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NOTE

WAIVING THE MINISTERIAL EXCEPTION

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The ministerial exception provides that discrimination law does not apply to claims arising out of the employment relationship between religious institutions and their ministerial employees. While the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC *suggested that this exception could be waived, others have argued otherwise. The pushback flows from a structural understanding of the Establishment Clause, which holds that the First Amendment creates a structural barrier between the separate sovereigns of church and state. On this understanding, the ministerial exception is simply a recognition of the fact that there are some areas in which the state has no power. But this is an incomplete analysis of waiver.*

A complete analysis of waiver has both doctrinal and theoretical consequences. Doctrinally, a viable concept of waiver can change the litigation behavior of parties. Theoretically, waiver exposes a flaw in conceptions of church sovereignty. The commentary fails to fully define what it means to be a sovereign, ignoring the fact that some sovereigns, such as states, can waive their immunity.

This Note seeks to present a comprehensive theory for the waivability of the ministerial exception. This theory confronts the exception on all three of its theoretical footings: as part of the structural restraint imposed by the Establishment Clause, as part of the right to church autonomy extended by the Establishment Clause, and as part of a church's right to shape its own faith protected by the Free Exercise Clause.

INTRODUCTION 1862
I. THE MINISTERIAL EXCEPTION 1864

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II. THE ESTABLISHMENT CLAUSE 1869
A. The Establishment Clause as Structural Restraint 1870
1. Characteristics of the Structural Establishment Clause 1871
2. Characteristics of the Eleventh Amendment 1878
3. Waiver of Eleventh Amendment Immunity 1885
4. Waiver of the Structural Establishment Clause 1886
B. The Establishment Clause as Right 1894
1. Overview of the Right 1894
2. Waiver of the Right 1897
III. THE FREE EXERCISE CLAUSE 1900
CONCLUSION 1901

INTRODUCTION

Professor Smith is a married, gay, and brilliant theology professor at a Catholic college. The college knew that he was married to a man when they hired him (in violation of Catholic doctrine) but chose to ignore that fact. The college prides itself on its progressive views and strongly desired to have Smith on its faculty. Smith's contract includes a waiver of the ministerial exception to employment discrimination law, an affirmative defense in employment discrimination cases, specifically stating that he will not be fired for his marriage. If this clause was not in his contract, Smith would not have signed it. The college would have lost out on Smith, and Smith would have lost out on the job. After ten years of employment, the college fires Smith. He claims it is because of his marriage. Smith brings a Title VII claim (assuming that such a claim is viable in this jurisdiction). The college responds that he was fired for alcohol-related problems. A trial commences and Smith wins. The college appeals the case and hires a new lawyer. That lawyer now claims that the college's actions were protected by the ministerial exception and that the district court overstepped its bounds in hearing the case. Can the appellate court now dismiss the claim on ministerial exception grounds? Or, should the court find that the college waived the ministerial exception by explicitly stating as much in the employment contract and by not raising it at trial?

Deciding whether a religious organization can waive the ministerial exception has both doctrinal and theoretical consequences. Doctrinally, a viable concept of waiver can change the litigation behavior of parties. If

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a religious organization does not raise the ministerial exception in a timely fashion, and no other religious questions are raised, then the religious organization would lose that defense. Consequently, an appellate court would not be able to reach out *sua sponte* to the ministerial exception or allow the religious organization to now advance that defense. Practically, this means that employment discrimination claims brought by employees of religious organizations[1] have a higher chance of actually getting decided and not simply being thrown out of court at a late stage in litigation.[2]

Theoretically, a consideration of waiver highlights a potential flaw in academic conceptions of church sovereignty. Academics argue that waiver is foreclosed because, among other things, churches are sovereign entities that enjoy supreme adjudicatory control over internal religious matters.[3] But this theory relies on an implied assumption—that sovereigns cannot waive this immunity and be brought before a civil court. However, some sovereigns, such as states, *can* waive their immunity and be subject to the jurisdiction of the courts.[4] Waiver, then,

[1] Examples of such claims include, but are not limited to, actions under Title VII for gender and race discrimination, see, e.g., Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985), actions under the Age Discrimination in Employment Act, see, e.g., Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 170 (5th Cir. 2012), and actions under the Americans with Disabilities Act, see, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 172 (2012).

[2] Compare Conlon v. Intervarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015) (affirming dismissal of employment discrimination case at the appellate level even though religious organization failed to the raise the ministerial exception at the district court level by holding that "[t]he ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived"), with Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1318 (11th Cir. 2012) (holding that citing the ministerial exception only once in appellee brief constitutes waiver of the defense on appeal).

[3] See, e.g., Carl H. Esbeck, A Religious Organization's Autonomy in Matters of Self Governance: *Hosanna-Tabor* and the First Amendment, 13 Engage 168, 170 (2012) ("[T]he First Amendment . . . has determined that there are a few areas of authority that have not been rendered unto Caesar."); Paul Horwitz, Act III of the Ministerial Exception, 106 Nw. U. L. Rev. 973, 981 (2012) (painting the Supreme Court's procedural characterization of the ministerial exception as simply a technical matter); Howard M. Wasserman, Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption, 160 U. Pa. L. Rev. PENNumbra 289, 315 (2012) ("[N]onjurisdictional doctrines can be accorded procedural incidents of jurisdiction, such as nonwaivability, where the policy goals and values underlying that doctrine demand it.").

[4] See, e.g., Parden v. Terminal Ry. Co. of the Ala. State Docks Dep't, 377 U.S. 184, 186 (1964) (allowing party to sue state with state's consent despite Eleventh Amendment); Petty

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raises the question of the true nature of church sovereignty. Is a church more like a state in a federal union? Is it more like a foreign country?[5] Or is it something in between, like a sovereign American Indian tribe?[6] The current commentary fails to answer this question, choosing instead to justify the nonwaivability of the ministerial exception with the label "sovereignty."

This Note seeks to present a novel and comprehensive theory for the waivability of the ministerial exception. This Note accepts that religious organizations have some degree of sovereignty. However, unlike the extant academic commentary, rather than treat the sovereignty of the church as the ultimate answer to the question of waivability, this Note treats sovereignty as its launching point.

This theory must confront the exception on all three of its theoretical footings: as part of the structural restraint imposed by the Establishment Clause, as part of the right to church autonomy extended by the Establishment Clause, and as part of a church's right to shape its own faith protected by the Free Exercise Clause. Part I discusses the exception and its doctrinal roots. Section II.A analogizes the structural restraint imposed by the Establishment Clause to the Eleventh Amendment and argues that the Eleventh Amendment's concept of waiver is applicable to the ministerial exception. Section II.B discusses the ministerial exception as a right and argues that it poses no entanglement problems for the courts. Part III quickly affirms that Free Exercise rights can be waived.

I. THE MINISTERIAL EXCEPTION

The ministerial exception provides that federal employment discrimination law does not apply to claims arising out of the employment relationship between religious institutions and their

v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 280–82 (1959) (reading state's statutory waiver of its sovereign immunity to apply to suits in federal court); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 55 (1944) (reading state's statutory waiver of its sovereign immunity to only apply to suits in state court).

[5] Horwitz, supra note 3, at 980 (comparing churches to foreign sovereigns).

[6] For a full history of tribal sovereign immunity, see William Wood, It Wasn't an Accident: The Tribal Sovereign Immunity Story, 62 Am. U. L. Rev. 1587 (2013).

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ministerial employees.[7] This exception has been lurking in the lower courts since the 1970s,[8] but its existence was affirmed by a unanimous court in the landmark case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[9] In so doing, the Court attempted to resolve two issues that plagued the lower courts and commentators: the constitutional hook to which the ministerial exception is tethered and the proper procedural characterization of the exception.

Doctrinally, the Court, recognizing the circuitous development of the exception in the lower circuits,[10] rooted the exception in both clauses of the First Amendment.[11] The exception has one foot firmly planted in the Establishment Clause, which "prohibits government involvement in such ecclesiastical decisions."[12] Its other foot is in the Free Exercise Clause, for that clause "protects a religious group's right to shape its own faith and mission through its appointments."[13]

The exception's historical allegiance lies with the Free Exercise Clause. *McClure v. Salvation Army*, in which the exception was first announced, stated that "the application of the provisions of Title VII to . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause . . . ."[14] Other courts followed suit.[15] According to this theory, the church has *a right* "to decide for itself, free from state interference, matters of church administration and government."[16] An employment discrimination case, however, "would involve an investigation and review of these practices [minister's

[7] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

[8] See McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

[9] 565 U.S. at 188.

[10] See infra notes 14–24 and accompanying text.

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

[12] Id. at 189.

[13] Id. at 188.

[14] 460 F.2d 553, 560 (5th Cir. 1972); see also Michael A. Helfand, Religion's Footnote Four: Church Autonomy as Arbitration, 97 Minn. L. Rev. 1891, 1914 n.105 (2013) (noting that "the ministerial exception was first announced by the Fifth Circuit in *McClure*").

[15] See Helfand, supra note 14, at 1914 n.105 (collecting cases).

[16] *McClure*, 460 F.2d at 560.

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assignment, salary, and duties] and decisions."[17] This in turn would cause the "State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."[18]

The exception was forced to find a new doctrinal home after *Employment Division, Department of Human Resources of Oregon v. Smith* shrank the Free Exercise universe.[19] *Smith* held that the Free Exercise Clause does not protect individuals from facially neutral and generally applicable laws.[20] This proved problematic for a Free Exercise–rooted ministerial exception concerning employment discrimination statutes, since these statutes were nearly always facially neutral and generally applicable.[21] The courts responded to this limitation by broadening the reach of the Establishment Clause.[22] The shift from the Free Exercise Clause to the Establishment Clause transferred the locus of analysis from the churches to the courts. Rather than analyzing the exception as involving some right vested in the religious organization, the courts now focus on the *courts'* inherent inability to adjudicate religious questions.[23] In other words, the purpose

[17] Id.

[18] Id.

[19] 494 U.S. 872 (1990); see also Helfand, supra note 14, at 1912 (noting the doctrinal shift that occurred after *Smith*); Douglas Laycock, Church Autonomy Revisited, 7 Geo. J.L. & Pub. Pol'y 253, 262 (2009) (noting that *Smith* shrank "the Free Exercise Clause to a substantial but still undetermined extent").

[20] 494 U.S. at 878–79.

[21] See Helfand, supra note 14, at 1914.

[22] See id. at 1916 n.114 (collecting cases); see also Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 Fordham L. Rev. 1965, 2004–05 (2007) (describing commentators' arguments in favor of this approach); Laycock, supra note 19, at 264 (noting that there is no effective difference in labeling the ministerial exception as flowing from the Free Exercise Clause rather than the Establishment Clause); 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] (offering a view of the ministerial exception as "rest[ing] on the Establishment Clause alone").

[23] See, e.g., Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) ("The assumption behind the rule . . . is that Congress does not want courts to interfere in the internal management of churches, as they sometimes do in the management of prisons or school systems . . . . [L]egislators do not want the courts to tell a church whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic.").

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of the ministerial exception, as reinterpreted under the Establishment Clause, "is to avoid judicial involvement in religious matters, such as claims of discrimination that if vindicated would limit a church's ability to determine who shall be its ministers."[24]

The Court's attempt at clarifying the procedural status of the exception[25] was relegated to a footnote.[26] The Court held that the "exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has the 'power to hear [the] case.'"[27] In short, the ministerial exception is an affirmative defense to the employment discrimination claim on the merits, not a barrier to the court's subject matter jurisdiction.

The proper procedural characterization of the doctrine may sound like the concern of only clerks and academics, for either way, the claim is precluded from going to trial.[28] But an affirmative defense has one feature a motion to dismiss for lack of subject matter jurisdiction lacks: the ability to be waived. If a party does not raise its affirmative defense in a timely manner, the party is considered to have waived that defense.[29] A motion to dismiss for lack of subject matter jurisdiction, on the other hand, can never be waived by the parties.[30] In fact, it can be raised *sua sponte* by any court hearing the case.[31]

A plain reading of *Hosanna-Tabor*'s footnote four would suggest that the ministerial exception can be waived. And at least two lower courts

[24] Id.

[25] At the time *Hosanna-Tabor* was decided, lower courts characterized the ministerial exception in a variety of ways. Some circuits treated the exception as a subject matter jurisdiction question. Others found that it went to the merits of the claim. See Wasserman, supra note 3, at 293–94 nn.28–29 (collecting cases).

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

[27] Id. (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010)).

[28] Fed. R. Civ. P. 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction); id. 12(b)(6) (failure to state a claim upon which can be granted).

[29] Id. 12(h)(1)–(2).

[30] Id.

[31] Id. 12(h)(3).

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have held as much.[32] Stalwarts of the ministerial exception, however, think otherwise. Notwithstanding footnote four and the Court's characterization of the exception as a typically waivable affirmative defense, there are two arguments that suggest that the exception can never be waived. Both justifications dismiss the procedural characterization of the ministerial exception demanded by footnote four, finding either the actual language of the Court or the underlying policies to be more persuasive. First, the above-the-line text of *Hosanna-Tabor* suggests that the exception, notwithstanding its procedural characterization, could never be waived. This is the approach taken by the Sixth Circuit in *Conlon v. Intervarsity Christian Fellowship*.[33] In that case, the court held that the *Hosanna-Tabor* "Court's clear language recognizes that the Constitution does not permit private parties to waive the First Amendment's ministerial exception."[34] The *Conlon* court cites the following language from *Hosanna-Tabor* to support this conclusion: "Both Religion Clauses *bar* the government from interfering;" "the Establishment Clause . . . *prohibits* government involvement;" and it is "*impermissible* for the government to contradict a church's determination."[35] The second theory goes beyond the language of the Court and to the underlying policy. Under this theory, "the ministerial exemption could still be nonwaivable, even as a merits defense, if the policies underlying church sovereignty and church autonomy demand this additional procedural protection."[36] These policies, as will be discussed below, concern religious autonomy over religious questions.[37]

However, these arguments ultimately rest on a label, not an explanation. As noted above, the ministerial exception has roots in three theories: the "Structural" Establishment Clause, which categorically bars government involvement in religious affairs; the "Rights" Establishment

[32] Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1318 (11th Cir. 2012) (holding that citing the ministerial exception only once in appellee brief constitutes waiver of the defense on appeal); Petschonek v. Catholic Diocese of Memphis, No. W2011-02216-COA-R9-CV, 2012 WL 1868212, at *6 (Tenn. Ct. App. May 23, 2012) (holding that the court had subject matter jurisdiction to adjudicate the case).

[33] 777 F.3d 829, 836 (6th Cir. 2015).

[34] Id.

[35] Id.

[36] Wasserman, supra note 3, at 315.

[37] See infra notes 41–96 and accompanying text.

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Clause, which protects a church's right to autonomy over internal, religious decisions; and the Free Exercise Clause, which protects a church's right to shape its own faith. If the ministerial exception is ultimately a product of the structural restraint imposed by the Establishment Clause, then proper analysis of waiver calls for analogies to other sovereign entities that are protected from suit by a structural restraint imposed by the Constitution. States, for instance, are protected from suit in federal court without their consent by the structural restraint of the Eleventh Amendment.[38] However, states are also empowered to waive this immunity.[39] Analogizing to Eleventh Amendment immunity provides a comprehensive framework by which waiver of the ministerial exception can be analyzed. This analogy is justified because of the striking similarities between the structural restraint imposed by the Establishment Clause and the structural restraint imposed by the Eleventh Amendment. Both (1) recognize a division of sovereignty, either between church and government or state government and federal government; (2) draw their persuasive force from their historical longevity; (3) limit the power of both the judiciary and the legislature; and (4) are themselves fundamentally limited. If the ministerial exception is rooted in the "Rights" Establishment Clause, then religious organizations can still waive their immunity, in certain instances, with no threat of entanglement. Finally, the part of the ministerial exception rooted in the Free Exercise Clause can easily be waived.

II. THE ESTABLISHMENT CLAUSE

The Establishment Clause prohibits the government from making any law "respecting an establishment of religion."[40] This clause can be read in one of two ways. First, it can be read to be a structural restraint on the powers of the government—the government simply has no power to legislate in this area. The second reading protects a right—the people's liberty of conscience. But under either reading of the clause, the ministerial exception is not a mandatory prophylactic measure against court adjudication and can be waived by knowing parties.

[38] See infra note 99 and accompanying text.

[39] See infra note 103 and accompanying text.

[40] U.S. Const. amend I.

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This Part proceeds as follows. Section II.A argues that the structural element of the Establishment Clause can be waived, at least as far as the ministerial exceptions is concerned. It does so by comparing (1) the theory of the Structural Establishment Clause with (2) the theory of the Eleventh Amendment. Subsection II.A.3 then discusses waiver of the Eleventh Amendment. Subsection II.A.4 argues that this theory of waiver should be imported into ministerial exception jurisprudence. Section II.B argues that if the Establishment Clause is considered a right, the ministerial exception can be waived without leading to the state substituting its own judgment for that of a religious organization.

A. The Establishment Clause as Structural Restraint

According to this theory, the ministerial exception flows from the structural protection erected by the First Amendment "that categorically prohibits federal and state governments from becoming involved in religious leadership disputes."[41] Church and state are two wholly distinct, coexisting, and competing sovereigns.[42] Churches, in other words, are like Mexico.[43] And just as the United States is barred from interfering in the sovereign affairs of Mexico, the Establishment Clause, as a structural restraint, prevents the government from wading into the sovereign activities of the church.[44]

[41] Conlon v. Intervarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015); see also Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1, 9 (1998) (arguing that the "Court has applied the Establishment Clause as structural"); Christopher C. Lund, In Defense of the Ministerial Exception, 90 N.C. L. Rev. 1, 59 (2011) (arguing that the Establishment Clause could be read to bar states from reappointing ministers and juries from deciding "what it means to be a good minister"); Lupu & Tuttle, Courts, supra note 22, at 137 (arguing that the Establishment Clause "should operate to exclude government from a certain class of messages and decisions," namely, disputes between religious institutions and their leaders); Wasserman, supra note 3, at 291–92 (noting that the ministerial exception "is a specific application of the broader freedom of the church doctrine . . . [which] requires that secular authorities keep its 'hands off' matters of faith, religious doctrine, theological pronouncements, the structure and internal governance of religious institutions, and other matters of the spiritual domain").

[42] Horwitz, supra note 3, at 980.

[43] Id.

[44] Id; see also Esbeck, supra note 41, at 8 ("[T]he task of a structural clause is to manage sovereign power.").

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But characterizing the exception as a product of a structural restraint is only a label. If churches are separate sovereigns, the proper analysis, when considering the question of waiver, should be to analyze other structural clauses that allocate power between two sovereigns, like the Eleventh Amendment. This Amendment shows that theoretical characterization is not destiny, for it can be waived. This concept of waiver should be translated into the ministerial exception jurisprudence.

Looking to the states to define the border of a church's sovereignty is justified because of the striking similarities between the structural restraint imposed by the Establishment Clause and the structural restraint imposed by the Eleventh Amendment. Both (1) recognize a division of sovereignty, either between church and government or state government and federal government; (2) draw their persuasive force from their historical longevity; (3) limit the power of both the judiciary and the legislature; and (4) are themselves fundamentally limited.

1. Characteristics of the Structural Establishment Clause

a. The Establishment Clause Allocates Power Between Two Sovereign Entities

The Structural Establishment Clause allocates powers between two sovereign entities—church and state.[45] It concerns "the proper role of *government* in the society that we have shaped for ourselves in this land."[46] According to this understanding of the Establishment Clause, church and state are fundamentally different things. Perhaps churches earned this difference because of their longevity[47] or perhaps because they are a "shield against oppressive civil laws."[48] Regardless of the reason, the courts have "long recognized that the Religion Clauses

[45] See Esbeck, supra note 3, at 169; Esbeck, supra note 41, at 3–4; Horwitz, supra note 3, at 982–83; 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, 63–65 (2008).

[46] Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

[47] See infra notes 68–77 and accompanying text.

[48] *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

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protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."[49]

Recognizing the church as a sovereign entity places it on an equal, but separate, level to the state.[50] The competency of government is the profane; the competency of the church is the sacred.[51] Government has no authority to enter into the sphere of the church,[52] just as the church has no authority to enter into the sphere of government. But it is not a wall that the First Amendment erects; rather, it is a "logical distinction."[53] The Establishment Clause does nothing more than compel Caesar to "recognize[] that he is only Caesar" and prohibit "any attempt to demand what is God's."[54] It is important to note that this "recognition" is not a carving away of preexisting powers of the state. The state *never* had the power to regulate internal church matters because "[a]t a deep level, these questions lie beyond the reach of the state altogether."[55] This is because churches are not voluntary organizations that are legal creations of the state.[56] Rather, they are

[49] Id; see also Thomas C. Berg, Religious Organizational Freedom and Conditions on Government Benefits, 7 Geo. J.L. & Pub. Pol'y 165, 173 (2009) ("Disestablishment means that the state does not determine religious truth . . . ."); Paul Horwitz, Churches as First Amendment Institutions: Of Sovereignty and Spheres, 44 Harv. C.R.-C.L. L. Rev. 79, 91–99 (2009) (providing overview of Abraham Kuyper's notion of sphere sovereignty).

[50] Esbeck, supra note 41, at 10 ("[T]he Establishment Clause . . . acknowledges the existence of a competency centered in religion that is on a plane with that of civil government."); see also Horwitz, supra note 49, at 96 (arguing that the church is "coordinate with the state, not subordinate to it"); Horwitz, supra note 3, at 980 ("This allocation of authority . . . is a settlement between coequal institutions . . . .").

[51] Esbeck, supra note 41, at 10 n.34 (quoting Max L. Stackhouse, Religion, Rights, and the Constitution, *in* An Unsettled Arena: Religion and the Bill of Rights 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds., 1990)); see also Richard W. Garnett, The Freedom of the Church, 4 J. Catholic Soc. Thought 59, 60 (2007) (noting that the spheres of the sacred and profane are separate); Horwitz, supra note 49, at 96–97 (cataloguing the different responsibilities of church and state).

[52] Horwitz, supra note 3, at 980; Berg, supra note 49, at 173 ("Disestablishment means that the state does not determine religious truth; in that sphere the various religious institutions and associations have sovereignty.").

[53] Esbeck, supra note 41, at 10 n.34 (quoting William Clancy, Religion as a Source of Tension, *in* Religion and the Free Society 23, 27 (William Lee Miller et al. eds., 1958)).

[54] Id. (quoting William Clancy, Religion as a Source of Tension, *in* Religion and the Free Society 23, 27–28 (William Lee Miller et al. eds., 1958)).

[55] Horwitz, supra note 3, at 980.

[56] Kalscheur, supra note 45, at 65.

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preexisting, transnational sovereign entities that continue to exist after the dissolution of the state.[57] The Establishment Clause, then, merely recognizes this fact of history.[58]

Practically, this structural restraint reserves a sphere in which "religious entities may operate unhindered by government in accordance with their own understanding of divine origin and mission"[59] and acknowledges a religious institution's right to govern its own internal affairs.[60] It is those subject matters that are out-of-bounds for government interference—"ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion."[61] The state, on the other hand, retains the power to regulate "various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society."[62]

But this demarcation is much more than a simple division of potential cases to hear or rules to write; it affirms "the penultimacy of the state."[63] By recognizing the church's coequal and sovereign status, the state reaffirms that it is a limited government.[64] And organized religion's refusal to recognize the state's sovereignty as absolute, in turn, checks the state's power.[65] The result of the government limiting itself by recognizing the authority of the church "means that at least one

[57] Esbeck, supra note 41, at 55.

[58] Id. at 10 n.34 ("This is not only an affirmation of the freedom of individual belief or practice, no[r] only an acknowledgement that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control." (quoting Max L. Stackhouse, Religion, Rights, and the Constitution, *in* An Unsettled Arena: Religion and the Bill of Rights 92, 111 (Ronald C. White, Jr. & Albright G Zimmerman eds., 1990))).

[59] Esbeck, supra note 41, at 56; see also Horwitz, supra note 49, at 98 ("The state itself cannot interfere with religious pluralism because it lacks the competence to make determinations about who is the true church, and any interference with the church would fall outside its sovereign duties and thus violate the principle of sphere sovereignty.").

[60] Helfand, supra note 14, at 1893–94.

[61] Esbeck, supra note 41, at 10–11.

[62] Max L. Stackhouse, Religion, Rights, and the Constitution, *in* An Unsettled Arena: Religion and the Bill of Rights 92, 111 (Ronald C. White, Jr. & Albright G Zimmerman eds., 1990).

[63] Kalscheur, supra note 45, at 91.

[64] Helfand, supra note 14, at 1894.

[65] Esbeck, supra note 41, at 67.

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association may be brought into being in society that has a sovereignty beyond the control of government."[66] This structural restraint, in other words, protects the people by acting as a counterweight to the modern nation-state.

b. The Establishment Clause Is Rooted in History

The structural restraint embedded in the Establishment Clause derives much of its theoretical justification from its historical longevity. The separate spheres conception of church and state "predates the Constitution itself."[67] The First Amendment, as noted above, did not create the distinction; it simply codified it.

The Structural Establishment Clause is rooted in the theory of "Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state."[68] Some trace this theory back to the aftermath of the collapse of imperial Rome and the reign of Pope Gelasius during the fifth century.[69] Others, however, choose to mark the advent of the Two Kingdoms theory six hundred years later, at the Investiture Controversy.[70] Whenever its conception, the "acknowledgement of limited competence [by the state] created the social and cultural conditions for the possibility of what a later generation of constitutions and democrats called the limited state."[71]

The establishment of British colonies in the New World, and the concomitant importation of English common law and European thinking

[66] Stackhouse, supra note 62, at 111.

[67] Horwitz, supra note 3, at 978. For a more detailed review of this history, as it applies specifically to the ministerial exception, see Thomas C. Berg et al., Religious Freedom, Church-State Separation, and the Ministerial Exception, 106 Nw. U. L. Rev. Colloquy 175, 179–84 (2011).

[68] Michael W. McConnell, Non-State Governance, 2010 Utah L. Rev. 7, 8.

[69] Id.

[70] Garnett, supra note 51, at 59–60; Steven D. Smith, Discourse in the Dusk: The Twilight of Religious Freedom?, 122 Harv. L. Rev. 1869, 1869–70 (2009) (book review); see also Richard Schragger & Micah Schwartzman, Against Religious Institutionalism, 99 Va. L. Rev. 917, 926 (2013) ("'Freedom of the church' made its appearance during the Investiture Controversy.").

[71] Garnett, supra note 51, at 60 (quoting George Weigel, The Cube and the Cathedral: Europe, America, and Politics Without God 101 (2005)).

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in general, wrought no reconciliation to this divorce of church and state. Rather, the American tradition has long embraced the independence of the two.[72] The early colonists carried with them this centuries-long understanding of the division of church and state.[73] The Two Kingdoms theory first made its way into American constitutional literature as part of the Laws and Liberties of Massachusetts Bay of 1648, which proclaimed that "our churches and civil state have been planted, and grown up (like two twins)."[74] One hundred years later, John Adams ensured that the "Massachusetts Constitution of 1780 guaranteed the right of churches to select their own ministers without state interference."[75] Finally, this tradition was codified as part of the federal constitution.[76] James Madison, the Framer of the First Amendment, stated that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance."[77] A concept rooted in the shadowy past was thus elevated to constitutional doctrine in the New World.

c. The Establishment Clause Limits Both the Judiciary and the Legislature

This codification limits the power of both the judiciary and the legislature. First, the Structural Establishment Clause disables courts from exercising jurisdiction over religious questions.[78] Generally, "[a] court may not adjudicate a cause of action if evaluation of the elements

[72] Richard W. Garnett, Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?, 22 St. John's J. Legal Comment 515, 523 (2007).

[73] Horwitz, supra note 3, at 978 (noting that the tradition "can be found in the writings of Roger Williams, the structure of the Puritan communities in New England, and elsewhere").

[74] Id. (alteration in original) (quoting Laws and Liberties of Massachusetts Bay, at A2 (1648) (Max Farrand ed., 1929)).

[75] Id.

[76] See id. at 978–79.

[77] Id. at 978 (alteration in original) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* Church and State in the Modern Age: A Documentary History 59, 60 (J.F. Maclear ed., 1995)).

[78] Helfand, supra note 14, at 1894.

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of, or defenses against, that cause of action necessarily requires the court to make findings that purport to interpret or apply church doctrine."[79]

Courts lack the power to adjudicate in four general areas.[80] First, courts cannot hear cases regarding church doctrine, whether it be resolving a question of what the doctrine actually is, a change to the doctrine, or a dispute in the doctrine.[81] Second, courts cannot hear cases regarding the organizational structure of a church, "including interpretation of the church's organic documents, bylaws, and traditions."[82] Third, courts cannot hear cases regarding church governance, which includes "the selection, promotion, discipline, and terms of employment concerning clerics and other ecclesiastics."[83] Finally, courts cannot hear cases regarding "the admission, guidance, expected moral behavior and excommunication of church members."[84] These prohibited cases cut across tort law,[85] contract law,[86] civil rights nondiscrimination legislation,[87] the extent of religious use of real estate to obtain a tax exemption,[88] and criminal fraud.[89]

[79] Lupu & Tuttle, Courts, supra note 22, at 135. The academic commentary is divided as to why this jurisdictional deficit exists. The first theory posits that courts simply lack the authority to resolve religious questions because church and state are different entities. See, e.g., Esbeck, supra note 41, at 57 ("[T[he objection is that government has no competence in making decisions that are in the purview of religion."). The second theory rejects the premise that "religious institutions are presumptively autonomous." Ira C. Lupu & Robert Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37, 78–79 (2002) [hereinafter Lupu & Tuttle, Distinctive Place]. Rather, courts have no subject matter jurisdiction because they lack the institutional knowledge and ability to address religious questions. Lupu & Tuttle, Courts, supra note 22, at 138; Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 BYU L. Rev. 1789, 1815 (2004) [hereinafter Lupu & Tuttle, Sexual Misconduct]. But no matter the theoretical underpinning, these commentators agree that the Establishment Clause limits a court's subject matter jurisdiction and precludes courts from hearing these kinds of cases.

[80] Esbeck, supra note 41, at 44–45. As Esbeck notes, courts do not always dismiss these cases out of a technical lack of subject matter jurisdiction, but the language they use in the dismissal has the same result. See id. at 42 n.163.

[81] Id. at 44 n.172 (collecting cases).

[82] Id. at 44 n.173 (collecting cases).

[83] Id. at 44 n.174 (collecting cases).

[84] Id. at 45 n.175 (collecting cases).

[85] Id. at 49 n.199 (collecting cases).

[86] Id. at 49 n.200 (collecting cases).

[87] Id. at 50 n.201 (collecting cases).

[88] Id. at 50 n.202 (collecting cases).

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Second, the Establishment Clause limits the legislative branch. It does so by acting as an "existence condition" on all acts of Congress—if Congress passes a statute that violates the clause, the thing passed is not a law.[90] Congress simply cannot enact a law that violates the sovereignty of the church, such as one that regulates the internal governance of a religious organization.[91] The statute at issue in *Hosanna-Tabor* itself can be seen as a Congressional violation of the First Amendment. Congress lacked the authority to extend to religious ministers the protections of the Americans with Disabilities Act because it interfered with the church's autonomy to hire and fire its own ministers.[92] In this context, the church's status as a separate sovereign is not erecting a common law barrier between church and court, but rather is erecting a barrier between organizational decisions and congressional regulation.[93]

d. The Restraint Is Fundamentally Limited

Finally, the structural restraint erected by the Establishment Clause is not all-encompassing. Gone are the days of Quasimodo finding amnesty on church grounds—some internal church decisions need to be regulated for the good of the whole. Thus, even if a case falls within the sphere of traditional ecclesiastical immunity, a court will have subject matter jurisdiction if it involves fraud or collusion,[94] sexual harassment,[95] or negligent employment arising out of a pastor's molestation of a child.[96]

[89] Id. at 50 n.203 (collecting cases).

[90] Wasserman, supra note 3, at 299 ("For a sub-constitutional legal rule, such as a statute, to come into existence as valid and enforceable law, it must satisfy certain constitutional conditions, notably legislative enactment in compliance with these internal and external limits.").

[91] One example of this is a law that transfers church authority from one diocese to another. Esbeck, supra note 41, at 44 n.173 (discussing *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) and how "[t]he First Amendment prevents the judiciary, as well as the legislature, from interfering in the ecclesiastical governance of the Russian Orthodox Church").

[92] 565 U.S. at 179–80.

[93] Wasserman, supra note 3, at 316.

[94] Esbeck, supra note 41, at 44 n.171.

[95] See Bollard v. Cal. Province of Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999); Black v. Snyder, 471 N.W.2d 715, 720–21 (Minn. Ct. App. 1991); McKelvey v. Pierce, 800 A.2d 840, 851 (N.J. 2002).

[96] See Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323–24 (Colo. 1996).

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2. Characteristics of the Eleventh Amendment

To review, the ministerial exception is justified, in part, on the structural restraint imposed by the Establishment Clause. This has led commentators to argue that, because structural restraints cannot be waived, the ministerial exception cannot be waived. But calling something a structural restraint does not complete the analysis. If the First Amendment allocates power between two sovereigns, the question of waiver should be answered by looking to other structural clauses that do the same. The Eleventh Amendment is such a clause. This comparison is justified because the Eleventh Amendment shares the same four characteristics discussed above. First, the Eleventh Amendment allocates power between two competing sovereigns. Second, it is justified, in part, because of its historical pedigree. Third, it limits the power of both the legislative and judicial branches. And fourth, the restraint it creates is itself fundamentally limited.

a. The Eleventh Amendment Allocates Power Between Two Sovereign Entities

Much like it did for church and state, the federal Constitution "split the atom of sovereignty" between the states and the federal government.[97] State and federal governments, like church and state, are coequal sovereigns: the states do not exist at the sufferance of the federal government, and neither does the federal government exist at the sufferance of the states.[98] Rather, the states had preexisting powers, and the people chose to delegate a small set of these powers to the federal government.[99] The Eleventh Amendment is one way of restraining that federal government from exercising certain powers over the states. Namely, federal courts lack the power to hear cases in which states are

[97] U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[98] See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816) ("The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States' . . . . [I]t is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States.").

[99] Id.; Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 491 (1954).

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defendants.[100] By limiting the jurisdiction of federal courts, the amendment affirms a division of power.[101] It demonstrates that the states, including state courts, were left the "responsibility for dealing, and . . . authority to deal, with the whole gamut of problems cast up out of the flux of everyday life."[102]

This purpose of the Eleventh Amendment, to protect a sphere of state sovereignty from being invaded by federal courts, is best illustrated in two lines of cases: states' statutory waiver of their immunity and civil rights actions against state officers. First, states can waive their immunity to suit in a specific area via statute.[103] To understand these cases, it is first necessary to distinguish between the Eleventh Amendment and state sovereign immunity. The Eleventh Amendment, as discussed above, prevents a state from being sued in federal court. State sovereign immunity is a related theory, but it holds that a state cannot be sued in state court.[104] If a state purports to waive its immunity by statute, but is ambiguous as to whether it means in state or federal courts, the court has to make a decision. Courts have done so adhering to underlying principles of federalism. Specifically, "[t]he Court has been most reluctant to find a waiver of federal court immunity in areas impinging on important state functions."[105]

Compare *Great Northern Life Insurance Co. v. Read*[106] and *Petty v. Tennessee-Missouri Bridge Commission*.[107] In each of these cases, the Supreme Court had to decide whether the state's waiver of its immunity

[100] See Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1153 (1988) (noting that the Eleventh Amendment "limits federal jurisdiction in suits against unconsenting states"); see also F. Ryan Keith, Note, Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity, 56 Wash. & Lee L. Rev. 1037, 1073 (1999) (noting that "issues of federalism are especially important to discussions of the jurisdiction of federal courts").

[101] Fallon, supra note 100, at 1153; see also Note, Express Waiver of Eleventh Amendment Immunity, 17 Ga. L. Rev. 513, 521 (1983) ("[C]ourts treat the eleventh amendment as a tool of federalism.").

[102] Hart, supra note 99, at 491.

[103] Stewart A. Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139, 167 (1977).

[104] *Sovereign Immunity*, Black's Law Dictionary (9th ed. 2009).

[105] Baker, supra note 103, at 168.

[106] 322 U.S. 47 (1944).

[107] 359 U.S. 275 (1959). This example is drawn from Baker, supra note 103, at 167–69.

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was limited to its own courts or extended to the federal courts.[108] *Great Northern* concerned a state's taxing powers.[109] Oklahoma had established a special procedure for obtaining rapid adjudication of tax disputes. The empowering statute declared broadly that "all such suits shall be brought into the court having jurisdiction thereof."[110] The Supreme Court, however, refused to find that this statute waived Oklahoma's sovereign immunity in federal courts, finding instead that it was limited to its own state courts.[111] Tax collection, it stated, is something central to state sovereignty and cannot be easily waived away.[112] The Court reasoned that "when we are dealing with the sovereign exemption from judicial interference in the *vital* field of financial administration a clear declaration of the state's intentions to submit its fiscal problems to other courts than those of its own creation must be found."[113]

In contrast, *Petty* concerned the creation of a state agency to run a ferry line.[114] Its empowering statute allowed it "to contract, to sue and be sued in its own name."[115] While this statute is just as ambiguous as the one in *Great Northern*, it was found sufficient to waive the state's sovereign immunity.[116] A convincing reason for this different treatment is that the operation of a ferry line "is hardly at the center of state sovereignty."[117]

Second, the degree of federal court intrusion into a state's sovereignty is considered in civil rights cases in which state officers are defendants—individuals can bring claims for injunctive relief against state officers for violation of *federal* law but not *state* law. In *Ex parte Young*, the Supreme Court held that claims for prospective injunctive relief can be brought against individual state officers in their official

[108] *Great Northern*, 322 U.S. at 49; *Petty*, 359 U.S. at 276.

[109] 322 U.S. at 48.

[110] Id. at 48 n.1.

[111] Id. at 55.

[112] Id. at 54.

[113] Id. (emphasis added).

[114] 359 U.S. at 277.

[115] Id.

[116] Id. at 280–82.

[117] Baker, supra note 103, at 168.

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capacity.[118] This holding relied on a fiction—that the officer is not the state, but simply a person acting without authority.[119] But there are limits to this idea. *Pennhurst State School & Hospital v. Halderman*, a child of that doctrine, held that plaintiffs cannot bring claims for injunctive relief against state officials for violations of state (and not federal) law.[120] The Court explicitly gave up the fiction, and explained that the real purpose behind the *Young* doctrine is the supremacy of federal interests.[121] In *Young*, that interest was protecting a federal constitutional violation. But in *Pennhurst*, there was no federal interest. The case concerned an officer's violation of *state* law, not *federal* law.[122] Because there was no federal interest that required vindication, the Court held that it would violate "the principles of federalism that underlie the Eleventh Amendment" to issue an injunction against state officials based on state law.[123] In sum, the Eleventh Amendment furthers federalism and protects vital state interests by prohibiting, barring waiver, federal courts from hearing cases in which states are defendants or cases in which state officers are sued for violations of state law.

b. The Eleventh Amendment Is Rooted in History

The Eleventh Amendment, like the Structural Establishment Clause, is simply a codification of a practice rooted in history. The Amendment is generally understood to be a codification of the pre-constitutional principle of state sovereign immunity.[124] State sovereign immunity ("the king can do no wrong"), in turn, has its roots in thirteenth-century

[118] 209 U.S. 123, 155–56 (1908).

[119] Nathan C. Thomas, Note, The Withering Doctrine of *Ex parte Young*, 83 Cornell L. Rev. 1068, 1078–79 (1998).

[120] 465 U.S. 89, 106 (1984).

[121] Id. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

[122] Id. at 106.

[123] Id.

[124] See, e.g., Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 291–92 (1973) (Marshall, J., concurring in the result) ("The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding.").

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England[125] and was carried with the colonists to the New World.[126] There, the colonists incorporated the concept into their colonial governments.[127]

This concept was not displaced by the framing of the federal Constitution.[128] James Madison, a driving force behind the Constitution, assured antifederalists that "article III did not alter the traditional principle that '[i]t is not in the power of individuals to call any state into court.'"[129] This argument was again voiced by Alexander Hamilton in Federalist No. 81: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . ."[130] A specific amendment protecting immunity was not seen as necessary until the Supreme Court held that Article III *did* grant it the power to hear a case with a state as a defendant.[131] This decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted."[132] *Hans v. Louisiana*,[133] the first case decided after the passage of the Eleventh Amendment, makes perfectly clear that the "purpose of the eleventh amendment was to reestablish a general regime of state immunity from suit."[134]

[125] Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 2–4 (1963).

[126] Fallon, supra note 100, at 1188.

[127] Id.

[128] Id. at 1189.

[129] Id. at 1190 (quoting 3 Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 533 (J. Elliot ed., 2d ed. 1836) (speech of James Madison to the Virginia ratifying convention)).

[130] Federalist No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

[131] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 480 (1793) (holding that Article III allowed a citizen of South Carolina to sue Georgia).

[132] Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934); see also Fallon, supra note 100, at 1191 ("Within six months [of *Chisholm*] Congress had passed, and within two years the states had ratified, the eleventh amendment . . . .").

[133] 134 U.S. 1, 11 (1890) (holding that a citizen of a state cannot sue that state, even though the Eleventh Amendment only refers to citizens of other states).

[134] Fallon, supra note 100, at 1193.

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c. The Eleventh Amendment Limits Both the Judiciary and the Legislature

The Eleventh Amendment, despite being "oddly framed,"[135] limits both federal courts from hearing certain cases and Congress from abrogating the states' immunity. The explicit purpose of the Amendment is to prevent a federal court from hearing a case that would otherwise be within the scope of its Article III powers.[136] "The history of the adoption and development of the Amendment . . . confirms that it is an independent limitation on the exercises of Art. III power . . . ."[137] Further, the Court has read the "spirit" of the Amendment to be more powerful than the text, and has found several constraints that are not textually apparent.[138] First, the Amendment applies only to suits in law or equity, but the Supreme Court has also rejected cases arising in admiralty.[139] Second, federal courts cannot hear cases brought against states by foreign nations.[140] Third, while the Amendment speaks only of cases between states and citizens of another state, the Court has found the Amendment to also prevent jurisdiction when a state is sued by one of its own citizens.[141] Fourth, the Amendment is not limited to claims arising out of diversity jurisdiction—it "is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts."[142]

Although entirely silent about the legislative branch, the Eleventh Amendment also limits Congress's ability to abrogate state sovereign immunity by way of federal statutes passed pursuant to its Article I powers.[143] "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment

[135] Id.

[136] *Pennhurst*, 465 U.S. at 119–20.

[137] Id. at 120.

[138] Baker, supra note 103, at 150; Fallon, supra note 100, at 1193.

[139] Ex parte New York, No. 1, 256 U.S. 490, 497 (1921); Baker, supra note 103, at 150.

[140] Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934); Baker, supra note 103, at 152.

[141] *Hans*, 134 U.S. at 15.

[142] *Pennhurst*, 465 U.S. at 120.

[143] Seminole Tribe v. Florida, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitation imposed upon federal jurisdiction.").

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prevents congressional authorization of suits by private parties against unconsenting States."[144] *Seminole Tribe v. Florida*[145] concerned the Indian Gaming Regulatory Act,[146] which was "designed to restore to the states a role in regulating gaming operated by Indian tribes."[147] The Act granted U.S. district courts jurisdiction over causes of action "initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact."[148] The titular Seminole tribe attempted to bring a cause of action against the state under this statute.[149] The Supreme Court held that Congress lacked the power to abrogate state sovereign immunity when acting pursuant to Article I; thus, the case against the state could not move forward.[150] Chief Justice Rehnquist wrote that the Eleventh Amendment is not "so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."[151] Rather, it is a structural restraint against the judiciary that cannot be skirted by the legislature's attempted grant at jurisdiction.[152]

d. The Restraint Is Fundamentally Limited

Finally, the Eleventh Amendment is fundamentally limited. A functioning federal system sometimes requires that state sovereignty give way to federal or national interests. For example, state officials must adhere to federal law and cannot hide behind sovereign immunity

[144] Id. at 72.

[145] Id. For a more complete discussion of *Seminole Tribe* and state sovereign immunity, see Daniel J. Meltzer, The *Seminole* Decision and State Sovereign Immunity, 1996 Sup. Ct. Rev. 1.

[146] 25 U.S.C. §§ 2701–2721 (2012) (portion invalidated in 1996).

[147] Meltzer, supra note 145, at 3.

[148] 25 U.S.C. § 2710(d)(7)(A)(i).

[149] *Seminole Tribe*, 517 U.S. at 51–52.

[150] Id. at 72–73.

[151] Id. at 72.

[152] Id. at 72–73.

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to cloak their actions.[153] Furthermore, the federal government can sue the states directly.[154] And lastly, states can sue each other.[155]

3. Waiver of Eleventh Amendment Immunity

Notwithstanding the wholly restrictive language of the Amendment ("shall not be construed to extend to any suit in law or equity"[156]), Eleventh Amendment immunity can be waived.[157] This waiver does nothing more than prevent the state defendant from relying on the Eleventh Amendment as a defense.[158] By waiving its immunity, the state is not granting the jurisdiction to an otherwise jurisdiction-less court. Rather, it is more like an act of grace or goodwill toward its citizens. For example, a state's waiver of immunity does not, on its own, allow any plaintiff to bring a claim against the state in federal court. That plaintiff must still meet the subject matter jurisdiction requirements of federal court.[159] It is for the court to decide whether it has the power to hear the case, independent of any urging of the parties.[160]

Eleventh Amendment jurisprudence also provides a framework for *how* and *when* states can waive their immunities. States can waive their immunity in two ways: by statute and by litigation behavior.[161] First, "[a] state may waive its immunity from federal suit by statute, but this doctrine has been given a narrow scope."[162] In this context, courts divorce state sovereign immunity from the Eleventh Amendment—

[153] See supra notes 118–23 and accompanying text.

[154] See, e.g., United States v. Texas, 143 U.S. 621, 646 (1892); see also Baker, supra note 103, at 160.

[155] See, e.g., South Dakota v. North Carolina, 192 U.S. 286, 321 (1904); see also Baker, supra note 103, at 159.

[156] U.S. Const. amend. XI.

[157] A waiver of a state's Eleventh Amendment immunity allows the state to be sued in federal court. See, e.g., Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184, 186 (1964) (allowing party to sue state with state's consent despite Eleventh Amendment). A waiver of a state's sovereign immunity allows it to be sued in state court. See, e.g., *Great Northern*, 322 U.S. at 54 (holding that statutory waiver only extended to state courts).

[158] Keith, supra note 100, at 1046.

[159] Id. at 1047.

[160] Id. at 1047–48.

[161] Baker, supra note 103, at 166–69.

[162] Id. at 167.

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consent to suit in state courts (waiver of sovereign immunity) is not always read to allow for suits in federal courts (waiver of Eleventh Amendment immunity).[163] As was noted above, questions of waiver often turn on how deeply the subject touches on a state's sovereignty.[164] Specifically, "when primary aspects of state sovereignty are implicated, the Court demands a very clear waiver of eleventh amendment immunity."[165]

Second, states can waive their immunity by litigation behavior. A state can raise the Eleventh Amendment at any point, whether before trial, after trial, or on appeal.[166] However, this rule only applies if the state is in federal court unwillingly. If, on the other hand, it is the state that gets the federal courts involved (for example, through removal), then its Eleventh Amendment immunity should be considered waived.[167]

4. Waiver of the Structural Establishment Clause

This concept of waiver should be transplanted into ministerial exception jurisprudence. As discussed above, the ministerial exception is partially rooted in the Structural Establishment Clause. And the Structural Establishment Clause bears a strong resemblance to the Eleventh Amendment: both (1) are based on a fundamental and natural division of power; (2) are rooted in history; (3) limit the power of the judiciary and the legislature; and (4) are bounded by fundamental limitations. Under this conception, churches are still sovereign—they are just more like Texas than Mexico. If this is the case, then waiver of an aspect of church sovereignty should be analyzed as if it were a waiver of Eleventh Amendment immunity.

[163] See supra notes 106–17 and accompanying text.

[164] See supra notes 106–17 and accompanying text.

[165] Baker, supra note 103, at 169.

[166] Baker, supra note 103, at 166 (citing Edelman v. Jordan, 415 U.S. 651, 677–78 (1974); and Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 466–67 (1945)).

[167] Lapides v. Bd. of Regents of the Univ. Sys., 535 U.S. 613, 624 (2002); see also Wisc. Dep't of Corrections v. Schacht, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (treating state's consent to removal as waiver of sovereign immunity from suit in federal court); Keith, supra note 100, at 1070–71 (describing Justice Kennedy's concurrence).

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Recall the two main objections to the waivability of the ministerial exception to employment discrimination legislation[168]: the language of the *Hosanna-Tabor* court and its underlying policy foundation in the freedom of the church over religious questions.[169] Eleventh Amendment jurisprudence supplies a framework to overcome both of these objections and allows religious organizations to waive the ministerial exception.

First, the Eleventh Amendment erects no less rigid a barrier than the language used by the *Hosanna-Tabor* court. However, this language poses no barrier to a state waiving its immunity. Yes, the Establishment Clause "prohibits government involvement"[170] and "bar[s] the government from interfering" in religious decisions.[171] But the Eleventh Amendment states that the judicial power "shall *not* be construed to extend to *any* suit in law or equity."[172] This absolute restraint notwithstanding, states can be sued in federal court if they consent.[173] But even more implausibly, again given the absolute language of the Amendment, the Court allows state *officers* who are sued in their *official* capacity to be sued in federal court.[174] Even the Court recognizes that this doctrine is a fiction used to skirt the constraints of the Eleventh Amendment.[175] If even the absolute language of an amendment can be manipulated, then the dicta used by the *Hosanna-Tabor* Court surely does not create a solid foundation for the nonwaivability of the exception.

Perhaps the Eleventh Amendment can be distinguished from the Structural Establishment Clause by the fact that it has historically included the notion of waiver. Americans did not import the idea that the king could not be sued, but rather that the king could not be sued *without*

[168] Despite its foundation in the freedom of the church, the *Hosanna-Tabor* Court limited its holding to employment discrimination suits brought on behalf of a minister and challenging her church's decision to fire her. *Hosanna-Tabor*, 565 U.S. at 196. The footnote four affirmative defense, then, can only be raised in employment discrimination cases.

[169] See supra notes 32–37 and accompanying text.

[170] *Hosanna-Tabor*, 565 U.S. at 189.

[171] Id. at 181.

[172] U.S. Const. amend. XI (emphasis added).

[173] See supra notes 157–67 and accompanying text.

[174] *Young*, 209 U.S. at 159–60.

[175] See supra note 120 and accompanying text.

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his consent.[176] The Structural Establishment Clause, on the other hand, seems to categorically preclude civil adjudication in an entire sphere of activity.[177] This argument, however, forgets history: there was a time in which churches came to the courts to resolve internal disputes. The Supreme Court first recognized an autonomous space for churches in 1871.[178] For the next seventy years, the Court's Establishment Clause jurisprudence focused on the autonomous space within which churches govern.[179] But this separate sphere was not impermeable and, in fact, lower courts entered into the church's sphere to adjudicate cases that turned on religious doctrine or practice.[180] This era saw lower courts award church property to a minority faction because the majority had departed from the original faith;[181] examine church doctrine;[182] and determine that poultry was kosher.[183] These cases suggest an Establishment Clause parallel to the "without its consent" clause of state sovereign immunity: although a church is supreme within its own autonomous sphere, it can consent, by litigation behavior, to a court's jurisdiction. In sum, neither the text of *Hosanna-Tabor* nor the potential absence of a historical notion of consent precludes a church from waiving the ministerial exception.

If the ministerial exception is not waivable, it must be for the second reason: its underlying policy goals. The policy goal of the ministerial exception is to protect church sovereignty over religious questions by denying courts the power to decide religious questions.[184] Its nonwaivability, then, depends on the assumption that every employment discrimination suit raises a religious question that would necessarily have to be answered by the court. If that were the case, the ministerial exception would be a necessary prophylactic to courts unknowingly, or accidentally, deciding religious questions. But not all employment

[176] Jaffe, supra note 125, at 1.

[177] See supra notes 78–89 and accompanying text.

[178] Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871); Helfand, supra note 14, at 1906.

[179] Helfand, supra note 14, at 1906–07.

[180] See id. at 1907 n.76 (collecting cases).

[181] Smith v. Pedigo, 33 N.E. 777, 786 (Ind. 1893).

[182] Montgomery v. Snyder, 320 S.W.2d 283, 291 (Mo. Ct. App. 1958).

[183] Cohen v. Eisenberg, 19 N.Y.S.2d 678, 681 (N.Y. Sup. Ct. 1940).

[184] See supra notes 45–62 and accompanying text.

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discrimination suits involve religious disputes or religious questions that cannot be tested objectively.[185] And if there is no religious question to be answered by the court, there is no policy being furthered. The possibility of waiver does no more than allow for a fact-specific, case-by-case methodology to determine whether there is a live religious question,[186] much like the one used in Eleventh Amendment jurisprudence to determine whether state sovereign interests would be infringed upon.

Courts analyze statutory waivers of the Eleventh Amendment according to its underlying policy interest: federalism.[187] Ambiguous statutes that purport to waive activities that are central to a state's sovereignty apply only to state court; statutes that waive activities that are not so central can apply to federal court.[188] Transplanting this framework into Structural Establishment Clause jurisprudence would allow a church to waive its freedom from court interference when there is no threat to its sovereignty, that is, when there is no live religious question that must be answered by the court. Just as a state can waive its immunity in federal court when the underlying value of federalism is not served, a church should be able to waive its immunity in court when the underlying value of church sovereignty over religious questions is not served.

Proper analysis of this question demands a brief overview of employment discrimination claims.[189] The plaintiff first has to establish

[185] See Lund, supra note 41, at 53 ("There will be little inquiry problem if the church claims it fired the minister for being an alcoholic, or for being chronically late, or for having been convicted of a felony."); Corbin, supra note 22, at 2013 ("But some suits do not involve religious disputes at all, and in others, the religious reason can be objectively tested.").

[186] Granting courts the freedom to determine whether there is a live religious question in the case is not a novel concept. For cases that follow this methodology, see Lund, supra note 41, at 54 nn.226–27 (collecting cases). For academic discussion on this concept, see Corbin, supra note 22, at 2013–22. But see Berg et al., supra note 67, at 177 (arguing that the ministerial exception "bars government interference in the selection of those performing religious functions, even when that interference in the selection of those performing important religious functions, even when that interference is for ostensibly 'neutral' or 'secular' reasons that do not involve the government making explicit theological determinations"); Lund, supra note 41, at 54–57 (cataloguing issues with case-by-case approach).

[187] See supra notes 97–105 and accompanying text.

[188] See supra notes 106–17 and accompanying text.

[189] For a more in-depth discussion, see Corbin, supra note 22, at 2010–12.

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discrimination based on a forbidden trait.[190] She can do this by direct or circumstantial evidence.[191] If there is convincing direct evidence of discrimination, the plaintiff prevails. If she lacks direct evidence, her circumstantial evidence is evaluated according to the *McDonnell Douglas Corp. v. Green* three-stage test.[192] First, "the plaintiff must establish . . . that (1) she belongs to a protected class; (2) she was qualified for the position at issue; (3) she was rejected for the position; and (4) the position remained open or was filled by someone else."[193] Second, the defendant must respond with a "legitimate nondiscriminatory reason for the employment decision."[194] And "[f]inally, the plaintiff must rebut the employer's stated reason with circumstantial evidence demonstrating that the defendant relied on an illegitimate reason for its decision."[195] This circumstantial evidence can include evidence that the defendant's purported reason was false; "that stereotypical beliefs influenced the decision"; that other employees were treated similarly; and that this plaintiff is "more qualified than the successful candidate."[196]

Religious questions can enter the courtroom by way of step two: the defendant-church's purported legitimate reason for the firing. But, again, not all employment discrimination suits involve religious disputes or religious questions that cannot be tested objectively.[197] Consider *DeMarco v. Holy Cross High School*.[198] DeMarco was a math teacher at the Catholic Holy Cross High School.[199] He was fired and then brought an age discrimination claim under the Age Discrimination in Employment Act.[200] The court held that the application of the

[190] See, e.g., 42 U.S.C. § 2000e-2(a) (2012) (barring discrimination based on race or sex).

[191] Corbin, supra note 22, at 2010.

[192] 411 U.S. 792, 802, 804 (1973); Corbin, supra note 22, at 2010.

[193] Corbin, supra note 22, at 2010–11; see *McDonnell Douglas*, 411 U.S. at 802.

[194] Corbin, supra note 22, at 2011.

[195] Id.

[196] Id.

[197] For a more exhaustive analysis of the case-by-case methodology, see Corbin, supra note 22, at 2013–22.

[198] 4 F.3d 166 (2d Cir. 1993).

[199] Id. at 168.

[200] Id.

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McDonnell Douglas test would not violate the Establishment Clause.[201] The court explained that if a religious entity put forward a religious reason for firing the plaintiff, the jury *must not* inquire into its plausibility; rather, it must presume that the religious motive is reasonably or validly held.[202] But this does not mean that the jury cannot inquire into whether this religious motive was the true purpose behind the termination or whether it is a pretext.[203] The question, in this case, is not whether this religious belief is held, but whether this religious belief led to the termination.[204] If the church can put on evidence convincing the jury that this belief was not a pretext, then it will prevail.[205] But if the religious motivation is found to be a pretextual motivation for the termination, then the plaintiff will prevail.[206] At no point is the court inquiring into the religious beliefs of the organization. Rather, the court is simply doing what it does in all other contexts: resolving a question of fact.

Courts should not balk at this inquiry. The application of the ministerial exception itself requires a similar analysis. First, the court must decide whether the organization is a religious organization.[207] Second, the court must decide whether the plaintiff is a minister of the organization.[208] This can be determined based on whether the organization held the plaintiff out as a minister, whether the plaintiff held herself out as a minister, the plaintiff's title, and the plaintiff's job description.[209] This inquiry requires courts to peer into religious organizations and discern the organizational structure of the entity.[210]

[201] Id. at 170.

[202] Id. at 171.

[203] Id.

[204] Id.

[205] Id.

[206] Id.

[207] *Hosanna-Tabor*, 565 U.S. at 190; see also Corbin, supra note 22, at 2026–27 (assuming the organization's religious nature in discussing whether a given employee is a minister).

[208] *Hosanna-Tabor*, 565 U.S. at 190; see also Corbin, supra note 22, at 2026 ("In determining whether a plaintiff counts as a 'minister' who triggers the ministerial exemption, courts must decide whether the plaintiff plays an important religious role. In so doing, courts are deciding directly questions of religious doctrine in a way they never do when deciding whether discrimination occurred.").

[209] *Hosanna-Tabor*, 565 U.S. at 191–92.

[210] Corbin, supra note 22, at 2027.

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The court's consideration of the religious motivation as pretextual in employment discrimination cases is no less intrusive than is deciding whether someone is a minister. In fact, it may even be more intrusive.[211] Suppose a church argues that plaintiff is a minister, even though the plaintiff had no religious duties, was not held out as a minister, and was not titled as a minister. The Court there would be forced to analyze the *truth* of the church's claim.[212] In weighing religious motivations for firing, on the other hand, the court takes the truth of the assertion at face value.

This case-by-case methodology should easily survive *Hosanna-Tabor*. Religious organizations now have a choice. If they face a suit for employment discrimination by one of their ministers, they can exercise the ministerial exception. This completely avoids the court having to even inquire into the pretext of the firing.[213] But if the church chooses to waive the exception, for whatever reason, the church loses this advantage. The court now enters into the case-by-case framework. If the "relationship between employee and employer is so pervasively religious that it is impossible"[214] to engage in the discrimination inquiry, then the case is dismissed for lack of jurisdiction under the Establishment Clause. Further, if the question of termination necessarily turns on answering a religious question, the case should be dismissed. But if the church does not assert a religious motivation for the termination, or if the religious motivation is susceptible to "entirely neutral methods of proof," then the claim can proceed.[215] This framework allows for the Structural Establishment Clause to trigger only when its underlying policy motivations are touched upon: a religious question entering the courtroom.

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[211] See id. at 2028 ("In contrast, application of Title VII never requires that kind of direct grappling with religious doctrine or beliefs. In a Title VII case, the court does not decide what is important to a religion. Instead, it decides whether a legitimate religious reason or an illegitimate secular reason (discrimination) motivated a decision.").

[212] A similar example can be found in Corbin, supra note 22, at 2027–28.

[213] *Hosanna-Tabor*, 565 U.S. at 194–95 (noting that the point of the ministerial exception is "not to safeguard a church's decision to fire a minister only when it is made for a religious reason" and that "[t]he exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone").

[214] *DeMarco*, 4 F.3d at 172.

[215] Minker v. Balt. Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990); see also Lund, supra note 41, at 54 nn.226–27 (collecting cases).

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Operationally, waiver of the ministerial exception should mimic waiver of the Eleventh Amendment. Rather than by statute, waiver of the ministerial exception would be executed via contract. Because church governance is a primary aspect of church sovereignty, the waiver must meet the standards set by the Court when considering aspects central to state sovereignty, such as taxation. To that end, the following requirements should be met. Only deliberate waivers are enforceable; "[c]ourts will not imply waivers of constitutional rights."[216] Thus, the waiver must be "intentional and intelligent, knowing, express, and unambiguous."[217] Finally, there must be "a strong presumption against waiver generally."[218] In practice, then, a waiver of the ministerial exception should only apply to the type of discrimination claim that is waived. If the contract waives the ministerial exception for age discrimination claims, then it should not be read to waive claims regarding sexual orientation. Second, it should only apply to the parties to the contract. A waiver vis-à-vis Minister A does not apply to Minister B. Finally, like in Eleventh Amendment jurisprudence,[219] the waiver should not be read to be a grant of jurisdiction to the court. The court continues to lack jurisdiction over religious questions. The waiver merely removes the affirmative defense of the ministerial exception.

Finally, churches should be able to waive the ministerial exception by litigation behavior. If the church is willingly in court (for example, by not exercising its affirmative defense of the ministerial exception), then the court should find that the exception has been waived. If an affirmative defense is not used at the outset of litigation, it is considered waived.[220] The failure to raise an affirmative defense should be considered an intentional and fully informed act. Perhaps the church has built its reputation as a progressive haven; getting a discrimination case thrown out on a technicality is sure to do more harm than raising a

[216] Douglas Laycock & Susan E. Waelbroeck, Academic Freedom and the Free Exercise of Religion, 66 Tex. L. Rev. 1455, 1471–73 (1988).

[217] Id. at 1472 nn.73–77 (collecting cases).

[218] Christopher C. Lund, Free Exercise Reconceived: The Logic and Limits of *Hosanna-Tabor*, 108 Nw. U. L. Rev. 1183, 1227 (2014) (citing Roell v. Withrow, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting) ("[C]ourts indulge every reasonable presumption against waiver." (internal quotation marks omitted))).

[219] See supra note 158 and accompanying text.

[220] See supra note 29 and accompanying text.

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theological justification for the firing. And again, this rule only applies to this one affirmative defense. If the church decided to defend itself by raising a religious question that would have to be decided by the court, the case would still be dismissed.

To conclude this Section, relying on church sovereignty to prevent waiver of the ministerial exception is either mistaken or incomplete. An analysis of what church sovereignty actually entails reveals a striking similarity to Eleventh Amendment immunity. Because the two theories are so similar, it is at least plausible that the waiver allowed for by state sovereign immunity should be imported into Structural Establishment Clause jurisprudence.

B. The Establishment Clause as Right

The ministerial exception need not be considered part of a structural restraint rooted in medieval history for it to prevent a court from adjudicating internal church disputes. The Establishment Clause is also understood as a rights-protecting clause, one that guarantees a religious organization's liberty of conscience.[221] Understood this way, the Establishment Clause would "prohibit[] government involvement in . . . ecclesiastical decisions"[222] because it leads to the state coercively substituting its own judgment in place of that of the religious organization. Waiver, however, is still a viable theory. Like its structural cousin, waiver of the ministerial exception as an Establishment Clause right would be viable as long as it did not require the court to substitute its own judgment for that of the church in fundamentally religious questions.

1. Overview of the Right

The Constitution "declares as a basic postulate of the relation between the citizen and his government that 'the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of

[221] See, e.g., Engel v. Vitale, 370 U.S. 421, 429 (1962) ("Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs.").

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

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governmental hand.'"[223] To that end, the Establishment Clause protects the liberty of conscience by "enjoin[ing] those involvements of religious with secular institutions which . . . serve the essentially religious activities of religious institutions."[224] The church, under this conception, has a *right* to autonomy over internal, religious decisions. The Framers designed the Establishment Clause to be a bulwark against government interference with that right, specifically against "those official involvements of religion which would tend to foster or discourage religious worship or belief."[225]

The conception of church autonomy as a right of conscience is most vivid in the early church property cases.[226] *Watson v. Jones* concerned a struggle between factions of a Presbyterian church vying for control of the church building.[227] In short, a minority faction believed that the majority deviated from dogma and thus were no longer the "true church," and, since the deed of the church property was conditioned on adherence to dogma, the minority was the rightful possessor of the deed.[228] The Court refused to get involved, stating that:

> *[T]he right* to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[229]

[223] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring) (quoting 1 Annals of Cong. 730 (1789) (Joseph Gales ed., 1834) (statement of Rep. Carroll)).

[224] Id.

[225] Id. at 234.

[226] Helfand, supra note 14, at 1906 ("In the early church property disputes, the Court's decisions raised establishment concerns, but did so in the context of the affirmative institutional rights of religious organizations.").

[227] 80 U.S. (13 Wall.) 679, 681 (1871). Discussion of this case can also be found in Helfand, supra note 14, at 1906–07.

[228] *Watson*, 80 U.S. (13 Wall.) at 681, 688, 692.

[229] Id. at 728–29 (emphasis added).

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This pseudo-associational right was constitutionalized in *Kedroff v. Saint Nicholas Cathedral*.[230] That case concerned a New York statute that transferred control of Russian Orthodox churches in the United States from the central governing body in the Soviet Union to the diocese of North America. In striking down this statute, the Court reads *Watson* as "radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation . . . [in] matters of church government as well as those of faith and doctrine."[231]

This rights-protecting facet of the Establishment Clause is also present in the Court's third-party harms line of cases. In *Estate of Thornton v. Caldor, Inc.*,[232] Chief Justice Burger writes that the Establishment Clause orders government to "guard against activity that impinges on religious freedom, and . . . take pains not to compel people to act in the name of any religion."[233] Justice Brennan expands this conception from "the people" to "organizations" in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[234] Specifically, "religious organizations have an interest in autonomy in ordering their internal affairs."[235] This interest calls for "solicitude" to the church[236]: a categorical exemption for religious organizations with respect to employment in nonprofit activities.[237] In sum, the Establishment Clause creates a bulwark against the government from invading the right of churches to govern their own affairs.

[230] 344 U.S. 94, 116 (1952). *Watson* was decided pre-*Erie* and thus under federal common law. Esbeck, supra note 41, at 47 n.184. There are at least two Justices (Alito and Kagan) who seem to understand the ministerial exception to be a variant of the freedom of association. *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984)) (alteration in original)).

[231] *Kedroff*, 344 U.S. at 116. This case was technically decided under the Free Exercise Clause, but Justice Brennan treated it as falling under the Establishment Clause in *McDaniel v. Paty*, 435 U.S. 618, 638 n.15 (1978) (Brennan, J., concurring in the judgment).

[232] 472 U.S. 703 (1985).

[233] Id. at 708.

[234] 483 U.S. 327, 340 (1987) (Brennan, J., concurring in the judgment).

[235] Id. at 341.

[236] Id. at 342; see also *Hosanna-Tabor*, 565 U.S. at 189 ("[T]he text of the First Amendment . . . gives special solicitude to the rights of religious organizations.").

[237] *Amos*, 483 U.S. at 345–46 (Brennan, J., concurring in the judgment).

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2. Waiver of the Right

As a first principle, constitutional rights can be waived.[238] The special solicitude extended to religious organizations is simply a categorical rule of decision-making—if a religious organization alleges that something is an internal affair, then that allegation deserves deference. It is not, however, an absolute bar to judicial decision-making in this arena. Consider the court's third-party harms line of cases.[239] This doctrine prevents the government from accommodating religious organizations or individuals when that accommodation entails shifting significant burdens to third parties who do not share those beliefs.[240] However, there is nothing in this line that suggests a religious party could choose *not* to make the third-party harms argument in the lower court but then raise that argument in the Supreme Court. The Court, likely, would hold that this argument had not been properly briefed and thus had been waived by the petitioner.

Waiver of an Establishment Clause right is not as simple as that, however, for these rights are governed by slightly more stringent rules. Specifically, the Court's entanglement doctrine could prevent even willing parties from coming to court if it requires that the court decide a religious question. The Court fears entanglement not in the traditional sense (for example, government monitoring of funding to religious

[238] Laycock & Waelbroeck, supra note 216, at 1471 n.72 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that warrantless search does not violate the Fourth Amendment if a person has consented to search)).

[239] See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (holding that proper application of the Religious Land Use and Institutionalized Persons Act "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); Texas Monthly v. Bullock, 489 U.S. 1, 5 (1989) (plurality opinion) (invalidating a permissive state sales-tax exemption for religious newspapers and magazines); *Estate of Thornton*, 472 U.S. at 708–11 (invalidating a state statute that granted employees an absolute right not to work on their chosen Sabbath, regardless of the costs on the employer); 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, 357–59 (2014) (providing overview of the third-party harms line of cases).

[240] Nelson Tebbe, Richard Schragger & Micah Schwartzman, Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation, Balkinization (Oct. 16, 2014), https://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html [https://perma.cc/A6FQ-PHQ8].

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schools),[241] but in the actual decision-making process of the court.[242] Consider *Amos*.[243] At issue in that case was the scope of Section 702 of Title VII, which allows religious organizations to discriminate on religious grounds in employment decisions.[244] The Court held that the extension of this exception to the secular nonprofit activities of religious organizations does not violate the Establishment Clause.[245] Justice Brennan, in his concurrence, exposes the entanglement concern. First, Justice Brennan characterizes religious organizations as having a right to "autonomy in ordering their internal affairs."[246] Second, if the Court were to limit Section 702 to only religious activities, a court would first have to decide whether an activity is religious or secular.[247] This, in turn, calls for case-by-case analysis, which results in "considerable ongoing government entanglement in religious affairs."[248] To be clear, this is not entanglement in the sense that it would call for the government to monitor a religious organization. Instead, it is entanglement in that the court would have to decide, over the objection of the organization, whether a specific activity is actually religious. This, in turn, is the state substituting its own judgment for that of the religious organization in violation of the organization's liberty of conscience. To solve this problem, Justice Brennan writes that courts should entirely remove themselves from this thicket by extending a categorical exemption to religious organizations who commit discrimination with respect to the

[241] See, e.g., Agostini v. Felton, 521 U.S. 203, 208–09, 234–35 (1997) (finding no entanglement concern in extension of indirect aid to parochial schools); Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 482, 489 (1986) (finding no entanglement concern in the extension of assistance from "a state vocational rehabilitation assistance program to a blind person studying at a Christian college" to become a minister); Aguilar v. Felton, 473 U.S. 402, 404, 412–13 (1985) (invalidating state statute that provided state aid to church-related elementary and secondary schools because it would require excessive government monitoring to ensure no funds were used for religious purposes), overruled by Agostini v. Felton, 521 U.S. 203 (1997); Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971) (holding similar statutes unconstitutional).

[242] See Corbin, supra note 22, at 2009–10.

[243] 483 U.S. at 327.

[244] Id. at 329–30.

[245] Id. at 330.

[246] Id. at 341 (Brennan, J., concurring in the judgment).

[247] Id. at 343.

[248] Id.

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organization's nonprofit activities.[249] The Court advanced an even stronger strain of this argument a decade earlier: even when parties agree to the court's jurisdiction, "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs."[250] Instead of wade into the internal affairs of a religious organization and risk deciding a religious issue (thereby imposing the will of the government in place of the will of the church), the Establishment Clause mandates a "deference to religious institutions on matters of self-government and adjudication."[251]

However, this strain of entanglement does not pose an insurmountable burden to waiving the ministerial exception. First, not every employment discrimination case will create an entanglement problem.[252] If, for example, the church has chosen to waive the ministerial exception and comes into court, but then presents a nonreligious, nondiscriminatory motivation for firing the plaintiff, then the court runs no risk of answering a religious question at all.[253] The court does not even need to credit a religious question as true, since there simply is not one present in the case.

Second, even where there are slight entanglement problems, courts have held that they can use neutral principles of law to adjudicate the case without violating the Establishment Clause.[254] This approach is "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[255] Migrating that rule to ministerial exception jurisprudence would allow a court to potentially retain jurisdiction if a defendant-church raises a religious motivation for the plaintiff's termination. Like in *DeMarco*, the court can take the church's religious motivation as doctrinally true, but

[249] Id. at 345.

[250] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); see also Helfand, supra note 14, at 1909–10 (providing an overview of *Milivojevich*).

[251] Helfand, supra note 14, at 1910.

[252] See Corbin, supra note 22, at 2013–22.

[253] Id. at 2013.

[254] Jones v. Wolf, 443 U.S. 595, 602–04 (1979) (holding that the court could use neutral principles of law to examine church documents as long as the court does not consider church doctrine); see also Corbin, supra note 22, at 1987 (providing an overview of *Jones*).

[255] *Jones*, 443 U.S. at 603.

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then still use neutral principles of employment discrimination law (namely, circumstantial evidence) to analyze whether or not that was the actual motivation for the termination.[256] In fact, this raises even less of an entanglement issue than the techniques used in *Jones v. Wolf*, where courts were examining religious documents.[257] Here, there is no examination of religious documentation at all. The court is simply taking the religious doctrine at face value. In sum, if the ministerial exception arises out of the Establishment Clause's rights-protecting umbrella, it can be waived in limited circumstances.

To conclude, whether the ministerial exception is understood to be part of a structural restraint against government intervention or a facet of the right of church autonomy, it should be able to be waived by knowing parties. By doing so, a church does not grant a court any jurisdiction it would not have otherwise; rather, it is simply removing an affirmative defense from the table. Courts still cannot decide religious questions, and if a religious question were to be raised at some point in the litigation, the court would no longer have the power to hear the claim.

III. THE FREE EXERCISE CLAUSE

Finally, the ministerial exception's Free Exercise root can be waived. As the *Hosanna-Tabor* Court explained, the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments."[258] "The Free Exercise Clause rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant."[259] But rights protected by this clause can be waived.[260] Even leading theorists of the ministerial exception concede that "under . . . a rights-based theory, a religious organization should be free to submit its relationships with clergy to the standards and jurisdiction of civil law."[261] This makes intuitive sense—if the exception is designed to protect church autonomy, then churches

[256] Corbin, supra note 22, at 2022.

[257] Id. at 2022 n.381.

[258] 565 U.S. at 188.

[259] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999).

[260] Esbeck, supra note 41, at 58 n.236.

[261] Lupu & Tuttle, Courts, supra note 22, at 145.

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should be able to use that same autonomy to submit their claims to the courts. Consider *Minker v. Baltimore Annual Conference of the United Methodist Church*.[262] There, the plaintiff-minister brought a breach of contract claim against the superintendent, alleging that the superintendent failed to live up to his promise of providing the plaintiff with a more suitable pastorship.[263] The D.C. Circuit held that this claim was improperly dismissed.[264] The contract, the court wrote, was a voluntary agreement between minister and church.[265] This is simply a judicial enforcement of a standard accepted by the church and relied upon by the minister.[266]

Of course, even a Free Exercise-based conception of the ministerial exception can protect a religious organization's authority over religious issues. To deal with the threat of these issues entering the courtroom, waiver of the Free Exercise portion of the ministerial exception must mirror waiver of the Establishment Clause portion of the exception: only in those cases wherein the plaintiff can "prove his case without resorting to impermissible avenues of discovery or remedies" can waiver be permitted.[267] Once a party to the suit is "forced to inquire into matters of ecclesiastical policy," the court should "grant summary judgment on the ground that . . . pursuing the matter further would create an excessive entanglement with religion."[268] Waiver does not demand that civil courts examine ecclesiastical policy; it merely allows a religious organization to enter court in the first place.

CONCLUSION

In conclusion, each of three doctrinal footings of the ministerial exception does not necessarily preclude its waiver. First, the understanding that the ministerial exception is a nonwaivable aspect of church sovereignty protected by the Structural Establishment Clause is undermined by the waivable nature of the closely related doctrine of

[262] 894 F.2d 1354 (D.C. Cir. 1990).

[263] Id. at 1358.

[264] Id. at 1361.

[265] Id. at 1359–60.

[266] Id. at 1359–61.

[267] Id. at 1360.

[268] Id.

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state sovereign immunity as preserved by the Eleventh Amendment. Further, Eleventh Amendment immunity provides a framework for how and when churches can waive the exception. Second, the understanding of the ministerial exception as a right protected by the Establishment Clause allows for waiver. Third, the ministerial exception's Free Exercise Clause component is easily waivable.

Waiver, under any of these theories, does no more than *permit* judicial inquiry. Once a religious issue enters the arena, the court can grant summary judgment to the religious organization to prevent any entanglement between church and state. As this Note illustrates, a viable concept of waiver of the ministerial exception can survive alongside a structural conception of the Establishment Clause or a rights conception of either of the Religion Clauses. Thus, if the ministerial exception is truly nonwaivable, then courts and commentators cannot rely on the conclusive label of "church sovereignty" as justification. Instead, they must conduct a deeper analysis of the true nature of the church's sovereignty in light of the fact that some sovereigns, such as states, can waive a structural restraint recognized by the Constitution.