2013

Limits on State Regulation of Religious Organizations: Where We Are and Where We Are Going

Lloyd Hitashi Mayer
Notre Dame Law School, lmayer@nd.edu

2013 Columbia Law School Charities Regulation and Oversight Project Policy Conference on "The Future of State Charities Regulation"

Emerging Issue: State Jurisdiction Over Religious Organizations

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INTRODUCTION

The breadth of activities and organizational forms among religious organizations rivals that of nonprofits generally, and religious organizations are vulnerable to the same types of problems that justify state regulation and oversight of nonprofits. Such problems include excessive compensation, improper benefits for board members and other insiders, misleading or fraudulent fundraising, employment discrimination, unsafe working conditions, consumer fraud, improper debt collection, and many others.[1] *Religious organizations are different, however, in that under federal and state law they enjoy unique protections from state regulation.*

This paper describes how such federal and state protections limit state regulation of religious organizations under current case law. It also explores the tension between the general ability of states to apply neutral and generally applicable laws to religiously motivated conduct and the special legal protections provided for some internal actions of religious organizations—particularly employment actions relating to ministers and certain internal disputes. It concludes by exploring how courts are likely to develop such limits in the future.

I. CURRENT LIMITS ON STATE REGULATION OF RELIGIOUS ORGANIZATIONS

Three related sets of limitations apply to interactions between governments and both religious organizations and religiously motivated activities. First, the federal Constitution usually permits the application of generally applicable, neutral laws to such organizations and activities as long as that application is done in a non-discriminatory manner. This permission is

[*] Associate Dean & Professor of Law, University of Notre Dame. I am very grateful to Mark Chopko, Richard Garnett, and William Marshall for helpful comments, to Joseph Ganahl for research assistance, and to the Columbia Law School Charities Law Project for the opportunity to prepare this paper.

[1] *See, e.g.*, Memorandum from Theresa Pattara & Sean Barnett to Senator Charles Grassley (Jan. 6, 2011), *available at* http://www.finance.senate.gov/newsroom/ranking/release/?id=5fa343ed-87eb-49b0-82b9-28a9502910f7 (collecting allegations of such misconduct by religious organizations).

tempered, however, by the fact that the federal government and some states have chosen to provide protection for religious organizations and individuals beyond that required by the federal Constitution through religious freedom statutes, state constitutional provisions, and the federal Religious Land Use and Institutionalized Persons Act. Second, the federal Constitution protects certain internal decisions by religious organizations from the reach of even generally applicable, neutral laws and may, by extension, prohibit other government involvement in such decisions. Third and finally, the federal Constitution and related case law limits the ability of private parties to challenge decisions by the government to exempt religious organizations from otherwise applicable laws or otherwise treat them favorably even if not required to do so by the federal Constitution, although such challenges are still possible under some circumstances. This Part explores these existing limitations as they impact state regulation of religious organizations.

A. Free Exercise & the Smith Decision

The most commonly cited source of protection from government regulation for religious organizations is the First Amendment of the U.S. Constitution, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] Under the Fourteenth Amendment, these limitations apply to the state governments as well as to the federal government.[3] In the few Free Exercise Clause cases it considered before the mid-twentieth century, the Supreme Court interpreted the latter part of this provision as only prohibiting the government from interfering with religious *belief*, but not from interfering with religiously motivated *actions*.[4] The Court did not clearly extend the protection of the Free Exercise Clause to religiously motivated actions until the 1960s,[5] although it suggested that such protection existed in 1940.[6] Even then the protection was less than it appeared. While on its face the Court imposed strict scrutiny—requiring any law that placed a substantial burden on religiously motivated actions to be narrowly tailored to further a compelling governmental interest—in practice the Court often watered down that protection while continuing to use strict scrutiny language.[7] This watering down was particularly evident with respect to Free Exercise Clause challenges to federal tax laws, including restrictions on tax-exempt religious organizations.[8]

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[2] U.S. CONST. amend. I.

[3] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (applying the Establishment Clause as against the states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause as against the states).

[4] Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived [by the First Amendment] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."); *see also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 125 (2002); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989).

[5] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[6] Cantwell, 310 U.S. at 303-04.

[7] *See* Alan Hurst, Hosanna-Tabor *and the Exaggerated Decline of Separationism* 14-15 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230022; Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1157–58 & n.103 (2009); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990).

[8] *See* Mayer, *supra* note 7, at 1158–59 (discussing United States v. Lee, 455 U.S. 252 (1982) (denying request for exemption from social security tax)); *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (involving tax exemption); Hernandez v. Comm'r, 490 U.S. 680 (1989) (involving the charitable contribution deduction).

More importantly, the extension of protection to religiously motivated actions was only temporary, as the Court set it aside in the 1990 decision *Employment Division v. Smith*.[9] In *Smith*, the Supreme Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[10] While the law at issue in *Smith* was a criminal law prohibiting the use of peyote, the Court did not explicitly limit its holding to illegal drug laws specifically or criminal laws more generally.[11] The case has therefore generally been interpreted as allowing the federal government and state governments to apply any valid and neutral laws of general applicability to religious organizations and individuals in the same manner as they apply those laws to non-religious organizations and individuals, even if such application prevents or substantially burdens religiously motivated actions.[12] For example, the California Supreme Court applied *Smith* to conclude that a state law mandating that employers provide health insurance coverage for contraception did not violate the Free Exercise Clause because the law was a neutral and generally applicable one.[13]

Smith does not, of course, protect either laws that are intentionally targeted at disfavored religiously motivated actions or selective enforcement of otherwise neutral and generally applicable laws against disfavored religious organizations or individuals. For example, only three years after the *Smith* decision, the Supreme Court in *Church of the Lukumi Babalu Aye v. City of Hialeah*[14] struck down three ordinances that it found a local government had enacted to suppress the central worship service element of a disfavored religion.[15] It concluded that these ordinances were neither neutral nor generally applicable, and so could only survive constitutional scrutiny if they were narrowly tailored to further one or more compelling government interests, which the Court found they were not.[16] Similarly, federal courts have concluded that a constitutional claim of selective or discriminatory prosecution in violation of the Fifth Amendment may be based on a demonstration of religious animus, a claim that is most often raised in the criminal prosecution context.[17] A religious organization could therefore successfully challenge the selective application of an otherwise neutral and generally applicable law if it can meet the relatively high evidentiary burden of proving that the selective application was based on discrimination against that organization's particular religious beliefs. For example,

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[9] 494 U.S. 872 (1990). For a more in-depth discussion of the Court's path to *Smith* and the ramifications of that decision, see the paper prepared by Mark E. Chopko (*Some Thoughts about Regulating Religious Charity*) for this collection.

[10] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[11] *See Smith*, 494 U.S. at 878-80.

[12] *See* City of Boerne v. Flores, 521 U.S. 507, 513-14 (1997) (discussing *Smith* in the context of case involving a zoning ordinance without any indication that *Smith* would not apply); Fairbanks v. Brackettville Bd. of Educ., 2000 WL 821401, at *2 (5th Cir. May 30, 2000) (concluding that the holding in *Smith* is not limited to criminal laws and gathering cases to this effect).

[13] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 82 (Cal. 2004); *see also* Catholic Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 522 (2006) (reaching the same conclusion with respect to a similar law).

[14] 508 U.S. 520 (1993).

[15] *See id.* at 534.

[16] *See id.* at 542 (not neutral), 545–46 (not generally applicable), 546–47 (not narrowly tailored and not furthering compelling governmental interests).

[17] *See, e.g.*, United States v. Jennings, 991 F.2d 725, 730 (11th Cir. 1993); United States v. O'Driscoll, 203 F. Supp. 2d 334, 342 (M.D. Pa. 2002).

a federal district court recently considered a claim by officials of a tax-exempt religious organization that the indictment against them relating to the alleged activities of their organization must be dismissed because of religiously based selective prosecution in violation of the Fifth Amendment, although the court ultimately rejected this claim because the officials failed to prove by clear and convincing evidence that the prosecution had both discriminatory effect and discriminatory purpose.[18]

The Court in *Smith* also acknowledged two exceptions to the rule it adopted in that case. The first exception was for "hybrid" claims that implicated one or more constitutional provisions other than the Free Exercise Clause.[19] However some, including then Justice Souter, have questioned the viability of this exception, arguing it is at most an acknowledgement that *Smith* did not weaken the protections provided by other constitutional provisions.[20]

The second exception is likely more significant. In the case of laws under which the government has a system of exemptions, the Court concluded that—at a minimum—the government may not refuse to extend an exemption in a "religious hardship" situation without a compelling reason.[21] This exception may have broad application because often laws include secular exemptions or grant government agencies authority to create either categorical or individualized waivers, exemptions, or variances to otherwise applicable rules.[22] For example, in a decision authored by now Justice Alito, the U.S. Court of Appeals for the Third Circuit held that the existence of a categorical medical exemption to a police department's no-beard policy required that the department's refusal to provide a religious exemption be subject to heightened scrutiny even post-*Smith*.[23] Similarly, a federal district court recently concluded that the numerous categorical and individualized exemptions to a law requiring pharmacists to dispense emergency contraceptives rendered the law not generally applicable and so not covered by *Smith*.[24] The extent of this exception, however, is not completely clear. For example, in the no-beard policy case the court also concluded that the exemption for undercover police officers, by itself, would not have rendered the policy subject to heightened scrutiny.[25] Similarly, the U.S. Court of Appeals for the Tenth Circuit concluded that the mere existence of some secular exemptions to a land use regulation was not enough to render the regulation not generally applicable absent evidence of subjective application of such exemptions or religious animus.[26]

There is also an additional complication in the form of post-*Smith* legislative developments. In 1993, the federal government adopted the Religious Freedom Restoration Act

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[18] United States v. Mubayyid, 476 F. Supp. 2d 46, 58–60 (D. Mass. 2007).
[19] Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).
[20] *See Lukumi*, 508 U.S. at 566–67 (Souter, J., concurring); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 630–32 (2003) (summarizing the criticisms of the hybrid claim exception).
[21] *Smith*, 494 U.S. at 884. *See generally* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178 (2005) (discussing the continuing vitality of *Sherbert* with regard to hardship exemptions from a generally applicable law in the aftermath of *Smith*).
[22] *See* Duncan, *supra* note 21, at 1190–98 (reaching this conclusion and discussing cases applying the exception).
[23] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365–66 (3d Cir. 1999).
[24] Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 978 (W.D. Wash. 2012).
[25] *Fraternal Order of Police*, 170 F.3d at 366.
[26] Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655 (10th Cir. 2006); *see also id.* at 651 (collecting cases reaching a similar conclusion); *see also* Mitchell County v. Zimmerman, 801 N.W.2d 1, 12-15 (Iowa 2012) (collecting cases discussing this issue).

(RFRA), seeking to restore the pre-*Smith* protections for religiously motivated actions.[27] While the Supreme Court subsequently held that the federal RFRA cannot apply as against state governments,[28] many states adopted similar legislation.[29] Furthermore, some state courts have concluded that their state constitutions continue to provide the level of protection for religious exercise that existed under the federal Constitution pre-*Smith*, and other state courts have found a level of state constitutional protection somewhere between the pre-*Smith* and post-*Smith* federal constitutional levels of protection.[30] The effect of state RFRAs and such state constitutional holdings is limited, however, by the fact that courts have generally looked to the pre-*Smith* case law to determine the reach of these laws and, as noted previously, that case law was less protective of such actions than might be thought.[31]

The federal government also adopted the Religious Land Use and Institutionalized Persons Act (RLUIPA) [32] in 2000, in response to the Supreme Court's conclusion that RFRA could only apply to the federal government.[33] With respect to state regulation of religious organizations, RLUIPA limits the ability of state and local governments to deny religiously related use of real property based on otherwise neutral and generally applicable zoning laws by re-imposing the pre-*Smith* strict scrutiny test on such decisions and also prohibiting discrimination against or exclusion of religious organizations by requiring that religious land uses be treated on "equal terms" with nonreligious land uses.[34] At least one commentator argues, however, that based on the court RLUIPA decisions to date the primary effect of the statute appears to have been to bring greater judicial scrutiny to decisions involving religious land use, as courts generally overturn such decisions only if that scrutiny reveals discriminatory or otherwise unfair government action.[35]

B. The Ministerial Exception and the Hosanna-Tabor *Decision*

Two important lines of cases that the Supreme Court did not fully address in *Smith* relate to limits on government entanglement with the internal affairs of religious organizations.[36] The Court briefly mentioned the first line of such cases, which involved decisions imposing such limits in the context of intra-church or intra-denominational disputes that involved significant ecclesiastical matters.[37] The other line of cases involved federal appellate court decisions (and

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[27] 42 U.S.C. §§ 2000bb–2000bb-4 (2006); *see also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 211 (2004) (listing other federal legislative responses to *Smith*).

[28] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[29] *See* Christopher C. Lund, *Religious Liberty After* Gonzales: *A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 & n.67 (2010) (listing the sixteen state RFRA statutes).

[30] *See* Laycock, *supra* note 27, at 211-12 (summarizing the various state legislative and judicial responses to *Smith*); Piero A. Tozzi, *Whither Free Exercise:* Employment Division v. Smith *and the Rebirth of State Constitutional Free Exercise Jurisprudence?*, 48 J. CATH. LEGAL STUD. 269, 276-83 (2009) (discussing the mixed—and to some extent muddled—interpretation by state courts of state constitutional provisions protecting free exercise of religion).

[31] *See supra* notes 7–8 and accompanying text.

[32] 42 U.S.C. §§ 2000cc to 2000cc-5.

[33] Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 FORDHAM URB. L.J. 1221, 1223 & n.13 (2012).

[34] 42 U.S.C. § 2000cc(b)(1).

[35] *See* Weinstein, *supra* note 33, at 1234, 1242.

[36] *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 184-87 (discussing these two lines of cases).

[37] Emp't Div. v. Smith, 494 U.S. 872, 877 (1990). *See generally* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 390–97 (1984) (discussing

similar state court decisions) imposing such limits in the context of employment disputes with ministers and other employees who perform religious functions by creating a so-called "ministerial exception" to various employment laws.[38] While not squarely addressed by the Supreme Court prior to 2012, the ministerial exception arguably has its origin in the first line of cases and particularly a case where the Supreme Court struck down as unconstitutional a state law that sought to resolve a dispute over who had the authority to choose the ruling prelate of the Russian Orthodox Church in America.[39] These lines of cases together arguably demonstrated that the First Amendment creates a zone of independence or autonomy for religious organizations within which governments cannot interfere, albeit a zone with unclear borders.[40]

After its 1990 decision in *Smith*, the Supreme Court did not take up a dispute squarely implicating either of these lines of cases until 2011, where for the first time it agreed to consider the viability of the "ministerial exception" decision.[41] In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[42] the Court unanimously concluded that the lower courts had correctly found that such an exception existed under the First Amendment.[43] More specifically, it decided that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[44] In the course of reaching this conclusion, the Court cited favorably to the other line of cases involving intra-church or intra-denominational disputes, further indicating that this line also remained viable.[45] The Court also distinguished this context from that of *Smith* on the following grounds:

> *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. . . . The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[46]

This argument highlights the Court's view that *Smith* does not reach "internal church decision[s] that affect[] the faith and mission of the church itself," effectively creating a zone of

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this line of cases); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 845–48 (2009) (same).

[38] *See generally* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 21-22 & nn. 92–97 (2011) (listing federal appellate and state court decisions recognizing the ministerial exception).

[39] *See* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 119 (1952) (concluding the New York law was unconstitutional because it "directly prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy").

[40] *See generally* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 (discussing how *Smith* should affect the choice between the three approaches the Supreme Court has taken in cases involving the internal governance of religious organizations); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 433–37 (1986) (examining the differing levels of church autonomy accorded in various contexts).

[41] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 131 S. Ct. 1783 (2011) (order granting petition for writ of certiorari).

[42] 132 S. Ct. 694 (2012).

[43] *See id.* at 706. *See generally* Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, CATO SUP. CT. REV. 2011–2012, at 307 (2012).

[44] *Hosanna-Tabor*, 132 S. Ct. at 702.

[45] *Id.* at 704–05.

[46] *Id.* at 707 (citation omitted).

activity outside of the reach of *Smith* and of government more generally.[47] *Hosanna-Tabor* did not clearly resolve, however, the exact parameters of this zone, either with respect to the ministerial exception specifically or more broadly with respect to the internal governance of churches and possibly religious organizations in general.

Turning first to the ministerial exception, the Court only partially answered one critical question and left relatively unclear a second critical question. The first question is who, exactly, qualifies as a "minister" for purposes of this exception. Addressing this issue in *Hosanna-Tabor*, the Court looked to "all the circumstances of [plaintiff's] employment."[48] More specifically, the Court considered whether the employing organization held her out as a minister, whether she had received religious training, whether she had been formally commissioned as a minister, whether she held herself out as a minister, and whether her job duties "reflected a role in conveying the Church's message and carrying out its mission."[49] The Court did not consider controlling the fact that most of the plaintiff's duties were secular in nature, rejecting the determinative weight given by the Sixth Circuit to the relatively small amount of time spent by the plaintiff on religious functions.[50] This totality of the circumstances approach naturally leaves significant ambiguity, in particular with regard to how much weight to give to each factor. The Court was also not unanimous on this issue, as Justice Thomas would have instead "defer[red] to a religious organization's good-faith understanding of who qualifies as its minister,"[51] and Justice Alito (joined by Justice Kagan) would have "focus[ed] on the function performed by persons who work for religious bodies" instead of formal commissioning, which does not occur in some faiths.[52] Nevertheless, the Court did provide some guidance on this key question even if it did not provide a bright line rule.

The other key question the Court only answered implicitly, however, leaving much more room for uncertainty: to wit, what types of organizations can have ministers? As one commentator has already noted, the Court in its decision appeared to use the terms "church," "religious group," "religious organization," and "religious institution" interchangeably and without definition or explanation.[53] The Court clearly felt that the covered organizations for purposes of the ministerial exception were not limited to a purely worship-focused church, as the organization in *Hosanna-Tabor* was both a church and school.[54] But the Court did not explain what factors were determinative or even relevant for its apparent conclusion that such an institution could have ministers for whom its employment decisions would be covered by the ministerial exception. Furthermore, Justice Thomas in concurrence appears to have carefully avoided using the term "church" in favor of the term "religious organization,"[55] and Justice Alito, also in concurrence, likewise appears to have favored terms such as "religious bodies," "religious groups," and "religious organizations,"[56] indicating a view that the exception extends beyond traditional churches.

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[47] *Id.*
[48] *Id.* at 707.
[49] *Id.* at 707–08.
[50] *Id.* at 709.
[51] *Id.* at 710 (Thomas, J., concurring).
[52] *Id.* at 711 (Alito, J., concurring).
[53] Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. & PUB. POL'Y 493, 503 (2013).
[54] *Hosanna-Tabor*, 132 S. Ct. at 699.
[55] *See id.* at 710–11 (Thomas, J., concurring).
[56] *See* Murray, *supra* note 53, at 503-04 (discussing Justice Alito's opinion).

Turning now to the other line of cases, it also raises but does not fully answer two similar questions. The first question is what decisions qualify as internal decisions involving significant ecclesiastical matters that are therefore protected from government regulation. A review of the federal cases in this line by Professor Carl Esbeck revealed a relatively small but important set of decisions regarding:

> (1) questions about correct doctrine and resolving doctrinal disputes; (2) the choice of ecclesiastical polity, including the proper application of procedures set forth in organic documents, bylaws, and canons; (3) the selection, credentials, promotion, discipline, and retention of clerics and other ministers; (4) the admission, discipline, and expulsion of organizational members; (5) disputes over the direction of the ministry, including the allocation of resources; and, (6) communication to the organization's clerics or the laity about matters of governance.[57]

Professor Esbeck further noted that the this set is likely relatively small (and presumably likely to remain small) because once a decision falls into this area, the courts no longer balance governmental interests against the burden on religiously motivated activities but instead categorically forbid government interference.[58]

Nevertheless, some courts have extended such protection to broad government investigations that seemed likely to lead to regulatory actions that could threaten the religious duties and objectives of a religious organization. For example, the U.S. Court of Appeals for the First Circuit found an investigation into the finances and costs of private schools to be unconstitutional as applied to Catholic parochial schools because of the likely impact of the admittedly very broad inquiry on the religious mission of those schools.[59] Similarly, a federal district court concluded that a broad Attorney General investigation of a church's finances and activities based on a media report of alleged illegal activities was unconstitutional, although a narrower investigation pursuant to clear statutory authority was permissible.[60] Some courts have also refused to resolve tort claims that require deciding issues of religious doctrine. For example, the Supreme Court of Texas dismissed a lawsuit bringing various claims relating to church ministers and members' actions involving the forcible laying on of hands on another member of the church.[61] The court determined that resolving the lawsuit would unavoidably involve deciding issues of religious doctrine, which it concluded the Free Exercise Clause prohibited.[62] While this case may be an outlier, it demonstrates that courts are sometimes wary of deciding even otherwise common types of legal cases involving religious organizations if religious doctrine is a central issue.

The second question is what types of organizations are eligible to make these types of protected decisions. While most of the cases in this line involve entities that are easily classified as churches or denominations, a few involve other types of religious organizations such as

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[57] Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE 168, 169 (2012) (footnotes omitted).
[58] *Id.*
[59] Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979).
[60] Word of Faith World Outreach Ctr. Church v. Morales, 787 F. Supp. 689, 702, 705-06 (W.D. Tex. 1992), *rev'd on other grounds*, 986 F.2d 962 (5th Cir. 1993).
[61] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 12-13 (Tex. 2008).
[62] *Id.* at 12–13.

parochial schools[63] and religious communities.[64] None of the decisions explain, however, how far the group of organizations that will receive this deference to their decision making extends, although for entities other than churches and denominations a close affiliation with a church or denomination appears to be required.[65] Therefore, as is the case with the ministerial exception, the type of decision that is protected from government interference is at least somewhat clear but the type of organization that can make such a decision is far less clear.[66] The ramifications of this situation will be discussed further in Part II.

C. Establishment and the Winn *Decision*

It is natural to focus primarily on what legal limits exist regarding state government attempts to restrict or regulate religious organizations. The flip side of this issue, however, is to query what legal limits exist regarding state government attempts to exempt religious organizations from otherwise applicable rules or to otherwise provide special treatment to religious organizations.[67] It is beyond the scope of this paper to fully explore this other group of limitations, but there is one area that has seen recent developments and so is worth highlighting: the extent to which private parties can challenge such exemptions or special treatment in court.

There is, of course, a long history of governments providing such exemptions and special treatment, ranging from the numerous tax exemptions and other special tax provisions enjoyed by religious organizations (often along with other types of nonprofit entities) to the many exemptions from other types of laws for churches or religious organizations, such as charitable solicitation registration and reporting requirements.[68] At the same time, Establishment Clause challenges by members of the public to these benefits and other special treatment are also now a regular fixture of the legal landscape.[69] A member of the public who is only able to asset a generalized grievance resulting from the government's provision of a benefit or exemption to another person issue lacks standing to challenge the government's decision under the "taxpayer standing" line of cases,[70] but there is an exception for challenges based on

[63] *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979).
[64] *See, e.g.*, Wipf v. Hutterville Hutterian Bretheren, Inc., 808 N.W.2d 678 (S.D. 2012).
[65] *See, e.g.*, Catholic Bishop of Chi. v. NLRB, 559 F.2d 1112, 1118–21 (7th Cir. 1977) (rejecting a requirement that an organization be "completely religious" in order to be protected from government regulation under the Religion Clauses, but suggesting that a "substantial religious character" and a close relationship with religious authorities is required), *aff'd on other grounds*, 440 U.S. 490 (1979).
[66] *See* Hurst, *supra* note 7, at 97-98 (arguing that the Supreme Court is moving toward a narrower definition of the religious sphere and therefore toward a narrower view of what organizations qualify as religious organizations under the First Amendment).
[67] *See generally* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006).
[68] *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–50 (1992) (discussing the large number and breadth of exemptions and other special treatment provided by state and federal statutes for religious organizations); Diana B. Henriques, *Religion Trumps Regulation As Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1, *available at* http://www.nytimes.com/2006/10/08/business/08religious.html?pagewanted=all&_r=0.
[69] *See* Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 844 (2012) (describing such litigation).
[70] *See generally* Kristen Hickman, *How Did We Get Here Anyway? Considering the Standing Question in* DaimlerChrysler v. Cuno, 4 GEO. J.L. & PUB. POL'Y 47, 54-56 (2006).

the Establishment Clause.[71] The scope of that exception was at issue in the recent case *Arizona Christian School Tuition Organization v. Winn*.[72]

Winn involved an Establishment Clause challenge to a state tuition tax credit that, in part, benefitted sectarian schools.[73] Before the Supreme Court could reach the merits of the case, however, it had to consider whether the taxpayers bringing the claim had standing to do so. The Court first concluded that the reason for generally denying taxpayers standing to challenge government expenditures or tax benefits—the speculative nature of any prediction that the government action would result in particular financial or other injury to the plaintiffs—applied in this situation, so the plaintiffs in *Winn* could not have standing unless an exception to the general rule applied.[74] The Court then reaffirmed an earlier decision, which it characterized as having recognized such an exception "when, in violation of the Establishment Clause and by means of the taxing and spending power, [the taxpayers'] property is transferred through the Government's Treasury to a sectarian entity."[75]

What is noteworthy about *Winn* is that the Court then went on to conclude that tax credits (and presumably, by extension, all tax provisions that favor taxpayers, including exemptions and deductions) are not equivalent to legislatively directed government expenditures because they represent a legislative decision not impose a tax on a party other than the challenging taxpayer and so no connection exists between the taxation of the plaintiffs in the case and the provision of the credit.[76] The Court therefore distinguished this situation from one where the legislature dictates that a certain expenditure must be made out of the government's general funds (which would include the taxes collected from plaintiffs challenging the expenditure) favoring one or more religious organizations.[77] In those situations, taxpayers generally appear to have standing to challenge spending by the legislature if the challenge is based on Establishment Clause grounds.[78] An example of a transfer which gives such standing comes from my home town of South Bend, Indiana, where taxpayers successfully brought suit challenging the local government's decision to purchase a piece of property and then transfer it—on what the court found to be favorable terms—to a Catholic school.[79] While the defendant city did not raise the issue, the federal district court hearing the case still considered whether the plaintiffs challenging the transfer on Establishment Clause grounds had standing to do so and concluded they did because the plaintiffs were municipal taxpayers and the city had used tax dollars to acquire the property at issue.[80]

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[71] *See infra* notes 74–75 and accompanying text.
[72] 131 S. Ct. 1436 (2011).
[73] *Id.* at 1441.
[74] *Id.* at 1444–45.
[75] *Id.* at 1445–46 (internal quotation marks omitted) (citing Flast v. Cohen, 392 U.S. 83, 105–06 (1968)).
[76] *Id.* at 1447–48; *see also* Mathilda McGee-Tubb, *Standing a Little Above the Rest: Establishment Clause Enforcement & Taxpayer Standing After* Winn 19-24 (Jan. 10, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212886 (discussing the tax credit versus government spending distinction made in *Winn*).
[77] *Winn*, 131 S. Ct. at 1147.
[78] *Id.* at 1446; Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After* Cuno *and* Winn, 40 HASTINGS CONST. L.Q. 1, 52 (2012).
[79] Wirtz v. City of S. Bend, 813 F. Supp. 2d 1051 (N.D. Ind. 2011).
[80] *Id.* 1056–57. Because the plaintiffs were municipal taxpayers challenging spending by their municipality, they likely had standing even if their claim had not been based on the Establishment Clause. *See infra* note 84 and accompanying text.

The Supreme Court's holding in *Winn* significantly limits the ability of taxpayers to challenge exemptions or other special treatment provided to religious organizations on Establishment Clause grounds in the federal courts, at least when the vehicle for doing so is the tax laws. The effect of the *Winn* decision on Establishment Clause litigation generally, however, is not clear yet. For example, in an unreported opinion a federal district court held that if a plaintiff alleges unequal treatment because of the denial of a tax benefit that is available to similarly situated religious organizations or individuals, that plaintiff has standing to pursue the claim as that allegation is a well pled injury in fact for the plaintiff and so the taxpayer standing cases do not apply.[81] That opinion therefore holds that if a plaintiff can establish they would receive the benefit but for their lack of religious status, then the plaintiff has alleged a sufficient, non-speculative specific injury in fact to provide standing. If the holding of this case survives and is accepted by other federal courts—a result that is far from certain—it would mean that tax benefits provided by governments specifically to religious organizations but not to similarly situated secular entities could still lead to lengthy challenges, although such challenges may not ultimately be successful.[82] Furthermore, the *Winn* decision did not foreclose state courts, as opposed to federal courts, from considering federal Establishment Clause challenges under the generally more liberal taxpayer standing rules in state courts.[83] Finally, municipal taxpayers generally have standing to challenge spending decisions by their municipality, in contrast to federal and state taxpayers who generally lack standing to challenge spending decisions by the federal government or their state government, and so would have standing to challenge those decisions on Establishment Clause as well as other grounds.[84]

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[81] Freedom from Religion Found. v. United States, No. 11-cv-626, slip op. at 6 (W.D. Wis. Aug. 29, 2012), *available at* http://ffrf.org/uploads/legal/Geithner-motiontodismiss.pdf.

[82] For example, the cited district court opinion is in a case where the plaintiffs are challenging the exclusion from gross income under Internal Revenue Code § 107 for ministers who receive housing or housing allowances as part of their compensation; whether this tax benefit actually violates the Establishment Clause is a matter of some dispute. *Compare, e.g.*, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707 (2003), *with, e.g.*, Edward A. Zelinsky, *Do Religious Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633 (2012) (rejecting claims that § 107 is violative of the Establishment Clause); *see also, e.g.*, Kid's Care v. State of Ala. Dep't of Human Res., 2001 WL 35827965, at *2 (M.D. Ala. June 14, 2001) (assuming that plaintiffs had standing but still rejecting their federal constitutional challenges to an exemption from otherwise applicable daycare laws for religiously affiliated entities).

[83] *See* Zelinsky, *supra* note 78, at 3. While I agree with Professor Zelinsky's observations regarding the more liberal standing rules in state courts, I am less certain that he is correct when he concludes that state Supreme Court decisions on the merits of Establishment Clause claims often would not be reviewable by the Supreme Court of the United States because of the standing issue. *Id.* at 57. The resolution of that issue turns on whether the application of the general taxpayer standing rule to Establishment Clause claims is compelled by the Constitution or is instead a prudential decision, because 28 U.S.C. § 1257(a) explicitly grants the Supreme Court of the United States jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . ."

[84] *See* DailmerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006) (discussing municipal taxpayer standing although not opining squarely on its permissibility); Hickman, *supra* note 70, at 56 ("the [Supreme] Court has exhibited greater willingness to entertain taxpayer suits that challenge municipal government action"); Zelinsky, *supra* note 78, at 52 ("municipal taxpayers have plenary standing to contest local taxes and budgetary outlays in the federal courts").

II. THE FUTURE OF LIMITS ON STATE REGULATION OF RELIGIOUS ORGANIZATIONS

As the above discussion details, the exact parameters of the limits on state regulation of religious organizations are not fully settled. Any predications of how those parameters will be resolved or will shift in the future are therefore difficult to make. Nevertheless, I will attempt to make a few such predications here based on the current trends, as well as highlighting some issues that are too difficult to predict at this point.

A. Broadly Permitted Regulation

Smith currently controls the Supreme Court's interpretation of the Free Exercise Clause and there is little reason to think that the Court is likely to revisit this now more than 20-year old precedent. While only two of the justices who participated in that decision remain on the Court (Justices Scalia and Kennedy), they both voted in the majority, and Justice Scalia authored the Court's opinion. More importantly, only one of the current justices has indicated in a subsequent Supreme Court opinion any disagreement with its holding.[85] While Justice Alito showed some sympathy for free exercise claims in opinions he authored while on the U.S. Court of Appeals for the Third Circuit,[86] it is far from clear that he would go so far as to support overruling *Smith*. The rule of *Smith*, that valid and neutral laws of general applicability may, constitutionally, apply with equal force to both religious organizations and nonreligious organizations, therefore appears unlikely to change for at least the near future.

Of course, some state constitutions and laws provide greater protection.[87] Even then, however, those provisions at most invoke the pre-*Smith* level of protection, which, as mentioned previously, was generally less strong than it appeared on its face.[88] Furthermore, the evidence to date is that litigation invoking the protection of state RFRA laws and state constitutional provisions is relatively rare and even more rarely successful, in part because state courts have often interpreted state RFRAs and state constitutions as providing less protection than existed under the pre-*Smith* cases.[89] So while the exact limits provided under state law will vary from state to state, even the highest level of protection may not deter much state regulation of religious organizations. This is particularly true with respect to enforcement of tax-law based restrictions on such organizations, as the Supreme Court showed particular deference to tax-based restrictions pre-*Smith*.[90]

Other than the internal governance exception and related ministerial exception that I will discuss in a moment, the remaining legal limits on state government regulation of religious organizations are therefore the constitutional prohibition on disfavoring a particular religion and, arguably, the *Smith* rule exception for laws that include a system of exemptions. With respect to

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[85] *See* City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (agreeing with the dissent of Justice O'Connor, who argued the Court had wrongly decided *Smith*); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (writing for the Court, Chief Justice Roberts distinguished *Smith* without criticizing it); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2995 n.27 (writing for the Court, Justice Ginsburg favorably cited *Smith*).

[86] *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

[87] *See supra* notes 29–30 and accompanying text.

[88] *See supra* note 7 and accompanying text.

[89] Lund, *supra* note 29, at 479–83, 485–89.

[90] *See supra* note 8 and accompanying text.

disfavoring a particular religion, the *Church of the Lukumi Babalu Aye* case illustrates that a state law or regulation clearly targeting the practices of a particular faith will be unconstitutional.[91] Similarly if a government agency chooses to selectively apply an otherwise neutral and generally applicable law or regulation only to disfavored religious organizations, that selective application would be similarly unconstitutional if it could be proved.[92] With respect to exemptions, there is at least some case law indicating that if a government agency has the authority to grant discretionary exemptions it generally must do so when not doing so will result in a substantial burden on religiously motivated activity.[93] To exact extent of this exception is still unclear, however. Absent religious discrimination or a system of exemptions, and outside the relatively narrow context covered by RLUIPA, the combination of the *Smith* decision and the apparently relatively weak free exercise protection that exists—even in jurisdictions where state constitutions or laws appear on their face to grant more such protection—therefore indicates that state governments likely will continue to have a comparatively free hand in applying neutral and generally applicable laws to churches and other religious organizations.

B. Limited if Uncertain Scope of the Ministerial and Internal Governance Exceptions

Even pre-*Smith*, the First Amendment protection for religiously motivated actions was a balancing test that looked at both the burden on religious belief and the interest of the government furthered by the regulation at issue. In contrast, both the federal appellate courts and now the Supreme Court have held that, if the ministerial exception applies, no such balancing test is applicable; instead, the protected decision is simply off-limits to otherwise applicable government regulation, such as anti-discrimination laws.[94] Internal governance decisions of churches and at least some other religious organizations that involve significant ecclesiastical matters are similarly off-limits, with courts required to stand aside from resolving disputes regarding such decisions.[95] Furthermore, it can be reasonably argued that other government agencies and officials must likewise avoid involvement in such disputes, although the courts generally have not reached this issue. So even if a state regulator decided it was prudent to become involved in such disputes,[96] they likely would face constitutional barriers to doing so.

Because a decision that falls within either the internal governance exception or the related ministerial exception effectively removes that decision from government oversight, the courts have tended to narrowly construe these exceptions in several ways and likely will continue to do so.[97] One way is to carefully limit the types of decisions that fall within these exceptions. For example, with respect to the ministerial exception the courts have only applied it as against employment-related claims, such as allegations of discrimination on the basis of race, gender, or sexual orientation when making hiring, firing, promotion, and similar employment decisions, as

[91] *See supra* notes 15–16 and accompanying text.
[92] *See supra* note 17–18 and accompanying text.
[93] *See supra* note 21–22 and accompanying text.
[94] *See supra* note 44 and accompanying text.
[95] *See* Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 267 (2009) (commenting that under these lines of cases "[i]nstead of global balancing, we get categorical rules, and specific activities are either protected or unprotected").
[96] For reasons why it might not be prudent, see Part II of the paper prepared by William P. Marshall (*Government Regulation of Religious Organizations: The Example of Religious Fraud*) for this collection.
[97] *See supra* note 58 and accompanying text.

well as wrongful termination claims.[98] The Supreme Court in *Hosanna-Tabor* was in fact careful to limit the holding of that case to employment discrimination suits such as the one at issue there, "express[ing] no view on whether the [ministerial] exception bars other types of suits . . . ."[99] In the more general internal dispute arena courts have allowed states to refuse to apply the exception when the dispute turns primarily on state law matters and resolution of non-religious factual matters as opposed to ecclesiastical matters, and so can be resolved by reference to religiously neutral principles.[100] Courts have also generally refused to extend these exceptions to protect a minister from torts claims relating to the minister's conduct or the minister's employer from negligent hiring or negligent supervision torts claims.[101]

Another way to narrowly construe the exceptions would be to limit the organizations deemed capable of making these types of decisions generally and with respect to selection of ministers specifically. Current case law clearly does not limit covered organizations to traditional churches or similar bodies of non-Christian faiths, with religious schools being the most common example of a covered non-church, religious organization.[102] That said, even in the school context courts have generally required both a relatively strong and pervasive religious character for the organization and a formal tie to a church or denominational body.[103] Again because of the strength of protection that exists if these exceptions apply, it seems likely that courts will continue to be reluctant to extend them to organizations that are not clearly sectarian in nature. That said, the federal courts are currently split over whether Free Exercise Clause protection extends to for-profit entities in the context of challenges to a mandate from the U.S. Department of Health and Human Services to provide health insurance coverage for contraception.[104]

Finally, in the ministerial exception context another means of limiting the reach of that exception is to narrowly define the term minister. As with covered organizations, the courts have not, however, sharply limited this term by, for example, only applying it to individuals who are formally identified as ministers and engage full-time in the administration of sacrament or

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[98] *See* Lund, *supra* note 38, at 21–22.

[99] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 710 (2012).

[100] *See, e.g.*, Askew v. Trs. of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc., 684 F.3d 413, 419 (3d Cir. 2012) ("When a church dispute turns on a question devoid of doctrinal implications, civil courts may employ neutral principles of law to adjudicate the controversy." (citing Jones v. Wolf, 443 U.S. 595, 602–03 (1979)).

[101] *See, e.g.*, Sanders v. Baucum, 929 F. Supp. 1028, 1033–36 (N.D. Tex. 1996) (collecting cases); *see also* People v. Campobello, 810 N.E.2d 307, 316–17 (Ill. App. Ct. 2004) (concluding that state compelled disclosure of documents relating to an alleged sexual assault was not unconstitutional); Soc'y of Jesus of New England v. Commonwealth, 808 N.E.2d 272 (Mass. 2004) (same); Laycock, *supra* note 95, at 274.

[102] *See supra* notes 63-64 and accompanying text.

[103] *See, e.g.*, Kant v. Lexington Theological Seminary, No. 2011-CA-000004-MR, 2012 WL 3046472, at *5–6 (Ky. Ct. App. July 27, 2012) (holding that seminary qualified for the ministerial exception because of its faith-based purpose, the fact students attended in order to be prepared for Christian ministry, and its relationship with the Christian Church (Disciples of Christ)).

[104] *Compare, e.g.*, Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (concluding that Free Exercise Clause protection extends at least to a closely held secular, for-profit enterprise when the owners operate the enterprise in accordance with their religious beliefs) *with, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Ok. 2012) (concluding for-profit corporations do not have constitutional free exercise rights). *See generally* Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?* (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229632.

rites.[105] Rather, the courts, and most recently the Supreme Court, have favored a totality of the facts and circumstances approach that considers formal ordination, public identification, self-identification, and duties, but does not make any particular fact controlling.[106] Nevertheless, the courts may look with skepticism on claims of minister status for individuals who were not clearly identified as ministers both by their employer and by themselves. Attempts to argue that employees beyond those who are consistently held out as ministers are ministers may therefore fail, as almost certainly may attempts to argue that employees whose duties are purely secular in nature are ministers merely because they work for a religious organization.[107]

A recent U.S. Court of Appeals decision indicates, however, that courts may be willing to define "minister" more broadly for these purposes. Considering how to determine if an individual is a minster post-*Hosanna-Tabor*, the court rejected its previously adopted three-prong test in favor of a broad facts and circumstances test.[108] It then concluded that a "Music Director" for a Catholic church was a minister for purposes of the ministerial exception because music played an important role in the celebration of Mass, the Music Director selected the hymns to be played and trained cantors, and the church considered him a minister as a result, even though the Music Director was not ordained, had not received ministerial training, and did not apparently explicitly hold himself out as a minister.[109]

The bottom line is therefore that while the internal governance and ministerial exceptions remain viable even in the wake of *Smith*, courts are most likely to continue to construe them relatively narrowly. That said, the exact scope of who is a minister and what is a religious organization that can invoke these protections remains uncertain. State governments seeking to apply their neutral and generally applicable laws should therefore be careful when doing so may interfere with decisions by arguably religious organizations that involve ministerial employment or internal governance decisions. Similarly, state officials should be wary of becoming involved in helping to resolve internal disputes if the dispute is of the type that may fall within one of these exceptions.

C. The Wild Card of Establishment Clause Challenges

In our increasingly secular society[110] it is not surprising that there have been many challenges to the enactment of laws and others actions by governments that appear to favor religious organizations either through exemptions from other applicable laws or through other special treatment.[111] Some have even proposed that any special treatment of religion, religious organizations, or religious individuals is no longer justified.[112] The first hurdle that a challenger to such actions has to overcome is establishing standing in court. The Supreme Court's decision

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[105] *See Hosanna-Tabor*, 132 S. Ct. at 707–09.
[106] *Id.*
[107] *See, e.g., id.* at 715 (Alito, J., concurring) (noting that "a purely secular teacher would not qualify for the 'ministerial' exception").
[108] Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 175–76 (5th Cir. 2012).
[109] *Id.* at 177–80.
[110] *See* Mark Chopko, *Some Thoughts about Regulating Religious Charity*, at 27 & nn. 108-109.
[111] *See, e.g., Lawsuits*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, https://www.au.org/our-work/legal/lawsuits (last visited Mar. 29, 2013); *Ongoing Lawsuits—Legal—Freedom from Religion Foundation*, FREEDOM FROM RELIGION FOUNDATION, http://ffrf.org/legal/challenges/ongoing-lawsuits (last visited Mar. 29, 2013).
[112] *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

in *Winn* makes doing so more difficult in some circumstances, but how much more difficult remains unclear.

Turning first to exemptions and other special treatment provided through the tax laws, *Winn* appears at first glance to make challenges to such provisions very difficult because of its holding that the Establishment Clause exception to the general rule that taxpayers lack standing to challenge government spending and taxing decisions does not apply to credits—and presumably therefore exemptions and deductions—provided through the tax laws, as such items do not represent government expenditures.[113] The recent federal district court decision relating to the pastoral housing exclusion from gross income indicates, however, that parties seeking to challenge such provisions may be able to instead establish standing if they can show they are similarly situated to those who benefit from these provisions but are denied such benefits only because they lack a religious character.[114] Furthermore, even if the federal courts are closed to plaintiffs challenging such provisions the states courts may not be.[115] The barrier created by *Winn* to challenging these tax provisions may therefore not be insurmountable.

As for other types of exemptions and special treatment, *Winn* does not address the non-tax context and so the previous case law that found standing for taxpayers to challenge such provisions if their claim is brought under the Establishment Clause still appears to apply. Of course, that exception still requires an exercise of the legislature's taxing and spending power to be at issue, which is not always the case, particularly with respect to exemptions from otherwise applicable laws.[116] Absent the exercise of such power, plaintiffs seeking to challenge such provisions must find a more particularized basis for their standing than their status as taxpayers, as the plaintiffs in the challenge to the pastoral housing exclusion arguably did.

It is not clear if the Supreme Court or other courts will further alter the standing law in this area. Assuming they do not, it remains possible—if not always easy—for plaintiffs to having standing to challenge exemptions and other special treatment provided to religious organizations, particularly if similarly situated nonreligious organizations are not eligible for such provisions or a legislature actually authorizes expenditures that intentionally favor one or more religious organizations over other organizations (as opposed to tax benefits or exemptions that are deemed to not result in such expenditures under *Winn*). State and local governments should therefore be aware that such challenges are not only possible but may proceed past the motion to dismiss stage if the plaintiffs can establish their standing to bring such challenges on one of these grounds, leading to significant litigation costs even if the plaintiffs are not ultimately successful.

CONCLUSION

Existing case law bars state laws, courts, and probably officials from becoming involved in a relatively narrow but important set of decisions by religious organizations that relate to the application of their religious views to internal governance and choice of leadership. In this area

[113] *See supra* notes 75–76 and accompanying text.
[114] *See supra* note 81 and accompanying text.
[115] *See supra* note 83 and accompanying text.
[116] *See supra* notes 79–80 and accompanying text.

the courts have held the First Amendment requires governments to stand aside, and, as the Supreme Court's recent unanimous decision in *Hosanna-Tabor* strongly indicates, that is likely to remain their position for the foreseeable future. At the same time, the courts are also likely to continue to limit this high level of protection to a relatively small group of decisions involving the application of religious beliefs by churches and other clearly religious organizations.

Outside of this protected area, the *Smith* decision holds that state governments are generally free to adopt and apply neutral laws of general applicability even if those laws substantially burden the religiously motivated actions of religious organizations unless those governments provide for secular but not religious exemptions from such laws. While some states provide greater protection for such actions through state constitutional provisions or statutes and the federal government provides greater protection through RLUIPA to certain real property related actions, courts applying these additional protections still tend to permit such government regulation and it seems unlikely that they will significantly change this approach. That said, if a government regulation is either adopted or implemented in a way that has the purpose and effect of discriminating on the basis of religious beliefs against religious organizations generally or a particular religious group specifically, such regulation is still likely to fail in the face of a federal constitutional challenge. (This conclusion does not, however, usually extend to conditions placed on government grants or other government benefits that are not generally available.[117]) Furthermore, if a particular regulatory regime has a system of secular exemptions the government may be required to demonstrate why religious exemptions should not also be granted.

Finally, courts have also shown an increasing willingness to avoid resolving Establishment Clause challenges to exemptions and other special treatment for religious organizations absent either a particularized injury to the complaining party or a clear expenditure of government funds. In *Winn* the Supreme Court may have foreclosed most such challenges to tax provisions that favor religious organizations by applying the lack of taxpayer standing general rule, although the exact ramifications of that decision—particularly in the state courts—remain to be seen. Nevertheless, state governments must continue to be aware that special treatment of religious organizations, particularly through expenditures, is still vulnerable to challenges that could involve lengthy litigation and possibly defeat.

The limits on state regulation of religious organizations are a dynamic legal area, but in many ways both the current and likely future borders for such regulation are at least somewhat apparent. Those borders combine a constitutionally required respect for the internal, religiously based decision making of such organizations with the conclusion that outside such decisions religious organizations can be made subject to the same rules that apply to secular entities. What remains perhaps most unclear is the extent to which members of the public can challenge choices by state legislators and other officials to exempt religious organizations from such rules or otherwise to treat such organizations specially, and so such challenges will remain a continuing issue for state governments.

[117] *See* Joseph R. Ganahl, Note, *Fostering Free Exercise*, 88 NOTRE DAME L. REV. 457, 474-75 (2012).