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Abstract

This Essay argues that the source of judicial inconsistency in applying the U.S. religious-question doctrine is confusion about whether the doctrine protects a free-exercise right held by religious individuals and groups against government interference, or is instead an anti-establishment immunity stemming from a structural disability on government (and especially judicial) action with respect to questions of religious belief and practice. Part 1 sketches the religious-question doctrine as it emerged from the U.S. Supreme Court's church property and office cases. Part 2 explains that 'rights' and 'structure' are distinct jurisprudential concepts whose application yields differing results. Part 3 argues that attending to these differences yields important explanatory insights about the religious-question doctrine, using as brief illustrations the clergy child-abuse cases in the United States, and the treatment of church "autonomy" by the European Court of Human Rights.

Keywords

Disability, duty, free exercise rights, anti-establishment immunity, religious question doctrine, rights, structure.

Introduction[*]

For nearly 150 years, the "religious-question" doctrine has been understood to prohibit civil courts in the United States from deciding questions of religious doctrine or practice,[1] including whether a doctrine or practice is logical, consistent, plausible, reasonable, or weighty, [2] or whether a religious litigant properly understands what his or her (or its) religion requires.[3] Such matters are "off-limits" to government.[4]

While no one disputes the existence of the religious-question doctrine, its legal source and conceptual contours are uncertain and highly contested. The doctrine has been variously described as an 'adjudicative disability' on the exercise of judicial power,[5] a matter of 'ecclesiastical abstention' analogous to the doctrines that limit federal jurisdiction,[6] a 'religious-group right' protecting corporate and communal free exercise,[7] and a 'freedom of the Church' analogous to the medieval separation of churchly functions from the prerogatives of monarchical rulers.[8] Until recently, it was even uncertain which clause of the U.S. Constitution warranted the doctrine.[9] And finally, the doctrine contains an important limitation: While courts may not properly decide religious questions, they may still

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[*] My thanks to Olivier Roy and Pasquale Annicchino for the invitation to participate in the engaging exchange on this topic at EUI.

1 *E.g.*, Jared Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U.L. REV. 497, 497-98 (2005); *Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998); Michael A. Helfand, *Litigating Religion*, 93 B.C. L. REV. 493 (2013); Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 PEPP. L. REV. 1013, 1013 (2014).

2 *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2778 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.") (parentheses deleted); Employment Division v. Smith, 494 U.S. 872, 887 (1990) ("It is [not] appropriate for judges to determine the 'centrality' of religious beliefs [or] the place of a particular belief in a religion or the plausibility of a religious claim."); United States v. Ballard, 322 U.S. 78, 86 (1944) (People "may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (19872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

3 *E.g.*, *Hobby Lobby*, 134 S.Ct. at 2779 ("[I]t is not for us to say that [the claimants'] religious beliefs are mistaken or insubstantial.") (parentheses deleted); Thomas v. Review Bd., 450 U.S. 707, 715 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceive the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

4 *See, e.g.*, IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 53 (Grand Rapids, Mich.: William B. Eerdmans, 2014) [hereinafter LUPU & TUTTLE, SECULAR GOVERNMENT].

5 *E.g.*, 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, 122-23 (2009) [hereinafter Lupu & Tuttle, *Courts, Clergy, Congregations*].

6 *E.g.*, Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 Ind. L.J. 219, 222-23 (2000).

7 *E.g.*, Frederick Mark Gedicks, *Towards a Constitutional Theory of Religious Group Rights*, 1989 WIS. L. REV. 99, 131-37.

8 *E.g.*, Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U.L. Rev. 973, 980 (2012).

9 *See* Idleman, *supra* note 6, at 223-26. This question was apparently resolved by Hosanna-Tabor Evangelical Lutheran Church. & School. v. EEOC, 132 S.Ct. 694 (2012), which rooted the doctrine in both Religion Clauses but not the Speech Clause and its freedom of association. *See id.* at 703 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

The "Religion Clauses" of the U.S. First Amendment provide that "Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST., amend. I. The first clause is universally referred to as the "Establishment Clause," and the second as the "Free Exercise Clause."

adjudicate internal disputes among religions and their congregations and leaders when it is possible to do so on the basis of "neutral" or secular principles of law.[10]

Uncertainties over the source, content, and limits of the religious-question doctrine have resulted in its confused and inconsistent application in lower courts. The doctrine is occasionally ignored by courts, which then proceed to entangle themselves in disputed questions of theology, doctrine, or practice.[11] More often, courts invoke the doctrine as justification for withdrawing from adjudication of disputes to which the doctrine need not apply.[12] Both errors entail significant social and constitutional costs. When courts undertake to decide theological questions, they interpose the power of the state into the heart of religious liberty—namely, the freedom to worship God in the form and manner one chooses. But courts that fail to adjudicate disputes out of misplaced concern for the religious-question doctrine leave perpetrators without punishment and victims without redress.

This Essay argues that the foundation for judicial confusion and inconsistency in applying the religious-question doctrine is confusion about whether the doctrine protects a free-exercise right held by religious individuals and groups against government interference, or is instead an anti-establishment immunity stemming from a structural disability on government (and especially judicial) action with respect to questions of religious doctrine and practice. Part 1 sketches the religious-question doctrine as it emerged from the church property and office cases. Part 2 explains that 'rights' and 'structure' are distinct jurisprudential concepts whose application yields differing results. Part 3 argues that attending to these differences yields important explanatory insights about the religious-question doctrine, using as brief illustrations the clergy child-abuse cases in the United States, and the treatment of church "autonomy" by the European Court of Human Rights.

1.

The religious-question decisions of the United States Supreme Court (USSCt) cases have most often involved controversies over title to church property, but include disputes over ecclesiastical office and church hiring decisions. In the property scenario, theological disagreement divides a congregation or

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[10] Jones v. Wolf, 433 U.S. 595, 601 (1979); *see also Hosanna-Tabor*, 132 S.Ct. 694 (2012) (holding that ministerial employment decisions are exempt from Title VII of the Civil Rights Act of 1964, but fashioning a secular definition of "minister" to mark the boundaries of this exemption).

[11] *E.g.*, Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1178 n.25 (10th Cir) (rejecting the theological distinctions offered by RFRA claimant between various of means of supplying contraceptives to students and employees under the Affordable Care Act), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 15-105 & -119); East Texas Bapt. Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir.) (rejecting RFRA claimant's understanding of theological complicity), *cert. granted*, 136 S.Ct. 444 (2015); Geneva Coll. v. Burwell, 778 F.3d 422 (3rd Cir.) same), *cert. granted sub nom.* Zubik v. Burwell, 136 S.Ct. 444 (2015) (Nos. 14-1418 & 15-191); Priests for Life v. Burwell, 772 F.3d 229 (D.C. Cir. 2014) concluding that the mandate did not require claimant to violate its religious beliefs), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 14-1453 & -1505)..

[12] *See* Goldstein, *supra* note 1, at 502 (criticizing the doctrine's development into "an apparently absolute prohibition on judicial examination of all questions touching on religion"); Helfand, *supra* note 1, at 557; Lund, *supra* note 1, at 1019 (suggesting that the doctrine seems "massively overbroad" and may have "grown far beyond what its rationales would justify").

Professor Helfand has recently argued that the doctrine is rooted in deference to internal church adjudicatories, and not in questions about the jurisdiction or expertise of secular courts. *See* Helfand, *supra* note 1, at 520.

> [T]he current iteration of the religious question doctrine stems from decades of doctrinal confusion regarding the church autonomy doctrine. In its initial articulation, the church autonomy doctrine served as the constitutional analog to religious arbitration. At its core, the church autonomy doctrine served an adjudicatory function whereby religious institutions were empowered to resolve internal disputes that involve matters of faith, doctrine, church governance, and polity. In this way, the church autonomy doctrine was original deployed by the Supreme Court to divide up dispute resolution responsibilities between religious and secular tribunals.

Id. (internal brackets and quotation marks omitted). *See also id.* at 496-99 (summarizing thesis and argument).

hierarchical church into two or more opposing factions. At some point it becomes clear that the factions cannot or will not reconcile within the boundaries of existing doctrine, and that the dispute must instead be resolved by expulsion of the dissident faction from the congregation, or the entire congregation from the church or general denomination. A dispute then arises over who is entitled to the property and offices of the pre-existing congregation. The faction lacking possession or control of the property files a legal action claiming that it represents the "true" adherent to the church's theology and doctrine, and thus is entitled to its property. [13]

The church office cases follow a comparable pattern. A church or congregation believes that a religious cleric or other officer has departed from essential theological teachings or religious practices, or is otherwise its rightful leader. The parties cannot resolve their disagreements, and the cleric's employment is accordingly terminated. The cleric then typically files a legal action for reinstatement or damages for wrongful discharge, claiming that he or she has not, in fact, departed from essential church teachings or is otherwise entitled to the office from which he or she has been ousted. [14]

Because the religious-question doctrine bars secular courts from deciding disputed questions of theology or religious doctrine, the Supreme Court dictates that these cases be resolved by deferring to the interpretation advanced by the church's internal governing structure—the majority of members in case of an independent congregation, and church leadership in case of a hierarchical church.[15] If no such interpretation is forthcoming, courts generally must refrain from adjudicating the case rather than rendering the interpretation itself, because theological and ecclesiastical questions are simply not justiciable.[16] If, however, a court determines that it can resolve the case according to "neutral legal principles" without resort to interpretation of religious doctrine, it need not give any deference at all to the church's interpretation of relevant religious doctrine or other theological commands that might (also) decide the case.[17] *Jones v. Wolfe* and *Hosanna-Tabor Evangelical Church and School* illustrate this limitation to the doctrine.

Jones involved the familiar pattern of congregational schism over theological disagreement, with the parties divided on whether the congregation's property legally belonged to the national denominational body with which the congregation was affiliated, or to the congregational majority who wished to break away.[18] As we've seen,[19] the religious-question doctrine prohibits courts from deciding which of the factions is truer to denominational beliefs. *Jones* held, however, that courts are free to decide church property disputes—even those in which theological disagreement plays a

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13 *E.g.*, Jones v. Wolf, 433 U.S. 595 (1979); Maryland & Va. Chs. v. Sharpsburg Ch., 396 U.S. 367 (1970); Presbyterian Ch. v. Hull Mem. Presbyterian Ch., 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); *see* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (decided at federal common law).

14 *E.g.*, Hosanna-Tabor Evangel. Lutheran Ch. & Sch. v. EEOC, 132 S.Ct. 694 (2012); Serbian East. Orth. Diocese v. Milivojevich, 426 U.S. 696 (1976); *see* Gonzalez v. Roman Cath. Archbishop, 280 U.S. 1 (1920) (decided at federal common law).

15 *See Jones*, 443 U.S. at 607-09; *Serbian Eastern Orthodox*, 426 U.S. at 696; *Maryland & Virginia Churches*, 396 U.S. at 368-69 (Brennan, J., concurring); *Watson*, 80 U.S. (13 Wall.) at 725, 726-27.

16 *See, e.g.*, *Maryland & Virginia Churches*, 396 U.S. at 369-70 (Brennan, J., concurring).

> [C]ivil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. [] Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy.
>
> *Id.*

17 *Jones*, 443 U.S. at 602-603; *Presbyterian Church*, 393 U.S. at 449.

18 443 U.S. at 597-99.

19 *See supra* text accompanying notes 13-17.

material role—by reference to "neutral principles of law."[20] Courts may rely on, for example, the name in which legal title is held, the provisions of local and national denominational constitutions, corporate charters and bylaws, relevant state statutes, the course of dealing between the local congregation and national denomination, and so on.[21]

Hosanna-Tabor applied this distinction to the ministerial exception in an illuminating way. The Court found that ministerial employment decisions are exempt from Title VII because the Religion Clauses each prohibit government from telling a church who it must appoint as its minister.[22] The Court nevertheless formulated its own *secular* definition of "minister" for the purpose of administering the ministerial exception that it had just recognized. Carefully reviewing the record, the Court found that the Title VII plaintiff in that case, Cheryl Perich, "was a minister within the meaning of the exception"[23] because both she and the defendant church had held her out as a minister, she had been formally educated and commissioned as a minister, and, perhaps most important, she performed duties which *the Court* found quintessentially ministerial—teaching the Church's beliefs and practices and otherwise working in service to its mission.[24] "In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception."[25]

The rationale for the property and office cases is that judicial resolution of theological or ecclesiastical disputes, even when necessary to resolve litigation, would impermissibly entangle the government in the affairs of religion.[26] Because the prohibition on church-state entanglement protects religion from the state, as well as the state from religion,[27] the cases sometimes deploy extravagant language about the liberty value of church "autonomy."[28] However, this line of cases should be understood to have as much to do with judicial competence—in the sense of both jurisdiction and expertise—as church autonomy.[29] After all, when religiously neutral legal doctrine suggests a

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[20] 443 U.S. at 602; *accord* Presbyterian Ch. in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Ch., 393 U.S. 440, 449 (1969) ("[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded.").

[21] 443 U.S. at 603; *e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 & n.15 (1976) (suggesting that examination of denominational constitutions and property deeds was an acceptable way to resolve church property and office disputes); Maryland & Va. Eldership of Churches of God v. Sharpsburg Church of God, 396 U.S. 367, 367-68 (1970) (affirming state court resolution of local-national denominational property dispute by reference to state statutes governing religious corporations, conveyance deeds, corporate charters, and the national denominational constitution); *see* LUPU & TUTTLE, *supra* note 4, at 66.

[22] 132 S.Ct. 694 (2012).

[23] *Id.* at 709.

[24] *Id.* at 707-08.

[25] *Id.* at 708; *accord id.* at 711-12 ("The 'ministerial' exception . . . should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.") (Alito, J., concurring).

[26] *Milivojevich*, 426 U.S. at 696; *see also Presbyterian Church*, 393 U.S. at 440 ("If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

[27] *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982) ("The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other.").

[28] *E.g.*, *Kedroff*, 344 U.S. at 116 (*Watson* "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.").

[29] *See Watson*, 80 U.S. (13 Wall.) at 733-34.

resolution, church autonomy is irrelevant, and the Court may resolve the dispute in a way that ignores and even contradicts the result that would have been indicated by deference to church polity.[30]

2.

Professor Hohfeld famously aligned eight common-law concepts into four correlative relationships, among which are rights and duties, and immunities and disabilities.[31] According to Hohfeld, to claim a "right" to certain interests is necessarily to claim that a "duty" is imposed on others to shape their otherwise lawful actions to avoid intruding on the protected interest.[32] Likewise, to say that a person is "immune" from the legal consequences of a particular action is necessarily also to say that others are "disabled" from taking the action.[33]

Hofeldian rights/duties and immunities/disabilities map easily onto concepts of "rights" and "structure" familiar to U.S. constitutional law. Constitutional rights protect personal liberty interests against otherwise legitimate government action,[34] and constitute duties owed by the government to the individuals who hold them.[35] Constitutional structure, on the other hand, allocates sovereign power in the first place, granting or withholding such power from government,[36] and for the benefit of society as a whole rather than any particular individual or group.[37]

This is all elementary constitutional law, but elementary law that has consequences often overlooked. Rights controversies are always about whether the government has exercised power that it legitimately wields under the Constitution, in a way that takes account of the special domains marked and protected by rights. For example, local governments in the United States possess the power to

(Contd.)

> [Although churches generally lack jurisdiction to decide criminal or civil disputes,] it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,--a matter over which civil courts exercise no jurisdiction,--a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,--becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of these may be said to be questions of jurisdiction.
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> *Id.*, *quoted with approval in Milivojevich*, 426 U.S. at 696-97; *accord* Lupu & Tuttle, *Courts, Clergy, Congregations*, *supra* note 6, at 122-23. *But see Hosanna-Tabor*, 132 S.Ct. at 709 n.4 (suggesting that the ministerial exception functions as an affirmative defense to a ministerial employment action, and not as a jurisdictional bar on the court).

30 Gedicks, *supra* note 7, at 132.

31 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–58 (1913).

32 *Id.* at 32 ("In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best.")

33 *Id.* at 55.

34 *See* Matthew D. Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3, 14 (19980; *e.g.* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 7-8 (1998) [hereinafter Esbeck, *Structural Restraint*] ("For a rights clause to succeed in the task of securing personal religious liberty, the political majority must be compelled to adjust its police power objectives to the needs of the religious minority or religious nonconformist.").

35 *See* Esbeck, *supra* note 34, at 2-3.

36 1 LAURENCE TRIBE AMERICAN CONSTITUTIONAL LAW §2-3, at 125-26 (3rd ed. 2000)*;* ERNEST A. YOUNG, THE SUPREME COURT AND CONSTITUTIONAL STRUCTURE 621-22 (2012); Esbeck, *supra* note 34, at 3; *e.g.*, Dennis v. Higgins, 498 U.S. 439, 453 (1991) ("[T]he Commerce Clause is a structural provision allocating authority between federal and state sovereignties.") (Kennedy, J., concurring).

37 *See* Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 327 (2000) ("Once Congress is disabled from doing something, it is immaterial who the intended beneficiaries of the clause were; the disability is absolute and works to the benefit of everyone.").

regulate the locations and aesthetics of commercial signs under the police power, but they must do so in a way that respects the right to freedom of expression, which accords heightened protection to commercial speech under the Speech Clause of the First Amendment.[38] Individual rights, in other words, are always balanced against government interests. [39] Rights, therefore, can always be waived; since they exist to protect their holders against exercises of legitimate government authority, those very holders are free to relieve the government of its duty to avoid trampling a right-protected interest whenever they find it to their advantage to do so. [40]

Structural controversies, by contrast, have a different focus and character. Structural controversies are about whether the government *can act at all*. Structural constraints disable the government from acting, they withhold sovereign power in the first place; individuals are thus immune from government actions which exceed the structural limitations prescribed by the Constitution. With structural limitations there is nothing to balance, no possibly 'compelling' government interest that might justify government action in a particular instance, because the government lacks all power to act in any event.[41] Nor can structural constraints be waived. Unlike rights, they are not imposed to protect the personal interests of particular people, but are absolute constraints to protect all people at all times.[42] Since structural limits deny sovereign power to government in the first place, there cannot ever be a justification for the government's exercise of power withheld by a structural limit. [43]

From the founding era through the nineteenth century the entire First Amendment was thought to impose a structural disability on federal government action.[44] During the twentieth century, however,

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[38] *Cf.* Printz v. United States, 521 U.S. 898, 941 (1997) (Stevens, J., dissenting) ("[T]he First Amendment prohibits the enactment of a category of laws that would otherwise be authorized by Article I . . . .").

[39] *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (State law school's compelling interest in enrolling racially and ethnically diverse class outweighed white applicant's equal protection right to be free of racial classifications).

[40] Esbeck, *supra* note 34, at 3; *e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-49 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."); Insurance Corp. of Ireland, Ltd. v. Companie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); Bybee, *supra* note 38, at 325 ("Amendments III through VIII are personal privileges or immunities; they are rights in personam against the government, and may be waived.").

[41] *E.g.*, New York v. United States, 505 U.S. 144, (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate.").

[42] Esbeck, *supra* note 34, at 3; *e.g.*, *Schor*, 478 U.S. at 850-51 ("Article III, § 1 . . . serves as an inseparable element of the constitutional system of checks and balances. To the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 1.") (internal quotation marks and citations omitted); *Compagnie des Bauxites*, 456 U.S. at 702 (Subject-matter jurisdiction "functions as a restriction on federal power . . . . [] Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.").

[43] *See* Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) ("[T]he Federal Government may act only where the Constitution authorizes it to do so."); *cf*. Hohfeld, *supra* note 31, at 45, 55 (characterizing a disability as, literally, a "no-power").

Numerous commentators have concluded that structural constitutional restraints constitute Hohfeldian disabilities. *See, e.g*, Bybee, *supra* note 37, at 318-21; Ronald R. Garet, *Three Concepts of Church Autonomy*, 2004 BYU L. REV. 1349, 1354-56, 1369-70; Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 5, at 122 & n.7, 135-37; Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U.L. REV. 1038, 1048-49 (1992).

[44] *See* Downes v. Bidwell, 182 U.S. 244, 277 (1901) (dictum); *accord id.* at 297-98 (White, J., concurring) (First Amendment prohibitions are "absolute withdrawals of power which the Constitution has made in favor of human liberty" which "are applicable to every condition or status."); Thomas Jefferson, "Resolutions Adopted by the Kentucky General Assembly," Res. III (Nov. 10, 1798), *in* 30 PAPERS OF THOMAS JEFFERSON: 1 JANUARY 1798 TO 31 JANUARY 1799, at 550,

most provisions of the First Amendment were reconceptualized as individual rights that impose duties on government when it exercises otherwise legitimate power, probably under the pressure of incorporating them against the states as due-process "liberties."[45] Thus, prior to *Employment Division v. Smith*, individuals had a right to relief from laws that incidentally burden their beliefs and practices, unless the government could show that the law action is the least-restrictive means of implementing a compelling government interest. The Free Exercise Clause protects a right even after *Smith*, though it is considerably diminished—the right to relief from laws that intentionally burden religious beliefs and practices, unless the government satisfies compelling interest and least-restrictive means requirements.

The Establishment Clause, however, remains a disability that immunizes the people from government action that exceeds the limits of constitutional power demarcated by the Establishment Clause.[46] The Establishment Clause wholly disables government from taking any action relating to an "establishment of religion." Whereas the Free Exercise Clause now protects an individual right subject to waiver and interest-balancing,[47] the Establishment Clause sets a structural limitation on government that may not be transgressed regardless of whether a powerful government interest might justify the transgression,[48] or those affected by it have waived their right to object.[49]

In short, there are basically two ways of conceptualizing the religious-question doctrine: as an individual or group right against government interference in theological disputes protected by the Free Exercise Clause, or as a structural bar on government resolution of theological disputes underwritten by the Establishment Clause. The Court's decisions provide support for both concepts. Often the Court

(Contd.)

550-51 (2003) (The First Amendment confirms that the Constitution afforded the federal government no power over the freedoms of religion, speech, or press . . . .").

45 *E.g.*, Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Douglas, J., concurring) (Free Exercise Clause); Near v. Minnesota, 283 U.S. 697, 707 (1931) (Press Clause); Gitlow v. New York, 268 U.S. 652, 666 (1925) (Speech Clause); REX E. LEE, A LAWYER LOOKS AT THE CONSTITUTION 129 (1981) (Free Exercise Clause).

46 *E.g.*, Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (affirming that civil courts are barred from "resolving church property disputes on the basis of religious doctrine and practice," but allowing that civil courts may properly decide such disputes on the basis of "neutral principles" of secular law such as "objective, well-established concepts of trust and property law"); *see* Lamont v. Woods, 948 F.2d 825, 835 (*Downes* "suggested that the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time and place."); LEE, *supra* note 45, at 129 (The Establishment Clause "has a different thrust" than the Free Exercise Clause. "Unlike any other First Amendment provision, [it] deals with structural matters, specifically the relationships between government and religious institutions or religious movements.").

47 *See* LEE, *supra* note 45, at 129; *e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (Religiously burdensome laws that are not religiously neutral or generally applicable must be narrowly tailored to protect a compelling government interest).

48 *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 596 (1992) (Establishment Clause violations may not be balanced against majoritarian preferences.); Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2005) (opinion by McConnell, J.) (Establishment Clause violations except those involving religious discrimination are "flatly forbidden without reference to the strength of governmental purposes."); Lupu & Tuttle, *Courts, Clergy, and Congregations*, *supra* note 5, at 129 ("[A]n Establishment Clause-anchored doctrine of ministerial exemption . . . would admit of no interest-balancing whatsoever.").

49 *See, e.g.*, Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994) (majority student vote to allow graduation prayer could not waive constitutional limitations imposed by Establishment Clause), *vacated as moot*, 515 U.S. 1154, 1155 (1995); EEOC v. Catholic U. Am, 856 F.Supp. 1, 12-13 (D.D.C. 1994) (holding *sua sponte* that court lacked jurisdiction under Establishment Clause to adjudicate theological questions despite failure of either party to raise issue), *aff'd*, 83 F.3d 455 (D.C.Cir. 1996); Johnson v. Sanders, 319 F. Supp. 421, 433 n. 32 (D. Conn. 1970) ("The Establishment Clause is the guardian of the interests of society as a whole and is particularly invested with the rights of minorities. It cannot be 'waived' by individuals or institutions, any more than the unconstitutionality of state-prescribed school prayers could be 'waived' by certain pupils absenting themselves from the classroom while they were conducted."), *aff'd mem.* 403 U.S. 955 (1971); *Lupu & Tuttle, Courts, Clergy, and Congregations*, *supra* note 5, at 135-36, 146 (The limitations imposed by the Establishment Clause "cannot be waived or conferred by consent of the parties. [E]ven if all of the parents in a public school district agreed to permit official prayers in the schools, the practice would still violate the Establishment Clause . . . .").

has characterized the doctrine as if it were a disability analogous to subject-matter jurisdiction in federal courts, which points to an Establishment Clause limitation. Other decision, however, speak of the doctrine as if it were a right to noninterference in a religious group's internal affairs. The Court's most recent foray into this area characterizes the doctrine as *both* a Free Exercise group right and an Establishment Clause disability, which entails its own conceptual problems.[50]

3.

Whether the religious-question doctrine protects a right under the Free Exercise Clause or defines a structural limit under the Establishment Clause necessitates a different account and analysis of what courts may properly do in an action in which the answer to a religious question seems significant. Two illustrative examples are provided by the child sex abuse scandals that have rocked the Catholic Church and other religions in the United States and elsewhere, and the development of a church "autonomy" doctrine by the European Court of Human Rights (ECtHR).

a.

Victims and prosecutors have sought to hold churches criminally and civilly liable on secondary liability theories for the manner in which they dealt with clerics who sexually abused children—for example, by failing to report the abusing priests to authorities, and leaving them in or transferring them to positions that enabled continued or additional abuse. Churches have typically claimed the protection of the religious-question doctrine, arguing that how they deal with wayward clerics and how they generally make internal ministerial assignments are matters of theology and doctrine that secular courts may not judge or second guess in adjudicating a crime or tort.

If the religious-question doctrine is conceptualized as a right, then like all rights it is subject to override when necessary to protect legitimate societal interests. The prevention of child sexual abuse, and the rescue of children from ongoing abuse, both obviously count as 'compelling government interests' that would uncontroversially justify setting aside a free-exercise right for the protection of others and of society generally.

But if the religious question doctrine is conceptualized as a disability on the exercise of judicial power or a limit on the jurisdiction of courts, the result is very different. 'The state can no more intervene in the sovereign affairs of the church,' declared Professor Horwitz, 'than it can intervene in the sovereign affairs of Canada or Mexico.'[51] If churches are indeed immune from liability for how the choose their clerics and assign them church responsibilities, then even the urgent need to rescue children from ongoing or potential child abuse cannot justify government intervention into these internal ecclesiastical matters, any more than it would justify such intervention into the domestic affairs of another country.

Specifying the scope of the Establishment Clause disability is crucial. The religious-question doctrine does not prohibit a court from adjudicating a case in which a religious question is presented, but only from adjudicating such a case *by answering the religious question*. The Establishment Clause disability represented by the religious-question doctrine need not necessarily block criminal prosecution or civil tort actions when a church knowingly or negligently allows an abusing cleric to work with children. A court is probably barred from reviewing a defendant church's decision to employ or not to terminate a cleric later found to have been engaged in sexual misconduct at the time of the decision; *Hosanna-Tabor* strongly suggests that whom a church chooses to employ as its leader

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50 *See* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 421-33 (2013).

51 Horwitz, *supra* note 8, at 980.

is a quintessential religious question that courts lack power to second guess.[52] Nor may a court review whether a church properly understood and followed its own doctrine and practices guidelines—this, too, would entail the interpretation and application of religious doctrine and practice in violation of the religious-question doctrine.[53]

But a court may certainly find that the actions of a church in assigning its clerics satisfied the prima facie case of a secular criminal or civil cause of action—for example, that the church knew or should have known that children in its care were at serious risk of sexual abuse by a cleric, that it therefore had a duty, like that of any other person with children in its care, to report the cleric to authorities or otherwise to eliminate or mitigate that risk, and failed to do so, thereby causing new or continued abuse with the obvious harm this entails. Proving these elements does not require a court to answer any religious question; rather, it merely requires the court to apply "neutral principles of law" designed to protect children from abuse due to the action or inaction of the church.

b.

Neither the European Convention of Human Rights nor any constitution of a European Union nation contains a clause comparable to the U.S. Establishment Clause. Indeed, many E.U. nations have *de jure* or *de facto* established churches. Rather than being barred from adjudicating religious questions in such countries, courts are often empowered with jurisdiction to answer such questions, as it may adjudicate the actions in any other branch of the government. While the European Court of Human Rights (the ECtHR) has developed a modest nonestablishment doctrine,[54] particularly in the areas of religious instruction and prayer in government schools,[55] the doctrine of church autonomy is rooted in Article 9 of the European Convention on Human Rights, which protects, *inter alia*, the freedom to worship teach, practice, or observe one's religion "in community with others."[56]

Under Article 9, in other words, church autonomy is protected by right rather than an immunity.[57] As a consequence, the ECtHR has often found that government interests or other rights are sometimes important enough to outweigh church autonomy;[58] for example, the ECtHR has found that employment rights as well as rights to freedom of assembly and association take precedence over church autonomy rights.[59] Were church autonomy protected under Article 9 by an immunity that disables government from acting at all with respect to the exercise of religion in community with

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[52] *See* 132 S.Ct. at 703 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 710.

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical"—is the church's alone."
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> *Id.* (internal citation omitted).

[53] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (rejecting this argument).

[54] Claudia Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991, 1007-17 (2012).

[55] *Id*. at 1019-24.

[56] The entire paragraph reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

[57] *See* Haupt, *supra* note 54, at 1063 (suggesting that the developing anti-establishment doctrine under Article 9 "might result from the combination of free exercise protection and its existence in a pluralistic, democratic society").

[58] Pasquale Annicchino, *Il Conflitto tra il principio di autonomia dei gruppi religiosi ed altri diritti fondamentali: recenti pronounce della Corte Suprema degli Stati Uniti e della Corte europea dei Diritti dell'Uomo*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 55, 67 (Apr. 2013).

[59] *See id.* 62, 63.

others, the analysis would instead focus on the breadth of the immunity, and might well lead to different substantive decisions in the cases.

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Judging religion is never a simple enterprise. But it is rendered even more problematic when judges do not clarify whether asserted religious liberties are protected by rights which impose duties on government to limit its actions, or immunities which disable government from acting at all. These different modes of protection lead to different analyses and outcomes which courts ignore at their peril.

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