

2017

# Constitutional Law: If These Walls Could Talk: Giving Undue Deference to Religious Actors by Expanding the Ecclesiastical Abstention Doctrine—Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession

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Available at: <http://open.mitchellhamline.edu/mhlr/vol43/iss1/8>

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**CONSTITUTIONAL LAW: IF THESE WALLS COULD  
TALK: GIVING UNDUE DEFERENCE TO RELIGIOUS  
ACTORS BY EXPANDING THE ECCLESIASTICAL  
ABSTENTION DOCTRINE—*PFEIL V. ST. MATTHEWS  
EVANGELICAL LUTHERAN CHURCH OF UNALTERED  
AUGSBURG CONFESSION***

Jeremy D.F. Krahn<sup>†</sup>

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Good name in man and woman, dear my lord,  
 Is the immediate jewel of their souls.  
 Who steals my purse steals trash; 'tis something, nothing;  
 'Twas mine, 'tis his, and has been slave to thousands;  
 But he that filches from me my good name  
 Robs me of that which not enriches him,  
 And makes me poor indeed.<sup>1</sup>

### I. INTRODUCTION

Since the inception of the United States, the relationship between government and religion may be best characterized as a balancing act. The First Amendment of the United States Constitution unequivocally affirms an individual’s right to exercise his religion; yet, at the same time, it forbids the government from favoring one religion over another or favoring religion over non-religion.<sup>2</sup> Although some have recognized the seemingly paradoxical nature of the combination of the Free Exercise and Establishment clauses,<sup>3</sup> government and religion have, for the most part, coexisted comfortably.<sup>4</sup>

The United States has thrived as a nation that respects both the law of the land and one’s right to practice religion. However, the law of the United States and the teachings of one’s religion can, at times, be at odds.<sup>5</sup> And while the judiciary generally precludes

1. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

2. U.S. CONST. amend. I. There is, of course, considerable debate as to how these clauses should be interpreted—particularly how the Establishment Clause should be interpreted. *See infra* Section II.A.1.

3. *See* *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“While the two Clauses express complementary values, they often exert conflicting pressures.”); *see also* *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970) (“The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”).

4. *See* *Developments in the Law—Religion and the State: II. The Complex Interaction Between Religion and Government*, 100 HARV. L. REV. 1612, 1612–19 (1987).

5. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014)

itself from adjudicating matters of an ecclesiastical nature, religion cannot always evade the authority of secular law.<sup>6</sup>

The First Amendment also protects freedom of speech.<sup>7</sup> While many have touted the benefits of a populace that promotes free speech,<sup>8</sup> certain types of speech have been deemed unworthy of the First Amendment's protections.<sup>9</sup> The Supreme Court has, with qualification,<sup>10</sup> rejected the notion that defamatory statements should be constitutionally protected.<sup>11</sup> There is, after all, great value in one's name and reputation.<sup>12</sup>

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(holding that a provision of the Affordable Care Act, as applied to for-profit closely held corporations, substantially burdened the free exercise of religion); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that the First and Fourteenth Amendments prevented the state from compelling an Amish student to attend public school until the age of sixteen).

6. See *infra* Section IV.A.

7. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

8. Justice Oliver Wendell Holmes famously likened freedom of speech to "free trade in ideas," otherwise known as the "marketplace" of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . ."). Holmes' contention—that the truth will ultimately prevail when presented with competing ideas—was evidently inspired by the writings of John Milton and John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* 98 (Gertrude Himmelfarb ed., Penguin Classics 1988) (1859) ("He who knows only his own side of the case, knows little of that."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 (1984).

9. See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding that the First Amendment does not protect statements deemed to be "true threats"); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (proscribing child pornography); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (limiting speech that is directed to incite or produce imminent lawless action and is likely to incite or produce such action).

10. The Supreme Court has navigated the difficult realm of defamation by requiring different standards of proof based on the status of the victim and content of the statement. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (not requiring plaintiff to prove damages unless state law so requires when plaintiff is a private individual and matter is not of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring private plaintiff to prove falsity, fault as determined by the state, and actual damages when a statement implicates a matter of public concern); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring public figure plaintiff to prove falsity and actual malice).

11. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There

In *Pfeil v. St. Matthews Evangelical Lutheran of Unaltered Augsburg Confession*,<sup>13</sup> religious authority and civil law met at a crossroads. A church's right to autonomy stood at odds with a defamation victim's right to a remedy. The Minnesota Supreme Court held that a religious actor is not liable for statements that are made in the context of a church disciplinary proceeding when they are disseminated only to members of the church.<sup>14</sup> The majority found that adjudicating a defamation claim in this context would excessively entangle the court with religion and therefore violate the First Amendment.<sup>15</sup> Because the court did not apply neutral principles of law, which allow a court to adjudicate claims without touching religious doctrine, and because the court did not address the defamation claim on a statement-by-statement basis, its decision gave great deference to religious institutions.<sup>16</sup>

This Note begins by exploring the history and evolution of the ecclesiastical abstention doctrine<sup>17</sup> in the United States, including its current status in Minnesota.<sup>18</sup> It then discusses the facts and procedure of *Pfeil* and outlines the rationale for the majority and dissenting opinions.<sup>19</sup> Next, it analyzes the court's decision and argues that the Minnesota Supreme Court ignored its own guidelines and extended the scope of the ecclesiastical abstention

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are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words.").

12. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice Stewart noted that the protection of one's reputation reflects the "essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.*; see also *supra* text accompanying note 1.

13. 877 N.W.2d 528 (Minn. 2016).

14. *Id.* at 542.

15. *Id.*

16. *Id.* ("Ultimately, adjudicating Pfeils' claims would . . . unduly interfere with respondents' constitutional right to make autonomous decisions regarding the governance of their religious organization.").

17. Ecclesiastical abstention is a judicial doctrine—originating from the First Amendment—that "forbids courts from inquiring into religious doctrine, belief, discipline, or faith in order to resolve disputes over church property, church polity, or church administration." Shea Sisk Wellford, Note, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM. L. REV. 193, 194 (1994).

18. See *infra* Part II.

19. See *infra* Part III.

doctrine to a level beyond what United States Supreme Court jurisprudence requires.<sup>20</sup> Finally, it concludes that the *Pfeil* holding essentially gives a religious actor an absolute privilege to defame in church disciplinary proceedings.<sup>21</sup> Ultimately, this Note suggests that the court should have used neutral principles of law, without invoking the ecclesiastical abstention doctrine, to determine which statements could be adjudicated.

## II. HISTORY OF RELEVANT LAW

### A. *Establishment Clause*

To fully understand the nature of the ecclesiastical abstention doctrine, it is necessary to examine its roots in the First Amendment. In Minnesota, this means taking a closer look at the Establishment Clause.<sup>22</sup>

#### 1. *Competing Philosophies*

The proper interpretation and meaning of the Establishment Clause is a topic that is subject to considerable academic debate.<sup>23</sup> Soon after the inception of the First Amendment, some—most notably Thomas Jefferson—advocated for a “wall of separation between Church and State.”<sup>24</sup> Jefferson, and those influenced by Enlightenment thinkers, envisioned a country that maintained “a perfect separation between ecclesiastical and civil matters.”<sup>25</sup> However, critics called attention to the flaws in this black-and-white approach, arguing that the First Amendment “does not say that in every and all respects there shall be a separation of Church and State.”<sup>26</sup> Rather, “it studiously defines the manner, specific ways, in

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20. See *infra* Part IV.

21. See *infra* Part V.

22. See *infra* note 128–29 and accompanying text.

23. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1318 (1997).

24. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 146, 164 (1878)).

25. See Letter from James Madison to Edward Livingston (July 10, 1822), in 9 WRITINGS OF JAMES MADISON 98, 102 (Gaillard Hunt ed., 1910); see also Erwin Chemerinsky, *Why Separate Church and State?*, 85 OR. L. REV. 351 (2006) (advocating for a complete separation between church and state).

26. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

which there shall be no concert or union or dependency one on the other.”<sup>27</sup>

In modern times, the “wall of separation” interpretation of the Establishment Clause has essentially been replaced by a theory of complete neutrality toward religion.<sup>28</sup> In other words, government cannot support religion over non-religion, nor can it favor one religion over another.<sup>29</sup> While still supporting the ideology of separation between church and state, the neutrality principle does not advocate for hostility towards religion.<sup>30</sup>

The Supreme Court has largely modeled its Establishment Clause jurisprudence on this principle since the mid-twentieth century.<sup>31</sup> However, the Court has, at times, seemingly abandoned neutrality for a narrower reading of the Establishment Clause: the so-called “accommodation” approach.<sup>32</sup> Unlike the Jeffersonian view—which seeks to preclude most, if not all, government involvement with religion—the accommodation approach advocates for a narrow interpretation of the Establishment Clause in which government can more easily interact with religion.<sup>33</sup> A narrow interpretation, the accommodationists argue, is more in line with the intent of the Framers of the Constitution.<sup>34</sup> Whatever the original intent of the Framers or the individual philosophies of the Justices of the Supreme Court, it is clear that current Establishment Clause jurisprudence is dictated by one case and the “ground rules” it established: *Lemon v. Kurtzman*.<sup>35</sup>

## 2. *The Lemon Test*

In *Lemon*, the Court dealt with the constitutionality of a Rhode Island statute that sought to supplement the salaries of teachers

27. *Id.*

28. Sedler, *supra* note 23, at 1339.

29. *Everson*, 330 U.S. at 18; *see also* *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

30. Sedler, *supra* note 23, at 1339.

31. Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU*, 71 MO. L. REV. 317, 351 (2006) (“Last term, neutrality was the favored Establishment Clause principle. And, it has enjoyed that status for more than fifty years.”).

32. *Id.* at 352–53. *See infra* note 41 for an example of this approach in *Marsh v. Chambers*, 463 U.S. 783 (1983).

33. Sedler, *supra* note 23, at 1318 n.2.

34. Harwood, *supra* note 31, at 352–53.

35. 403 U.S. 602 (1971).

who taught secular subjects in parochial schools.<sup>36</sup> In order to ensure that these teachers were teaching only secular subjects, the state required submission of the schools' financial data and other records.<sup>37</sup> The Supreme Court deemed the statute unconstitutional, ruling that the statute would require continuous state surveillance, which would lead to excessive entanglement of government with religion.<sup>38</sup> In striking down the Rhode Island statute, the Court announced a new rule: A statute conforms to the Establishment Clause if (1) it serves a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive government entanglement with religion.<sup>39</sup> Despite the widespread displeasure with the *Lemon* test in the academic community,<sup>40</sup> it remains a benchmark for Establishment Clause jurisprudence. Indeed, all but one post-*Lemon* Supreme Court case involving the Establishment Clause has applied this test to resolve the issue at hand.<sup>41</sup>

The three prongs of the *Lemon* test reflect the "cumulative criteria developed by the Court over many years."<sup>42</sup> The first prong (the "purpose prong") determines whether the actual purpose of a statute or government action is to "endorse or disapprove of religion."<sup>43</sup> Although a law need not be unrelated to religion, it

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36. *Id.* at 607.

37. *Id.* at 607–08.

38. *Id.* at 619 ("These prophylactic contacts will involve excessive and enduring entanglement between state and church.").

39. *Id.* at 612–13.

40. Sedler, *supra* note 23, at 1344.

41. *Id.* at n.108. The one exception to this pattern came in *Marsh v. Chambers*, where the Court interpreted the Establishment Clause through the lens of its historical background and the "intent" of the Framers. See 463 U.S. 783, 786–92 (1983). In doing so, the majority concluded that the Framers of the Constitution did not intend for the Establishment Clause to prohibit prayer in the legislature. *Id.* at 788 ("Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."). Ironically, both *Marsh* and *Lemon* were authored by Chief Justice Burger.

42. *Lemon*, 403 U.S. at 612. Some have suggested that the first two prongs were derived from *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), and that the third prong was a result of the decision in *Walz v. Tax Commission*, 397 U.S. 664 (1970). See William Van Alstyne, *What Is "An Establishment of Religion"?*, 65 N.C. L. REV. 909, 909 n.2 (1987).

43. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).



must not abandon neutrality and act with the intent of promoting a particular point of view in religious matters.<sup>44</sup> In order to make this determination, courts may need to take a close look at a government action “to ‘distinguis[h] a sham secular purpose from a sincere one.’”<sup>45</sup> The second prong (the “effect prong”) determines whether the practice, regardless of its purpose, “conveys a message of endorsement or disapproval.”<sup>46</sup> A law violates this prong if it is “fair to say that the government itself has advanced religion through its own activities and influence.”<sup>47</sup>

The third prong of the *Lemon* test—the “entanglement prong”—is the prong most relevant in *Pfeil*, and it requires a determination of the *degree* of entanglement.<sup>48</sup> Because a certain level of entanglement of government with religion is inevitable, and indeed permitted,<sup>49</sup> it must be deemed *excessive* in order to violate the Establishment Clause.<sup>50</sup> However, certain religious programs “whose very nature is apt to entangle the state in details of administration and planning” pose a risk of entanglement through government participation.<sup>51</sup> It is therefore necessary to consider the relationship between the government and the religious entity, as well as other factors, to determine the level of entanglement.<sup>52</sup>

44. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

45. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75 (O’Connor, J., concurring)).

46. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

47. *Amos*, 483 U.S. at 337. It is important to note that improper advancement of religion by the government is not limited to direct means. The Supreme Court has gone so far as to suggest that social pressure should be accorded the same weight as more direct means of coercion. See *Santa Fe*, 530 U.S. at 312.

48. See *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (“The test is inescapably one of degree.”).

49. See *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (“Interaction between church and state is inevitable . . . and we have always tolerated some level of involvement between the two.”).

50. *Id.*

51. *Walz*, 397 U.S. at 695 (Harlan, J., concurring) (discussing the risk that government involvement in certain religious programs will politicize religion).

52. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). The Court has suggested that three factors should be considered when determining if entanglement is excessive: (1) “the character and purposes of the institutions that are benefitted,” (2) “the nature of the aid that the State provides,” and (3) “the resulting relationship between the government and the religious authority.” *Id.*

### 3. *Excessive Entanglement*

Given that not all government entanglement with religion is unconstitutional, it is useful to differentiate between cases deemed excessive from those permitted, particularly in the ecclesiastical realm.

Courts have found the government to be excessively entangled with religion in a variety of contexts. In one case, a Connecticut statute provided workers with an absolute right to observe their Sabbath on any day of the week.<sup>53</sup> The Supreme Court affirmed the lower court's holding that the statute excessively entangled government with religion by requiring the state to decide which religious activities constituted an "observance of Sabbath" in order to assess an employee's sincerity.<sup>54</sup> In another case, a Baltimore city ordinance made it a misdemeanor to falsely indicate, with intent to defraud, that food complied with kosher standards.<sup>55</sup> The Fourth Circuit held that the Baltimore ordinance, which required the employment of three ordained Orthodox Rabbis to enforce the kosher standards, would require the government to become excessively entangled with religion and would therefore violate the Establishment Clause.<sup>56</sup>

Because entanglement must be excessive to be considered unconstitutional, it is not surprising that many relationships between government and religious institutions are permitted. In *Bowen v. Kendrick*, for example, the constitutionality of the Adolescent Family Life Act was challenged.<sup>57</sup> This Act provided federal grants to public and private organizations "for services and research in the area of premarital adolescent sexual relations and pregnancy."<sup>58</sup> Some of the grantees were religiously affiliated, which required the government to review the grantee's educational

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53. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 706 (1985).

54. *Id.* at 708.

55. *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1338 (4th Cir. 1995).

56. *Id.* at 1342 (stating that the ordinance was unconstitutional on its face because it "vest[ed] significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect"). The court further found that the city ordinance violated the "effect prong" of the *Lemon* test because it impermissibly advanced and endorsed the Jewish faith. *Id.* at 1346.

57. 487 U.S. 589, 589 (1988).

58. *Id.*

materials and monitor them with periodic visits to avoid First Amendment concerns.<sup>59</sup> Although the Court acknowledged that some entanglement was necessary, it did not find the entanglement excessive and held the Act constitutional on its face.<sup>60</sup> Likewise, the Supreme Court in *Roemer v. Board of Public Works of Maryland*<sup>61</sup> ruled that annual audits of religiously-affiliated colleges and universities did not amount to excessive entanglement.<sup>62</sup> In Minnesota, the Minnesota Supreme Court in *Hill-Murray Federation of Teachers v. Hill-Murray High School* held that lay faculty members at religious schools could collectively bargain without violating the Establishment Clause.<sup>63</sup> The court reasoned that the subjects of negotiation (hours, wages, working conditions) were entirely secular terms of employment and therefore did not implicate First Amendment concerns.<sup>64</sup>

Still, other courts have attempted to avoid a constitutional question altogether, electing instead to bypass the excessive entanglement question and defer to the decision of the religious organization. For example, in *NLRB v. Catholic Bishop of Chicago*,<sup>65</sup> the Supreme Court held that Congress did not intend that the

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59. See *id.* at 615–17.

60. See *id.* at 617.

61. 426 U.S. 736 (1976).

62. *Id.* at 767. These audits were performed in order to ensure that the aid provided was being used for secular purposes. *Id.* at 742. In ruling that the entanglement was not excessive, the Court stressed that the audits performed would not likely be any more entangling than audits involved in the course of the normal accreditation process. *Id.* at 764. Additionally, the Court reasoned that the danger of political divisiveness would be substantially lessened because the aided institutions were not elementary or secondary schools. *Id.* at 765–66.

63. 487 N.W.2d 857, 864 (Minn. 1992). In holding that the Minnesota Labor Relations Act (MLRA) was intended to allow lay faculty members to collectively bargain, the court declined to “categorize th[e] minimal responsibility [of the duty to bargain about employment conditions] as excessive entanglement.” *Id.* “The first amendment wall of separation between church and state” did not prohibit limited government regulation of secular aspects at the school. *Id.* And although *Hill-Murray*’s holding was seemingly contradictory to *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the court also highlighted the difference between the Congressional intent in creating the NLRA and the history and intent of the MLRA. *Id.* at 861–62.

64. *Hill Murray*, 487 N.W.2d at 863. However, the Minnesota Supreme Court took care not to extend its holding past the faculty members’ ability to negotiate on conditions of employment. The court clarified that “doctrinal and religious issues are matters of inherent managerial policy and are nonnegotiable.” *Id.* at 87.

65. 440 U.S. 490 (1979).

National Labor Relations Act would require parochial schools to recognize the unionization of lay faculty members.<sup>66</sup> Accordingly, the Court declined to construe the Act in a manner that would require a deeper inquiry into First Amendment issues.<sup>67</sup>

As these cases suggest, the mere fact that a court decides a case involving the government regulation of, or relationship with, a religious institution does not necessarily amount to excessive entanglement.<sup>68</sup> Judicial scrutiny of the relationship between church and state only becomes problematic when courts are required to overrule a religiously based act or interpret religious doctrine.<sup>69</sup> However, if a court can apply laws of general applicability (i.e., neutral principles of law), it can regulate the activities of a religious organization without implicating the excessive entanglement prong of the *Lemon* test.<sup>70</sup>

## B. Ecclesiastical Abstention Doctrine

### 1. Origins: First Amendment

The ecclesiastical abstention doctrine, which limits a secular court's ability to decide matters associated with church doctrine,<sup>71</sup> finds its roots in the First Amendment of the United States Constitution.<sup>72</sup> Although it is unclear from which exact source the doctrine is derived, it is generally understood to have developed from judicial interpretation of the Free Exercise Clause or the Establishment Clause.<sup>73</sup> These clauses, which provide that

66. *Id.* at 506; *see also* *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787–88 (1981) (holding that Congress did not intend religiously-affiliated schools to be subject to federal unemployment compensation laws).

67. *Catholic Bishop of Chicago*, 440 U.S. at 507.

68. Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 653 (2013).

69. *Id.*

70. *Id.* at 655 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012)); *see also infra* Section IV.A.

71. Jarod S. Gonzalez, *At the Intersection of Religious Organization Missions and Employment Laws: The Case of Minister Employment Suits*, 65 CATH. U. L. REV. 303, 309 (2015) (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976)); *see* Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM. L. REV. 193, 197 (1994).

72. Gonzalez, *supra* note 71, at 309.

73. *See* Christopher R. Farrel, *Note: Ecclesiastical Abstention and the Crisis in the*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”<sup>74</sup> seek to simultaneously lift government-imposed burdens on the exercise of religion and prohibit preferential treatment of a religion.<sup>75</sup>

## 2. *Evolution of the Doctrine in Supreme Court Jurisprudence*

Most of the early cases that invoked the ecclesiastical abstention doctrine dealt with church property disputes.<sup>76</sup> The framework for the doctrine was set in 1871 in *Watson v. Jones*.<sup>77</sup> In *Watson*, two rival factions of a Kentucky Presbyterian Church were divided: the minority in favor of slavery and the majority opposed.<sup>78</sup> The church had recently purchased a parcel of land and conveyed the title to the trustees of the church, with the restriction that both the property and trustees follow the “fundamental laws” of the national Presbyterian Church.<sup>79</sup> The General Assembly, the highest judicatory in the Presbyterian Church, instructed pro-slavery members of the church to “repent and forsake [their] sins before they could be received.”<sup>80</sup> The pro-slavery faction, being staunchly opposed to this resolution, assumed control of the property and claimed that the requirement was contrary to the Church’s constitution.<sup>81</sup> The General Assembly rejected this notion and declared the anti-slavery faction to be the rightful owners of the property.<sup>82</sup> When faced with the decision of which faction was the

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*Catholic Church*, 19 J.L. & POL. 109, 116 (2003).

74. U.S. CONST. amend. I.

75. Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1127 (1990). See generally 1 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 1.2, Westlaw (database updated Mar. 2017).

76. See Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 511–14 (2005). For an in-depth historical analysis of civil court adjudication of church property disputes, see Justin M. Gardner, *Ecclesiastical Divorce in Hierarchical Denominations and the Resulting Custody Battle Over Church Property: How the Supreme Court Has Needlessly Rendered Church Property Trusts Ineffectual*, 6 AVE MARIA L. REV. 235, 240–45 (2007).

77. 80 U.S. 679 (1871); see also Farrel, *supra* note 73, at 116–17.

78. See *Watson*, 80 U.S. at 690–91.

79. See *id.* at 683.

80. *Id.* at 691.

81. *Id.* at 692.

82. *Id.*

lawful owner of the property, the Supreme Court elected to defer to the ruling of the Presbyterian General Assembly because of the ecclesiastic nature of the issue.<sup>83</sup> The Court outlined three principal reasons for its decision to defer.

First, a church's ability to make governance decisions is at the very heart of religious freedom and therefore should not be decided by civil courts.<sup>84</sup> In other words, a court should be reluctant to interfere with internal affairs of private religious associations.<sup>85</sup> Interference in this area, according to the Court, "would lead to the total subversion of such religious bodies."<sup>86</sup>

Second, the Court justified its deference by analogizing to a contractual agreement.<sup>87</sup> The Court acknowledged that there is an unquestioned right to organize voluntary religious associations, but all who associate themselves with such an organization implicitly consent to the laws and decisions of its governing body.<sup>88</sup> The question then became whether the church polity was congregational or hierarchical,<sup>89</sup> which would determine the type of deference shown. If the church was congregational,<sup>90</sup> a

83. *Id.* at 732 (quoting *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. 282, 291 (1896)) ("The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offence against the word of God and the discipline of the church.").

84. *Id.* at 729 ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."). The Court conceded that this philosophy contrasted with English doctrine at the time, which stated that it was the duty of the court to determine the standard of faith in the church. *Id.* at 727.

85. See Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1293 (1980).

86. *Watson*, 80 U.S. at 729.

87. See *id.* ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.").

88. *Id.* at 728–29. If civil courts could overturn religious tribunals on matters of church doctrine, the Court argued, the purpose and influence of the religious tribunals would be meaningless. *Id.* at 729 ("But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.").

89. *Id.* at 722–23.

90. Congregational churches are more autonomous than hierarchical institutions. Adams & Hanlon, *supra* note 85, at 1292 n.6. Because they do not generally recognize a superior authority, these types of churches govern

resolution would be determined according to the rules governing ordinary voluntary associations.<sup>91</sup> If, however, the church was hierarchical<sup>92</sup> in nature, the Court would defer to the highest church tribunal that had considered the conflict.<sup>93</sup> Because the church at issue was hierarchical, the Court elected to defer to the ruling of the highest church tribunal: the Presbyterian General Assembly.<sup>94</sup>

Finally, the Court recognized that civil courts do not necessarily possess the expertise or competence needed to interpret church doctrine.<sup>95</sup> Given that many churches have “a body of constitutional and ecclesiastical law of [their] own,”<sup>96</sup> review by a civil court would “be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.”<sup>97</sup> Therefore, the Presbyterian General Assembly would be in the best position to define the doctrine of the Presbyterian Church.<sup>98</sup>

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themselves and are “free to affiliate and withdraw from other church organizations at will.” *Id.* Examples include numerous Baptist churches, Jewish congregations, and Quakers. *Id.*

91. *Watson*, 80 U.S. at 725; *see also* Adams & Hanlon, *supra* note 85, at 1292–93. For example, in the case of a land dispute with no clear title, a decision reached by the majority of the congregation would be conclusive. Adams & Hanlon, *supra* note 85, at 1293; *cf.* Sedler, *supra* note 68, at 646 (“[W]hen the form of church organization is congregational rather than hierarchical, the courts may . . . apply general principles of contract and property law to determine which of the contending factions is entitled to the church property.”).

92. A hierarchical organization is defined as an organization of churches “having similar faith and doctrine with a common ruling convocation or ecclesiastical head.” Adams & Hanlon, *supra* note 85, at 1292 n.6 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 110 (1952)). Examples include the Roman Catholic Church, Eastern Orthodox Church, and Presbyterian Church. *Id.*

93. *Watson*, 80 U.S. at 727; *see also* Adams & Hanlon, *supra* note 85, at 1293. Scholars have noted the risk of granting this much power to a church tribunal. If the deference doctrine was strictly applied in these cases, a hierarchical church judicatory would have “almost unlimited authority over its associated churches.” Adams & Hanlon, *supra* note 85, at 1301–02.

94. *Watson*, 80 U.S. at 733–735.

95. Adams & Hanlon, *supra* note 85, at 1293; David J. Overstreet, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric’s Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, 273 (1996).

96. *Watson*, 80 U.S. at 729.

97. *Id.*

98. *Id.*

In a similar case decided just one year after *Watson*, the Court once again heard a property dispute between two competing factions of a church.<sup>99</sup> Like *Watson*, both divisions claimed to be the “true” church.<sup>100</sup> Although the Court conceded that it could not resolve matters of church discipline, it still asserted authority to decide the property dispute at issue.<sup>101</sup> In order to resolve the dispute, the Court was willing to inquire into the organizational structure of the church.<sup>102</sup>

A pair of cases in the late nineteenth and early twentieth-centuries modified the scope of *Watson*.<sup>103</sup> In *Brundage v. Deardorf*,<sup>104</sup> the court stated that the deference shown in *Watson* did not extend to decisions made by a hierarchical church judicatory that were “in fraud of the rights of a minority seeking to maintain the integrity of the original compact.”<sup>105</sup> A court is not obligated to defer to religious authority in the case of an “open, flagrant, avowed violation” of the church’s fundamental law.<sup>106</sup> And the Supreme Court in *Gonzalez v. Roman Catholic Archbishop of Manila*,<sup>107</sup> although acknowledging the high level of deference shown to the decisions of church tribunals, indicated that an exception might be made in the case of “fraud, collusion, or arbitrariness . . . .”<sup>108</sup> Although these cases were rooted in the contractual rationale of *Watson* and

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99. *Bouldin v. Alexander*, 82 U.S. 131, 133–34 (1872).

100. *Id.* at 134.

101. *Id.* at 139.

102. *Id.* at 140. Ultimately, the Court found that the church was congregational. *Id.* Since a congregational church is represented only by the majority of its members, the actions of the small minority to excommunicate church members and trustees was held to be invalid. *Id.*

103. *Adams & Hanlon*, *supra* note 85, at 1302–03.

104. 55 F. 839 (C.C.N.D. Ohio 1893), *aff'd*, 92 F. 214 (6th Cir. 1899). Although *Brundage* was not a Supreme Court case, it is notable that the author of the opinion, Judge Taft, would later serve as Chief Justice during the term in which *Gonzalez v. Roman Catholic Archbishop of Manila*, *infra* note 108, was decided. See Frank Freidel and Hugh Sidey, *William Howard Taft Biography*, in THE PRESIDENTS OF THE UNITED STATES OF AMERICA (2006), <https://www.whitehouse.gov/1600/presidents/williamhowardtaft>.

105. *Brundage*, 55 F. at 847–48.

106. *Id.* at 846. Since a violation of the original compact amounted to “a withdrawal from the lawful organization of the church,” the violating party was not entitled to the property in dispute. *Id.*

107. 280 U.S. 1 (1929).

108. *Id.* at 16.



did not implicate the First Amendment,<sup>109</sup> subsequent cases were firmly grounded in the United States Constitution.<sup>110</sup>

The deference rule in *Watson* was first recognized as a constitutional principle in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*.<sup>111</sup> In *Kedroff*,<sup>112</sup> a section of a New York statute proposed the transfer of administrative power in the Russian Orthodox churches of New York from the central governing authority in Moscow to the Russian Orthodox Church in America.<sup>113</sup> Because the Russian Orthodox Church was hierarchical, the Court deferred to the highest governing body in Moscow.<sup>114</sup> Thus, the section of the statute that attempted to transfer power was ruled unconstitutional because it violated the Fourteenth Amendment and proscribed the free exercise of religion.<sup>115</sup>

The doctrine was affirmed once again in 1976 when the Supreme Court refused to overrule an Eastern Orthodox Church's decision to defrock one of its bishops because adjudication would

109. See Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 449 (2011) (explaining that since *Watson* was decided before the First Amendment was incorporated against the states, federal common law was used to justify the holding).

110. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (“For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decision of the highest ecclesiastical tribunal within a church of hierarchical polity . . . .”); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (discussing how the federal Constitution gives religious organizations the “power to decide for themselves, free from state [or court] interference”).

111. See Adams & Hanlon, *supra* note 85, at 1303. The *Kedroff* Court found the rule to be implicit in the Free Exercise Clause of the First Amendment. *Kedroff*, 344 U.S. at 116 (“Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”).

112. 344 U.S. 94 (1952).

113. *Id.* at 97–99.

114. *Id.* at 120.

115. *Id.* at 107. *Kedroff*'s holding, applying to legislative action, was extended to include judicial action eight years later. See *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (stating that abuse of state power is prohibited, whether by the legislature or judiciary, and reversing a state court's judgment that reassigned control of Saint Nicholas Cathedral from the Russian Orthodox Church in Moscow to the Russian Church of America).

require “extensive inquiry by civil courts into religious law and polity,” thereby violating the First and Fourteenth Amendments.<sup>116</sup> In doing so, the Supreme Court again recognized that the Constitution requires civil courts to give great deference to religious tribunals when addressing doctrinal issues.<sup>117</sup>

In recent years, courts have extended the doctrine to exempt churches from following employment discrimination laws when making decisions regarding ministerial employees—a so-called “ministerial exception.”<sup>118</sup> In other words, if a civil court were to enforce employment discrimination laws on churches, it would essentially be appointing and dismissing ministers, which would violate both the Free Exercise Clause and the Establishment Clause.<sup>119</sup> However, not all employment claims in the religious context have been denied. The Court has applied the Fair Labor Standards Act to a commercial business operated by a religious foundation<sup>120</sup> and has applied a California sales and use tax to a religious organization’s sale of religious materials.<sup>121</sup>

Although great deference has been given to church authority since *Watson*, it is clear that the ecclesiastical abstention doctrine and its progeny do not grant infinite autonomy to a religious organization.<sup>122</sup> If a court can apply “neutral principles of law”<sup>123</sup> to

116. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

117. *See* Farrel, *supra* note 73, at 119–20.

118. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012). For an extended analysis of the ministerial exception and its relevance in *Hosanna-Tabor*, see Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821 (2012); *see also infra* note 221 and accompanying text.

119. *See Hosanna-Tabor*, 132 S. Ct. at 706. The Court has also clarified that Congress intended for church-affiliated schools to be exempt from federal unemployment compensation laws. *St. Martin Lutheran Evangelical Church v. South Dakota*, 451 U.S. 772, 784 (1981).

120. *See Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 306 (1985). The Court held, in part, that the federal statute did not pose an entanglement issue. *Id.* at 305. The recordkeeping required by the statute was no more intrusive than other permitted government activities, such as fire inspections and building and zoning regulations. *Id.* at 305–06.

121. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 397 (1990). The Court found no “constitutionally significant” entanglement in the administrative burdens that the law placed on the plaintiff. *Id.* at 394.

122. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 605 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969); *see also supra* notes 104–10 and accompanying text.

resolve controversies involving religious organizations, adjudication of the merits does not involve “an internal church decision that affects the faith and mission of the church itself”<sup>124</sup> and therefore does not violate the First Amendment.<sup>125</sup> It is only when a claim implicates church doctrine that deference is required.<sup>126</sup>

### 3. *The Doctrine in Minnesota*

Given that the First Amendment is applicable to the States by way of incorporation,<sup>127</sup> the ecclesiastical abstention doctrine is applicable in Minnesota. Although the United States Supreme Court has never endorsed a specific test when applying the doctrine, Minnesota courts have analyzed the ecclesiastical abstention doctrine under the Establishment Clause.<sup>128</sup> Specifically, Minnesota courts have used the three-pronged test set forth in *Lemon v. Kurtzman* to determine whether a state action violates the Establishment Clause.<sup>129</sup>

While the ecclesiastical abstention doctrine is applicable in Minnesota, the state’s courts have frequently used neutral principles of law to avoid any First Amendment quandaries.<sup>130</sup> This

123. See *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002); *Neutral Principles*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining neutral principles as “[r]ules grounded in law, as opposed to rules based on personal interests or beliefs”).

124. *Hosanna-Tabor*, 132 S. Ct. at 707.

125. See *infra* Section IV.A.

126. See *infra* Section IV.A.

127. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) (“The process of absorption of the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause.”).

128. See, e.g., *Odenthal*, 649 N.W.2d at 435.

129. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)) (“[A] state action must have a secular purpose, must neither inhibit nor advance religion in its primary effect, and must not foster excessive governmental entanglement with religion.”); see *supra* Section II.A.2.

130. See, e.g., *Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 863 (Minn. 1992) (holding that the Minnesota Labor Relations Act, which granted collective-bargaining privileges to parochial school employees, was a neutral law that did not violate the Free Exercise Clause); *Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982) (holding that a court is constitutionally entitled to use neutral principles of law to determine church property ownership); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 266 (Minn. Ct. App. 2003) (holding that the district court could constitutionally examine religious

is what occurred in *Geraci v. Eckankar*, where a female systems analyst sued her religiously-affiliated employer for gender discrimination and defamation, among other claims.<sup>131</sup> While declining to decide the plaintiff's gender discrimination claim,<sup>132</sup> the Minnesota Court of Appeals saw no problem in considering the defamation claim.<sup>133</sup> Even though the alleged incident was in a religious context, the court still applied the defamation analysis and ultimately held that the employer did not defame the plaintiff.<sup>134</sup>

A similar use of neutral principles of law appeared in *State v. Wenthe*,<sup>135</sup> where the Minnesota Supreme Court was tasked with determining the constitutionality of a statute that prohibited clergy-parishioner sexual conduct occurring during the course of spiritual counseling.<sup>136</sup> The Defendant argued that the "statute excessively entangle[d] the State with religion because it require[d] an inquiry into whether an individual [was] seeking religious or spiritual advice, aid, or comfort."<sup>137</sup> The court rejected this argument, noting that precedent permitted a court to determine whether advice given by a clergy member was "of a religious or spiritual nature."<sup>138</sup> Because a court can make this determination by using neutral principles of law, the court reasoned, it does not become

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documents in order to apply neutral principles of law).

131. 526 N.W.2d 391, 395 (Minn. Ct. App. 1995).

132. *Id.* at 401. The court reasoned that the gender discrimination claim would require the court to question the employment decisions of the church. *Id.* ("[W]e cannot devise a way to determine if this reason for termination was a pretext for discrimination without questioning the reasons for the excommunication and the veracity of those reasons.").

133. *Id.* at 397–98.

134. *Id.* at 397. The court held that the plaintiff was not defamed because the statements did not refer to her specifically and could not be proven false. *Id.*

135. 839 N.W.2d 83 (Minn. 2013).

136. *Id.* at 86–87.

137. *Id.* at 91.

138. *Id.* (Hanson, J., plurality opinion) (quoting *State v. Bussmann*, 741 N.W.2d 79, 89 n.5 (Minn. 2007)). The court also recognized that similar inquiries were permitted in the context of clergy-penitent privilege. *Id.* (citing *State v. Rhodes*, 627 N.W.2d 74, 85–86 (Minn. 2001); *State v. Black*, 291 N.W.2d 208, 216 (Minn. 1980), *abrogated on other grounds by State v. Jones*, 556 N.W.2d 903, 909 n.4 (Minn. 1996)).

excessively entangled with religion.<sup>139</sup> Accordingly, the statute was held to be constitutional.<sup>140</sup>

In *Odenthal v. Minnesota Conference of Seventh-Day Adventists*,<sup>141</sup> the Minnesota Supreme Court established the analytical framework for adjudicating tort claims against religious organizations.<sup>142</sup> The plaintiff, a member of the Seventh-Day Adventist church, brought a variety of claims against his former minister—most notably one for negligent counseling.<sup>143</sup> In holding that the district court had jurisdiction to adjudicate the negligence claim, the court reasoned that the statutory definition of “mental health practitioner” could be interpreted without implicating religious doctrine, and therefore the court did not excessively entangle itself with the church.<sup>144</sup>

As these cases demonstrate, neutral principles of law have been embraced and utilized by Minnesota courts for years. Although adjudication of matters involving church doctrine and polity is still forbidden, Minnesota courts have used neutral principles of law as an alternative method to adjudicate certain lawsuits while preventing excessive entanglement with religion.

### III. THE PFEIL DECISION

#### A. *Facts and Procedure*

LaVonne and Henry Pfeil (“Pfeils”) were devoted members of St. Matthew Evangelical Lutheran Church in Worthington, Minnesota,<sup>145</sup> a church associated with the Lutheran Church-Missouri Synod.<sup>146</sup>

139. *Id.* at 91–92.

140. *Id.* at 92.

141. 649 N.W.2d 426 (Minn. 2002).

142. *See Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession*, 877 N.W.2d 528, 542 (Minn. 2016) (Lillehaug, J., dissenting); *infra* Section IV.A.

143. *Odenthal*, 649 N.W.2d at 429.

144. *Id.* at 438.

145. Although the church’s legal name is “St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington, Nobles County, Minnesota,” the church refers to itself as “St. Matthew” and is referred to as such throughout this Note. *Pfeil*, 877 N.W.2d at 530 n.1 (majority opinion).

146. *Id.* at 530–31.

On August 22, 2011, the Pfeils received notice that they had been excommunicated from the church for misconduct.<sup>147</sup> In this letter, signed by St. Matthew's pastors Thomas Braun ("Braun") and Joe Behnke ("Behnke"), the Pfeils were accused of engaging in "slander and gossip" against the church.<sup>148</sup> Shortly thereafter, the leadership and congregation of St. Matthew held a special meeting to affirm or reject the Pfeils' excommunication.<sup>149</sup> The meeting attendees, after being presented with the August 22 letter that outlined the allegations, voted to affirm the excommunication.<sup>150</sup>

In March 2012, a Missouri Synod panel agreed to hold a hearing to reconsider the excommunication, but the decision was affirmed.<sup>151</sup> It was during this hearing that Behnke allegedly stated that the Pfeils had accused him of stealing money from the church.<sup>152</sup> The Pfeils subsequently brought a lawsuit against St. Matthew, Braun, and Behnke (collectively, "respondents"), asserting claims for defamation and negligence.<sup>153</sup>

Relying on the First Amendment and the ecclesiastical abstention doctrine,<sup>154</sup> the Nobles County District Court granted respondents' motion to dismiss after determining it was precluded from ruling on the Pfeils' claims due to lack of subject-matter jurisdiction.<sup>155</sup> The Minnesota Court of Appeals affirmed the district court's finding, reasoning that the ecclesiastical abstention doctrine barred an inquiry into the excommunication

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147. *Id.* at 531.

148. *Id.* Among other allegations, the letter also claimed that "[t]he Pfeils engaged in behavior unbecoming of a Christian" and "intentionally attacked, questioned, and discredited the integrity" of church leaders. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* Henry Pfeil died in April 2012, and Lavonne Pfeil was named trustee for Henry's claims. *Id.* at 531 n.3.

154. *Id.* at 532.

155. *Id.* at 531–32. Respondents also moved to dismiss for failure to state a claim, pursuant to Minnesota Rule of Civil Procedure 12.02(e). *Id.* at 532 n.4. The district court granted the motion with respect to the claims made by the recently deceased Henry Pfeil but denied the motion with respect to LaVonne Pfeil's claims. *Id.* It is also worth noting that the Minnesota Supreme Court majority, relying on *Hosanna-Tabor*, clarified that the ecclesiastical abstention doctrine did not act as a jurisdictional bar. *Id.* at 535. However, the majority did not go so far as to categorize the doctrine as an affirmative defense. *Id.*

proceedings.<sup>156</sup> On appeal, the Minnesota Supreme Court sought to determine whether adjudicating the Pfeils' claims would amount to an "excessive governmental entanglement with religion"<sup>157</sup> or involve "an internal church decision that affect[ed] the faith and mission of the church itself."<sup>158</sup>

*B. Minnesota Supreme Court Decision and Dissent*

Before the Minnesota Supreme Court, the Pfeils primarily argued that adjudication of certain claims would not violate the Establishment Clause of the First Amendment.<sup>159</sup> By analyzing each claim separately, the court could circumvent the First Amendment issue by using neutral principles of law on the permissible claims.<sup>160</sup> By doing so, respondents' First Amendment rights would still be sufficiently protected.<sup>161</sup> Respondents countered that adjudicating *any* of the claims would violate the First Amendment,<sup>162</sup> given "the religious context in which the statements were made."<sup>163</sup> Adjudicating church statements made in disciplinary proceedings, respondents argued, would have a chilling effect on future speech.<sup>164</sup>

The majority agreed with respondents and held that the statement-by-statement approach advocated by the Pfeils would violate the First Amendment because it would foster an excessive entanglement of government with religion.<sup>165</sup> Accordingly, the court affirmed the district court's decision to dismiss the Pfeils' claims.<sup>166</sup> In doing so, the majority reasoned that differentiating

156. Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession, No. A14-0605, 2015 WL 134055, at \*6 (Minn. Ct. App. Jan. 12, 2015), *aff'd*, 877 N.W.2d 528 (Minn. 2016).

157. Pfeil, 877 N.W.2d at 537 (quoting Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 435 (Minn. 2002)).

158. *Id.* (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012)).

159. *Id.* at 537–38. Although the Pfeils acknowledged that most of their claims could not serve as the basis for a defamation claim, they argued that four of the claims could still be adjudicated in a constitutional manner. *Id.* at 538.

160. *See id.* at 537–38.

161. *See id.* at 539.

162. *Id.* at 536.

163. *Id.* at 538.

164. *See id.* at 539.

165. *Id.* at 542.

166. *Id.*

between religious and secular statements might require the court to interpret church doctrine, which would amount to an unconstitutional entanglement of government with religion.<sup>167</sup> Furthermore, the court feared that adjudicating claims on a statement-by-statement basis would act as an incentive for a religious organization to—in order to avoid litigation—justify every decision under the guise of church doctrine.<sup>168</sup>

The dissenting opinion rejected the notion that merely determining whether or not a claim excessively entangles the court is, in and of itself, excessive entanglement.<sup>169</sup> The dissent stated that because the United States Supreme Court had never decided an analogous case,<sup>170</sup> the majority's holding directly contradicted the precedent established in *Odenthal*.<sup>171</sup> Accordingly, the dissent argued that the court could have, and should have, used neutral principles of law to determine whether defamation had occurred.<sup>172</sup> Additionally, the dissent advocated for the use of a qualified privilege to balance the relative rights of a defamed party and a religious organization.<sup>173</sup>

#### IV. ANALYSIS

##### A. *Neutral Principles of Law*

The Minnesota Supreme Court erred in holding that the adjudication of any of the Pfeils' claims would necessarily amount to an excessive entanglement with religion and therefore violate the First Amendment. The majority should have reversed and remanded the case to the district court, and it should have instructed the lower court to use neutral principles of law in determining which statements could be adjudicated without implicating the ecclesiastical abstention doctrine.<sup>174</sup>

A court has two options when deciding a dispute involving a church disciplinary proceeding: (1) it may defer to the religious tribunal's ruling; or (2) if the dispute does not require the court to

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167. *See id.* at 538.

168. *Id.* at 539.

169. *See id.* at 544 (Lillehaug, J., dissenting).

170. *Id.* at 543.

171. *Id.* at 542.

172. *Id.* at 546.

173. *Id.* at 545.

174. *Id.* at 546.



decipher issues of an ecclesiastical nature, it may use neutral principles of law to make a decision.<sup>175</sup> In deciding *Pfeil*, the Minnesota Supreme Court ignored the analytical framework it had established in *Odenthal v. Minnesota Conference of Seventh-Day Adventists*. As a result, *Odenthal* and *Pfeil* adopted conflicting holdings,<sup>176</sup> thereby diluting the doctrine of stare decisis.<sup>177</sup>

In *Odenthal*, the Minnesota Supreme Court found that the district court did not entangle itself with religion by determining whether a minister met the statutory definition of an “unlicensed mental health practitioner.”<sup>178</sup> Even though the claim was in a religious context, the district court was permitted to use neutral principles of law because the statutory definition was neutral on its face and did not involve religious principles.<sup>179</sup> Similarly, one of the statements in *Pfeil*, the allegation that Behnke accused the Pfeils of saying Behnke had stolen church funds,<sup>180</sup> can be resolved without implicating church doctrine by using the neutral law of

175. Cf. Isaac A. McBeth & Jennifer R. Sykes, Comment, *The Unavoidable Ecclesiastical Collision in Virginia*, 14 RICH. J.L. & PUB. INT. 509, 521 (2011) (explaining how courts use these same two approaches in the related context of church property disputes).

176. *Pfeil*, 877 N.W.2d at 544 (Lillehaug, J., dissenting) (“Nothing in *Odenthal* hints that adjudicating a particular kind of state tort claim is entangling per se. To the contrary, it requires that we analyze state tort claims on a claim-by-claim basis.”).

177. *Id.* The doctrine of stare decisis is crucial to the judiciary, lending both certainty and legitimacy to the judicial process. See generally Jordan Wilder Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681 (2008) (discussing the merits of stare decisis and its role in legitimizing judicial review).

178. See *Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 438 (Minn. 2002); see also MINN. STAT. § 148B.60, subdiv. 3 (1998) (repealed 2003) (statutory definition of “unlicensed mental health practitioner”).

179. See *Odenthal*, 649 N.W.2d at 438; see also *State v. Wenthe*, 839 N.W.2d 83, 90 (Minn. 2014) (“No entanglement problem exists . . . when civil courts use neutral principles of law—rules or standards that have been developed and are applied without particular regard to religious institutions or doctrines—to resolve disputes even though those disputes involve religious institutions or actors.”); *Tubra v. Cooke*, 225 P.3d 862, 872 (Or. App. 2010) (“If, however, the statements . . . do not concern the religious beliefs and practices of the religious organization . . . then the First Amendment does not necessarily prevent adjudication of the defamation claim . . .”).

180. Appellant’s Brief and Addendum, *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession*, 877 N.W.2d 528 (2016) (No. A14-0605), 2015 WL 5000489, at \*25.

defamation.<sup>181</sup> Even though the claim may have originated in a religious context, the claim is secular in nature because its determination does not involve matters of religious doctrine or polity.<sup>182</sup> Whether or not the claim was defamatory has nothing to do with “an internal church decision that affects the faith and mission of the church itself.”<sup>183</sup>

Indeed, courts outside of Minnesota have been willing to distinguish secular claims—specifically, defamation—from those involving religion. In *Miles v. Perry*, a church secretary was accused of misappropriating church funds by the pastor and board of trustees.<sup>184</sup> These accusations were made by the pastor and board of trustees within the context of a church board meeting.<sup>185</sup> The Connecticut Appellate Court declined to dismiss the plaintiff’s defamation claim,<sup>186</sup> reasoning that the defamatory accusations were actionable *per se* because they involved “a crime involving moral turpitude”<sup>187</sup> and referred to “improper conduct or lack of skill or integrity in one’s profession.”<sup>188</sup> In other words, the court determined that analysis of church doctrine was not required in order to find that the accusations were defamatory.

Similarly, in *St. Luke Evangelical Lutheran Church, Inc. v. Smith*, a pastor accused two church employees of carrying on an affair.<sup>189</sup> The accusation spread to members of the church, leading to the

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181. In order to recover for a defamatory statement, a plaintiff must prove: (1) statement was communicated to someone other than plaintiff; (2) statement was false; (3) statement harmed plaintiff’s reputation; and (4) statement is not protected by a qualified privilege. *See Stuemppes v. Parke, Davis & Co.*, 297 N.W.2d 252, 255–57 (Minn. 1980) (citing RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. LAW INST. 1977)).

182. *See Jones v. Wolf*, 443 U.S. 595, 602–04 (1979) (explaining that there is no entanglement issue when neutral principles of law are applied without regard to religious institutions or doctrines); *cf. Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709 (1976).

183. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

184. 529 A.2d 199, 202 (Conn. App. Ct. 1987).

185. *Id.*

186. *Id.* at 213.

187. *Id.* at 209 (citing *Proto v. Bridgeport Herald Corp.*, 72 A.2d 820, 825 (Conn. 1950)).

188. *Id.* (quoting *Charles Parker Co. v. Silver City Crystal Co.*, 116 A.2d 440, 444 (Conn. 1955)).

189. 568 A.2d 35, 36 (Md. Ct. Spec. App. 1990).

dismissal of the plaintiff, one of the accused employees.<sup>190</sup> After suing for defamation and invasion of privacy, the plaintiff was awarded more than \$300,000 in compensatory and punitive damages<sup>191</sup> even though the defamatory statements were uttered within the church context. And in *Marshall v. Munro*, the plaintiff, an ordained minister, was denied a job with a church based on derogatory information the church had received.<sup>192</sup> The plaintiff was accused of being divorced, being dishonest, being “unable to perform pastoral duties due to throat surgery,” and making improper advances at a church member.<sup>193</sup> Although the Alaska Supreme Court declined to rule on the plaintiff’s breach of contract claim,<sup>194</sup> the claims of defamation and interference with contract were considered.<sup>195</sup> Noting that courts “have a duty to adjudicate in neutral terms . . . without resolving underlying religious issues,”<sup>196</sup> the court ruled that the defamation and interference with contract claims could be severed from the impermissible claims.<sup>197</sup> While both the plaintiff and the defendant were pastors, the claims of defamation and interference with contract did not implicate the plaintiff’s “qualifications or the qualifications required of pastors in general.”<sup>198</sup>

In an even more liberal use of the neutral principles of law doctrine, the Iowa Supreme Court refused to summarily dismiss a plaintiff’s defamation claim in the church context.<sup>199</sup> In *Kliebenstein v. Iowa Conference of United Methodist Church*, a United Methodist Church district superintendent accused the plaintiff of embodying

190. *Id.* at 36–37.

191. *Id.* at 37. Although the case was later remanded to the Maryland Court of Special Appeals, it was done so in order to affirm the ruling of the Circuit Court. *Id.* at 43.

192. 845 P.2d 424, 425 (Alaska 1993).

193. *Id.*

194. *Id.* at 428. The court reasoned that determining whether the defendant “breached a covenant of good faith would require the court to interpret Marshall’s and Munro’s employment relationship.” *Id.* Therefore, the court could not adjudicate the claim because the First Amendment does not permit courts “to imply contractual duties on religious entities.” *Id.*

195. *Id.*

196. *Id.* at 426.

197. *See id.* at 428. (“There is no difficulty in separating the contract claim from the tort claims of defamation and interference with contract.”).

198. *Id.*

199. *See Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404, 408 (Iowa 2003), *cert. denied*, 540 U.S. 977 (2003).

the “spirit of Satan.”<sup>200</sup> The issue before the court was whether the phrase “spirit of Satan” had a secular meaning that could be used without interpreting church doctrine.<sup>201</sup> After consulting the dictionary, the court determined that words such as “Satan,” “satanic,” and “devil” all carried secular and sectarian meanings and could therefore be analyzed “without treading on—or wading into—religious doctrine.”<sup>202</sup> Given the secular meaning of these words, the ecclesiastical abstention issue could be avoided.<sup>203</sup>

Although courts differ as to the method of analysis to be used in a state tort claim against religious organizations,<sup>204</sup> *Odenthal* made it clear that Minnesota had already approved of the statement-by-statement approach advocated by many other states.<sup>205</sup> Because there is no United States Supreme Court case that deals with the issue in *Pfeil*,<sup>206</sup> the Minnesota Supreme Court should have applied the framework set in *Odenthal*<sup>207</sup> to analyze the Pfeils’ claims on a statement-by-statement basis.

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200. *Id.* at 405.

201. *Id.* at 407.

202. *Id.* at 407–08. Although “spirit of Satan” was not defined in the dictionary, the court was content to combine other words that amounted to the same meaning. *Id.* Because these words could also be used in a secular context, the court did not have to “resort to theological reflection.” *Id.* at 407.

203. *See id.* at 407–08. In addition to the secular meaning of these words, the court emphasized that any ecclesiastical protection was weakened because the alleged defamatory statement was disseminated to church members and non-members alike. *Id.* at 407 (quoting *Brewer v. Second Baptist Church of L.A.*, 197 P.2d 713, 717 (1948)) (“The fact that Swinton’s communication about Jane was published outside the congregation weakens this ecclesiastical shield. First, otherwise privileged communications may be lost upon proof of excess publication or publication ‘beyond the group interest.’”).

204. *Compare Pfeil v. St. Matthews Evangelical Lutheran of Unaltered Augsburg Confession*, 877 N.W.2d 528, 537 n.9 (Minn. 2016) (citing examples of courts that have declined to adjudicate defamation claims arising out of a church disciplinary proceeding), *with id.* at n.10 (citing examples of states that have adopted a claim-by-claim approach to adjudicating alleged torts made in the church context).

205. *See Odenthal v. Minn. Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 441 (Minn. 2002) (“Because these standards appear to be neutral with respect to religion, they can be applied without excessive entanglement.”).

206. *Pfeil*, 877 N.W.2d at 534.

207. *Odenthal*, 649 N.W.2d at 440–43.

B. *Extending the Scope of the Ecclesiastical Abstention Doctrine to Avoid a “Complicated and Messy Inquiry”*

It is clear that several state courts have analyzed defamation claims arising out of a church disciplinary proceeding on a claim-by-claim basis.<sup>208</sup> Rather than follow the analysis advocated by numerous states and its own framework in *Odenthal*, the *Pfeil* court announced a new rule that extended the ecclesiastical abstention doctrine beyond what is required by United States Supreme Court jurisprudence.<sup>209</sup>

In order to avoid a “complicated and messy inquiry,”<sup>210</sup> the majority relied heavily on *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>211</sup> However, *Pfeil* presented facts and issues that were not addressed in *Hosanna-Tabor*.<sup>212</sup> The holding in *Hosanna-Tabor* was *not* meant to extend beyond employment discrimination suits involving ministerial employees.<sup>213</sup> Grounding the *Pfeil*

208. See, e.g., *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1113 (Pa. 2009) (holding that a court should analyze each individual claim to determine whether it was “reasonably likely” that the plaintiff could meet its burden of proof without intruding into the “sacred precincts”); *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605, 608 (S.C. 2013) (holding that statements made during a church disciplinary hearing were independent of religious doctrine and therefore could be adjudicated using neutral principles of law); *Bowie v. Murphy*, 624 S.E.2d 74, (Va. 2006) (holding that a defamation claim based on an alleged instance of assault did not involve matters of church governance); see also *supra* notes 184–203 and accompanying text.

209. *Pfeil*, 877 N.W.2d at 542 (Lillehaug, J., dissenting).

210. *Id.* at 538 (majority opinion).

211. See *id.* at 534–35, 540.

212. Compare *id.* at 536–42 (determining whether a court can use neutral principles of law to adjudicate a defamation claim in the context of a church disciplinary proceeding), with *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–10 (2012) (determining whether an employment discrimination claim in a religious context would result in “government interference with an internal church decision that affects the faith and mission of the church itself,” thereby precluding adjudication through the ministerial exception).

213. See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 274 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Although *Priests for Life* was later vacated and remanded by *Zubik*, there is nothing to suggest that the opinion of the Supreme Court has changed regarding its hesitance to extend the holding in *Hosanna-Tabor*. *Priests for Life* dealt with a challenge to contraceptive coverage in the Affordable Care Act and did not deal directly with the ministerial exception. See 772 F.3d at 235.

decision in a case that did not address the same issues was misguided.

Likewise, the *Pfeil* majority's reliance on *Black v. Snyder*<sup>214</sup> and *Schoenhals v. Mains*<sup>215</sup> was unfounded.<sup>216</sup> In *Snyder*, the court refused to adjudicate a pastor's defamation claim because it was made in the context of a church employment decision and therefore triggered the ministerial exception.<sup>217</sup> However, the court *did* allow the pastor to bring a sexual-harassment claim because the claim did not involve scrutiny of church doctrine or interfere with church employment decisions.<sup>218</sup> In *Mains*, the court refused to hear a defamation claim because the alleged statements involved matters of church doctrine and discipline.<sup>219</sup> However, the court suggested that one of the claims—being engaged in the “direct fabrication of lies with the intent to hurt the reputation” of the church—appeared neutral on its face and could possibly be adjudicated without interpreting church doctrine.<sup>220</sup> Accordingly, it is clear that the *Pfeil* court could have adjudicated claims presented before it while still being consistent with the holdings in *Snyder* and *Mains*. Defamation law, which is neutral on its face, could have been applied to the claim relating to stealing church funds because the claim did not implicate the ministerial exception and did not involve matters of church doctrine and discipline.<sup>221</sup>

### C. Judicial Policy Making

As Justice Lillehaug appropriately noted in his *Pfeil* dissent, the process of deciding whether government is excessively entangled with religion does not *necessarily* amount to excessive entanglement.<sup>222</sup> Indeed, courts are often required to make

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214. 471 N.W.2d 715, 720 (Minn. Ct. App. 1991), *review denied*, (Minn. Aug. 29, 1991).

215. 504 N.W.2d 233, 234–36 (Minn. Ct. App. 1993).

216. *See Pfeil*, 877 N.W.2d at 535–36 (discussing the lower courts' approvals of *Black v. Snyder* and *Schoenhals v. Mains*).

217. *Black*, 471 N.W.2d at 720.

218. *See id.* at 721; *see also* Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (holding that adjudication of an employment contract claim is permissible if the plaintiff can prove that the contract was breached without examining church doctrine).

219. *See Schoenhals*, 504 N.W.2d at 234–36.

220. *Id.* at 236.

221. *Pfeil*, 877 N.W.2d at 546 (Lillehaug, J., dissenting).

222. *Id.* at 544.

inquiries that involve religious doctrine;<sup>223</sup> this in itself does not violate the First Amendment.<sup>224</sup> An example of this preliminary examination appears in cases involving the Religious Freedom Restoration Act (RFRA).<sup>225</sup> In one such case, *United States v. Meyers*,<sup>226</sup> the defendant was convicted of conspiracy to possess and distribute marijuana.<sup>227</sup> The defendant claimed to be the founder and Reverend of the “Church of Marijuana,” a religion that commanded him to “use, possess, grow and distribute marijuana for the good of mankind and the planet earth.”<sup>228</sup> In order to decide whether this practice was protected by RFRA, the court had to determine whether the teachings of the “Church of Marijuana” fell under RFRA’s definition of “religious beliefs.”<sup>229</sup> Ultimately, the court determined that the defendant’s beliefs amounted to a personal philosophy and were therefore not protected by RFRA.<sup>230</sup>

As some commentators have noted, determining what practices are “religious” is essential to both Free Exercise and Establishment Clause jurisprudence.<sup>231</sup> In order to do so, there must be a certain level of flexibility for the judiciary to determine

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223. Gardner, *supra* note 76, at 258 (“Courts are routinely required to examine religious doctrines in order to determine whether a certain practice is ‘religious’ for the purposes of the First Amendment and various other laws that deal with religion.”); *see also* Wisconsin v. Yoder 406 U.S. 205, 215–16 (1972) (discussing the need to examine the doctrine and practice of the Amish religion before determining whether respondents’ beliefs were “religious” and “sincere”).

224. *See* Overstreet, *supra* note 95, at 291 n.129 (citing cases that have distinguished between permissible judicial intrusion and excessive judicial involvement).

225. 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

226. 95 F.3d 1475 (10th Cir. 1996).

227. *Id.* at 1479.

228. *Id.*

229. *See id.* at 1481–84.

230. *See id.* at 1484 (“[W]e hold that Meyers’ beliefs more accurately espouse a philosophy and/or way of life rather than a ‘religion.’ The district court did not err in prohibiting Meyers’ religious freedom defense.”); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

231. *See* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1959–60 (2001) (arguing that prohibiting courts from making initial inquiries related to religious beliefs would result in “killing the free exercise with kindness” and “a weakened Establishment Clause”).

whether a law will inhibit religious freedom or whether it will excessively entangle government with religion.<sup>232</sup> If, after making this inquiry, there is no entanglement, then there is no “compulsory deference to religious authority.”<sup>233</sup>

Because the *Pfeil* court did not have to completely defer to the religious authority of the respondents, its holding appears to be the result of an intentional policy choice.<sup>234</sup> By granting a religious actor an almost unlimited opportunity to defame during disciplinary proceedings, the court essentially balanced a defamed victim’s right to recovery with a church’s right to discipline its members and ruled that the scales of justice tipped toward the interests of the church.<sup>235</sup> The majority did not consider how its decision might apply to scenarios involving a defamed victim’s right to remedy; but at the same time, the majority seemed very concerned as to the “chilling effect” that a statement-by-statement analysis may have on a religious actor’s speech.<sup>236</sup> And although a church’s right to discipline is important to its freedom of religion, adjudicating a valid defamation claim does not interfere with that freedom. There is no need for the First Amendment to “str[ike] the balance” in this case.<sup>237</sup>

#### D. Future Ramifications

By refusing to consider otherwise valid claims because of the religious context in which they arose,<sup>238</sup> the *Pfeil* decision effectively allows a person to freely defame another in certain contexts. The gravity of this decision leads one to question if more extreme defamatory statements or other tortious acts might be permissible

232. *See id.*

233. *Jones v. Wolf*, 443 U.S. 595, 605 (1979).

234. *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession*, 877 N.W.2d 528, 545 (Minn. 2016) (Lillehaug, J., dissenting).

235. *See id.* at 541 (majority opinion).

236. *Compare id.* at 539 (arguing that the separation of “religious” claims and “secular” claims could lead to a restraint of speech), *with id.* at 540 n.12 (“Although we recognize the dissent’s concerns regarding future cases, it would be inappropriate to speculate on how the First Amendment may apply to hypothetical facts that are not before us.”).

237. *Id.* at 542 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012)) (“[T]he First Amendment has struck the balance for us.”).

238. *Id.*



in a church disciplinary setting.<sup>239</sup> It is unclear, for example, whether a plaintiff could seek a remedy after being accused of sexual assault in a church disciplinary proceeding.<sup>240</sup> Furthermore, the evident conflict between *Odenthal* and *Pfeil*—both Minnesota Supreme Court decisions—may lead future courts to make inconsistent decisions.<sup>241</sup> Likewise, the *Pfeil* court’s willingness to extend the historically limited benefit of absolute privilege is concerning.

1. *Expanding the Narrow Applications of Absolute Privilege in Minnesota*

Permitting a religious actor to defame another in a religious context, as the *Pfeil* decision does, essentially amounts to an absolute privilege.<sup>242</sup> But as Minnesota courts have emphasized, absolute privilege has “narrow limits”<sup>243</sup> and is granted only “when public policy weighs strongly in favor of such extension.”<sup>244</sup> In other words, only in cases “in which the public service or the administration of justice requires complete immunity” will this

239. See *id.* at 546 (Lillehaug, J., dissenting) (“[I]t is difficult to discern why the court’s categorical rule of law insulating religious actors from defamation claims would not extend to and insulate those actors from liability for other torts.”).

240. See *id.* at 544.

241. Cases involving similar facts and law sometimes lead to seemingly contradictory results, which can lead to confusion in the legal community. Even the highest court in the land is not immune from handing down inconsistent decisions, as evidenced in some of its First Amendment jurisprudence. Compare *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 873–74 (2005) (holding that the presence of framed copies of the Ten Commandments in two Kentucky courthouses had a predominantly religious purpose, and therefore violated the Establishment Clause of the First Amendment), with *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (holding that a Ten Commandments monument displayed on the grounds of the Texas State Capitol did not amount to an unconstitutional government endorsement of religion).

242. *Pfeil*, 877 N.W.2d at 542 (Lillehaug, J., dissenting). Privileges in the defamation context are “divided into two categories: absolute and qualified.” Erica Holzer, *Torts: Striking A Balance: Minnesota’s Minority Stance on the Privilege to Defame—Zutz v. Nelson*, 788 N.W.2d 58 (Minn. 2010), 38 WM. MITCHELL L. REV. 559, 561 (2011) (citing *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 416 (1954)).

243. See *Matthis*, 243 Minn. at 223, 67 N.W.2d at 417.

244. *Zutz v. Nelson*, 788 N.W.2d 58, 66 (Minn. 2010).

privilege be extended.<sup>245</sup> Church disciplinary proceedings do not constitute, and have never constituted, an area that requires complete immunity. Accordingly, the *Pfeil* majority departed from precedent by extending absolute privilege to protect church officials in the disciplinary context. Examining current applications of absolute privilege demonstrates this misstep.

One notable application of absolute privilege, where public policy strongly favors such an extension, is to federal legislative,<sup>246</sup> judicial,<sup>247</sup> and executive<sup>248</sup> officials. In these contexts, the privilege works to enable federal officials to speak freely while performing their governmental duties.<sup>249</sup> The rationale for such a protection is not, as one might assume, to shield certain exalted individuals<sup>250</sup> but rather to promote the public welfare by giving officials the freedom to run a functioning government.<sup>251</sup>

To varying degrees, states have also extended absolute privilege to government officials. When given the chance,<sup>252</sup> Minnesota courts have erred on the side of limiting absolute

245. See *Matthis*, 243 Minn. at 223, 67 N.W.2d at 417.

246. Freedom of speech within the legislature has always been a pillar of United States democracy, as evidenced by its inclusion in the Constitution:

[Members of Congress] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. CONST. art. I, § 6, cl. 1. Every state has acknowledged this legislative privilege in one way or another, see *Holzer*, *supra* note 242, at 566, including Minnesota. See MINN. CONST. art. IV, § 10 (“For any speech or debate in either house [members of each house] shall not be questioned in any other place.”). However, even legislative officials have a limit to the privilege they are afforded. See *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (holding that defamatory statements disseminated in newsletters and press releases were not “essential to the deliberations of the Senate” and therefore were not protected speech).

247. See *Bradley v. Fisher*, 80 U.S. 335, 351 (1871).

248. See *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

249. See *Holzer*, *supra* note 242, at 565.

250. See *id.* at 566–67.

251. See *Barr v. Matteo*, 360 U.S. 564, 572–73 (1959) (“The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government.”).

252. See *Holzer*, *supra* note 242, at 572 (“Within Minnesota, courts have repeatedly faced the decision of whether to join this growing trend [of extending instances of absolute privilege], or maintain the ‘narrow limits’ Minnesota has placed on absolute privilege since it became a state.”).

privilege and confining it within the “narrow limits” that have historically been granted.<sup>253</sup> Even as other jurisdictions have, at times, been more generous in extending absolute privilege,<sup>254</sup> Minnesota has generally extended this privilege to legislative, judicial, and executive officials, but only when a strong public policy is served by granting absolute privilege.<sup>255</sup>

In Minnesota, legislators are granted absolute privilege via the Minnesota Constitution.<sup>256</sup> The relevant section provides that members of the Minnesota legislature “shall be privileged from arrest during the session of their respective houses” and “shall not be questioned” while acting in an official capacity.<sup>257</sup> Given the inclusion of these provisions in the state’s Constitution, it is clear that the drafters recognized the need for legislators to speak freely in order to best serve the public. In other words, the strong public policy that is served by extending the privilege to legislators is that it is necessary to prevent legislators from becoming mired in litigation, which would inevitably distract them from their duty to the public.<sup>258</sup> Furthermore, the timidity that would result from an unprivileged environment would prevent legislators from being completely forthcoming, thereby harming the public by limiting access to the truth.<sup>259</sup> For these reasons, it is clear that this area falls within the “narrow limits” of absolute privilege.

Absolute privilege extends to judicial branch officials in Minnesota. In *Matthis v. Kennedy*,<sup>260</sup> the Minnesota Supreme Court held that defamatory statements made in the course of a judicial proceeding<sup>261</sup> are absolutely privileged if they are related to the subject matter of the proceeding.<sup>262</sup> The court reasoned that this extensive protection satisfied the strong public policy of allowing parties and their attorneys to be free to defend their causes in court

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253. *See id.* at 573.

254. *See id.* at 571 nn.92–94.

255. *Id.* at 573.

256. MINN. CONST. art. IV, § 10.

257. *Id.*

258. *See Holzer, supra* note 242, at 567.

259. *See id.*

260. 243 Minn. 219, 67 N.W.2d 413 (1954).

261. *See id.* at 223, 67 N.W.2d at 417. A judicial proceeding, according to the *Matthis* court, includes not only trials, but also any “proceeding of a judicial nature.” *Id.*

262. *See id.* at 219, 67 N.W.2d at 414.

without fear of being subjected to future lawsuits for libel and slander.<sup>263</sup> Thus, absolute privilege is necessary in this context.

The Minnesota Supreme Court also extended absolute privilege to high-level state executive officials, something that was done on the federal level almost a century earlier by the United States Supreme Court<sup>264</sup> and recommended by the Restatement (Second) of Torts.<sup>265</sup> In *Johnson v. Dirkswager*,<sup>266</sup> a hospital supervisor sued Minnesota's Commissioner of Public Welfare for defamation, among other claims.<sup>267</sup> The lawsuit concerned a telephone interview between the Commissioner and a newspaper reporter in which the Commissioner revealed that the hospital supervisor had been terminated from his position because of "sexual improprieties."<sup>268</sup> In ruling in favor of the Commissioner, the Minnesota Supreme Court stated that the absolute privilege enjoyed by legislative and judicial representatives should also be extended to top-level executive officials.<sup>269</sup> Therefore, the statements communicated by the Commissioner to the newspaper reporter were protected because they were made in the course of his official duty.<sup>270</sup> According to the court, the public is better served when executive officials are free to speak out in the performance of their duties.<sup>271</sup> But Minnesota courts have consistently limited this privilege to *high-ranking* executive officials.<sup>272</sup>

However, one notable exception that does extend absolute privilege to low-level executive officials was formulated in *Carradine v. State*.<sup>273</sup> In *Carradine*, a motorist sued a Minnesota state trooper

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263. See *id.* The court also noted that the privilege extended not only to attorneys but to parties and witnesses as well. *Id.* at 223, 67 N.W.2d at 417.

264. See *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896).

265. RESTATEMENT (SECOND) OF TORTS § 591 (AM. LAW INST. 1977).

266. 315 N.W.2d 215 (Minn. 1982).

267. See *id.* at 217.

268. See *id.* This information was published the next day in the *Minneapolis Tribune*. *Id.*

269. See *id.* at 221 ("It seems to us that the same policy considerations that warrant an absolute privilege for those in the legislative and judicial branches of government apply to the executive branch.").

270. See *id.*

271. See *id.*

272. See, e.g., *Holzer*, *supra* note 242, at 573 n.105 (describing examples of the Minnesota Supreme Court declining to extend absolute privilege to lower level government employees).

273. 511 N.W.2d 733 (Minn. 1994).

for making allegedly defamatory statements in his arrest report.<sup>274</sup> While noting that police officers were not necessarily “high level” executive officials, the court’s opinion did not turn on whether or not absolute privilege should be given to “low level” employees.<sup>275</sup> Instead, the court’s inquiry was whether making an arrest report was a key part of a state trooper’s duties.<sup>276</sup> Because the court determined that this was indeed an important part of an officer’s duties, an officer would be protected from any defamation claim that may arise out of a written arrest report.<sup>277</sup> Accordingly, the public policy of allowing a government official to perform confidentially—which, ultimately, benefits the public—remained intact.<sup>278</sup>

The holding in *Carradine* acted as an exception to the court’s preference of limiting absolute privilege, but the case should not be read as exhibiting willingness to extend this privilege to other areas. Indeed, the *Carradine* court, while extending absolute privilege to statements made in arrest reports, also held that a qualified privilege was sufficient for police statements to the media.<sup>279</sup> The *Carradine* decision was not meant to create a broad application of absolute privilege. Thus, the court maintained its narrow application of the privilege.

As the above cases reveal, Minnesota courts’ extension of absolute privilege has been very narrow. At no point have these courts gone so far as to extend this far-reaching privilege to church disciplinary proceedings, and for good reason: communications within the church do not implicate the public to the same extent as government proceedings. The rationale for the privilege in the

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274. *See id.* at 734. In the arrest report, the police officer described the motorist’s conduct as involving “speeding, reckless driving, fleeing an officer, and impersonating an officer.” *Id.*

275. *See id.* at 735.

276. *See id.* at 736 (“Whether an executive officer is absolutely immune from defamation liability depends on many factors, including the nature of the function assigned to the officer and the relationship of the statements to the performance of that function.”).

277. *See id.* at 736–37. Without this freedom to write a detailed and accurate report, the court reasoned, police officers would become more hesitant and less forthcoming, which could affect the usefulness of the report in subsequent prosecution. *Id.* at 736.

278. *See id.* at 735.

279. *See id.* at 737 (“[W]e conclude that not all statements made to the press by an arresting officer such as Trooper Chase are absolutely privileged.”).

government setting is to promote the public welfare by encouraging open communication, even if it is, at times, defamatory. There is no such justification in the church disciplinary context. Open communication between church leaders and church members is, of course, a desirable goal, but protecting defamatory statements made in this setting is not supported by any strong public policy. Given the absence of justification in the church setting and the Minnesota Supreme Court's tradition of hesitancy in this area, the *Pfeil* court should not have been so quick to extend what essentially amounts to an absolute privilege to defame.

2. *Balancing Interests of Church and Defamed Victim Through a Qualified Privilege*

By essentially granting a church actor carte blanche to defame within the church, the *Pfeil* majority did not adequately account for the devastating impact that a defamatory statement may have on its victim.<sup>280</sup> Statements made in private conversations, particularly contentious ones, cannot be expected to stay private.<sup>281</sup>

A better alternative would be to create a qualified privilege for communications during church disciplinary proceedings.<sup>282</sup> Such a privilege is recognized in the Restatement (Second) of Torts<sup>283</sup> and used in other jurisdictions to balance the rights of a defamed victim and the rights of a religious organization.<sup>284</sup> When applied to *Pfeil*, a qualified privilege would have protected all of the communications that were religious in nature while still allowing the court to determine if the privilege was abused in making the non-religious

280. See *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010) (“[D]efamatory speech . . . can be personally crushing and career-ending.”); *Holzer*, *supra* note 242, at 564 (“Victims of defamatory speech, for example, are subject to hatred, ridicule, obloquy, and contempt.”).

281. See *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession*, 877 N.W.2d 528, 545 (Minn. 2016) (Lillehaug, J., dissenting) (“This proviso ignores the reality of how defamation can devastate its victims. Any statement made in a closed meeting of ‘members’ and ‘participants’ is unlikely to stay there.”).

282. *Id.*

283. RESTATEMENT (SECOND) OF TORTS § 596 cmt. e (AM. LAW INST. 1977) (“[Qualified privilege is available] for communications among [members of a religious organization] concerning the qualifications of the officers and members and their participation in the activities of the society.”).

284. See, e.g., *Rankin v. Phillippe*, 211 A.2d 56, 58 (Pa. Super. Ct. 1965).

statements. Thus, the privilege would have respected both the church's right to speech and the defamed victim's right to a remedy.

A qualified privilege, like an absolute privilege, protects statements made in certain contexts.<sup>285</sup> Rather than inhibit speech, these privileges act to encourage it—even when the speech might be defamatory.<sup>286</sup> The Minnesota Supreme Court has previously stated the elements and effects of qualified privilege:

The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.<sup>287</sup>

The difference between the two privileges lies in the amount of protection offered. An absolute privilege bars liability for even *intentionally* false statements made with actual malice, while a qualified privilege bars liability *only* when the statement is made in good faith and without malice.<sup>288</sup> In other words, a qualified privilege ceases to act as a safeguard if it is abused.<sup>289</sup>

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285. *Minke v. City of Minneapolis*, 845 N.W.2d 179, 182 (Minn. 2014) (citing *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 889 (Minn. 1986)).

286. *Id.*

287. *See Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256–57 (Minn. 1980) (quoting *Hebner v. Great N. Ry.*, 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899)); *see also Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 380 (Minn. 1990).

288. *Matthis v. Kennedy*, 243 Minn. 219, 223, 67 N.W.2d 413, 416 (1954).

289. *Id.* (“[A] qualified or conditional privilege grants immunity only if the privilege is not abused . . .”); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115, at 832 (5th ed. 1984) (“[Qualified] immunity is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion.”). There are four ways in which an actor can abuse this protection. *See* RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (AM. LAW INST. 1977) (citations omitted) (stating that a qualified privilege may be abused: (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter; (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given; (3) because of excessive publication; or (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged).

Indeed, a similar privilege was granted in Minnesota for communications in the context of employment.<sup>290</sup> An example of this appears in *Stuempges v. Parke, Davis & Co.*, where the Minnesota Supreme Court held that a supervisor forfeited his qualified privilege when he acted with malice while speaking about the character of his former employee, the plaintiff.<sup>291</sup> The supervisor had indicated that he was confident in the employee's capabilities as a salesperson and that he would give a good recommendation to prospective employers.<sup>292</sup> However, when the supervisor was called upon to give his recommendation, he referred to the plaintiff as a poor salesperson who was hard to motivate.<sup>293</sup> While the court recognized that an employer should be able to speak freely while acting as a reference for a former employee, the court determined that this freedom ends when the employer undercuts the former employee with malice and bad faith.<sup>294</sup>

The same policy guiding *Stuempges* should apply in the context of church disciplinary proceedings. Religious actors should be able to speak freely about matters of church doctrine and should be protected when doing so. However, when a harmful claim is made about a church member that does not implicate religious law or polity, the claim should be evaluated to determine if it was defamatory. Applying a qualified privilege in this situation, as the Minnesota Supreme Court has done in the context of employment, should help assuage any First Amendment concerns.

The reluctance of the *Pfeil* majority to extend a qualified privilege seems to hinge on the possibility that litigation may be prolonged to determine if the privilege was abused.<sup>295</sup> However, defamation suits are often prolonged in order to make this abuse/non-abuse determination.<sup>296</sup> Determining whether a

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290. See *Lewis*, 389 N.W.2d at 889–90; *Stuempges*, 297 N.W.2d at 256–57 (Minn. 1980); *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 97, 235 N.W.2d 371, 374 (1975).

291. *Stuempges*, 297 N.W.2d at 258, 260.

292. See *id.* at 256.

293. See *id.* at 255.

294. See *id.* at 258.

295. *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession*, 877 N.W.2d 528, 540 n.11 (Minn. 2016) (“[D]etermining whether a statement is entitled to the protection of a qualified privilege requires extensive litigation.”).

296. See, e.g., *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 890 (Minn. 1986); *Stuempges*, 297 N.W.2d at 258.



statement is protected by a qualified privilege does not have to be an extensive, time-consuming ordeal. Minnesota courts already do this in the context of employment.<sup>297</sup> Although there are valid distinctions between an employment case and a case involving religious organizations, length of trial is not one of them. The minimal time it would take to make this determination should not be used as justification for denying a defamed victim a right to a remedy.

## V. CONCLUSION

In *Pfeil*, the court was asked to determine whether adjudicating the Pfeils' defamation claim would excessively entangle the government with religion, thereby violating the First Amendment.<sup>298</sup> Although courts have historically been reluctant to extend absolute privileges,<sup>299</sup> the *Pfeil* court's affirmation of the lower courts' holdings essentially granted a church actor an absolute privilege to defame in church disciplinary proceedings. To avoid any possible entanglement issue, it appears the court gave automatic deference to respondents merely because of their religious connection.<sup>300</sup> The majority failed to use the *Odenthal* framework of analyzing each state tort claim on a claim-by-claim

297. See *supra* notes 290–94 and accompanying text.

298. *Pfeil*, 877 N.W.2d at 536–37.

299. *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010) (“Absolute privilege is not lightly granted and applies only in limited circumstances.”); see *Holzer*, *supra* note 242, at 572–73.

300. See *Magarian*, *supra* note 231, at 1960 (“Absolute judicial avoidance of inquiries into religious substance, especially if it resulted in a weakened Establishment Clause, would cross the line that divides appropriate respect for religious autonomy from inappropriate solicitude for religious claims of transcendence.”); see also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting). In his dissent in *Milivojevich*, Justice Rehnquist warned of the possible Establishment Clause issues that may arise from giving automatic deference to religious institutions:

Such blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

426 U.S. at 734.

basis, thereby extending the scope of the ecclesiastical abstention doctrine and undermining the doctrine of stare decisis.<sup>301</sup> The court should have used neutral principles of law to determine which statements could be adjudicated without implicating the ecclesiastical abstention doctrine.

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301. See Connors, *supra* note 177, at 681; see also Harwood, *supra* note 31 at 350–51 (“[I]f the Court fails to abide by a single principle in addressing issues implicating a discrete area of the law, then there will be inconsistency in its decisions, and its jurisprudence will provide insufficient guidance to future Courts, lower courts, and policymakers alike.”).

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