KINGDOM WITHOUT END? THE INEVITABLE EXPANSION OF RELIGIOUS SOVEREIGNTY CLAIMS

by
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This Essay considers the concept of religious sovereignty, the right of religious institutions to order their own affairs, and the lack of "legitimate authority" for a state to intervene in these affairs. Courts must grant deference to religious institutions with respect to their internal affairs, and this allows these institutions to avoid certain legal rules, based upon the First Amendment. For instance, the ministerial exception allows religious institutions to avoid employment discrimination claims. This and other exceptions have pervaded the court system in recent years, resulting in high-profile conflicts between religious institutions and federal laws, such as the Affordable Care Act. This Essay examines the divided or dual sovereignty that exists within the United States because of religious sovereignty. This Essay argues that such religious sovereignty is problematic because it has no logical stopping point. Through examining Christian Legal Society v. Martinez*,* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,* Burwell v. Hobby Lobby Stores*, and* Zubik v. Burwell*, this Essay examines the indefinite expansion of religious sovereignty through religious institutions' exemption from government interference in its affairs and from generally applicable laws. This Essay also attempts to examine the causes of the expansion of religious sovereignty, and the problems associated with this expansion.*

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I. INTRODUCTION

This Essay considers the nature of religious sovereignty claims, and in particular, their tendency toward indefinite expansion. In using the term "religious sovereignty," I am specifically referring to what is sometimes called a "jurisdictional" conception of the right of religious institutions to order their internal affairs: that is, that the state inherently and absolutely lacks "legitimate authority" to intervene in the affairs of a religious institution.[1] Thus, sovereignty claims are generally different in both nature and scope from claims that courts must exercise some degree of deference to religious institutions with respect to particular questions, or even that courts should avoid deciding particular kinds of questions (such as those touching on religious doctrine). In addition, sovereignty claims are also usually treated as distinct from claims by individuals or institutions to be exempt from a generally applicable law that burdens the claimant's religious beliefs.

Today, the notion that religious institutions possess inherent sovereignty is nonetheless largely embodied in the claims of religious institutions to avoid certain legal rules—often, antidiscrimination rules—based on the First Amendment. For example, the ministerial exception, which is grounded in both the Free Exercise Clause and the Establishment Clause of the First Amendment, allows at least some religious institutions to avoid employment discrimination claims by its ministers.[2] Moreover, arguments grounded in religious sovereignty have gained increasing salience in recent years, particularly as high-profile conflicts have arisen between the tenets of some religions and the requirements of some federal laws, such as antidiscrimination laws and the Affordable Care Act.

But claims of religious sovereignty are much older than the Constitution itself. Proponents of the notion that religious institutions possess a

[1] *See, e.g.*, Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33, 41–44 (2013); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 978 (2012); Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 54–55 (2008); Howard M. Wasserman, Essay, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 297–98 (2012).

[2] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

special form of autonomy that grants them immunity from secular regulation often reach back as far as the Middle Ages for their precedents.[3] These origins were explicitly theological in nature, drawing on the view of Pope Gelasius I from the Roman Empire that there were two powers in the world, the secular and the religious, each of which was supreme in its own domain.[4] However, the notion of separate spheres of power was as much a product of power struggles between spiritual and secular authorities as it was a product of religious conviction.[5]

Moving forward in time, Chief Justice Roberts's opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*—the first Supreme Court case to officially recognize the ministerial exception—referred to the entanglements of, and struggles between, the English monarchy and the church in the 16th and 17th centuries, which provided the impetus for the Puritans to come to America and establish their own churches in New England.[6] Indeed, Protestantism had adopted the "two-kingdoms theology," according to which separate but overlapping secular and spiritual authorities were willed by God; this Protestant view helped to shape early American political philosophy, including the more simplified notion of "separation" of church and state.[7]

This basic, highly influential theory of divided or dual sovereignty often serves as a justification for what is now generally referred to as a right of institutional autonomy.[8] Yet, several scholars have also strongly criticized either the premises underlying, or the consequences flowing from, dual sovereignty as a basis for affording legal immunities to religious institutions.[9] This Essay, too, criticizes the notion of religious sovereignty but takes a slightly different tack, arguing that such sovereignty is problematic because it has no logical stopping point, and that the lack of limitation is inherent to sovereignty claims.

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[3] Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, NW. U. L. REV. COLLOQUY 106, 179–80 (2011).

[4] Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 67–68 (2013); *see* Brian Tierney, *Religious Rights: A Historical Perspective*, *in* RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 34–36 (Noel B. Reynolds & Cole W. Durham, Jr. eds., 1996); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335, 361 (2013).

[5] Horwitz, *supra* note 4, at 74.

[6] *Hosanna-Tabor*, 134 U.S. at 182.

[7] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 17 (2000).

[8] *See, e.g.*, Garnett, *supra* note 1, at 44; Horwitz, *supra* note 4, at 95; Wasserman, *supra* note 1, at 291.

[9] *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 1–21 (2007); BRIAN LEITER, WHY TOLERATE RELIGION? 54–67 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 932 (2013).

This Essay proceeds as follows. Part II briefly traces a trajectory of recent Supreme Court cases dealing with claims of institutional autonomy by religious groups in varying contexts, from *Christian Legal Society v. Martinez*, through *Hosanna-Tabor*, and ending—at least for now—with *Burwell v. Hobby Lobby Stores* and the still-unresolved *Zubik v. Burwell*. It also demonstrates the tendency of religious sovereignty claims to expand indefinitely, leading to an apparent merger of two previously distinct types of legal claims: the claims of religious institutions of a right to the internal ordering of their affairs, free from governmental interference, and claims of religious individuals or entities to exemptions from generally applicable laws. Part III then attempts to identify some causes of this convergence and expansion, attempting to demonstrate that the nature of sovereignty itself makes delimitation of such autonomy claims difficult or impossible.

II. RELIGIOUS SOVEREIGNTY CLAIMS: A TRAJECTORY

It is possible to trace a trajectory through recent Supreme Court cases in which an organization has asserted a right, as a religious institution, to autonomous ordering of its internal affairs. It is a trajectory both of increasing sympathy on the part of the Court toward such claims, as well as of expanding scope for the autonomy claims. The four cases that belong in this trajectory—*Christian Legal Society*, *Hosanna-Tabor*, *Hobby Lobby*, and *Zubik*—are doctrinally dissimilar. They involve claims under various constitutional and statutory rubrics, including the Free Speech, Freedom of Association, Free Exercise Clause, and Establishment Clauses, and the Religious Freedom Restoration Act (RFRA). They are, however, united by a common thread of argument—namely, that religious institutions, because of their religious identity, are to some extent immune from regulation by the secular state.

A. Christian Legal Society v. Martinez

In *Christian Legal Society v. Martinez*, a religious student group claimed a right both to be recognized as an official student organization by the University of California at Hastings (a public institution) and to exclude gays and lesbians, whose presence, they claimed, would undermine their message and identity due to the group's opposition to "unrepentant homosexual conduct."[10] The Christian Legal Society (CLS) asserted a slew of constitutional claims when the university found that the group violated a school policy requiring that all student groups, to be officially recognized and share in certain benefits, must accept any student who sought

[10] 561 U.S. 661, 672 (2010).

to join.[11] In particular, CLS claimed violations of its free speech rights, free exercise rights, and right to freedom of association.[12] The Supreme Court focused primarily on the free speech claim, finding CLS's free exercise claim to be weak and its association claim to be subsumed under the same analytical framework as the speech claim.[13] Applying public-forum analysis, the Court held that Hastings had created a "limited" public forum with its student organizations program and that, under the standards of reasonableness and viewpoint-neutrality required for such forums, Hastings's all-comers requirement passed constitutional muster, even when applied to a religious group such as CLS.[14]

CLS is thus a case about the free-speech and association rights of religious organizations, and specifically about whether they can be forced to comply with nondiscrimination requirements that violate their religious tenets as a condition of receiving official recognition and subvention. It may also be seen more generally as a case about the autonomy rights of religious organizations—their right to make membership decisions, and to apply and enforce their own rules and regulations, even if those rules conflict with those of the state. Indeed, although CLS itself did not put forward an institutional-autonomy argument, some amici did. For example, the amicus brief of the American Center for Law and Justice and others drew on Supreme Court cases affirming the rights of religious institutions to order their internal affairs in arguing that religious groups have the right to "exert control over religious doctrine and the conduct of adherents."[15] Similarly, the amicus brief of the U.S. Conference of Catholic Bishops argued that "the Constitution divests the government of *any* interest in reaching into certain relationships constituting religious life."[16]

The Court's holding in *CLS* was limited to the narrow issue of whether a religious group that disapproved of homosexual conduct was entitled to official school recognition while excluding gay members in contravention of school policy. The reasoning of *CLS* suggests a potentially broader scope, however. It is hard to see how or why the right as-

[11] *Id.* at 673. It is questionable whether this description of Hastings's rule is an accurate one; however, the parties had stipulated to it. *Id.* at 675.

[12] *Id.*

[13] *Id.* at 683, 697 n.27.

[14] *Id.* at 688–90.

[15] Brief for Amici Curiae American Center for Law and Justice et al. in Support of Petitioner at 12, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 497336 (citing Watson v. Jones, 80 U.S. 679, 728–29 (1871), and Serbian E. Orthodox Church v. Milivojevich, 426 U.S. 696, 714–15 (1976)).

[16] Brief Amicus Curiae of U.S. Conference of Catholic Bishops in Support of Petitioner at 14, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 565210 (citing Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 292–93 (2008)).

serted by CLS to exclude particular groups of people from membership in its club can be limited to homosexuals, or even to mere membership in the organization. It is not clear, for example, why religious groups cannot prevent gays and lesbians from merely attending their events, since such attendance could also be construed to affect the group's autonomy to function in accordance with its beliefs and to interfere with the relationships among its members. [17] Moreover, there is no obvious reason why—where such autonomy claims are concerned—sexual orientation (or religion) should be the only permissible category for exclusion. By their nature, claims to autonomous functioning tend to assume that courts cannot judge the validity or invalidity of the reasons why a group seeks to exclude someone.

Ultimately, however, the Court rejected CLS's effort and applied a relatively deferential standard to the public university's regulation of CLS's membership rules.[18] Thus, in the first step of the trajectory, the Court considered but largely limited a strong claim to institutional autonomy by a religious organization.

B. Hosanna-Tabor Evangelical Lutheran Church v. EEOC

In *Hosanna-Tabor*, the Supreme Court officially recognized the ministerial exception.[19] Though in some ways a potentially sweeping decision,[20] *Hosanna-Tabor* was in other ways a modest step in the direction of recognizing religious sovereignty. It recognized a rule of law that lower courts had assumed to exist for decades,[21] and the facts of *Hosanna-Tabor* put it very close to the heartland of that rule. *Hosanna-Tabor* dealt with the right of a church to fire a teacher in its school, who had also been trained and elected as a minister. The teacher claimed that she was illegally fired based on her disability, but the Court declined to look behind the church's employment decision, holding that the employment decisions of a church with respect to its ministers are immunized from judicial re-

[17] *Cf.* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 527 (2011) ("But a right to exclude individuals from becoming members of an association because they hold unacceptable beliefs could reasonably extend to placing exclusionary limits on attendance at an association's programs as well.").

[18] *Martinez*, 561 U.S. at 664.

[19] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[20] *See, e.g.*, Zoë Robinson, Hosanna-Tabor *After* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 173, 173–74 (Micah Schwartzman et al. eds., 2016).

[21] *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 307-08 (3d Cir. 2006); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); McClure v. Salvation Army, 460 F.2d 553, 558–60 (5th Cir. 1972).

view.[22] The Court did not, however, delimit the scope of that holding. Although it is clear that the exception applies only to ministers, it left unanswered the question of how to determine who is a minister, as well as what kinds of institutions and what causes of action are immunized from judicial review.[23] It gave only a nonexhaustive list of cases where the exception would *not* apply, such as where a case involved a criminal prosecution or harm to minors.[24]

Thus, in some important respects, the unanimous opinion in *Hosanna-Tabor* represents an expansion of religious sovereignty. As Professor Michael Stokes Paulsen views it, "[t]he Court . . . made clear that the right itself is one of religious community autonomy, broadly understood. It is not a right limited to pastors alone."[25] Moreover, this right is grounded in both the Free Exercise Clause and the Establishment Clause of the First Amendment; thus, it cannot be changed or trumped by ordinary legislative action.[26] Drawing a connection, as this Essay does, between *Hosanna-Tabor* and *CLS*, Professor Paulsen argues that *Hosanna-Tabor* "has important consequences beyond direct employment regulation through anti-discrimination laws. Student religious groups, at state university campuses and at public schools, are religious communities, too. So are para-church ministries and many other types of religious organizations"; as such, they all share in "the right to control the selection of those who personify their beliefs, and to shape their own faith and mission through their decisions."[27] Admittedly, Paulsen's reading is intentionally broad and, one might suggest, optimistic. It is nonetheless a plausible understanding of *Hosanna-Tabor* and its broader implications.

Moreover, the Supreme Court made it clear that the ministerial exception existed outside of, and separate from, the framework set forth in *Employment Division v. Smith* for deciding whether a religious claimant is entitled to an exemption from a law that substantially burdens that claimant's religious exercise.[28] *Smith* held that no exemption is required when a neutral law of general applicability incidentally burdens religious

[22] *Hosanna-Tabor*, 565 U.S. at 196.

[23] *Id.* at 188, 190, 193.

[24] *Id.* at 196.

[25] Michael Stokes Paulsen, Hosanna *in the Highest!*, PUB. DISCOURSE (Jan. 13, 2012), http://www.thepublicdiscourse.com/2012/01/4541. *See generally* Andrew Koppelman, *"Freedom of the Church" and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145, 148, 152 (2013) (questioning whether the Court went this far in *Hosanna-Tabor* while also noting: "The power that *Hosanna-Tabor* gives to churches is sobering. The Court construed 'minister' pretty broadly, and some lower courts have gone even further.").

[26] *Hosanna-Tabor*, 565 U.S. at 188–89.

[27] Paulsen, *supra* note 25.

[28] *Hosanna-Tabor*, 565 U.S. at 189–90.

exercise.[29] Although antidiscrimination laws such as the Americans with Disabilities Act, at issue in *Hosanna-Tabor*, are neutral laws of general applicability, the Court distinguished *Smith* in *Hosanna-Tabor* by stating that *Smith* applied to "government regulation of only outward physical acts," whereas the ministerial exception applies to "internal church decision[s] that affect[] the faith and mission of the church itself."[30] The Court thus reaffirmed *Smith* outside the ministerial exception context and maintained the longstanding distinction between claims of religious individuals or entities to an exemption from a generally applicable law ("conscientious objection" claims), and claims of religious institutions to a right of noninterference in their internal affairs ("church autonomy" claims).[31]

C. Burwell v. Hobby Lobby *and* Zubik v. Burwell

Burwell v. Hobby Lobby and its sequel, *Zubik v. Burwell*, arguably represent a further expansion of the Supreme Court's recognition and acceptance of religious sovereignty. Although those cases arise under a federal statute, the Religious Freedom Restoration Act (RFRA), and therefore do not share in the constitutional status of *Hosanna-Tabor*, they nonetheless resemble that decision in several respects. In particular, they can be understood as cases recognizing the rights of a broader range of organizations than ever before to engage in autonomous ordering of their internal employment affairs.[32]

In *Hobby Lobby*, the Court held that RFRA required an accommodation for at least some large, for-profit corporations whose owners objected on religious grounds to complying with a federal regulation requiring them to extend coverage for all prescription contraceptives to their employees.[33] Under RFRA, the federal government may not substantially burden a person's religious exercise unless it is advancing a compelling

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[29] Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).

[30] *Hosanna-Tabor*, 565 U.S. at 190.

[31] This distinction was first set forth by 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, 1389–90 (1981).

[32] Interestingly, Professor Michael McConnell identified this potential expansion of *Hosanna-Tabor* in 2012, well before the *Hobby Lobby* decision came down:

> For example, what implications does *Hosanna-Tabor* have for the current controversy over the federal government's decision to require religious employers that provide health insurance for their employees to include contraceptive services, including sterilization and abortifacient drugs, free of cost? Is this an "internal church decision"? It constitutes a mandatory term in the contract between the religious organization and its employees, which looks "internal," and it certainly affects "faith and mission."

Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 835 (2012) (footnote omitted).

[33] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2784–85 (2014).

government interest, using the least restrictive means to do so.[34] According to the five-Justice *Hobby Lobby* majority, the federal contraceptive mandate substantially burdened Hobby Lobby's exercise of religion because it required the company either to engage in conduct that violated its sincere religious beliefs or to pay a very substantial fine.[35] Although the Court did not decide the question of whether the government interest underlying the mandate was compelling, it nonetheless held that the mandate violated RFRA because it was not the least restrictive means the government could use to advance its interest in ensuring women's cost-free access to contraception.[36] The Court noted that the government had already extended accommodations to nonprofit entities seeking to avoid the mandate on the same ground as *Hobby Lobby*, and therefore that replicating this accommodation for for-profit companies would "not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, [while serving] HHS's stated interests equally well."[37]

The plaintiff for-profit companies in *Hobby Lobby* did not frame the case as raising questions of religious sovereignty; rather, it was presented as a case about the right of one entity to an exemption from a generally applicable law. However, viewed from another angle, *Hobby Lobby* begins to look like an expansion of *Hosanna-Tabor* to the context of for-profit corporations. Arguably, *Hobby Lobby* vindicated the rights of religious employers to order their own internal affairs—to govern autonomously the terms of their relationships with their employees. As Professor McConnell puts it, the required contraceptives insurance "constitutes a mandatory term in the contract between the religious organization and its employees, which looks 'internal,' and it certainly affects 'faith and mission.'"[38]

Of course, there are important doctrinal differences between the church's claim under the ministerial exception and Hobby Lobby's claim under RFRA. The ministerial exception is constitutional, whereas RFRA is only a statute—albeit a kind of "super-statute" that governs other federal statutes as well as executive actions.[39] Perhaps more importantly, the ministerial exception provides a form of immunity that prevents courts from intervening in certain employment decisions, whatever the reason

[34] 42 U.S.C. §§ 2000bb to bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[35] *Hobby Lobby*, 134 S. Ct. at 2779.

[36] *Id.* at 2780, 2782.

[37] *Id.* at 2782.

[38] McConnell, *supra* note 32 at 835.

[39] William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, DUKE L.J. 1215, 1230 (2001).

for those decisions.[40] Once the court decides that a minister is involved and that the type of employment decision falls within the scope of the exception, it can go no further; it does not consider the possibility of pretext or balance the employer's interest against the government's.[41] Under RFRA, by contrast, there is a balancing test: the substantial burden on the claimant's religious exercise can be outweighed by a compelling interest, if the regulation is sufficiently narrowly tailored.[42] Finally, the ministerial exception applies, by its terms, only to "ministers," and therefore appears to have a definite internal limit: it is relevant only to claims arising from the relationship between a religious employer and, presumably, a relatively high-level employee.[43] RFRA applies whenever a government regulation imposes a substantial burden on an individual or entity and is therefore not limited to certain types of employment relationships.

Yet, *Hobby Lobby*'s facts, and their treatment by the Court, share many characteristics of a ministerial exception case. First, as noted above, although a RFRA claim is merely a statutory claim, the rights created by the statute trump the rights contained in all other federal laws, so RFRA functions in a quasi-constitutional manner. Second, the case involved an institutional rather than an individual claimant, whose request for accommodation would affect other individuals within the corporation and whose interests were not represented by the corporation's. This scenario resembles a ministerial exception case more than the typical free exercise claim for an exemption.[44] To be sure, it is not unheard of for an institutional claimant to assert a free-exercise right to an exemption from a generally applicable law that would adversely affect others within the institution. For example, in the 1982 case *United States v. Lee*, an Amish for-profit employer sought an exemption from paying Social Security taxes on behalf of his employees.[45] And in *Tony and Susan Alamo Foundation v. Secretary of Labor*, a nominally non-profit religious corporation engaged in commercial activities argued that the Free Exercise Clause protected it from having to comply with the wage requirements of the Fair Labor

[40] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012); *see also* McConnell, *supra* note 32, at 825.

[41] *Hosanna-Tabor*, 565 U.S. at 194–95; *see also* Koppelman, *supra* note 25, at 147.

[42] *Hobby Lobby*, 134 S. Ct. at 2759.

[43] Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165, at *4 (S.D. Ohio Mar. 29, 2012).

[44] See, for example, *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Sherbert v. Verner*, 374 U.S. 398 (1963), two often cited, archetypal free exercise cases involving individuals seeking exemptions from generally applicable legal rules. Arguably, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), another archetypal free exercise case, involved the claim of a religious organization (the Old Order Amish) to an exemption that would have an impact on certain members of the community who were not represented in the case (the children). The Court, however, did not appear to view the case in this way. *Id.* at 230–31.

[45] 455 U.S. 252, 255 (1982).

Standards Act.[46] Prior to *Hobby Lobby*, however, such claims were largely unsuccessful.[47] Third, like *Hosanna-Tabor* and *Hobby Lobby*, the claim involved an aspect of the employment relationship, and thus matters internal to the organization.

Moreover, the Court was extremely deferential to Hobby Lobby on the issue of whether the contraceptive coverage mandate constituted a substantial burden on its religious exercise, giving it what amounted to a broad immunity rather than a limited right to an exemption. The Court refused to consider the attenuated nature of the claimed religious violation as a factor in the "substantial burden" prong under RFRA.[48] Yet the connection between Hobby Lobby's owner's beliefs and the violation was in fact quite remote. Hobby Lobby's owners objected to covering certain drugs and devices because they believed them to be abortifacients.[49] They

[46] 471 U.S. 290, 303 (1985); *see also* 29 U.S.C. §§ 206(b), 207(a), 211(c), 215(a)(2), (a)(5).

[47] *Lee*, 455 U.S. at 261; *Tony & Susan Alamo Found.*, 471 U.S. at 303; see also Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 359 (2014) (discussing *Lee* and *Alamo* as exemplars of the tenet that accommodations were unacceptable under pre-*Smith* free exercise jurisprudence if they shifted heavy burdens onto third parties, such as employees). A pre-*Hosanna-Tabor* RFRA claim by an organization was successful in *Gonzales v. O Centro Espirita Beneficente de Uniao Vegetal*, 546 U.S. 418 (2006). The institutional claimant in *O Centro* was a religious sect rather than a for-profit employer, however, and it desired accommodation—allowing it to use an otherwise prohibited substance for religious purposes—that benefitted rather than burdened members of that organization. *Id.* at 439. Thanks to Jim Oleske for raising these points.

[48] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2777–78 (2014).

[49] *Id.* at 2759. Courts have been consistently deferential to free exercise plaintiffs on the nature and sincerity of their religious beliefs. Thomas v. Review Board of Indiana Emp. Div. Sec., 450 U.S. 707, 716 (1981). The question whether a government action imposes a substantial burden on those religious beliefs is a separate one, however, which need not be handled deferentially. *See, e.g.*, *id.* at 717–18 (considering the question of substantial burden on the petitioner's religious beliefs separately, after deferring to the petitioner on the nature of those beliefs); *see also* Bowen v. Roy, 476 U.S. 693, 700–01 & n.6 (1986) (rejecting a claim for a religious exemption from the government's use of a Social Security number in assigning benefits as not burdening the claimant's unquestionably sincere religious beliefs, and noting that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference"). In his contribution to this Symposium, Professor Marc DeGirolami argues, by contrast, that courts have long been highly deferential to plaintiffs' assertions that government conduct burdens their religion, and he notes that in cases decided between 2011 and 2015, federal appellate courts found the substantial burden requirement satisfied at a rate of over 2 to 1. Marc O. DeGirolami, *Religious Accommodation, Religious Tradition, and Political Polarization*, 20 LEWIS & CLARK L. REV. 1127, 1137 & n.48 (2017). This certainly indicates a high success rate for RFRA claimants, but it does not necessarily indicate a lack of serious judicial inquiry into the matter.

believed them to be abortifacients because they believed that life, and therefore pregnancy, begins at conception, and because they had reason to think that these drugs and devices might, in some unknown and likely unknowable number of cases, have the effect of preventing pregnancy by preventing a fertilized egg from implanting in the uterus.[50] They had no objection to other forms of contraception that did not operate in this manner.[51] Yet, even if this effect occurred in some number of cases, it required the intervention of several actions by independent actors whose conduct Hobby Lobby did not and could not control.[52] Regardless, the Court declined to scrutinize Hobby Lobby's claim of substantial burden, relying heavily on the size of the financial penalty imposed for the failure to comply and otherwise taking Hobby Lobby's claim entirely at face value. By essentially deferring away the "substantial burden" inquiry, the Court insulated important aspects of the relationship between religious employers and employees from government regulation and searching judicial review, subject only to the government's ability to pass an exacting version of strict scrutiny.[53]

Indeed, although the Court attempted to cabin the scope of its decision, the *logic* of the majority opinion hinted at a much broader potential realm of application. For example, the Court insisted in dicta that its holding was not so expansive as to authorize employers to engage in race discrimination in violation of federal law, because there is a compelling government interest in eradicating race discrimination, and anti-discrimination laws are narrowly tailored to that interest.[54] Yet, it is not clear what, if any, other interests rise to such a level: the *Hobby Lobby* majority only assumed, without deciding, that the interest in providing cost-free contraception to women—an interest that is intimately intertwined with gender equality[55]—is also compelling.[56] Similarly, the Court implicitly ratified *United States v. Lee*, refusing to extend to a religious for-profit employer an exemption from paying Social Security taxes.[57] But the majority had found with respect to the contraceptive mandate that it was a reasonable alternative for the government to exempt a small number of objecting employers and itself assume the cost of providing the benefit to

[50] *Hobby Lobby*, 134 S. Ct. at 2763 n.7.

[51] *Id.* at 2765–66.

[52] *Id.* at 2799 (Ginsburg, J., dissenting).

[53] Indeed, the Court's application of strict scrutiny under RFRA was more exacting than it had been under pre-*Smith* free exercise precedents. *See, e.g.*, *id.* at 2803–06.

[54] *Id.* at 2783 (majority opinion).

[55] Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 402 (1998).

[56] *Id.* at 2780.

[57] *Id.*; United States v. Lee, 455 U.S. 252, 261 (1982).

the affected employees. There is no reason why a similar logic could not apply in the Social Security context, or the Fair Labor Standards Act context; as Justice Ginsburg questioned in dissent, "[W]here is the stopping point to the 'let the government pay' alternative?"[58]

Regarded in this light, *Hobby Lobby* can be seen as expanding the right of institutions to order their internal affairs, because it involved a for-profit corporation, which got similar treatment to non-profit religious institutions.[59] At a minimum, it opens the possibility that for-profit corporations may be treated as religious institutions in other contexts.[60] It could also be seen as largely immunizing the employer-employee relationship from scrutiny, even outside the narrow set of employees that could be considered ministerial. Viewed as an institutional autonomy case, *Hobby Lobby* potentially expands the category of unprotected "ministers" to all employees of a religious corporation.

Finally, *Zubik v. Burwell*, which the Court considered in its 2015 Term, is the latest iteration of expanding sovereignty claims. *Zubik* considered RFRA claims by religious nonprofits that are by law exempt from the requirement to provide contraceptives coverage to their employees so long as they notify the government of their objection.[61] Those nonprofits claimed that the very act of having to opt-out of the contraceptive mandate imposed a substantial burden on their religious exercise, because it triggered contraceptive coverage by a third party, making the nonprofits complicit in the act of using contraception.[62] The question whether these nonprofits have a valid RFRA claim remains unresolved, as the Supreme Court chose to remand the case for the parties and lower courts to consider whether a compromise could be reached "that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[63] Thus, it is difficult to say whether the Court will continue to expand the scope of religious institution sovereignty.

Still, the claims of the nonprofits clearly seek that further expansion of religious sovereignty. First, as Professor Caroline Mala Corbin demon-

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[58] *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting).

[59] *Hobby Lobby*, 134 S. Ct. at 2768–69 (majority opinion). To be fair, of course, this was the Court's interpretation of RFRA's language and not some broader constitutional or existential holding regarding the nature of religious institutions.

[60] *Cf.* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 92 (exploring the proposition that "Free Exercise rights are not limited only to those entities permitted to hire and fire based on religion under Title VII, and that profit making is simply one factor among many that should be considered under Title VII").

[61] Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam).

[62] *Id.*

[63] *Id.* at 1561 (internal quotation marks omitted).

strates, the nonprofits have doubled down on their claim that they are entitled to almost absolute deference from the courts on the question of whether the opt-out imposes a substantial burden on their religious exercise: "They assert that once a religious objector claims that a particular statutory requirement amounts to a substantial burden as a matter of religious belief, then, as long as they are sincere, it amounts to a substantial burden under RFRA as a matter of law."[64] This conflates the sincerity and substantial burden prongs of the RFRA inquiry, making a RFRA claim easier for plaintiffs to make out. Moreover, at oral argument, the attorneys for the nonprofits spoke of the federal government as "hijack[ing]" their health-care plans.[65] Such language suggests a right to proprietary control over the plans themselves and over the employee benefits—which are in reality not just under the sole jurisdiction of employers, but rather are and long have been heavily regulated by law.[66] A strong sense of sovereignty thus pervades the nonprofits' claims in *Zubik*. But perhaps the clearest expansion of the sovereignty claim is demonstrated by the scope of the remedy those nonprofits apparently seek. It seems that, by attempting to ensure that they will play no part whatsoever in their employees' acquisition of contraception, they essentially seek complete exemption from the regulation, if not nullification of the regulation itself. This "step-by-step" strategy of seeking greater and greater distance from regulation—according to which for-profit businesses first sought the accommodation accorded to nonprofits, then nonprofits sought the complete exemption accorded only to churches—demonstrates the expanding scope of the sovereignty claims.[67] Yet, the carve-out from regulation that these nonprofits seek (and that for-profit businesses may well seek after them, if the nonprofits are successful) will almost certainly compromise the ability of "secretaries, janitors, and teachers" employed by religious institutions to access cost-free contraception.[68]

[64] Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 13, https://illinoislawreview.org/wp-content/uploads/2016/05/Corbin.pdf (footnote omitted) (citing Brief for Petitioners at 2, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 15–35, 15–105, 15–119, 15–191)).

[65] Transcript of Oral Argument at 14, Zubik v. Burwell, 136 S. Ct. 891 (2016) (No. 14-1418).

[66] *Cf.* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). Sepper discusses this phenomenon in terms of Lochnerian resistance to redistribution and pervasive regulation. *Id.* at 1463–64.

[67] This stepwise strategy is concisely described by Professor Leslie Griffin. Leslie Griffin, *Symposium: Workers Remain at Risk Post-*Zubik v. Burwell, SCOTUSBLOG (May 17, 2016), http://www.scotusblog.com/2016/05/symposium-workers-remain-at-risk-post-zubik-v-burwell/.

[68] *Id.*

D. Summary: The Expansion of Sovereignty Claims in the Supreme Court and Lower Courts

Although the cases described above have treated disparate doctrinal issues, they are united by the religious claimants' arguments for sovereignty with respect to their internal affairs. Moreover, they demonstrate an increasingly robust understanding by religious institutions and the Supreme Court of that sovereignty and its scope. The right to internal sovereignty has been extended beyond a narrow class of individuals explicitly trained, elected, or denominated as "ministers" to all employees of a religious institution.[69] The types of organizations that can claim religious autonomy rights include not just churches, or even their affiliated nonprofits, but also large, for-profit corporations. The scope of sovereignty seemingly embraces not only the hiring and firing of organizational leaders, but the entirety of the employment relationship.

Is it fair to say that the claims of all of the organizations in the above-described cases are claims to sovereignty, as opposed to mere deference or freedom from unwarranted state intrusions? It seems to me that this label is fairly applied to institutional-autonomy claims discussed here. They are claims of entitlement not just to deference, but to almost complete noninterference with certain aspects of institutional life. They imply incompetence of the courts to intervene, even on behalf of those within the institution who seek that intervention.

Professor Michael McConnell has concisely set out some attributes that pertain to sovereignty by private entities (or "non-state governance"). He suggests that such non-state governance generally entails: (1) entry into the organization by means that are not entirely voluntary; (2) exit from the organization that is either not permitted or carries enormous costs; (3) creation of rules that are specific to the organization; and (4) the power of the organization to impose sanctions for violation of those rules.[70]

Where religious organizations are concerned, the creation and enforcement of a separate set of rules is exactly the accommodation power sought vis-à-vis the government. Moreover, although relationships between religious employers and employees are generally treated as voluntary, there is reason to be wary of the panacea of supposed voluntariness, which may be more wishful thinking than reality.[71] The cost of departure

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[69] *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007) ("[C]ourts have considered a particular employee to be a 'minister' for purposes of the ministerial exception based on the function of the plaintiff's employment position rather than the fact of ordination.").

[70] Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 9 (2010).

[71] *See, e.g.*, B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 20, at 419, 421, 425–26.

from religious employment, which may (as in the case of *Hosanna-Tabor*) be accompanied by the loss of other religious status or even membership, can be exceedingly high for individuals.[72] And as Professor Elizabeth Sepper has pointed out, talismanic invocations of voluntariness in the employment context may lead to a *Lochner*-esque slippery slope of deregulating the employment relationship almost entirely.[73]

In minimizing the distinction between exemption claims and internal autonomy claims, the expansion of sovereignty claims may ultimately undermine to some extent the Supreme Court's holding in *Employment Division v. Smith*, which rejected the constitutional entitlement to exemptions from generally applicable laws. As the class of entities that can claim autonomy from regulation expands beyond churches, and the range of affected employees extends beyond a small class of church leaders, and the sorts of claims that courts are incompetent to hear come to encompass all claims arising from the employment relationship, the so-called "ministerial exception" starts to look like a generalized exemption from regulation for religiously-oriented employers. Likewise, given the enormous scope of deference granted by *Hobby Lobby* to religious claimants on the question of substantial burden, claims to an accommodation or exemption from regulation begin to take on the quality of sovereignty claims, delineating a realm of employment activity into which neither the legislature nor the courts can intervene.

Indeed, such expansive claims to sovereignty are hardly unheard of in the lower courts.[74] In fact, it is worth noting that the first case to recognize a form of the ministerial exception did so in the context of a claim by a female secretary in the Public Relations Department of the Salvation Army, a religious charitable organization, that she had been paid less than similarly-situated male employees.[75] It thus involved neither a church nor a minister, strictly speaking. More recently, religious employers have tried to claim that even non-coreligionists had the status of ministers, in order to assert the ministerial exception.[76] And numerous

[72] *Id.* at 426.

[73] Sepper, *supra* note 66, at 1461, 1466–67; *see also* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 280, 300–01 (2015) (questioning the voluntariness of the employment relationship).

[74] This Essay does not claim that such expansive sovereignty claims in lower courts have increased in the wake of *Hosanna-Tabor* and *Hobby Lobby*. This is a plausible thesis, but one that would require empirical testing that is beyond the scope of the project undertaken here.

[75] McClure v. Salvation Army, 460 F.2d 553, 555–56 (5th Cir. 1972). Admittedly, neither the Salvation Army's status as a "church" nor the plaintiff's ministerial status was put into question by the parties. *Id.* at 556.

[76] Kant v. Lexington Theological Seminary, 426 S.W.3d 587, 589 (Ky. 2014) (reversing the lower court's holding that a Jewish professor at a Christian seminary was a minister); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165, at *5 (S.D. Ohio Mar. 29, 2012) (rejecting a claim by a Catholic diocese that

nonchurch entities, such as hospitals, have attempted to claim the status of religious organizations entitled to invoke some form of institutional autonomy. For example, Methodist Healthcare, Inc., a hospital, successfully claimed the exception to avoid an Americans with Disabilities Act Claim by a resident in the hospital's pastoral training program.[77] In so upholding the exception, the Sixth Circuit noted that the ministerial exception "has been applied to claims against religiously affiliated schools, corporations, and hospitals by courts ruling that they come within the meaning of a 'religious institution.'"[78]

Beyond the ministerial exception, courts have long applied—and continue to apply vigorously—a doctrine of "ecclesiastical abstention," a doctrine that seems to overlap somewhat with the ministerial exception but continues to apply in cases where the ministerial exception is irrelevant.[79] According to an older Fifth Circuit case, the doctrine of ecclesiastical abstention expresses "[a] 'spirit of freedom for religious organizations, an independence from secular control or minipulation [sic] in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[80] This doctrine was recently applied in *Means v. U.S. Conference of Catholic Bishops*, in which the plaintiff—a patient of a Catholic Hospital—sued the directors of a hospital after she was denied medical information and access to care for a miscarriage due to the hospital's religiously motivated policies regarding abortion.[81] Rejecting this common-law negligence claim on various grounds, the U.S. District Court for the Western District of Michigan added that the claim was also barred by ecclesiastical abstention, because the court and jury could not "analyze [the hospital's] duty, breach, or causation without reference to the text of the [Ethical and Religious Directives], which are an expression of Catholic doctrine."[82] This holding demonstrates not only that the ecclesiastical abstention doctrine retains a scope of application independent of the ministerial exception, but also that the doctrine has been applied in a case involving a tort claim by a patient against a hospital, in which there was no question that the religious directives at issue were the source of the plaintiff's injury

a parochial school computer instructor, who was not Catholic, was nonetheless a minister).

[77] Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (2007).

[78] *Id.* (citing Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–10 (4th Cir. 2004)).

[79] *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); Klouda v. Sw. Baptist Theological, 543 F. Supp. 2d 594 (N.D. Tex. 2008).

[80] *Simpson*, 494 F.2d at 493 (quoting *Kedroff*, 344 U.S. at 116).

[81] No. 1:15-CV-353, 2015 WL 3970046, at *1–2 (W.D. Mich. June 30, 2015), *affirmed*, 836 F.3d 643 (6th Cir. 2016).

[82] *Id.* at *11.

and therefore did not require interpretation or application.[83] It is thus clear that at least some lower courts have construed *Hosanna-Tabor* as supplementing, but not limiting, the sovereignty already possessed by religious institutions under the doctrine of ecclesiastical abstention.

III. THE LIMITLESS NATURE OF SOVEREIGNTY CLAIMS

Is the tendency of sovereignty claims toward increasing scope and breadth a mere historically contingent fact? Or is there something inherent in religious sovereignty claims that tends to encourage such envelope-pushing? And if the latter is the case, what is it about such sovereignty claims that leads to their inevitable expansion?

This Part proposes several reasons why religious sovereignty claims have an inherent tendency to expand in scope. First, the Supreme Court opinions upholding religious sovereignty, like many proponents of religious sovereignty, are vague in desribing the limits of those sovereignty rights. Second, because the kind of sovereignty claimed by religious organizations is one that overlaps with the sovereignty of civil society and that lacks physical boundaries, its borders are self-imposed and not clearly defined. Indeed, religious sovereignty, which is often framed as a sort of privacy right, precludes inquiry into key border questions relevant to the application of the rule, such as who qualifies as a minister and the reasons for a particular employment decision. Third and finally, incentives produced by litigation encourage defendants to raise sovereignty claims whenever possible.

A. Unclear Doctrinal Boundaries

As discussed above,[84] the opinion in *Hosanna-Tabor* left numerous questions unanswered about the scope of its application. The Court did not clarify how courts were to determine who is a minister, what sorts of claims are immune from judicial review, or what sorts of institutions can claim the benefit of the ministerial exception. Nor did the Court explain how the ministerial exception interacts with the doctrine of ecclesiastical abstention. Similarly, *Hobby Lobby* opened the door to institutional free exercise claims by religious for-profit corporations, but it did not provide guidance on what sorts of for-profit entities might qualify for similar

[83] The *Means* court stated that adjudication of the plaintiff's negligence claim would require determination of nuanced religious questions surrounding the circumstances under which abortion would be permissible under the Catholic hospital's religious directives. *Id.* at *13. However, the hospital did not claim that the plaintiff's care was in violation of the directives or that there was any question about whether they applied, so it was not apparent how interpretation of those directives was needed to resolve the plaintiff's claim. *Id.* at *13–14.

[84] *See supra* Part II.B.

treatment in the future, or what sorts of regulations they can and cannot escape.[85]

Likewise, advocates of robust sovereignty for religious institutions are generally not eager to set out clear limits on that sovereignty, and indeed, most of them have not done so. For example, Professor Richard Garnett, one of the most eloquent defenders of the "freedom of the church," acknowledges "the apparent lack of a clear rule, prohibition, or principle connected to that doctrine," but also finds that lack relatively untroubling.[86] And Professor Robert Vischer has argued that for-profit institutions should be accorded free exercise rights, but perhaps not rights that are identical to those of churches and other core religious institutions; he thus argues that legislatures rather than courts are in the best position to determine the extent of those rights.[87]

As a counter-example, Professors Carl Esbeck and Christopher Lund have both attempted to draw reasonable lines to delimit the scope of religious autonomy.[88] Esbeck argues that the *Hosanna-Tabor* holding is limited to "the sphere of church governance, within which religious organizations are truly autonomous."[89] He thus distinguishes cases dealing with a church's position on political or social issues from decisions about a church's organization and management.[90] He does not, however, provide a principle for separating internal matters of governance from external matters, and he does not deal with more difficult questions involving entities other than churches, such as large religious nonprofit organizations. Focusing instead on the nature of the rule from which the church seeks exemption, Lund argues that churches are largely immune from judicial interference with respect to claims by church members sounding

[85] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2802–05 (2014) (Ginsburg, J., dissenting) (internal citations omitted) ("And where is the stopping point to the 'let the government pay' alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?").

[86] Garnett, *supra* note 1, at 45; *see also* Inazu, *supra* note 4, at 363–64 (noting the possible doctrinal extension of the "freedom of the church" without suggesting any doctrinal limits).

[87] Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 397, 399 (2013) ("There are many good reasons to defend the autonomy of for-profit businesses seeking to maintain or cultivate a distinct religious identity. In most cases, though, legislatures are better suited to make judgments of calibration than courts are.").

[88] *See infra* notes 89–93.

[89] Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 168, 170 (2012).

[90] *Id.*

in tort (what Lund calls "imposed legal obligations") when their resolution would implicate "religious beliefs and practices."[91] At the same time, he argues that churches should largely be held to so-called "assumed obligations," such as those involving contract and property.[92] Yet, Lund, too, acknowledges that boundary issues are not easily resolved; he does not put forward a theory for resolving them.[93]

The doctrinal scope of religious sovereignty, even after recent pronouncements from the Supreme Court, thus remains remarkably unclear. To be sure, this criticism should not be overstated. Alone, the uncertain contours of a legal doctrine should not be enough to condemn it, and it is not uncommon for the details of such a doctrine to be worked out over decades of constitutional common-law decision-making. Nonetheless, the inability of both the Supreme Court and the advocates of religious sovereignty to set out principled boundaries for the concept should, at a minimum, provide cause for concern about the workability of the concept itself.

B. No Physical Boundaries, but Categorical Ones

At the risk of obviousness, it nonetheless seems worth stating that the concept of religious sovereignty is different from the usual concept of sovereignty—for example, with respect to nation-states—because the purported realm of sovereignty does not correspond to a delimited physical space. A religious organization does not have physical borders, and its sovereignty is not spatially defined or delimited. Rather, its sovereignty is over particular subject matter, and it overlaps in many respects with the sovereignty of the civil authority.[94] Indeed, the origins of the call for "freedom of the church" arise as much from the struggle for political power as from a desire to avoid state intervention in religious affairs; this history demonstrates that religious sovereignty is a claim to the same people and the same geographic space that the political sovereign controls.[95]

Several aspects of religious sovereignty's unique jurisdiction thus combine to create a distinct problem for containing the concept: the lack

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[91] Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1201, 1203, 1216 (2014).

[92] *Id.* at 1220.

[93] *Id.* at 1203–04 (noting courts have split on the "boundary question" of who is an insider and who is an outsider of a Catholic school); *id.* at 1219 ("These problems cannot be solved; they can only be managed.").

[94] *See, e.g.*, Kalscheur, *supra* note 1, at 61.

[95] *Id.*; Horwitz, *supra* note 4, at 76 ("The king and his allies made their own theological arguments. Excommunication itself was as much a political as a religious weapon. And on both sides there was a tangle of political alliances and power relations." (internal footnote omitted)).

of obvious, salient borders for the realm of sovereignty; the overlapping domain of the sovereignty, and the failure of courts and commentators to delimit the scope of sovereignty. Sovereigns usually possess the power to define the limits of their own sovereignty, subject only to other sovereigns' superior claim (and ability to enforce it). In this respect, claims of religious sovereignty share the quality of arguments about the scope of a court's jurisdiction—they are decided by the entity whose power is, itself, at stake.[96] The "fox guarding the henhouse" problem is inescapable. This is the nature of sovereignty, and it is a problem that largely must be acknowledged and accepted when sovereigns are involved. But it highlights the extremely high stakes of affording a measure of sovereignty, as opposed to simply affording some deference to religious institutions on particular issues or engaging in a balancing process that is weighted in favor of religious institutions on particular issues. Once a non-state entity is given a measure of sovereignty, it can assert the authority to determine the scope of that sovereignty. Moreover, unlike democratic governments, non-state sovereigns are not necessarily subject to popular control, internal checks and balances, or enforceable individual rights.

The self-defining power of religious sovereigns also transforms the concept of government intervention into a moving target. The firing of a church employee for a medical condition, in violation of the Americans with Disabilities Act, and for reporting that violation, may appear to be a matter of civil rights, not internal church governance.[97] But if the employee is designated a minister, and if the church has a doctrinal rule forbidding recourse to external civil authorities for resolution of disputes, the conflict begins to look like an internal one.[98] Indeed, if we are to take the notion of sovereignty seriously, it is hard to know how courts can even decide who is a "minister," or whether an employment dispute involves one of "the church's" religious tenets, since these are paradigm questions of the ecclesiastical doctrine that courts are supposedly disempowered to decide.[99]

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[96] It also resembles the public-forum doctrine, according to which the government is given the power to define the purposes of a limited forum, and then is required only to regulate speech in accordance with those self-defined limits. *See, e.g.*, Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1593–94 (2008).

[97] *Cf.* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 408–15 (2013).

[98] *Cf.* Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor, 20 LEWIS & CLARK L. REV. 1265, 1276 (2017) (noting that *Smith* and *Hosanna-Tabor* "[b]oth . . . involve internal church activities").

[99] *Cf.* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 197 (2012) (Thomas, J., concurring) (arguing that "[a] religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets").

Indeed, whether institutional autonomy claims are framed as sovereignty claims or are framed instead as merely a "hands-off" doctrine—a sort of privacy right that allows religious entities to make certain decisions autonomously and without interference—the problem is the same.[100] Such claims are categorical, and they do not permit balancing. Creating a realm of nonintervention prevents inquiry into the reasons, the reasonableness, and the legitimacy or pretextual nature of religious organizations' decisions. When religious organizations' decisions are protected by such a shield, it is impossible, for example, to declare some reasons for hiring and firing to be legally permissible—such as gender—and others legally impermissible—such as race. This inability to draw lines, which is quite different when a balancing approach is used, may not be seen as problematic when high-level ministerial employees of a church are involved. But when other kinds of religious organizations are involved, and they extend the ministerial label well beyond the highest levels of hierarchy within the organization, this categorical disability on the part of the civil authorities to enforce civil rights begins to look significantly more troubling.

C. Litigation Incentives

Finally, one need not be a cynic to suggest that the prospect of litigation, and particularly that of civil rights litigation—with its attendant expense, potentially massive stakes, and adversarial nature—might encourage some defendants to push the boundaries of the already-hazy doctrines pertaining to religious autonomy and ecclesiastical abstention. The ministerial exception and the related ecclesiastical abstention doctrine are, as noted above, constitutional doctrines that function categorically.[101] No balancing or fact-finding is required; no legislative mandate can override them.[102] RFRA can function similarly, at least when the Court appears willing to defer to religious claimants on the question of substantial burden, thus potentially putting the federal government to the burden of passing strict scrutiny with respect to every regulation challenged by a religious plaintiff.[103] These doctrines thus present extraordinarily powerful tools for a defendant.

The ministerial exception, which is an affirmative defense,[104] is perhaps particularly troubling in this way. A religious organization asserting

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[100] *See, e.g.*, Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009); Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009); Lund, *supra* note 91, at 1197–98.

[101] *See supra* Part III.B.

[102] *See, e.g.*, Koppelman, *supra* note 25, at 163.

[103] *See* Corbin, *supra* note 64, at 13; Paulsen, *supra* note 25.

[104] *Hosanna-Tabor*, 565 U.S. at 195 n.4.

the exception is already, by definition, on the defensive. This means, as well, that the plaintiff has already *invited* the court's intervention into what is claimed to be an intra-religious dispute. The defendant's best means to prevent protracted litigation is to cast the entire dispute as an internecine fight that should not be handled by the courts. Yet this precise context is far removed from the origins of the doctrine of "freedom of the church," which arose from attempts by the secular sovereign to enter into and control the affairs of the church.[105] It did not arise in a context in which some individual or faction within the church requested a civil remedy for a civil wrong perpetrated by a member of the church. As the Supreme Court stated in an early religious-autonomy case, *Order of St. Benedict v. Steinhauser*, court jurisdiction should generally not be withheld when the matter before the court is "solely one of civil rights."[106]

IV. CONCLUSION

In a society that is increasingly polarized on the basis of religion and politics, there is perhaps no greater manifestation of that polarization than the claim to a realm entirely separate from, and independent of, the sovereignty of the civil state.[107] Though institutional autonomy for religious organizations may itself be an important way of protecting civil rights, it also brings with it difficulties that are not easily resolved. Claims of sovereignty have a natural and nearly inevitable tendency to expand, potentially overcoming the notion that religiously-grounded exceptions and accommodations are, in fact, exceptional. There is also no room for balancing other state interests against these expanding and categorical claims to freedom from regulation by the civil state.

The alternate approach, of course, is one in which the rhetoric of sovereignty and "freedom of the church" is abandoned altogether and which specifies carefully those issues that the courts may and may not decide. For example, there already appears to be some degree of consensus that courts may decide who is and is not a minister subject to the ministerial exception, although that question itself will in most cases—at least from the church's perspective—involve core religious and theological issues. By asserting that this issue can be decided from the perspective of civil society without excessively infringing the prerogatives of religious institutions and authorities, courts have demonstrated that other issues may be designated as being within the ambit of the courts, as well.[108] Similarly,

[105] *See supra* note 96 and accompanying text.

[106] 234 U.S. 640, 642–43 (1914).

[107] *See, e.g.*, Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 20, at 399, 399–418.

[108] The contribution of Professors Lupu and Tuttle reads *Hosanna-Tabor* as embracing a similar approach to the one advocated here—though, in my view, that read-

the federal courts have long asserted their competence to decide whether a government regulation constitutes a substantial burden on a plaintiff's religious exercise in a line of cases from which the Supreme Court has only recently—and perhaps temporarily—departed.[109] Thus, courts must abandon the path toward accepting sovereignty claims by religious institutions and embrace the power to decide what questions are and are not subject to Establishment Clause limitations on courts' ability to decide issues involving religious doctrine; they must resist the temptation to fall back on formalistic categories or defer to religious institutions to define the scope of their own autonomy from judicial control. Such an approach would not only alleviate the difficulty of cabining religious sovereignty, it would also create room for balancing state interests against the free exercise rights of claimants, thereby allowing the courts to protect both.

ing is somewhat optimistic. Lupu & Tuttle, *supra* note 98, at 1277–79. They argue that *Hosanna-Tabor* prevents only the adjudication of particular issues that involve the uniquely ecclesiastical question of fitness for ministry, and they therefore read *Hosanna-Tabor* as a subset of, rather than a supplement to, the doctrine of ecclesiastical abstention. *Id.* at 1291.

[109] *Supra* Part II.C.