corbin, *supra* note 89, at 1991 (giving examples of unemployment benefit accommodations and exemptions from school attendance laws).

234. See *id.*; *supra* notes 102–03.

235. See Corbin, *supra* note 89, at 1991–92 (citing *Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

236. See *id.* at 1992. This also means that accommodations and exemptions should not be given frequently. Marshall, *supra* note 227, at 196–98 (describing the religion/nonreligion distinction of what he calls the “equality” principle).

clause violations under the neutrality principle may justify government intrusion on religious activities, conservative groups, often called “values evangelicals,” have employed the neutrality principle to achieve their goal of creating a greater presence for religion in the public sphere. Indeed, church and state scholar Michael McConnell relied on the neutrality principle to effectuate his brilliant strategy to garner more government benefits for religious groups in the case *Rosenberger v. Rector and Visitors of University of Virginia*,²³⁷ in which a public university was compelled to fund a religious student newspaper.²³⁸ There, McConnell, representing the student group, argued that the religion clauses (but the Establishment Clause in particular) should be read as allowing government support of religion if it also supports nonreligion.²³⁹ This conception of the clauses is one of neutrality because neither religion nor nonreligion is allowed special benefits; the argument is based on the notion that funding for religious activities is not a benefit if identical secular activities receive such funding.

The fact that the Court has shifted toward employing the neutrality principle more often has not resulted in consistent rulings. The neutrality principle is to be employed in cases that allow government to provide benefits to religion and in cases that forbid benefits. As a result, the harm principle is both plausible given this trend toward neutrality and also more difficult to refute by values evangelicals since the analytical tool necessary for its implementation has been widely supported by them. Establishment and Free Exercise Clause cases exemplify the trend toward neutrality, although neither area has undergone a complete revision to total neutrality.²⁴⁰

2. Establishment Analysis Under the Neutrality Principle

Cases analyzing the Establishment Clause have moved closer to a neutrality perspective. As noted above, most of the Court’s intra-church decisions are based on the understanding that the government must not judge or evaluate religious doctrine and must defer to the decisions of the highest ecclesiastical bodies; most recently, however, in *Jones v. Wolf*, the

237. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

238. *Id.* at 819, 843–44.

239. *Id.* See also NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 207–12 (2005).

240. See, e.g., Marshall, *supra* note 227, at 194 (“A superficial review of current religion clause jurisprudence would likely lead to the conclusion that the area is in tumult. There is no underlying theory of religious freedom that has captured a majority of the Court, and the Court’s commitment to its announced doctrines is tenuous at best.”); Corbin, *supra* note 89, at 1992–96.

Court announced that intra-church disputes may be resolved when a court applies neutral principles of laws to judge religious doctrine.²⁴¹ This stark change marks a shift to neutrality in the Court's jurisprudence because intra-organizational disputes of religious institutions will be treated the same way as are similar disputes of nonreligious organizations.²⁴²

Although intra-church disputes are particularly relevant to the subject of this Note, other types of Establishment Clause cases have moved farther down the spectrum toward neutrality as well. These include cases concerning public forums for speech in public plazas, state subsidies to religious organizations, social service grants to religious organizations, and aid to private religious schools.²⁴³

3. Free Exercise Analysis Under the Neutrality Principle

The Court's movement closer to a neutrality regime is exemplified by its recent emphasis on the belief/conduct distinction in free exercise cases. As described above, the Court made its decisions not to give accommodations to the Mormons and Jehovah's Witnesses in *Reynolds* and *Prince* respectively because the accommodation requested was for conduct and not for belief.²⁴⁴ By making the distinction between conduct and belief, the Court recognizes the need to deny accommodations—a basic tenet of neutrality. *Smith* and its removal of the compelling interest test serves as a distinct example of the neutrality doctrine at work. By eradicating the

241. *Jones v. Wolf*, 443 U.S. 595, 604 (1979). See also *supra* notes 104–05, 147–51 and accompanying text (discussing the effect of *Jones* on disputes within autonomous religions). For a detailed description of the change in *Jones*, see Brady, *supra* note 102, at 1634–44.

242. See *supra* notes 150–51 and accompanying text (discussing the loss of church immunity in certain disputes). Marci Hamilton also argues that the line between intra-church disputes that may be heard by courts versus those that are not turns on the belief/conduct distinction, which is consistent with the neutrality principle. See Hamilton, *Religious Institutions*, *supra* note 197, at 1190–92. The fact that the Court refers to intra-church disputes that it may not hear as encompassing “solely ecclesiastical” matters communicates that the Court still has jurisdiction over cases that involve more than ecclesiastical matters. See *id.* This implies that while intra-church disputes composed entirely of questions of belief may not be heard, cases in which doctrine compels conduct may be heard. See *id.* Note, however, that Hamilton views ministerial exception cases as being a type of un-hearable, solely ecclesiastical dispute. See *id.* at 1188–89, 1193–96; *supra* notes 197, 208 (discussing the application of the no-harm doctrine to the ministerial exception).

243. Corbin, *supra* note 89, at 1992–93 & nn.173–80. See also Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1037 (2003) (“The Court’s more gradual but no less dramatic changes in the establishment area frequently allow (or require) states to treat churches on a par with their secular counterparts, thereby giving religious organizations access to governmental benefits that are generally available on nonreligious terms.”).

244. See *supra* text accompanying notes 207 and 213; *supra* note 215.

compelling interest test in the majority of cases,²⁴⁵ the Court made a statement that religion ought not get special treatment in the face of neutral, generally applicable laws. As a result, the harm principle could readily be applied—ingesting drugs is dangerous, harmful, illegal, and could cause the person who ingested them to disrupt the peace or break other laws.²⁴⁶

Next, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*²⁴⁷ also demonstrates that religion does not hold a seat superior to nonreligion and is consistent with the neutrality principle. In that case, the city of Hialeah enacted a law that made it a crime to perform animal sacrifice.²⁴⁸ It was clear, however, that the law was not put into effect to stop animal sacrifice, but to make it unpleasant for people of the Santeria faith to continue living in Hialeah; they were, after all, the only people who performed animal sacrifice in Hialeah.²⁴⁹ Holding that free exercise accommodation cases will receive strict scrutiny where there is a showing that the law burdening free exercise was enacted with animus, the Court held fast to the neutrality approach used in *Smith*.²⁵⁰ Neutrality espouses nondiscrimination of both religion and nonreligion. Discrete and insular minorities receive strict scrutiny when there is no showing of discrimination on the basis of religion in equal protection cases;²⁵¹ it is fitting, therefore, that groups or individuals discriminated against on the basis of their free exercise of

245. See *supra* Part II.B.1.

246. See *supra* notes 216–19 and accompanying text. See also Corbin, *supra* note 89, at 1994 (noting that the move to neutrality was evident even before *Smith* made it clear).

247. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

248. *Id.* at 525–28.

249. *Id.* See also Corbin, *supra* note 89, at 1995–96 (“The City of Hialeah’s intent to single out [Santeria] was evident from the history, language, and wildly underinclusive nature of the ordinances Under one ordinance, for example, few, if any, killings of animals were prohibited other than Santeria animal sacrifices.”).

250. See *Lukumi Babalu*, 508 U.S. at 534.

251. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). Other nonreligious groups not considered a “discrete and insular minority” that can demonstrate a law was enacted with animus might get what the Court refers to as rational basis review, but the Court sometimes scrutinizes more closely than the rational basis title implies. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a change in the Colorado Constitution to disallow homosexuals from receiving any preferential treatment was unconstitutional because its “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 450, 471–72 (1985) (holding that a law restricting where a home for disabled people could be located in particular areas of Cleburne, Texas was unconstitutional even though the Court did not find that disabled people were a discrete and insular minority).

religion should receive strict scrutiny as well.²⁵² Moreover, laws enacted to prevent harm would not be struck down under this regime because they would not have been enacted out of animus.²⁵³

Fact scenarios in which belief is at issue, however, generally receive accommodations. This is consistent with the principle of neutrality. Neutrality and its guarantee of equality between religion and nonreligion favors accommodations for pure religious belief, just as it would for nonreligious belief. This is because “(1) the law requires such liberty [of belief] in the interest of the greater good and (2) the belief itself will not harm others.”²⁵⁴

Many scholars disapprove of the neutrality approach, and implicitly the harm principle, especially in the free exercise context.²⁵⁵ One major concern is the effect it has on minority religions, particularly in light of the *Smith* Court’s eradication of the compelling interest test. Without that safeguard, the government need not prove its regulation of religious practices is compelling. Thus, minority religions might not be able to prove that their exercise of religious beliefs ought to be protected. After all, few

252. Caroline Corbin disagrees on this point, stating that “Under a true neutrality paradigm, bans on animal cruelty motivated by religious discrimination would be treated no differently than bans motivated by a secular reason: They would be subject to rational review This extra protection [in *Church of the Lukumi Babalu*] demonstrates that religion has not completely lost its status as special.” Corbin, *supra* note 89, at 1996. She explains her stance as being based on the fact that “[s]ocial and economic laws are generally subject only to a rational basis level of scrutiny” and cites *Williamson v. Lee Optical*, 348 U.S. 483 (1955). *Id.* at 1996 n.199. Social and economic laws might be subject to rational basis review, but those laws are not at issue here; it is only relevant to compare religious groups against other groups of people that can be categorized by distinct characteristics such as race, gender, sexual orientation, and disability. *See supra* note 251.

253. *See* Hamilton, *Religious Institutions*, *supra* note 197, at 1185–86 (explaining that the Court pointed out in *Locke v. Davey*, 540 U.S. 712, 724–25 (2004), that strict scrutiny is not appropriate for a law showing no animus toward religion; an example is a law that burdens free exercise because that exercise causes harm to others).

254. *Id.* at 1184 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The majority opinion in *Sullivan*, a free speech case, quotes Justice Brandeis: “[The Framers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.” *Sullivan*, 376 U.S. at 270–71.

255. *See, e.g.,* Corbin, *supra* note 89, at 1996 n.203 (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16 (1991)) (“[R]eligion is in some way a special human activity, requiring special rules applicable only to it.”); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 151 (1992) (“Why accommodate religion unless religion is special and important?”). Other reasons separationists would be opposed to neutrality correlate with free exercise arguments in support of the ministerial exception in Part II.B.1 of this Note, concerning church autonomy.

members of the legislature or judges are followers of minority religions such as Santeria, Native American religions, or Mormonism (or even Scientology); as a result, it is less likely that lawmakers will take counter-majoritarian free exercise claims into consideration when legislating or that judges will take those claims seriously when judging their sincerity.²⁵⁶ Another issue in that regard is the imposition of majority beliefs and value sets on minority groups. As a pluralistic nation, we should value the diversity of beliefs, not force assimilation of beliefs.²⁵⁷ Forced homogeneity is a tremendous concern, and there is always a risk in arguing for government regulation of conduct when that conduct is closely tied to religious belief—allowing government to legislate based on beliefs and morals could set dangerous precedents for the majority if and when their beliefs become minority beliefs.²⁵⁸

Proponents of the neutrality principle respond to these worries adequately enough that the harm principle is still a valid limiting principle

256. See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311, 318 (1991) (“A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous Legislators are more likely to be aware of majoritarian religious practices (their own) when they fashion general regulations, and thus are unlikely to place disabilities on those practices. Similarly, they are less likely to be concerned with religious practices outside their religious tradition and accordingly are more likely to place burdens on those practices inadvertently.”). See also Corbin, *supra* note 89, at 2000–01 (discussing the principles set forth by Marshall).

257. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990) (“The ideal of free exercise of religion . . . is that people of different religious convictions are different and that those differences are precious and must not be disturbed The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform.”).

258. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State”); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration.”). Interestingly, *Pierce* involved a referendum to make public school compulsory for all children, *Pierce*, 268 U.S. at 530–31, that was championed primarily by the Ku Klux Klan—staunch supporters of homogeneity. See David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 74 (1968) (“The Kleagle and his hooded colleagues had just helped persuade the citizens of Oregon to pass an initiative requiring all children . . . to attend public schools and essentially outlawing private elementary schools.”)

in light of Supreme Court precedent. First, and least convincingly, Marci Hamilton urges that minority religions have actually been successful in achieving exemptions based on non-mainstream practices.²⁵⁹ Moreover, the concern that neutrality and its de-emphasis on religious accommodation will impose homogeneity on our pluralistic society is exaggerated. “Pluralism’s attributes . . . do not inhere exclusively within the domain of religious groups. Secular ethnic, social, or political groups . . . serve to further . . . pluralism. Moreover, if the goal is promoting pluralism, protecting religious belief is overinclusive. Not all religious belief derives from religious communities. Many times religious is highly individualistic.”²⁶⁰ But most importantly, *Lukumi Babalu* exists to resolve the very concern that minority religions will be discriminated against by legislators and courts.²⁶¹ When courts employ a neutrality analysis and end up allowing government regulation of religious activities, as they would if they applied the harm principle, they are constrained by the *Lukumi Babalu* rule that their decision must not be discriminatory. If a lower court were to disallow an accommodation because of the desire to quell a minority religion, that decision would be reviewed under strict scrutiny and would likely be overturned.

Another reason the pluralism argument does, in certain instances, fail

259. Hamilton, *Religious Institutions*, *supra* note 197, at 1212–13. Accord Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1023 (2005) (finding no empirical support for the argument that minorities are disadvantaged in courts). Hamilton’s examples of such success in obtaining legislative accommodations include the exemption given to Catholics during Prohibition that allowed them to consume sacramental wine and the exemption given to Jewish soldiers that allowed them to wear yarmulkes under military helmets. *Id.* (citations omitted). The problem with this argument is that these religions, although minorities because of their numbers, have actually achieved great success and political power and are not the type of minority groups scholars argue will be affected by the harm principle. Hamilton also argues that the American legislature is not majoritarian, so it is not just the majority that gets laws enacted in its favor. HAMILTON, *GOD VS. THE GAVEL*, *supra* note 197, at 286–88.

260. Marshall, *supra* note 227, at 204. Marshall provides as an example *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). In *Thomas*, a man filed for unemployment benefits claiming he could not work at an armaments factory because of his religious convictions. 450 U.S. at 710–11. The Court granted him accommodation, even though they would not have done so if his beliefs were not religiously rooted. *See id.* at 713, 720. Marshall argues that Thomas’s beliefs were not especially tied to a collective religion, but were rather individualistic. Marshall, *supra* note 227, at 204–05. Accommodating his belief system does not further pluralistic goals. *Id.* at 204. Marshall presents another argument against such accommodation in a different article: “If the religious exemption works to insulate religious beliefs from social forces, as McConnell urges it should, those beliefs will enjoy a false vitality in the political arena relative to competing secular beliefs that must stand or fall on their own accord.” Marshall, *supra* note 256, at 322.

261. *See Corbin*, *supra* note 89, at 1999–2000.

is that accommodating religious practices causes physical harm to religious adherents or others—a basic tenet of the harm principle. This can be analogized to similar feminist scholarship concerning the practice of female genital mutilation (“FGM”). There is a valid argument to be made that FGM should be an allowable practice in this country, given that we are a pluralistic society that ought to be accepting of diverse cultural beliefs and practices.²⁶² When Americans speak and write about FGM as “dark, brutal, primitive, barbaric, and unquestionably beyond the pale,” they make judgments about cultural practices they might not understand.²⁶³ And when they legislate against these practices, they force a sort of homogeneous set of values, keeping as legal only those practices that are in line with certain prescribed western values.²⁶⁴ Legislators have, however, made FGM a crime, even amongst the competing arguments for pluralism and multiculturalism.²⁶⁵ This is because, in the United States, the judgment has been made that the cutting of female sexual organs is just too harmful to condone. In criminalizing the act of FGM, Congress noted that the practice “often results in the occurrence of physical and psychological health effects that harm the women involved” and “such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional.”²⁶⁶ Just as the risks to women who practice polygamy were too great, so too are the risks to women if different cultures are allowed to

262. See Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093, 1094 (1996) (“In particular, this larger debate concerns whether there is and should be a unifying American culture that guides our institutions, including the justice system, or whether the United States is and should be a culturally pluralistic nation in all respects, including in the law.”); Richard A. Shweder, “*What About Female Genital Mutilation?*” and *Why Understanding Culture Matters in the First Place*, in ENGAGING CULTURAL DIFFERENCES 216, 238 (Richard A. Shweder et al. eds., 2002) (noting that Justice Brennan wrote in his dissent in *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989), “We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.”). It should be noted, however, that Justice Brennan wrote this statement in reference to a petition by a biological father to be granted a hearing regarding visitation rights of his daughter. *Michael H.*, 491 U.S. at 141–43. The Court found that there was no fundamental right to define one’s family in a way that is contrary to the conception of the western “nuclear” family. *Id.* at 124. This fact scenario is quite different than that of allowing FGM (or trafficking practices by religious institutions, for that matter).

263. Shweder, *supra* note 262, at 219–20.

264. The American practice of legislating against foreign practices they find abhorrent is a type of political power the philosopher John Rawls referred to as “imperial liberalism”—the “attitude that it is desirable for us to spread and enforce our liberal conceptions and ideals for the good life in all corners of society and throughout the world.” *Id.* at 235.

265. 18 U.S.C. § 116 (2006).

266. Omnibus Consolidated Appropriations Act, Pub. L. No. 104–208, § 645(a), 110 Stat. 3009–708, 3009–708 (1996).

practice FGM.²⁶⁷ While cultural pluralism is an important value, so is the safety and prevention of harm to individuals.

The pluralism argument may also fail in circumstances in which accommodating diverse religious practices would cause indirect injuries on society by allowing groups whose beliefs contrast with important values held by our democratic society to operate under those incongruent belief systems. It is true that courts should be concerned with the diversity of religious belief in this country. A liberal society such as ours values diversity as a primary value that should be strived for in society and law. This is especially true in the area of religious accommodation—the U.S. government has long made a concerted effort to support the development of many different religious beliefs and groups, and the increase in the number of minority religious groups since the founding of the country cannot be ignored.²⁶⁸

Even amid the backdrop of toleration of religious diversity, however, our government often finds it appropriate to take action that effectively limits the proliferation of diverse faiths. Consider the very concept of school curriculum; though our government hopes to promote tolerance and values of individual liberty, those ethical standards are not always valued by many groups that make up our society.²⁶⁹ Indeed, many abhor such values and are opposed to inculcating their children with them, often because of religious beliefs. Even though such groups have mounted arguments against a uniform school curriculum that preaches those value systems on the grounds that that sort of curriculum forces homogeneity in a society that purports to value heterogeneity of belief systems, courts have

267. Under both McConnell's and Hamburger's definitions of harm, FGM would qualify. See *supra* notes 216–19 and accompanying text.

268. See Nancy L. Rosenblum, *Pluralism, Integralism, and Political Theories of Religious Accommodation*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 3, 11–12 (Nancy L. Rosenblum ed., 2000) (“[T]he proliferation of faiths—through schism, invention of new religions . . . and importation of nonwestern religions—is ceaseless.”).

269. See, e.g., *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1058–59, 1061–62 (6th Cir. 1987) (holding that the use of textbooks that cover material such as evolution, pacifism, and secular humanism did not violate free exercise rights of groups who believed those values were contrary to their religious beliefs); *Smith v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 827 F.2d 684, 692–95 (11th Cir. 1987) (holding that textbooks that promoted personal morality and discussed various lifestyles did not run afoul of the Establishment Clause in the face of a challenge that the books promoted the “religion” of secular humanism). For an in-depth discussion and analysis of the particular issues involved in this liberal paradox, see Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

left such curricula in place.²⁷⁰ In doing so, courts have furthered some liberal ideals at the cost of others, prioritizing a centralized, normative judgment of what is best for our society. Indeed, it has been argued that this not only helps further the tenets of liberalism directly, but also indirectly promotes a stabilized and cohesive society, as unlimited autonomy for all religious groups could promote anarchy.²⁷¹

At times, our government must make judgment calls between two avenues that purport to bolster democracy and liberalism. While accommodating the free exercise rights of all religious groups supports the important tenet of pluralism, accommodating free exercise rights of religions that preach intolerance or abuse detracts from liberalism's basic command that personal autonomy must cease when it impinges on the rights of others. Requiring our liberal democracy to "support groups whose tenets and practices are incongruent with public norms and principles of justice, including some overtly opposed to liberal democracy" is just as contrary to the notions of liberalism as is quelling minority religious groups.²⁷² When faced with such a judgment call, this Note proposes that it is legitimate and correct for the government to prefer protecting the basic human rights of individuals over religious institutional autonomy.

B. THE "HARM PRINCIPLE" AS APPLIED TO THIRD PARTY HARM CASES AND CHURCH CHILD ABUSE CASES

The harm principle has most recently been applied in the context of lawsuits brought against religious institutions in which third-party plaintiffs claim that a minister of the institution caused them to be injured.²⁷³ Most notably, it has been invoked (perhaps implicitly) in allowing cases alleging clergy sexual abuse of children to proceed, even among competing First Amendment concerns.²⁷⁴ These cases elucidate how and why the harm

270. See, e.g., *Mozert*, 827 F.2d at 1070 (holding "that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion.").

271. Graham Walker, *Illusory Pluralism, Inexorable Establishment*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES, *supra* note 268, at 111, 116.

272. Rosenblum, *supra* note 268, at 14.

273. The title "third-party plaintiffs" means that the plaintiffs who brought these cases were not ministers and did not work for the church. As such, these are not intra-church disputes.

274. For descriptions of some of these cases, see HAMILTON, GOD VS. THE GAVEL, *supra* note 197, at 13–31, and Brittany Reid, Comment, "If Gold Rust": *The Clergy Child Abuse Scandal Demonstrates the Need for Limits to the Church Autonomy Doctrine*, 72 MISS. L.J. 865, 866–70 (2002).

principle should be applied to ministerial exception cases.

The majority of courts allow disputes between a third party and a religious organization over tortious conduct by clergy to proceed.²⁷⁵ This is because courts use the “neutral principles of law” approach laid down in *Jones v. Wolf* to decide whether a tort was committed.²⁷⁶ In this way, even where religious doctrine might be involved, the courts avoid interpreting it by using an approach that circumvents such doctrine.²⁷⁷ Tort claims against religious organizations that have been successful include negligent supervision, negligent retention or transfer, and negligent hiring.²⁷⁸

Some courts, however, decline to allow these suits to proceed for the same church autonomy reasons outlined above.²⁷⁹ Under this theory, the neutral principles of law approach is inappropriate, because “any judicial inquiry about church decision making concerning clergy intrudes into the religious nature of this relationship in a way that either impermissibly impairs the church’s institutional free exercise or violates the establishment clause prohibition against excessive entanglement in church affairs.”²⁸⁰ These courts understand the belief/conduct distinction incorrectly. Whereas religious institutions deserve autonomy from the government concerning their beliefs, the courts have a duty to hear and adjudicate claims of abuse and misconduct when belief translates into “legal effects and consequences.”²⁸¹

It is clear that the reason many courts have been willing to step in and hear clergy abuse cases is because of the harm such conduct poses to individuals. For example, in *Doe v. Evans*, a Florida appellate court noted “that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by

275. Carmella, *supra* note 243, at 1040. *See also* Hamilton, *Religious Institutions*, *supra* note 197, at 1196 (“Many of these cases involve instances in which members of the clergy abuse children or adults who are disabled or in a disabled state.”).

276. *See supra* note 149–50 and accompanying text. For a discussion of cases employing this approach, see Reid, *supra* note 274, at 877–78.

277. For instance, courts can take judicial notice of beliefs prescribed in church doctrine. Hamilton, *Religious Institutions*, *supra* note 197, at 1197.

278. Carmella, *supra* note 243, at 1040 (citing *Malicki v. Doe*, 814 So. 2d 347, 351 n.2 (Fla. 2002)). These are corporate tort theories and exclude vicarious liability.

279. *See supra* Part II.B.1.

280. Carmella, *supra* note 243, at 1040–41.

281. *See* Hamilton, *Religious Institutions*, *supra* note 197, at 1197 (stating that this can be done using the neutral principles of law approach). *See also* Carmella, *supra* note 243, at 1042 (describing the suggestions of some scholars that a strict liability approach be taken to avoid entanglement).

authorizing civil damages against a church.”²⁸² Under this principle, free exercise is not burdened either because the state interest in deterring harmful behavior is compelling or because reasons for church autonomy fail where the dispute is not intra-church or does not turn on religious doctrine.²⁸³ Moreover, in *Malicki v. Doe*, the Florida Supreme Court held that in the face of this kind of harm, the process of deciding whether a tort was committed (applying neutral principles of law) does not cause excessive entanglement.²⁸⁴

VI. APPLYING THE “HARM PRINCIPLE” TO THE MINISTERIAL EXCEPTION

The concept that religion is imperfect and can, at times, trespass on individual rights cannot be debated. Government should, and can, regulate such trespasses.²⁸⁵ Sadly, however, the government has failed to do so on many occasions in the name of church autonomy and entanglement principles. A timely example of such a trespass that went uncured exists in *Headley v. Church of Scientology International*.²⁸⁶

A. HEADLEY AS A CASE STUDY

The Headleys’ lawsuit, discussed above, alleged violations of human trafficking under the TVPA.²⁸⁷ They argued that Miscavige’s and other leaders’ threats of violence and physical abuse made it so they felt they had no choice other than to perform work for them.²⁸⁸ Additionally, these

282. *Doe v. Evans*, 718 So. 2d 286, 289–91 (Fla. Dist. Ct. App. 1998), *overruled by* *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). The *Doe v. Evans* court held that a limit on its holding was whether the harm was criminal harm. *Id.* The Florida Supreme Court overruled this portion of the holding in *Malicki*. 814 So. 2d at 365.

283. *See Evans*, 718 So. 2d at 289–91; Lupu & Tuttle, *supra* note 135, at 1850–54.

284. *Malicki*, 814 So. 2d at 364 (“The core inquiry in determining whether the Church Defendants are liable [involves] . . . a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee ‘excessive’ entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law.”).

285. “Government,” as used here, is an inclusive term. As this Note uses it, it refers to both the judiciary and the legislature. The legislature, for instance, could chose to designate a statutory regime that is more explicit than the current language in Title VII, exempting religious institutions from suits brought by ministers. This exemption would then be subject to judicial review if it were challenged. Or, the judiciary could itself interpret other laws and Constitutional principles to create judge-made constraints on actions by religious organizations in regards to their ministerial employees.

286. *See Headley v. Church of Scientology Int’l*, No. CV09–3987, 2010 U.S. Dist. LEXIS 80807, at *10 (C.D. Cal. Aug. 5, 2010).

287. *See Plaintiff’s Memorandum*, *supra* note 1, at 15–16.

288. *See id.* at 2–4, 12–14.

threats and violence in combination with the security measures at Int Base rendered them not free to leave.²⁸⁹ Moreover, threats to separate them from one another and other family members compelled them to stay, and the threat of freeloader debt was a threat to abuse them with the legal process.²⁹⁰

The court analyzed the plaintiff's²⁹¹ claims by inquiring into whether hearing the case would violate either of the religion clauses of the First Amendment. Having held that the plaintiff was a minister for purposes of this lawsuit,²⁹² the court evaluated whether the ministerial exception applied to the TVPA. First, the court applied the *Sherbert* analysis, asking whether the state had a compelling interest in prohibiting trafficking under the TVPA, and whether that interest outweighed the Church of Scientology's free exercise rights.²⁹³ Next, the court considered whether the Establishment Clause barred the plaintiff's TVPA claims. Under the *Lemon* test, the court held that it was powerless to hear the TVPA claims because doing so would violate the entanglement prong of the test.²⁹⁴ As a result, summary judgment was granted for the defendants, and the plaintiff was denied recourse under the law.

289. *See id.* at 7–9.

290. *Id.* at 2–13. While their original motion for summary judgment included a wage and hours claim, they voluntarily dropped that claim because of contrary Ninth Circuit precedent in *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010) (en banc).

291. Claire and Marc filed their claims in separate lawsuits but had the same lawyers. The Court Order discussed here resulted from Claire's suit, but the court essentially issued the same order to resolve Marc's suit. *See Headley v. Church of Scientology Int'l*, No. CV09-3986, 2010 U.S. Dist. LEXIS 84869, at *10–18 (C.D. Cal. Aug. 5, 2010).

292. *Headley v. Church of Scientology Int'l*, No. CV09-3987, 2010 U.S. Dist. LEXIS 80807, at *15 (C.D. Cal. Aug. 5, 2010).

293. “[E]ven in pursuit of a compelling state interest, the balancing test contemplates that some statutes may still have such an adverse impact on religious liberty as to render judicial review of a Church's compliance with the statute a violation of the Free Exercise Clause.” *Id.* at *11 (quoting *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 672 (9th Cir.), *vacated in part, adopted in part en banc*, 627 F.3d 1288 (9th Cir. 2010)). Interestingly, the court never explicitly stated that the *Sherbert* balancing test weighed in the Church of Scientology's favor, but simply that “the Ninth Circuit has interpreted these clauses to ‘compel a ministerial exception from neutral statutory regimes that interfere with the church-clergy employment relationship.’” *Id.* at *13 (quoting *Alcazar*, 598 F.3d at 673).

294. *Id.* at *16 (“[I]nquiry into these allegations would entangle the Court in the religious doctrine of Scientology and the doctrinally-motivated practices of the Sea Org.”). Although the plaintiff argued that trafficking was not a part of Scientology's religious doctrine, the court was not persuaded. *Id.* at *17.

B. THE “HARM PRINCIPLE” APPLIED

The structure of *Headley* is uncommon; the only other case involving trafficking claims by ministers was decided in the District Court for the Eastern District of New York, but that opinion did not reference the application of the ministerial exception to TVPA claims.²⁹⁵ Regardless, evaluating how the exemption was applied at the district court level helps explicate the problems inherent in its current, relatively limitless form.

1. The Harm Principle Should Apply to the Ministerial Relationship

Although Marci Hamilton argues that the harm principle cannot be applied to ministers because ministers in effect consented to harmful treatment by their religious employers by signing an employment contract, this Note takes issue with this argument. It is a long-established principle of employment law that individuals can never contract away civil rights statutorily protected under Title VII.²⁹⁶

Moreover, even if a particular minister who attempted to sue a religious employer for discriminatory or abusive treatment did contractually consent to such behavior, courts would likely find such consent to be legally insufficient as a defense if mounted on behalf of the religious employer. A similar issue is central to the debate over criminal liability for injuries caused during sadomasochistic sex—although any two parties may consensually engage in sadomasochistic sex, a party who causes another injury incident to a violent sexual act will be held criminally responsible for that injury in many jurisdictions.²⁹⁷ This is the case even in the face of arguments by many liberal scholars that individuals should have the privacy and autonomy to engage in whatever sexual practices they

295. See *Shukla v. Sharma*, No. 07-CV-2972(CBA), 2009 U.S. Dist. LEXIS 91051, at *3–4, 6–9 (E.D.N.Y. Sept. 29, 2009). In that case, the defendants’ motion for summary judgment was denied as to the trafficking claims because a triable issue of fact existed as to whether the plaintiff’s claims were true. *Id.* at *8–9.

296. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (holding that an individual who signed a contract to submit employment discrimination claims to arbitration could not be restricted from filing a complaint with the EEOC); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), *abrogated by Gilmer*, 500 U.S. at 28 (“Since an employee’s rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer.”); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (holding that a former employee’s promise not to file with the EEOC was invalid because it “could impede EEOC enforcement of the civil rights laws” and thus would be void as against public policy).

297. See Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 241–43 (2001).

like.²⁹⁸ The law views the possible negative consequences of violent sex as too harmful to condone, allowing normative judgments about “acceptable sex” to trump personal autonomy justifications in situations involving injury from sadomasochistic sex. As a result, consent is often not allowed as a defense because “consent [can] merely [be] an expression of the ‘false consciousness of the oppressed.’”²⁹⁹

Just as it is important for the law to assume that no sane individual would consent to be injured in the context of “consensual” sadomasochistic sex, it is important for the law to hear cases brought by ministers against religious employers for discrimination or abusive treatment, even though those ministers signed employment contracts with their employers. This is the case even though the law values the autonomy of those individuals to contract for employment with the employer of their choice—the law should simply value the civil rights of those individuals more.

Headley serves as a keen example. There, the plaintiffs contracted with the Church of Scientology before the age of maturation.³⁰⁰ First, it is possible that, although their “consent” for employment was manifested in writing, they never consented to the abusive treatment they alleged in their complaint. But more importantly, even though they may have spent years acting in compliance with the Church’s instructions, and this perhaps may have evidenced “consent,” their compliance may simply be “an expression of the false consciousness of the oppressed.”³⁰¹ Because the law cannot be certain if their acts were of their own free will, consent should not be a factor in determining whether discriminatory or abusive practices by a religious employer are allowable.

2. Free Exercise Concerns

Had the harm principle been applied in *Headley*, both the free exercise and establishment analyses would change. First, the compelling interest balancing test derived from *Sherbert* would reverse in weight.³⁰² It cannot be argued that the state interest in preventing human trafficking is not extremely important.³⁰³ When compared with the free exercise rights of the

298. *Id.* at 281.

299. *Id.* at 283 (quoting Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 186 (2000)).

300. Plaintiff’s Memorandum, *supra* note 1, at 2.

301. *See id.*

302. This analysis was not explicit in *Headley*. *See supra* note 293. As a result, perhaps this is even more poignant of an example of why the balancing analysis should change.

303. In other words, it is “compelling.” *See* Plaintiff’s Memorandum, *supra* note 1, at 15-16.

Church of Scientology, the court should have considered the balancing executed in *Reynolds* and *Prince*—when beliefs translate into behavior that harms individuals, or even the American system of government, unlimited institutional free exercise rights must fall.³⁰⁴

Furthermore, the reasons proponents of the ministerial exception offer as support for the church autonomy doctrine falter in light of the harm caused to the plaintiffs by the Church of Scientology.³⁰⁵ As many opponents of the broad church autonomy doctrine argue, the concept is derived from property and contract disputes; the fact that ministerial exception cases deal with human behavior and lives ought to change at least the scope of autonomy.³⁰⁶ Moreover, the stance of the court has shifted from separationism to neutrality, and a broad church autonomy doctrine no longer fits within this framework.³⁰⁷ *Jones v. Wolf* allows for neutral principles of law to be applied to intra-church disputes, and courts ought to view this change as a tool for limiting the scope of the ministerial exception through application of the harm principle.³⁰⁸

3. Establishment Concerns

The Establishment Clause analysis would likewise change. First, although there is no denying that procedural entanglement concerns were present in *Headley*, substantive entanglement could be minimized by applying neutral principles of law, as set forth in *Jones*. After all, *Lemon* prohibits excessive entanglement, not any entanglement whatsoever.³⁰⁹ As such, there would not be an establishment violation. Moreover, the harm principle necessitates some entanglement in order to avoid other Establishment Clause problems. For example, by avoiding hearing the *Headley* case, the court in effect endorse the Scientology religion by allowing accusations of abuse to go uninvestigated. As a result, the Establishment Clause analysis should be reconsidered in light of the inherent murkiness of the clause itself.

304. See *supra* notes 207–08, 214, and accompanying text.

305. It should be noted that this analysis assumes that *Smith* does not abrogate the ministerial exception. Should it be decided that *Smith* does abrogate the ministerial exception, this argument becomes even more potent because strict scrutiny would be eliminated. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating RFRA as to state and local governments).

306. See *supra* note 146 and accompanying text.

307. See *supra* Part V.A.

308. See *supra* Part V.A.2.

309. See *supra* note 157 and accompanying text.

4. The Current Limits on the Ministerial Exception Are Ineffective

While the Supreme Court may give courts some much-needed guidance in terms of the “minister” requirement this Term, any guidance the Court offers probably will not remedy many of the problems in the current case law on ministerial exception.³¹⁰ The religious justification and criminal law requirements are poorly sketched and inadequate. The religious justification limit proposed in *Petruska I*, *Bollard*, and *Elvig* might change the analysis in some ministerial exception cases,³¹¹ imposing much-needed boundaries in this area of law, but it would not change the analysis in *Headley* and other cases. The limit simply does not account for the types of cases in which a religious institution acts in a way that harms people as a result of doctrinal motivation. This demonstrates that a different limit is needed that better protects the rights of individuals. The argument by the Church of Scientology, or any other religious institutions for that matter, that they deserve immunity from laws that protect basic human rights because such behavior is doctrinally motivated amounts to arguing for a loophole to treat their ministers inhumanely.

Likewise, the criminal law requirement is rarely invoked and is a weak proxy for the job the harm principle would do as a limit on the ministerial exception. This Note has demonstrated that courts have proven themselves relatively inept at limiting the exemption when harm is involved. Although it was stated in *Minker* that a hypothetical church that selected its clergy members by forcing them to play Russian roulette would still be subjected to homicide statutes because the ministerial exception falls where the church behavior is dangerous,³¹² *Headley* is a prime example that courts cannot draw the line between what is dangerous and what is acceptable. A specific principle, like the harm principle, is needed to aid courts in their analysis. Allowing institutional free exercise rights to run rampant, as the court did in *Headley*, constitutes a grave misunderstanding of the Free Exercise Clause of the First Amendment.

5. Potential Abuse of the Harm Principle: Pluralism and Measurement Concerns

Although proponents of a strong right to church autonomy or opponents to the harm principle may argue that the harm principle should

310. See *supra* note 167 and accompanying text.

311. See *supra* Part IV.B.

312. See *supra* notes 191–93 and accompanying text.

not be applied to ministerial exception cases because it will quell minority religions and run counter to the goal of religious diversity in the United States, these arguments are not strong enough to warrant giving up the harm principle as a limit on the ministerial exception. As discussed above, protections exist for discrimination against minority religions.³¹³ Indeed, *Lukumi Babalu* will serve as a barrier to discriminatory behavior by courts.³¹⁴ On top of that, where any religion is accused of human trafficking, courts must take such accusations seriously and the First Amendment should not be a bar to allowing courts to decide whether such accusations are true. This is because our country views the prevention of harm as a predominant value.³¹⁵

Moreover, applying the harm principle using as uniform a system of measurement as is possible will aid in preventing abuse of minority religious groups. This will be effectuated through a balancing test. This Note proposes that courts should employ Philip Hamburger's discussion of the standard for judging when free exercise accommodation is warranted when applying the harm principle.³¹⁶ Breaches of laws of morality, civil laws, or basic natural human rights do not justify free exercise accommodation, and the balance should weigh against church autonomy when a religious institution breaches such laws. When such a breach has occurred, courts should be warranted in applying the harm principle; if no such breach has occurred, the harm principle should not be applied.

Specifically, in the ministerial exception context, whether or not a breach of moral, civil, and natural laws has occurred can be judged against the rights guaranteed to individuals by Title VII, save the statutory exemption from religious discrimination.³¹⁷ As the Sixth Circuit has explained, "the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion," and such a right is clearly laid out in the text of Title VII.³¹⁸ Individuals are, however, guaranteed certain basic civil and human rights that may not be contracted away when they enter into an employment relationship. As a result, a

313. See *supra* note 260.

314. See Corbin, *supra* note 89, at 1999–2000.

315. The discussion of FGM is an example of this. See *supra* text accompanying notes 262–67.

316. See *supra* notes 218–20 and accompanying text. This system of measurement is contrary to the one proposed by Marci Hamilton; she would stop short of applying the harm principle where the harm was consented to. See *supra* note 197.

317. See *supra* note 72.

318. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 781 (6th Cir. 2010), *cert. granted* 131 S. Ct. 1783 (2011).

religious institution may be given an accommodation up until the point that these rights are infringed; at that point, a court would be justified in applying the harm principle even if the proffered reason for a breach of moral, civil, or natural law is religiously based. This system of measurement in no way involves bright-line rules. Indeed, it is necessarily subjective, as there is no exact standard available for judging whether behavior is harmful or not. Just as the *Sherbert* test necessitates balancing the importance of the state's interest in a particular law against the right of individuals or institutions to freely exercise their religion,³¹⁹ so too does the harm principle necessitate balancing the harm against an individual or society in general against the right of a religious institution to be autonomous or unregulated. At the very least, harm without regard to whether that harm is religiously motivated ought to be considered by courts.

This standard of measurement would allow the harm principle to be applied in *Headley*. The harm alleged there certainly runs afoul of moral, civil, and natural laws codified in Title VII and other human rights statutes. Forcing women to undergo abortions and allowing individuals to be subjected to physical labor without adequate compensation, rest, or access to egress is sufficiently harmful to outweigh the rights of religious institutions to be autonomous. This is so even though the religious institution has a legitimate claim that these behaviors are required by religious doctrine. If the court had applied the harm principle, the right to autonomy would have been weighed against the harm to the plaintiff regardless of whether the behavior was doctrinally motivated, and an outcome in favor of the plaintiffs would have been justified if the court considered the values inherent in protecting basic human rights to be above the right to unbounded religious practices.

It must be emphasized that the harm that invokes the harm principle need not always be physical. For example, the harm caused to the pregnant women and homosexual man in *Combs v. Central Texas Annual Conference of United Methodist Church*³²⁰ and in *Walker v. First Orthodox Presbyterian Church of San Francisco*³²¹ could be subject to harm principle analysis. After all, *Reynolds* and *Prince* did not center on sexual

319. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

320. *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 344 (5th Cir 1999).

321. *Walker v. First Orthodox Presbyterian Church of S.F.*, 22 Fair Empl. Prac. Cas. 762, 763 (Cal. Super. Ct. 1980). *See also supra* text accompanying note 67.

abuse or physical injury—they turned on individual and societal welfare. Discriminatory treatment against pregnant women and homosexuals is contrary to the laws of this country because of the harm such discrimination causes to both individuals and to society.³²² Though some may argue that the harm inflicted against the Headleys is more severe than discriminatory harm, courts must be careful in drawing a line between these two types of circumstances. Is it wise for courts to accept the principle that the harm derived from discrimination and violations of rights protected by statutes like Title VII is less severe than the harm inflicted by violations of statutes like the TVPA?

In labeling activities like those the Church of Scientology is accused of as greater evils than racism, gender discrimination, and discrimination on the basis of sexual orientation, courts make a dangerous value judgment that turns years of civil rights litigation on their head.³²³ Choosing public moral order over accommodating diverse religious beliefs that run in contravention of civil rights is not only justifiable, but also desirable for a liberal democracy—religious groups should be congruent with, or held to the same standards as, the prevailing moral standards of nonreligious groups.³²⁴ To do otherwise would provide no protection for government against religion. The harm principle is capacious enough to include many types of harm within its ambit, and this Note urges courts to take it into consideration when presented with ministerial exception cases in the future.

Under these standards, not every breach of Title VII guarantees would necessitate invoking the harm principle to deny a religious institution an accommodation. As stated above, a balancing test should be used to weigh the degree of harm against First Amendment protections. In this way, religious institutions that decline to ordain female ministers would not be denied accommodations, because courts would likely not find that the harm of that action was graver than the right of the religious institution to follow

322. See *supra* notes 66–67 and accompanying text.

323. Consider the argument propounded by Jane Rutherford that the ministerial exception implicates the Fourteenth Amendment. Rutherford, *supra* note 139, at 1080–82.

324. Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 73 (1998). See also *supra* notes 268–72 (discussing the legitimate exercise of liberal democracies to make judgments between two goals of liberalism when one goal dominates over the other). Cf. Nancy L. Rosenblum, Amos: *Religious Autonomy and the Moral Uses of Pluralism*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES, *supra* note 268, at 165, 188–89 (arguing that the role of government is not to ensure congruence between religious practice and public principles but rather to limit the power of legislative majorities to grant accommodations in favor of letting the courts decide on a case-by-case basis).

long-standing doctrine. Moreover, the courts are not the only entity capable of applying this notion. If Congress finds that courts are applying the standards unevenly, it could define clearer limits through legislation, describing what behavior will be tolerated, or more clearly delineating a balancing test to be used by the judiciary.

VII. CONCLUSION

The ministerial exception currently exists in a relatively limitless form. Although there are valid reasons for a ministerial exception of some variety, many of these arguments have been interpreted by courts to give religious institutions a broad right to discriminate and even to treat their ministers abusively. The fact that the district court applied the exemption as it did in *Headley* signals that courts ought to limit the immunity they give to religious institutions in employment relationships with their ministers by inquiring into whether the action taken by the institution caused harm to the plaintiff. By doing so, courts will be closing a loophole.

VIII. EPILOGUE

While this Note was in production, the Supreme Court handed down its decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.³²⁵ In a unanimous opinion, the Court recognized the existence of the ministerial exception, finding that the Free Exercise and Establishment Clauses of the First Amendment bar suits brought by “ministers” against religious institution employers alleging employment discrimination violations.³²⁶ Further, the Court held that the plaintiff, a teacher in a religious school who taught both secular subjects and a religion class, was a “minister” for purposes of her lawsuit and, as a result, was barred from pursuing her employment discrimination suit, reversing the Sixth Circuit’s decision below. The Court, however, rejected the notion that lower courts should use any sort of rigid test to decide if an employee of a religious institution is a “minister,”³²⁷ and offered no guidance as to the reaches of the ministerial exception. Indeed, the Court limited its holding to the case at bar:

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. We

325. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553 (Jan. 11, 2012).

326. *Id.* slip op. at 6.

327. *Id.* slip op. at 15–16.

express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.³²⁸

While the Court's decision in *Hosanna-Tabor* is a clear victory for religious institutional autonomy and is an emphatic indication that the nine Justices on the Supreme Court are apt to defer to religious institutions when they clash with government, the decision leaves lower courts and future litigants with more questions than answers. The Court did not announce any limits on the ministerial exception (other than the requirement that the plaintiff be a "minister"), and it certainly did not foreclose the limiting principle advanced by this Note. As a result, when factual scenarios involving harm to religious institutional employees or society in general inevitably arise in the ministerial exception context, courts and litigants ought to consider the harm principle and this Note's analysis of it as a limit on the exemption.

328. *Id.* slip op. at 21.