Marquette Law Review

Volume 85
Issue 4 *Summer 2002*

Article 6

2002

Employing the Section 5 Enforcement Power to Guarantee Religious Freedom in the State Courts

Ryan G. Lee

EMPLOYING THE SECTION 5 ENFORCEMENT POWER TO GUARANTEE RELIGIOUS FREEDOM IN THE STATE COURTS

I. INTRODUCTION

A local bishop is concerned that a minister in her bishopric is mentally unsound. The codes and canons of her ecclesiastic body charge the bishop with the duty to see to the mental fitness of her ministers. In an effort to determine whether her minister is in a state that might jeopardize the spiritual well-being of her flock, the bishop contacts the psychologist treating the minister, and using moral persuasion, obtains information relating to the therapy the minister is receiving. Based on this information, the bishop decides to relieve the minister of his duties.[1]

A claim is brought by the divested minister against the bishop for failing to reappoint him as a minister, claiming lost wages and earning capacity.[2] May the bishop be held liable for conduct in accordance with the ecclesiastic rules of her church? May a state court inquire into the propriety of a bishop's conduct concerning the administration of her bishopric and its ministers? It depends at what time in history the question is posed. Fifty years ago, the answer would have almost certainly been that the principle of separation of church and state,[3] that steadfast and enduring derivative of the Establishment Clause[4] and the Free Exercise Clause[5] of the First Amendment to the United States

---

1. The facts in this example are borrowed from the case *Alberts v. Donald*, 479 N.E.2d 113, 115 (Mass. 1985).

2. *Id.* at 120.

3. This principle often manifests itself under the doctrine of religious or ecclesiastic questions. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 220 (2000).

> [T]he First Amendment religious clauses . . . contain . . . restriction[s] on the capacity of government, and especially the judiciary, to involve itself in matters of religious truth and doctrine, potentially irrespective of the conduct at issue and the identities of the parties. Broadly conceptualized, this restriction amounts to a general prohibition on the adjudication of religious questions, not unlike the Article III prohibition on the adjudication of so-called political or nonjusticiable questions.

Id.

4. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . . .").

5. *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion]. . . .").

Constitution, would have decreed that state courts eschew involvement in such ecclesiastic quarrels.[6] Historically, abstention from hearing such claims did not stem from a belief that the minister's claim was without normative merit; rather, it was instinctively recognized by secular jurists that even the most erudite of that rank would be reduced to a mere neophyte once asked to expound upon the dictates of the ecclesiastic doctrine.[7]

Recently, however, both scholars[8] and judges[9] have become increasingly confident in the latter's ability to assume the role of arbiter between divided flocks and dueling shepherds. More and more state courts are entertaining causes of action in tort against ecclesiastic bodies,[10] and the academic and judicial temper towards these new modes of redress do not suggest that such actions are on the decline.[11] This growing trend of litigious vindication for civil harms allegedly inflicted

---

6. *See* Maxwell v. Brougher, 222 P.2d 910, 911 (Cal. Ct. App. 1950) (stating that "[w]here . . . a matter which concerns church discipline or the conformity of its members to the standard of morals required of them, the decision of the church tribunal will not be interfered with by the secular courts . . . by directing them to proceed in a certain manner . . .").

7. Saunders-El v. Tsoulos, 1 F. Supp. 2d 845, 848 (N.D. Ill. 1998) ("[C]ourts are not equipped to resolve intra-faith differences among followers of a particular creed in relation to the Religion Clauses.").

8. *See* Eduardo Cruz, Comment, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499 (1991); Ivy B. Dodes, Note, *"Suffer The Little Children . . .": Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 HOFSTRA L. REV. 165 (1987); Randall K. Hanson, *Clergy Malpractice: Suing Ministers, Pastors, and Priests for Ungodly Counseling*, 39 DRAKE L. REV. 597 (1990); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996).

9. *See* Jones v. Wolf, 443 U.S. 595, 604 (1979) (holding that a state may constitutionally adopt neutral principles of law to adjudicate church property disputes); Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1249 (9th Cir. 1999) (holding that "no First Amendment issue arises when a court resolves a church property dispute by relying on state statutes concerning the holding of religious property, the language in the relevant deeds, and the terms of corporate charters of religious organizations"); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 10 F. Supp. 2d 138, 148 (D. Conn. 1998) (holding that a fiduciary claim against a diocese may be resolved under Connecticut law using neutral principles).

10. *See* EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505 (E.D.N.C 1999); Schmoll v. Chapman Univ., 83 Cal. Rptr. 2d 426 (Cal. Ct. App. 1999); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); Alberts v. Devine, 479 N.E.2d 113 (Mass. 1985); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992); Lightman v. Flaum, 687 N.Y.S.2d 562 (N.Y. Sup. Ct. 1999); Martinez v. Primera Asemblea de Dios, Inc., No. 05-96-01458-CV, 1998 WL 242412 (Tex. Ct. App. May 15, 1998); C.J.C. v. Corp. of the Catholic Bishop, 985 P.2d 262 (Wash. 1999).

11. *See generally supra* note 8.

from the pulpit might be attributed to several factors. First, citizens increasingly look to courts to remedy legal and social harms, of which religious organizations are not incapable of rendering.[12] Second, the wealth and property holdings of religious organizations in the United States are at their zenith[13]—and wealth and property rarely fail to attract legal attention.[14] Third, and perhaps most important, an increasingly secular society inclined to render all things relative no longer recognizes a meaningful distinction between the affairs of the church and the affairs of other prominent, and civilly liable, organizations and entities.[15]

Whatever the reasons, this disturbing erosion of ecclesiastic autonomy is at odds with the basic tenets of the First Amendment.[16] It is also at odds with notions of sound and farsighted government.[17] The

---

12. *See, e.g.*, John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL'Y 25 (1996).

13. *See, e.g.*, William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 317 (1986) (noting that "[t]he financial growth and commercial expansion of churches provide a fertile source of regulatory conflict.").

14. John C. Moorhouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 679 (1998) (noting that plaintiffs pursue defendants with deep pockets "even though [they are] only tangentially involved, because it increases the likelihood of recovering damages"); Villiers, *supra* note 8, at 28 (noting "the church is a deep pocket").

15. Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating it Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1062.

> The reason the proper relation between church and state is hard to capture in one image is because religious groups and religious individuals are not autonomous and isolated entities that exist on the other side of a wall from secular society; rather, they exist in the midst of secular society. Religious groups have contact with other groups, both religious and secular. They use the property and resources of society. In addition, religious groups provide some of the same social services government does—such as education, health care, housing, and social welfare. Furthermore, religious groups often employ or provide services to individuals who are not members of the group. Thus, religion and government cannot avoid each other. Their interests and obligations intersect. But, where interests intersect, they can also collide.

Id.

16. *See* Douglas Laycock, *Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981) (noting that "the right of church autonomy" is one of the rights protected by the Free Exercise Clause that "tends to be overlooked").

17. *See* John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1194–95 (1990). The Comment discusses the advocacy for religious freedom and separation of church and state by James Madison and Thomas Jefferson.

specter of the federal government intermingling in religious affairs of its citizens was promptly and prudently arrested by the nascent Congress in 1791 with the passage of the Bill of Rights, which placed the grant of religious freedom first among those august provisions.[18] A century and a half later, through the concept of due process, the First Amendment was incorporated through the Fourteenth Amendment and made applicable to the states.[19] Today, the protection of religious freedom once again requires the attention and vigilance of Congress, and thankfully, Congress is not without remedy.

Section 5 of the Fourteenth Amendment[20] empowers Congress to enforce the protections of the First Amendment against the states.[21] Using this enforcement power, Congress may authorize the federal

---

> [James] Madison . . . cautioned against political involvement in . . . religious issues 'because it [would] destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions' . . . Madison was [also] victorious . . . in convincing the Framers of the Constitution to include protection of religious freedoms in the Bill of Rights.

Id. (citations omitted). The Comment also notes:

> [Thomas] Jefferson felt so strongly about the separation of church and state that he had the passage of the Virginia Statute of Religious Liberty listed on his tombstone as one of his greatest accomplishments. . . . Jefferson's vision of the first amendment still persists today: 'A wall of separation between church and State.'

Id. (citations omitted); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 299–301 (Anchor Books ed., 1969) (noting that the separation of church and state is essential to preserve religion in America).

18. *See* U.S. CONST. amend. I ("Congress shall make no law *respecting an establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

19. *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (incorporating the Free Exercise Clause through the Fourteenth Amendment); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (incorporating the Establishment Clause through the Fourteenth Amendment).

20. U.S. CONST. amend. XIV. The Fourteenth Amendment provides:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id.

21. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("We agree . . . of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion.").

judiciary to enjoin state courts that seek to adjudicate matters which (1) excessively entangle church and state, (2) have the primary effect of advancing or inhibiting religion, or (3) regulate religious rather than secular conduct.[22]

This Comment lays out the scope of the constitutional violations committed by the adjudication of torts against ecclesiastic bodies by state courts, and it proposes the remedy by which Congress might halt such encroachment by the state courts. Specifically, Part II diagrams the offenses inflicted upon the Free Exercise Clause and the Establishment Clause of the First Amendment arising from the engagement of religious conduct by secular state courts. Part III discusses the remedy that Congress may issue under its Section 5 power to grant injunctive relief to religious defendants. Part IV anticipates and addresses possible constitutional and statutory attacks brought against this injunctive remedy. Finally, Part V concludes that such a remedy is a prudent and appropriate means by which Congress may halt existing unconstitutional practices by state courts that hinder religious freedoms. Part V thus urges enactment of the proposed statute.

II. STATE COURT ADJUDICATIONS OF TORTS AGAINST ECCLESIASTIC BODIES ARE OCCURRING IN VIOLATION OF THE FIRST AMENDMENT

A. The Protections of the Establishment Clause: The Lemon Test

Under *Lemon v. Kurtzman*,[23] the United States Supreme Court outlined the three evils that the Establishment Clause is interpreted to prevent.[24] The first evil to be prevented is state action that lacks a secular purpose.[25] The second evil to be prevented is state action that has the primary effect of advancing or inhibiting religion.[26] The third evil to be prevented is state action that is excessively entangled with

22. These are the three prohibitions of government conduct under the so-called "Lemon test" in reference to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* Kurt T. Lash, Speech, *The Status of Constitutional Religious Liberty at the End of the Millenium*, 32 LOY. L.A. L. REV. 1, 5 (1998) (summarizing the Lemon test: "Government actions must have a secular purpose; they cannot have a primary effect of advancing or inhibiting religion; and government regulation must not excessively entangle church and state.").

23. 403 U.S. 602 (1971).

24. *Id.* at 612 ("In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'") (citations omitted).

25. *Id.*

26. *Id.*

religion.[27] Entanglement can result from administrative oversight, political entanglement, vesting religious individuals with governmental authority, or regulatory conduct by the state that advances or inhibits religion.[28]

These three tests serve as gauges whereby the Court can ascertain whether the state actions, taken as a whole, amount to an endorsement, or display a preference for one religion over another, or one set of religious beliefs and practices over another.[29] These gauges can be very sensitive. For example, a court may consider a judicial inquiry into a religious matter unconstitutional merely because it might have a "chilling effect" on an institution's sacerdotal practices.[30] Similarly, a court may consider a statute affecting a religious institution unconstitutional merely because it sets the stage for future litigation concerning what is or what is not religious.[31] In fact, courts have declared that a religious institution's right to be free from the legal probing and rancor of secular court affairs is at "the very core" of the constitutional guarantees for religious establishments.[32]

Although not all courts agree, the Establishment Clause is generally held to prohibit courts from reviewing a religious institution's decision to hire or terminate a minister.[33] In *Pritzlaff v. Archdiocese of*

---

27. *Id.*

28. *Id.*

29. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) (holding that the main factor is whether the legislation "constitutes an endorsement of one or another set of religious beliefs or of religion generally").

30. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995) (holding that determining whether ecclesiastical authorities negligently supervised a defendant bishop would have chilling effect on "future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause") (citations omitted).

31. New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) (declaring that the "prospect of church and state litigating in court about what does and does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once").

32. *Id.*; Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717–18 (1976) (holding "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastic concern" and a review of such firing practices is "impermissible under the First and Fourteenth Amendments").

33. Dausch v. Ryske, 52 F.3d 1425 (7th Cir. 1994); Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998) (holding that inquiries into "policies and practices of [churches in] . . . hiring or supervising their clergy" violate the First Amendment) (citation omitted); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Roppolo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994); Swanson v. Roman Catholic Bishop, 692 A.2d 441 (Me. 1997); Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997) (en banc) (stating that nonrecognition of the cause of negligent supervision of a clergy member preserves autonomy and freedom of religious institution); L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); *Pritzlaff*, 533 N.W.2d at 782 (holding that the

Milwaukee,[34] the Wisconsin Supreme Court declared that judicial inquiries into the realm of Church "policies and practices" for hiring and supervising clergy raise First Amendment "entanglement" problems in violation of the Establishment Clause.[35] Further, in *Van Osdol v. Vogt*,[36] the Colorado Supreme Court held that "judicial review" of church practices in hiring ministers "excessively entangles" church and state in violation of the Establishment Clause.[37] The *Van Osdol* court reasoned that personnel matters, when they pertain to ministers, are "inextricable" from matters relating to church doctrine.[38]

The Establishment Clause also limits excessive government encroachment into religious affairs in areas of secular administration.[39] In *Waltz v. Tax Commission*,[40] the United States Supreme Court held that the Establishment Clause prohibits "sponsorship, financial support, and active involvement" of the state in the realm of religious activity.[41] While the *Waltz* court acknowledged that it is inevitable that at some level government finds itself intermingled with religious organizations, the Court regarded any excessive entanglement on the part of government in the affairs of religion proscribed by the Constitution.[42]

Finally, the Establishment Clause restricts states and local governments from enacting ordinances regulating matters of a religious nature such as religious food preparation.[43] For example, laws regulating kosher food have been held to violate the Establishment Clause because they regulate "religious purity" rather than the sanitary

---

First Amendment bars a claim of negligent hiring, retaining, supervision, and training against religious institutions). *But see* Moses v. Diocese of Colo., 863 P.2d 310, 323 (Colo. 1993) (holding that a member of the clergy who "accepts the parishioner's trust and accepts the role of counselor" has a duty to act "with the utmost good faith for the benefit of the parishioner") (citation omitted); Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989).

34. 533 N.W.2d 780 (Wis. 1995).

35. *Id.* at 791 (citation omitted).

36. 908 P.2d 1122 (Colo. 1996).

37. *Id.* at 1132–33.

38. *Id.* at 1128.

39. *See* Waltz v. Tax Comm'n, 397 U.S. 664 (1970).

40. *Id.*

41. *Id.* at 668.

42. *Id.* at 674.

43. Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353, 1366 (N.J. 1992) (holding that kosher regulations "involve the State excessively in religious matters").

or nutritional quality of food.[44] Moreover, such regulations generate unconstitutional, if not awkward, confrontations between religious adherents who insist that their food is, for example, kosher, but are nonetheless prosecuted under state or municipal regulations because the secular agencies believe, as a matter of law, that the food does not conform to the requirements of Orthodox Judaism.[45]

In general, courts are still highly cognizant of the need to avoid entanglements between church and government that tread on the establishment of religion. However, as will be apparent by later discussions in this Comment, some state courts are becoming less rigid in their demands for a disconnection of church and state.

B. Protections of the Free Exercise Clause: The Smith *Test*

Unlike the relatively invariant jurisprudence of the Establishment Clause,[46] the interpretation of the Free Exercise Clause has recurrently changed over the last half century. Prior to the 1960s, a government action did not violate the Free Exercise Clause if it was in pursuit of non-religious ends, and if the purpose of the action was to regulate secular conduct rather than religious belief.[47] However, after the early 1960s the United States Supreme Court began to view laws that burdened the free exercise of religion as matters for heightened scrutiny, even if the laws affecting religious exercise were neutral in intent and application.[48]

In *Sherbert v. Verner*,[49] the Court held that an employment law which forced a Seventh Day Adventist to choose between working on Saturdays or honoring the Saturday Sabbath requirements of her religion placed a burden on the free exercise of religion and was discriminatory in its application.[50] The Court held that in order to uphold the employment law, the state must show it had a compelling interest justifying a Saturday work policy that did not accommodate

---

44. *Id.* at 1360.

45. *Id.*

46. *See supra* Part II.A.

47. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (holding that bigamy was validly prohibited by the state over Free Exercise objections because states were able to regulate conduct in violation of "social duties").

48. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

49. 374 U.S. 398 (1963).

50. *Id.* at 406.

those who worshiped on Saturdays—which the state was unable to do.[51]

Similarly, in *Wisconsin v. Yoder*,[52] the Court held that the State of Wisconsin could not compel Amish children to attend high school.[53] Applying a strict scrutiny standard, the Court found that the state's interest in educating all of its citizens was not a sufficient reason to interfere with the Amish religious belief that children be taught vocational skills at home.[54] Thus, the *Sherbert/Yoder* cases and their progeny assembled a regime of strict scrutiny protection for religious actors under the Free Exercise Clause for almost thirty years.

In 1990, however, the Court abruptly departed from the scheme laid out in the *Sherbert/Yoder* line of cases in its holding in *Employment Division v. Smith*.[55] Under *Smith*, the Court held that neutral government action, which is not directed at a religious practice, and generally applicable, does not violate the Free Exercise Clause if it survives a rational basis test.[56] *Smith* involved American Indians fired by their employers for using the hallucinogenic drug peyote during a religious ceremony.[57] The American Indians claimed that denial of unemployment benefits by the State of Oregon interfered with their First Amendment right to use the hallucinogen during the ceremonies.[58] Employing *reductio ad adsurdum*,[59] the court backed away from its earlier pronouncements in *Sherber/Yoder* and reeled in its strict scrutiny treatment of government action hindering the free exercise of religion.[60] Instead, the Court adopted a rational basis standard when reviewing neutral laws of general applicability.[61] The Court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion

51. *Id.* at 409.
52. 406 U.S. 205 (1972).
53. *Id.* at 207.
54. *Id.* at 224–25.
55. 494 U.S. 872 (1990).
56. *Id.* at 885.
57. *Id.* at 874.
58. *Id.*
59. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)) (asking "'Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'").
60. *Id.*
61. *Id.* at 885.

prescribes.'"[62]

In the wake of *Smith*, it was not clear whether the neutral laws of general applicability would apply to the practices and policies of religious institutions.[63] Under a regime where laws of neutral and general applicability are enforced, the pre-*Smith* legal protections[64] under the "church autonomy doctrine"[65] or the "ministerial exception"[66] protecting the prerogatives of ecclesiastic bodies to conduct their own affairs free from secular law might arguably be breached.[67] It appears, however, that the church autonomy doctrine has survived *Smith* because of its dual guardianship under both the Free Exercise Clause and the Establishment Clause.[68]

At least for now, courts continue to hold that the church autonomy doctrine survived *Smith*.[69] Under the surviving church autonomy doctrine, Title VII and certain intentional tort claims in the church employment realm are still barred under the Free Exercise Clause since such claims are thought to require nonjusticiable evaluations of

---

62. *Id.* at 879 (citations omitted).

63. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993, 1009 (1990) (sarcastically noting that as a result of the *Smith* decision "churches cannot be taxed or regulated any more heavily than General Motors. The only remaining protection is that provided by formal neutrality; religious conduct cannot be singled out for facially discriminatory regulation."); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 237 (1991) (stating that *Smith* signaled a "withdrawal of constitutional protection for the free exercise of religion").

64. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (holding that Title VII enforcement against religious institutions would encroach on religious freedom).

65. Laycock, *supra* note 16, at 1388–1402.

66. *See* EEOC v. Catholic Univ., 83 F.3d 455, 461 (D.C. Cir. 1996) (defining the "ministerial exception" as a "long held" practice of precluding civil courts from "adjudicating employment discrimination suits by ministers against the church or religious institution employing them"). The court further notes that the exception is applied also to lay employees of religious institutions "whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship....'" *Id.* (alteration in original) (citations omitted); *see also* Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 269 (1998) (explaining that under the ministerial exception "courts have consistently held that the application of anti-discrimination laws to religious organizations and their ministerial employees would prove a violation of the First Amendment").

67. *See supra* note 63 and accompanying text.

68. *Catholic Univ.*, 83 F.3d at 463 (stating that "the application of Title VII would violate the Free Exercise Clause" and that the ministerial exception "survives under an exception to the general rule in *Smith*"). *But see* Guinan v. Roman Catholic Archdiocese, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (applying the ministerial exception narrowly).

69. *Catholic Univ.*, 83 F.3d at 463; Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996).

ecclesiastic matters.[70] Explaining how the Free Exercise Clause still protects church autonomy, the United States Court of Appeals for the D.C. Circuit in *EEOC v. Catholic University*[71] delineated a Free Exercise Clause with two strands, one of which *Smith* did not affect.[72] The first strand addressed the Free Exercise Clause's protection of the individual's right to practice his or her faith.[73] The second addressed protection against government encroachment into the internal management of a church.[74] The latter, according to the court, was unaffected by the *Smith* decision.[75] Whether the ministerial exception in the post-*Smith* regime is bulwarked by the Establishment Clause[76] or the Free Exercise Clause is beyond the scope of this Comment; it is sufficient for the present to merely note that courts continue to recognize that a church remains free to select and administer to those persons who "will carry out its religious mission."[77]

Although some free exercise protections, such as the ministerial exception, continue to survive under the post-*Smith* regime, the fate of religious protections as a whole in the state courts is uncertain. As the next section illustrates, state courts employ a variety of techniques—most of which are inconsistent with the mandates of the First Amendment—to allow once-proscribed tort claims against ecclesiastic bodies to be adjudicated.

C. Courts are Split on the Interpretation of Protections Afforded by Both Religious Clauses of the First Amendment

1. The Application of "Neutral Principles of Law"[78] to Allow State Encroachment into Religious Affairs in Violation of the First Amendment

The First Amendment provides that interpretation of church law,

---

70. *Van Osdol*, 908 P.2d at 1128.

71. *Catholic Univ.*, 83 F.3d at 455.

72. *Id.* at 462.

73. *Id.*

74. *Id.*

75. *Id.*

76. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976); Van Osdol v. Vogt, 908 P.2d 1122, 1131 (Colo. 1996).

77. *See Catholic Univ.*, 83 F.3d at 462 (stating that courts are unable to determine if an employment decision is based on legitimate or illegitimate grounds without delving into the internal management of the church—which is impermissible).

78. Doe v. Evans, 718 So. 2d 286, 288 (Fla. Dist. Ct. App. 1998).

policies, or practices by a court excessively entangles government with religion in violation of the First Amendment.[79] However, tort actions against religious institutions are not offensive to the First Amendment if the commission of the tort is based on purely secular activities, outside the tenets of religion.[80] When the conduct associated with the tort is nonreligious, a court may then adjudicate the action by applying "neutral principles of law" that do not require the court to interpret church law, policies, or practices.[81] Such neutral principles of law are regularly applied in property and trust cases, where either a religious institution is a party to the case, or a property or trust dispute exists between two or more religious institutions.[82] While there is general agreement that certain cases can be litigated without the interpretation of religious canons and practices through the application of neutral principles of law, state courts are increasingly split as to how far the application of neutral principles may extend without excessive entanglement by the state courts in violation of the First Amendment.[83]

To apply neutral principles of law, a court must be convinced that the legal issue does not involve religious conduct.[84] However, determinations by state courts that conduct is secular and not religious are not always convincing, and the use of neutral principles often raises

79. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

80. *See* H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo. Ct. App. 1995).

81. *Evans*, 718 So. 2d at 286.

82. *See* Jones v. Wolf, 443 U.S. 595 (1979) (holding that religious disputes may, in certain circumstances, be resolved without entangling government with religion by invoking neutral principles of law that rely on objective, well-established concepts of law familiar to lawyers and judges, such as those in trust or property law. The application of neutral principles of law permits a court to interpret provisions of religious documents involving nondoctrinal matters as long as the analysis can be done in purely secular terms.).

83. Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994); Ayon v. Gourley, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998) (holding that inquiries into "policies and practices of the [church] . . . hiring or supervising their clergy" violate the First Amendment) (citation omitted); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991); Roppolo v. Moore, 644 So. 2d 206 (La. Ct. App. 1994); Swanson v. Roman Catholic Bishop, 692 A.2d 441 (Me. 1997); Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997) (en banc) (stating that nonrecognition of the cause of negligent supervision of a clergy member preserves autonomy and freedom of religious institution); L.L.N. v. Clauder, 563 N.W.2d 434 (Wis. 1997); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 782 (Wis. 1995) (holding that the First Amendment bars claims for negligent hiring, retaining, supervision, and training against religious institutions). *But see* Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993); Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996); Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Byrd v. Faber, 565 N.E.2d 584 (Ohio 1991); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989).

84. *See* Jones v. Wolf, 443 U.S. 595, 605 (1979) (stating that neutral principles of law may be applied when there is "no issue of doctrinal controversy . . . involved").

the question of whether courts first determine whether they want to adjudicate the case, and then resolve the issue of whether the conduct was religious to conform to a desired outcome.[85] Such exercises in semantics and sophistry allow courts to do "end-runs" around the First Amendment that lead to extraordinary and irreconcilable results.

In *Lightman v. Flaum*,[86] the New York Supreme Court held that a cause of action for alleged breach of the clergy-penitent privilege by a Jewish rabbi was allowable because the actions of the rabbi were "secular in nature" rather than religious.[87] The court declared that the defendant's duty to keep private certain religious conversations was not his "religious obligation as a Rabbi" and that there was no "justification, religious or otherwise" under Talmudic law for the Rabbi to breach his privilege.[88] How the Rabbi's ministerial obligations to members of his temple were not religious is unclear.[89] How the New York court was able to constitutionally make the religious duties of a rabbi to his congregates a requirement of law is even less clear. On the other hand, how the New York court purported to have power to hear the case is very clear: It declared the rabbi's conduct to be secular and proceeded to apply neutral principles of law to adjudicate the matter.[90] The court's holding in *Flaum* cannot be reconciled with the First Amendment prohibition against interpreting the tenets of religious doctrine by a court. Nonetheless, the court adjudicated the rightfulness or

---

85. *See* Idleman, *supra* note 3, at 259.

> Because the First Amendment obstacles to adjudicating tort claims against religious defendants cannot in principle be ignored outright, courts seeking to overcome these obstacles must rely upon or develop various exceptions to the First Amendment's applications. . . . The most widely invoked exception [to the First Amendment's application] involves the . . . neutral principles method, which allows the adjudication of religious institutional disputes when they can be resolved according to "neutral principles of law," that is, legal rules or standards that have been developed and are regularly applied in a given field of law without particular regard to religious institutions or doctrines.

Id. (citation omitted); Harrison Sheppard, *American Principles and the Evolving Ethos of American Legal Practice*, 28 LOY. U. CHI. L.J. 237, 250 (1996).

86. 687 N.Y.S.2d 562 (N.Y. Sup. Ct. 1999).

87. *Id.* at 568.

88. *Id.* at 570.

89. *Id.* at 765–71.

90. *Id.* at 569 (The judge's personal outrage with respect to the rabbi's conduct is expressed in the opinion: "In my view, this was not only improper, it was outrageous and most offensive, especially considering the stature of these defendants within the community. . . . [N]o member of the clergy . . . would dare breach the sanctity of his or her office to make public the type of confidential, private disclosures at issue in this case.").

wrongfulness of a Jewish rabbi's behavior under Talmudic law—a determination that a secular judge has neither the religious training, nor the constitutional authority, to make. The court's holding in *Flaum* is a troubling, albeit instructive, example of recent departures from the traditional abstention by state courts from interpreting the tenets of religious doctrine when adjudicating religious torts.

2. State Courts Must Interpret and Apply the First Amendment in a Uniform Manner

Although courts are free to employ neutral principles of law where applicable, the Constitution cannot abide too much disuniformity across states relating to adjudications involving the First Amendment. From early on in American history, a uniform interpretation of the Constitution has been held to be of paramount importance in protecting the constitutional rights of all United States citizens.[91] Under this legal principle, the Constitution's protections do not vary from state to state, and its protections should be uniformly interpreted and applied.[92] Where conflicting interpretations of the Constitution arise, violations inevitably follow. Logic instructs that where there are two contrary interpretations of a single Constitution, only one interpretation can be correct. Consequently, the other interpretation is unconstitutional and incorrect. Therefore, state court opinions that contradict one another when interpreting the First Amendment of the Constitution raise colorable questions concerning the constitutionality of each and every opinion.

In recent years, state courts have unquestionably split on the issue of whether the First Amendment allows a right of action against ecclesiastic institutions for negligent supervision of ministers[93] and

91. Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).

92. *See* Drummond v. Fulton County, 437 U.S. 910 (1978).

93. *See* Moses v. Diocese of Colo., 863 P.2d 310, 320–21 (Colo. 1993) (holding that although a court must not become embroiled in interpreting or weighing a church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of a religious belief but instead is merely an application of a secular standard to secular conduct); *see also* Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996); Kenneth v. Roman Catholic Diocese, 654 N.Y.S.2d 791 (N.Y. App. Div. 1997); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989). *But see* Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (en banc) (holding that "judicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy") (citation omitted); Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995).

whether religious ministers can be sued for breach of fiduciary duties.[94] Such splits are evidence that state courts are unconstitutionally adjudicating matters relating to alleged tortious conduct on the part of religious institutions. Confronted with colorable evidence that state courts are violating the Constitution by adjudicating torts against religious institutions, Congress may provide a means by which a uniform interpretation of the Constitution is applied in state courts by exercising its Section 5 enforcement power under the Fourteenth Amendment.[95]

3. Courts are Split on Allowing Causes of Action for Negligent Supervision of Ministers and Breach of Fiduciary Duties

a. Negligent Supervision

The tort of negligent supervision,[96] for the hiring, supervision, retention, and dismissal of religious employees, is allowed as a cause of action in some courts, but not others. Courts allowing these actions reason that the court is not inquiring into the employer's religious reasons for choosing or retaining a particular employee, but is instead focusing on the specific foreseeable dangers that ultimately result in harm to others.[97] For example, in *Bear Valley Church of Christ v. DeBose*,[98] the Colorado Supreme Court allowed a cause of action for negligent hiring and supervision of a clergy member.[99] The court maintained that such inquiries, even when applied to ministers, are so "limited and factually based that they can be accomplished with no

94. *Moses*, 863 P.2d 310; *Erickson*, 781 P.2d 383. *But see* Amato v. Greenquist, 679 N.E.2d 446 (Ill. App. Ct. 1997); H.R.B. v. J.L.G., 913 S.W.2d 92 (Mo. Ct. App. 1995).

95. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

96. *Moses*, 863 P.2d at 324 n.16 (stating that "the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual") (citations omitted); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1322 (Colo. 1996) (stating that "[a]n employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others") (citation omitted); Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) (stating that to prove a claim for negligent hiring or retention of a clergy member "a plaintiff must show: (1) the employer knew or should have known of the employee's dangerous proclivities, and (2) the employer's negligence was the proximate cause of the plaintiff's injuries") (citation omitted); *Kenneth*, 654 N.Y.S.2d 791 (defining negligent retention and supervision as torts where an "employer knew or should have known of the employee's propensity for the conduct which caused the injury").

97. *See supra* note 96.

98. 928 P.2d 1315 (Colo. 1996).

99. *Id.* at 1325.

inquiry into religious beliefs"[100] and are instead mere routine applications of standards of secular conduct.[101] Such decisions often employ the following line of reasoning: States may regulate secular conduct that is tortious.[102] Negligent hiring and supervision claims are not based solely on religious matters,[103] and subsequently, religious institutions may be held accountable for actions carried out as part of their religious practice.[104]

At the opposite end of the spectrum, some state courts continue to hold that negligent hiring claims violate both the Establishment Clause and Free Exercise Clause. These courts maintain that any adjudication of negligent supervision would involve an interpretation of church canon and internal church policies and practices.[105] In *Gibson v. Brewer*,[106] the Missouri Supreme Court did not allow a cause of action for negligent hiring on grounds that inquiry and examination into the hiring policies of religious bodies inevitably requires judicial inquiry into "religious doctrine,"[107] and involves excessive entanglement in church operations on the part of the government.[108]

To preserve the autonomy of religious bodies, these courts decline to recognize the adjudication of torts that require an inquiry into the reasonableness of ecclesiastic conduct, believing that such adjudications would tread on First Amendment protections.[109] These courts reason

---

100. *Id.* at 1323.

101. *Id.*

102. Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993); *see also* Konkle v. Henson, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996) (stating that "[t]he First Amendment . . . contains two freedoms[,] . . . the freedom to believe and the freedom to act. . . . The freedom to believe is absolute, while the freedom to act is subject to regulation for the protection of society.") (citation omitted).

103. *Moses*, 863 P.2d at 320.

104. Kenneth v. Roman Catholic Diocese, 654 N.Y.2d 791, 796 (N.Y. Sup. Ct. 1997).

105. *See generally* Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995) (stating that inquiry into practices and policies of churches of hiring and supervising clergy raises the same kind of First Amendment problems which might involve the court making sensitive judgment about the propriety of judgments about the supervision in light of religious beliefs); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991).

106. 952 S.W.2d 239 (Mo. 1997).

107. *Id.* at 246.

108. *Id.* at 247 (holding that "[s]uch excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment"). Further, adjudicating the reasonableness of a church's supervision of a cleric requires excessive entanglement into religious doctrine. *Id.*

109. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 791 (Wis. 1995) (stating that there is a general agreement that *intentional* torts of failure to supervise do not offend the First Amendment because the right to free exercise does not relieve an individual of the

that the Constitution demands that ecclesiastic institutions be free from "secular control or manipulation" when deciding matters of church governance.[110] The courts contend that inquiries into the reasonableness of religious conduct would result in "excessive entanglement in church operations" manifested by a court approving one model for church hiring or retention over another.[111] In *Ayon v. Gourley*,[112] for example, the Colorado District Court held that even general application of tort law principles to church procedures on the choice of its clergy members presents practices with an "intent to pass on their reasonableness."[113] In fact, even inquiries into the agency relationship between a bishop and a priest have been held unconstitutional because they require interpretation of religious law and usage.[114]

b. Breach of Fiduciary Duties

Another issue dividing courts is whether a clergy member may be held liable for breach of fiduciary duties.[115] Generally, a fiduciary relationship involves a relationship where one person has a duty to act for the benefit of another.[116] Recently, some courts have held that ministers, by holding themselves out to perform services for church members, such as counseling, owe those members fiduciary duties which

---

obligation to comply with a valid and neutral law of general applicability).

110. Swanson v. Roman Catholic Bishop, 692 A.2d 441, 443 (Me. 1997).

111. Ayon v. Gourley, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998).

112. 47 F. Supp. 2d 1246.

113. *Id.* at 1250 (stating that "the Court cannot agree . . . that . . . such a claim would be unlikely to cause excessive entanglement").

114. *See Pritzlaff*, 533 N.W.2d at 790.

115. Doe v. Evans, 718 So. 2d 286, 289 (Fla. Dist. Ct. App. 1998) (noting that "[n]egligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. Negligent retention . . . occurs when . . . the employer becomes aware or should have become aware . . . [and takes no further action].").

116. *See* Schmidt v. Bishop, 779 F. Supp. 321, 325 (S.D.N.Y. 1991) (stating that "a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another") (citations omitted); Moses v. Diocese of Colo., 863 P.2d 310, 321 (Colo. 1993) (defining a fiduciary relationship as a "'relation . . . between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation'") (quoting the RESTATEMENT OF TORTS § 874 cmt. a (1979)); Amato v. Greenquist, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997) (stating that "a fiduciary relationship is recognized to exist when 'a special confidence [is] reposed in one who, by reason of such confidence, must act in good faith and with due regard to the interests of the person reposing such confidence'" (quoting Estate of Osborn, 470 N.E.2d 1114, 1117 (Ill. App. Ct. 1984)).

are illegal to breach.[117] In such cases, the courts apply a secular standard of conduct to the minister, and adjudicate the matter by applying neutral principles of law to what is deemed nonreligious (secular) conduct on the part of the ministers.[118]

Other courts reject the notion that liability for breach of a fiduciary duty can be imposed by a court through the use of neutral principles. The rejection of the neutral principles approach is based on the belief that such a determination would require a court to define the scope of the fiduciary duty, and to define the standard of care to which a clergy member of a particular faith must adhere, which would excessively entangle the state with religion.[119] These courts summarily reject the notion that a legal duty can be imposed on an individual merely because that individual is a member of an ecclesiastic body.[120] These courts point out that if a minister were instead a neighbor or co-worker or friend, no secular law would hold him or her liable for breach of fiduciary duties.[121]

In *Doe v. Dunbar*,[122] the Florida Court of Appeals held that the creation of a tort for breach of a fiduciary duty which requires adherence to a particular religious doctrine constitutes an establishment of religion in violation of the religious clauses of the First Amendment.[123] Similarly, in *Dausch v. Rykse*,[124] the United States Court of Appeals for the Seventh Circuit held that recognition of a cause of action for breach of fiduciary duty premised upon the counseling relationship between a cleric and church member would violate the First Amendment.[125] The court held that "to define a reasonable duty standard and to evaluate [the cleric's] conduct against that standard . . .

---

117. *Moses*, 863 P.2d 310.

118. *Id*; *see also* F.G. v. MacDonell, 696 A.2d 697, 702 (N.J. 1997) (noting courts have found that the First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct occurring during the course of counseling a parishioner).

119. *See MacDonell*, 696 A.2d at 702 (suggesting that other causes of action are available in cases of molestation that do not require the court to set a reasonableness standard for clergy members—such as intentional infliction of emotional distress, assault, et cetera. Actions for fiduciary duties against religious institutions excessively entangle civil courts in religious matters. Most courts do not agree that breach of fiduciary duty is a disguised attempt at "clergy malpractice"—which no court has yet adjudicated.).

120. *See id.* at 706 (O'Hern, J., dissenting) (dissenting from the court's allowance of a cause of action for breach of fiduciary duty).

121. *See id.*

122. 718 So. 2d 286 (Fla. Dist. Ct. App. 1998).

123. *Id.*; *see also* MacDonell, 696 A.2d at 709.

124. 52 F.3d 1425 (7th Cir. 1994).

125. *Id.* at 1438.

is [a judicial practice] of doubtful validity under the Free Exercise Clause."[126]

4. Court Splits Raise Colorable Questions as to Whether State Courts are Unconstitutionally Adjudicating Torts Against Religious Defendants

The disparity of state court adjudications of negligent supervision and breach of fiduciary duties leave the constitutionality of such proceedings as open questions. Faced with the reality that state courts are arguably adjudicating torts against religious institutions unconstitutionally,[127] Congress is entitled to enact a remedy that enforces the religious clauses of the First Amendment against the state courts. Since the First Amendment applies to any action by a state power *including* state courts,[128] Congress is entitled to authorize the federal courts to enjoin state courts from unconstitutionally adjudicating torts against religious institutions under the Section 5 power of the Fourteenth Amendment.

III. CONGRESS MAY ENFORCE THE FIRST AMENDMENT AGAINST STATE COURTS BY PROVIDING INJUNCTIVE RELIEF TO ECCLESIASTIC DEFENDANTS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

A. The Section 5 Power of the Fourteenth Amendment

In *City of Boerne v. Flores*,[129] the United States Supreme Court unequivocally stated that Congress may enforce the Free Exercise Clause of the First Amendment against the states using the Section 5 enforcement power.[130] Congress has broad discretion and latitude in deciding when and where its enforcement power is required.[131]

126. *Id.*; *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (noting that while liability for negligent torts cannot be imposed without delving excessively into religious doctrine, policy, and practice, intentional torts can be); Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997) (noting that under the same reasoning, courts have refused to recognize torts in other causes of action. As for negligent infliction of emotional distress, to determine whether the diocese's responses to its member's claims were "reasonable" would require a judge to rule on the reasonableness standards of religious beliefs, discipline and government, and offends the First Amendment.).

127. *See supra* Part II.C.3.a–b.

128. Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam).

129. 521 U.S. 507 (1997).

130. *Id.* at 519.

131. *See id.* at 520 (noting that "Congress must have wide latitude in determining where [an unconstitutional action] lies").

However, the power is not plenary, and the Court has recognized several limitations on the employment of the Section 5 power.

In *Flores*, the Court held that the Section 5 power allows Congress to enforce constitutional rights only as they have been interpreted by the Court, and that the Section 5 power does not allow Congress to enhance or change the nature of constitutional rights.[132] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[133] the Court held that the remedy provided by Congress under the Section 5 enforcement power must be closely tailored to, and proportional to, the constitutional evil it is designed to prevent.[134] In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[135] the Court emphasized that valid use of the Section 5 power must be directed at the remediation or prevention of constitutional violations that could arguably be recognized by that body.[136] Most recently, in *United States v. Morrison*,[137] the Court affirmed that the Section 5 power may only be used against the states and may not be employed against mere private conduct.[138]

1. Limits on Enforcement Rights under Section 5: *Flores* and RFRA

As discussed in Part II of this Comment, the United States Supreme Court fundamentally altered the standard for First Amendment protections of the free exercise of religion in the landmark decision *Employment Division v. Smith*.[139] Prior to *Smith*, when confronted with a governmental regulation that substantially burdened a religious practice, the Court required the showing of a compelling government interest before the regulation would be deemed not to have violated the First Amendment.[140] In *Smith*, the Court dropped its requirement that the government show a compelling interest and held that religious practices could be regulated by the government under "neutral, generally applicable law."[141]

In response to *Smith*, religious adherents and their representatives in

132. *Id.* at 519, 520.
133. 527 U.S. 627 (1999).
134. *Id.* at 645–46.
135. 527 U.S. 666 (1999).
136. *Id.* at 675.
137. 529 U.S. 598 (2000).
138. *Id.* at 625–26.
139. 494 U.S. 872 (1990).
140. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).
141. *Smith*, 494 U.S. at 881.

Congress clamored to restore the religious protections lost in that decision.[142] In 1993, Congress enacted, and the President signed, the Religious Freedom Restoration Act[143] (RFRA) requiring federal and state governmental bodies to refrain from enacting laws of general applicability that would restrict the free exercise of religion, unless the government could show a compelling interest, thereby legislatively restoring the pre-*Smith* constitutional standard.[144]

In *Flores*, a local bishop applied for a permit from a local zoning board to expand the size of a church in his diocese.[145] The zoning board, citing a historical landmark ordinance, denied the petition.[146] The bishop commenced a lawsuit to obtain relief from the denial of his permit on the basis that, under RFRA, the local zoning board could not deny his petition, absent a compelling government interest for doing so.[147]

The Court struck down RFRA as applied to the states, holding that Congress did not have the authority to change the substantive rights of the First Amendment under the Section 5 power.[148] The Court reasoned that while the Section 5 power could be employed to enforce First Amendment rights as interpreted by the Supreme Court in *Smith*, an attempt to restore the "compelling interest" standard afforded by the pre-*Smith* doctrines was not within Congress's Section 5 authority.[149] Therefore, the zoning ordinance, as a neutral law of general applicability, did not unconstitutionally prohibit the free exercise of religion under the *Smith*-standard, and Congress could not enact legislation to make such conduct by the zoning board unconstitutional.[150]

Flores was a reminder to Congress of the limit on its abilities to legislate under Section 5. The Section 5 power may not be used to "alter[] the meaning of the Free Exercise Clause" or to "chang[e] what the right is."[151] When seeking to enforce the Free Exercise Clause under Section 5, therefore, Congress must abide by the Court's interpretation

142. *See Yoder*, 406 U.S. 205; Sherbert v. Verner, 374 U.S. 398 (1963).

143. 42 U.S.C. § 2000bb (1988 & Supp. V 1993) (struck down by the Court as unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

144. 42 U.S.C. § 2000bb-1 to -3(a).

145. 521 U.S. at 512.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 519.

150. *Id.*

151. *Id.*

of what rights the First Amendment affords to religion.

2. Proportionality of Enforcement Remedy under Section 5: *College Savings I*[152] and the amended Patent Remedy Act

College Savings I concerned the constitutionality of certain provisions in the amended Patent Remedy Act.[153] Congress amended the Patent Remedy Act to expressly abrogate state sovereign immunity for patent infringement claims brought by citizens of that state.[154] Using its Section 5 power, Congress intended to enforce the protections of the Due Process Clause of the Fourteenth Amendment by prohibiting states from denying patent holders their rights to just compensation for use of the patents.[155]

The Court held that the amended Patent Remedy Act could not be enforced against states because Congress did not closely tailor the Act to respond to actual instances of state patent infringements that violated, or arguably violated, the Constitution.[156] The Court held that the legislative means used by Congress to prevent or remedy unconstitutional injuries must be congruent and proportional to the evils confronted.[157] In its legislative report, Congress cited only a "handful" of patent infringement instances that Congress thought were unconstitutional, yet the Court reasoned that the actual legislative Act was "'so out of proportion to a supposed remedial or preventive object that [it could not] be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[158] Given the isolated nature of the patent violations cited in the legislative record, Congress was required to limit the scope of the coverage to address particular instances of constitutional violations.

152. The author recognizes the similarity of names between *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). To avoid confusion, the author refers to these cases as *College Savings I* and *College Savings II*, respectively.

153. 35 U.S.C. § 271 (1994 & Supp. IV 1998).

154. 35 U.S.C. §§ 271(h), 296(a).

155. *Id.*

156. *College Savings I*, 527 U.S. at 645–46.

157. *Id.* at 639.

158. *Id.* at 645–46 (citations omitted).

3. Enforcement of Constitutional Protections under Section 5: *College Savings II* and the TRCA

Under the Trademark Remedy Clarification Act (TRCA),[159] Congress authorized individuals to sue states in federal court under Section 43 of the Trademark Act of 1946[160] for advertising in a false or misleading manner. Under the Section 5 power, Congress attempted to abrogate state sovereign immunity from suit under TRCA to prevent deprivation of two property interests: (1) the right to be free from false advertising, and (2) the right of security in one's business interests.[161]

The Court rejected the TRCA provisions abrogating state sovereign immunity from suit and held that federal courts had no jurisdiction to entertain suits under the Act because neither of the two property interests cited by Congress were protected under the Due Process Clause.[162]

The Court stated that any legislation enacted under the Section 5 power must have the object of preventing or remedying constitutional violations.[163] The right to freedom from false advertising and the right of business security were not recognized property rights protected by the Constitution.[164] In absence of a recognized or colorable constitutional violation, the Court held that Congress did not have the authority to abrogate state sovereign immunity under the Section 5 enforcement power.[165]

4. Requirements that Section 5 Power be Limited to States or State Actors: *Morrison* and VAWA.

In *United States v. Morrison*,[166] the Supreme Court addressed whether Congress had the authority to pass the Violence Against Women Act[167] (VAWA), which was enacted under the Section 5 power to enforce the Equal Protection Clause of the Fourteenth Amendment.[168] In a lengthy legislative record, Congress cited empirical

159. 106 STAT. § 3567 (1999).
160. 15 U.S.C. § 1125(a) (1994 & Supp. V 1999).
161. 15 U.S.C. § 1122(b)-(c).
162. 527 U.S. at 672.
163. *Id.*
164. *Id.*
165. *Id.*
166. 529 U.S. 598 (2000).
167. 42 U.S.C. § 13981 (1994).
168. *Morrison*, 529 U.S. at 607.

data indicating that violence against women was being under-deterred by state court systems due to court biases against victims of gender-motivated violence, and Congress concluded that such widespread under-deterrence was a denial of the equal protection of the laws.[169] Under VAWA, victims of gender-motivated injuries were allowed to seek civil remedies against their aggressors in federal court.[170]

The Court struck down VAWA, emphasizing that the Fourteenth Amendment applies only to state actions.[171] By providing for a cause of action against private individuals, Congress's use of the Section 5 enforcement power was invalid.[172] The Court stated that VAWA was not aimed at conduct by states or state actors who fail to administer equal protection of the laws;[173] rather, the Act attempted to prevent private conduct by individuals who commit gender-motivated crimes.[174]

5. The Proposed Statute

To halt the unconstitutional adjudication of religious torts, Congress should authorize religious defendants to sue for injunctive relief as a prophylactic measure to prevent state courts from unconstitutionally adjudicating religious torts.[175] The statute might read:

> I. TITLE—This Act shall be known as the "Recognition of Religious Freedom Act."
>
> II. PURPOSE—This statute is enacted under Section 5 of the Fourteenth Amendment to the federal Constitution and is intended to enforce all rights existing under the first two religious clauses of the First Amendment to the Constitution.
>
> III. JUDICIAL RELIEF
>
> (A) TEMPORARY INJUNCTIVE RELIEF—A defendant to a civil action in state court may seek and secure temporary injunctive relief in the federal district court residing in the state where the cause of action is filed to prevent a state court from violating the first or second religious clauses of the First

169. *Id.* at 631–36 (Souter, J., dissenting).

170. 42 U.S.C. § 13981(d)(2)(A)–(B), (e)(3) (1994).

171. *Morrison*, 529 U.S. at 625–27.

172. *Id.*

173. *Id.* at 621.

174. *Id.*

175. Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (stating that "Congress may authorize a suit [against a state] in the exercise of its power to enforce the Fourteenth Amendment.").

Amendment to the Constitution where the defendant is able to produce prima facie evidence to support a claim that a violation to either of the religious clauses will occur if a state court continues to adjudicate the matter.

(B) PERMANENT INJUNCTIVE RELIEF—If temporary injunctive relief is granted to the defendant in subsection (A), the defendant may seek and secure permanent injunctive relief from a federal district court and the court shall permanently enjoin the state court from adjudicating the claim unless the state court proves by clear and convincing evidence that adjudication of the claim will not violate the religious clauses of the First Amendment to the Constitution.

IV. ATTORNEY'S FEES—Section 722(b) of the Revised Statutes (42 U.S.C. § 1888(b)) is amended.

V. BROAD CONSTRUCTION—This Act shall be liberally construed in favor of a broad religious protection, and a court shall interpret this statute to provide religious protection to the maximum extent permitted by the Constitution.

VI. DEFINITIONS—In this Act:

(A) DEFENDANT—The term "defendant" means any person against whom a cause of action is filed in state court.

(B) STATE COURT—The term "state court" means a court authorized to adjudicate any matter by the constitution, statute, or ordinance of any State.

B. Congress May Validly Enact the Proposed Statute Under Section 5 of the Fourteenth Amendment

1. The Threshold Requirements for Valid Employment of Section 5 Power are Satisfied

Before Congress can validly enact a statute under its Section 5 power, it must demonstrate that it has the power to do so. Namely, it must demonstrate that the statute enforces existing constitutional rights, is proportional to the evil confronted, remedies arguable constitutional violations, and is aimed at state actors.[176] The proposed statute meets all four of these requirements.

2. The Statute Enforces Existing Constitutional Rights

Under *Flores*, the United States Supreme Court held that Congress

176. *See supra* Part III.A.

may validly enforce the First Amendment rights as interpreted by the Court.[177] The proposed statute would do exactly that. The statute does not attempt to change the substantive rights of the First Amendment; rather, the statute merely prevents state courts from violating the substantive rights of the First Amendment as interpreted by the United States Supreme Court.

3. The Statute is Proportional to the Evil Confronted

In *College Savings I*, the Court held that Congress's enactment under the Section 5 power must be congruent and proportional to the evils it confronts.[178] The injunctive relief in this proposed act lets Congress provide a proportionate remedy for religious defendants who may face an unconstitutional adjudication of a tort against them.

A. There is a Need for Injunctive Relief before a State Court Enters a Final Judgment Against a Religious Defendant

Given the demands of federalism, injunctive relief is necessary to prevent state courts from adjudicating torts unconstitutionally. Without the right to enjoin a state court from proceeding to adjudicate a potentially unconstitutional matter, the right to challenge the unconstitutionality in federal court may be permanently lost. Under the Rooker-Feldman Abstention Doctrine,[179] injunctive relief may only be employed while a state court case is pending; therefore, once adjudicated by a state court, getting a case into federal court is a daunting, if not impossible, undertaking. If a state court issues a final judgment holding an ecclesiastic defendant liable, the constitutional violation cannot be heard until the defendant appeals to the highest court where a decision may be issued.[180] Even assuming that the case goes through the lengthy state court appellate process, the United States Supreme Court must still grant certiorari[181] before the case may be heard in a federal forum, and presently, the Supreme Court has declined to

177. 521 U.S. 507, 518–19 (1997).

178. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 639 (1999).

179. Johnson v. De Grady, 512 U.S. 997, 1005–06 (1994) (discussing the "Rooker/Feldman abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights").

180. 28 U.S.C. § 1291(a) (1994).

181. 28 U.S.C. § 1257.

grant certiorari petitions for these types of cases.[182] Given these legal realities, the chance that an unconstitutional adjudication of a religious tort would be reviewed by a federal court is slim. The unwillingness of the United States Supreme Court to even review these types of cases merely adds to the difficulty.

By providing federal injunctive relief at the onset of a state judicial proceeding, Congress would be enacting a preventive measure designed to ensure that potentially unconstitutional cases are actually reviewed by federal courts. Such an enactment is proportional to the present evil of unconstitutional decisions never seeing the light of a federal courtroom due to the arduous nature of the judicial appellate process.

B. Injunctive Relief Does Not Unduly Hinder State Court Adjudicatory Processes

The proposed statute does not infringe upon a state court's ability to adjudicate matters before it. The statute merely provides that a federal court look at the case in the event that the First Amendment might be violated. Therefore, permanently enjoining a proceeding under these circumstances would not unduly impact state prerogatives because in the event a potential adjudication would be deemed in violation of the First Amendment, the state court would never have had the constitutional authority to hear the matter in the first place.

While inconvenience to a state adjudication process may occur in some circumstances under the proposed statute, such minor efficiency losses in state courts are at least proportional to the need to eradicate state court decisions that violate the First Amendment. Thus, in an effort to enforce the First Amendment, Section 5 unquestionably grants Congress the power to provide for such injunctive relief against state courts to guarantee religious freedoms.

C. The Different Levels of Injunctive Relief are Based on Evidentiary Weight

The granting of a temporary injunction prior to issuing a permanent injunction demonstrates that the statute is proportional to the harm Congress is trying to prevent. Temporary relief is a proportional remedy to the evil confronted because it allows a claimant to immediately halt a judicial proceeding only where there is a prima facie

182. *See* Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); Pritzlaff v. Archdiocese of Milwaukee, 563 N.W.2d 780 (Wis. 1995), *cert. denied*, 516 U.S. 1116 (1996).

showing that it may violate the First Amendment. Further, the stay of the judicial proceeding is for only as long as necessary for a federal court to examine the constitutional issue involved. Thus, the type of injunctive relief provided in the statute directly corresponds with the weight of evidence a religious defendant is able to produce before a federal court showing that a particular proceeding is being conducted in violation of the First Amendment. Under this statutory arrangement, therefore, federal injunctive relief is granted only when sufficient evidence, at two different stages, is brought by the parties to show whether the state adjudication is unconstitutional.

Permanent injunctive relief would be rightfully granted by a federal court when a claimant produces evidence to show that the continuation of the proceeding would violate the Constitution. Given that the issue before the court is the First Amendment, the state court should bear the burden of clearly demonstrating that it is able to proceed with the adjudication of the matter without violating the First Amendment. If the state is able to meet its burden, then the proceeding should rightfully continue. If it cannot meet its burden, the proceeding should permanently end.

D. The Award of Reasonable Attorney's Fees is a Remedy in Proportion to the Result Congress is Trying to Achieve

An award of reasonable attorney's fees to a successful claimant under the proposed statute is necessary for Congress to reach its goal of preventing state court adjudications against religious defendants that violate the First Amendment. Under the proposed statute, civil litigants, not the government, are responsible for the enforcement of the First Amendment against the states. In some instances, the legal expenses associated with litigating these types of actions could be substantial. Thus, as part of its Section 5 prophylactic action, Congress may provide for statutory incentives to litigants to protect their First Amendment rights.

The fee-shifting provision works to deter state court actions that violate the First Amendment in two ways. First, fee-shifting statutes assist Congress with enforcement of the First Amendment by encouraging private individuals to challenge state actions when their constitutional rights are violated.[183] Second, fee-shifting statutes

183. City of Burlington v. Dague, 505 U.S. 557, 574–75 (1992) (Blackmun, J., dissenting) (stating that "[c]ongress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal statutes—most notably, civil rights and environmental

encourage competent counsel to represent claimants, thereby assuring that sound and thorough litigation results when a claimant seeks protection under the statute.[184] Thus, working in concert, the fee-shifting incentives assist Congress with achieving its First Amendment enforcement goals.

4. The Statute Remedies Colorable Constitutional Violations

In *College Savings II*, the Court held that Congress has authority to enact Section 5 prophylactic measures to remedy recognizable or colorable constitutional violations.[185] Witnessed by the stark difference in judicial opinions as to the First Amendment protections from adjudication of religious torts, Congress is entitled to conclude that constitutional violations are occurring at the state level.

When some state courts declare that a cause of action for breach of a fiduciary duty by a clergy member violates the First Amendment, and other courts hold that such a cause of action is allowed under the First Amendment, Congress can only rationally assume that half of the opinions are correct, and that the other half misinterpret the First Amendment. Thus, by enacting the proposed statute, Congress is acting with the intent to remedy these constitutional violations as required by the Court in *College II*.

5. The Statute is Aimed at State Actors

In *Morrison*, the Court made it clear that the Section 5 power is only validly employed against state actors.[186] The proposed statute meets this requirement because it is only directed against the actions of state courts.

IV. POTENTIAL CONSTITUTIONAL AND STATUTORY DIFFICULTIES WITH PROVIDING INJUNCTIVE RELIEF UNDER THE SECTION 5 ENFORCEMENT POWER

In addition to having the authority to enact the proposed statute under its Section 5 power, Congress must also show that the proposed

---

statutes").

184. City of Riverside v. Rivera, 477 U.S. 561, 577–80 (1986) (stating that Congress enacted fee-shifting statutes to ensure that competent counsel will be attracted to suits that without the fee-shifting statute would not be economically feasible for competent counsel to take).

185. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999).

186. 529 U.S. 598, 625–27 (2000).

statute does not violate other provisions of the Constitution or other legislative enactments. Specifically, this section will discuss how the proposed statute comports with state immunity from suit under the Eleventh Amendment, the Anti-Injunction Act, and the Younger Abstention Doctrine.

A. State Immunity from Suit under the Eleventh Amendment

The Eleventh Amendment to the Constitution[187] has been broadly interpreted to prevent federal court suits by citizens against states on claims concerning federal law.[188] Generally, Congress cannot abrogate the states' Eleventh Amendment protection of sovereign immunity from suit by citizens of its own or foreign states in cases raising federal questions. However, there are exceptions to this broad interpretation. Congress, under the Section 5 power, can abrogate Eleventh Amendment state sovereign immunity[189] and authorize injunctions against state officials acting in violation of federal law.[190]

In *Ex Parte Young*,[191] the Court held that when state officials act in a manner that violates the Constitution, they are "stripped of . . . official or representative character" and no longer act in a sovereign capacity.[192] The case involved the question of whether the Attorney General of the State of Minnesota could be enjoined from enforcing a law that was declared unconstitutional. The Court held that if the Attorney General enforced the statute, it would be an action outside of the rightful authority of the state, and therefore vulnerable to federal injunctive action.[193] Thus, if a state court attempts to unconstitutionally adjudicate a tort against a religious institution, the court ceases to act with legitimate authority as a state institution, and it may be validly enjoined by a federal court in order to prevent a violation to the First Amendment.[194]

In *Fitzpatrick v. Bitzer*,[195] the Supreme Court held that when

187. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

188. Hans v. Louisiana, 134 U.S. 1 (1890).

189. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

190. *Ex Parte* Young, 209 U.S. 123 (1908).

191. 209 U.S. 123.

192. *Id.* at 160.

193. *Id.*

194. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.5.1 (3d ed. 1999).

195. 427 U.S. 445 (1976).

Congress passes a statute pursuant to its power to enforce the post-Civil War Amendments,[196] and gives a citizen the right to sue a state in federal court, the statute abrogates the Eleventh Amendment. This principle was recently restated in *Seminole Tribe v. Florida.*[197] Therefore, if the proposed statute is validly enacted under the Fourteenth Amendment's Section 5 power, it abrogates the Eleventh Amendment and allows a citizen to petition the federal courts to enjoin a state court from unconstitutionally adjudicating a religious tort.

B. Anti-Injunction Act

Under the Anti-Injunction Act,[198] Congress may authorize or prohibit federal courts to stay proceedings in state courts.[199] While the purpose of the Act is to minimize federal interference with state judicial proceedings,[200] Congress may authorize the staying of judicial proceedings in fundamental areas of national public policy such as bankruptcy and tax law.[201] Therefore, under the proposed statute, Congress may expressly authorize a federal court to enjoin a state court when there is a prima facie showing that the adjudication of a religious tort violates the First Amendment.

C. The Younger Abstention Doctrine

In *Younger v. Harris*,[202] the United States Supreme Court held that absent exceptional circumstances, federal courts should not interfere with state criminal or quasi-criminal disciplinary actions.[203] Because the

196. The post-Civil War amendments are the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

197. 517 U.S. 44 (1996).

198. 28 U.S.C. § 2283 (1994) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

199. *Id.*

200. *See* W. Sys., Inc. v. Ulloa, 958 F.2d 864, 868 (9th Cir. 1992) (stating "[t]he Act reflects fundamental principles of equity, comity, and federalism which normally counsel against federal interference with state judicial proceedings").

201. Bankruptcy courts, for example, have power to restrain state court proceedings. *See* 11 U.S.C. § 105(a) (2000) (providing for stay of a bankruptcy suit until adjudication of petitions); 11 U.S.C. § 362 (providing for stay to enforce tax liens); 11 U.S.C. § 921 (1994) (allowing a state court proceeding to resume after removal of the case to federal court pursuant to 28 U.S.C. § 1446(e) (1994)).

202. 401 U.S. 37 (1971).

203. *Id.* at 56 (Stewart, J., concurring) (explaining that federal courts "must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution").

proposed statute does not address criminal or quasi-criminal administrative proceedings, the doctrine does not prevent Congress from providing for injunctive relief in this instance.[204] Further, the Younger Abstention Doctrine is a judge-made doctrine[205] designed to impose self-restraint on the federal judiciary to preserve the federalism balance between the federal government and the states.[206] As judge-made doctrine, Congress, under its Section 5 power, is able to override the Younger Abstention Doctrine by providing express authorization for federal injunctive relief.[207]

V. CONCLUSION

In conclusion, the Section 5 enforcement power of the Fourteenth Amendment may be employed by Congress to guarantee religious freedoms to ecclesiastic defendants in state courts. As a fundamental principle of constitutional law, the protections of the religious clauses of the First Amendment should be uniformly enforced in state as well as federal courts. However, state courts are not uniformly interpreting the First Amendment as it applies to religious defendants when adjudicating torts.[208] This disparity of interpretation and application of constitutional law raises colorable questions as to the constitutionality of state court tort adjudications on the whole as they apply to religious defendants. Congress, under the Section 5 power, is entitled to assume that constitutional violations are therefore occurring in the state courts and may enact legislation to remedy such violations.

By providing injunctive relief to ecclesiastic defendants who might otherwise suffer unconstitutional tort adjudications by state courts, Congress counteracts colorable constitutional violations by issuing a statutory remedy that is both proportional and closely tailored to the evil confronted. The relief provided by the statute proposed in this Comment is proportional because it does not deny a state court the right to proceed with an adjudication unless evidence can be shown that the action would violate the Constitution. Further, the statute would not

204. Huffman v. Pursue, 420 U.S. 592, 604 (1975) (limiting the Younger Abstention doctrine to criminal proceedings and those "akin to . . . criminal prosecution[s]").

205. CHEMERINSKY, *supra* note 194, § 13.1.

206. *Huffman*, 420 U.S. at 601 (recognizing that that United States are "made up of . . . separate state governments, and . . . that the National Government will fare best if the States and their institutions are left free to perform their separate functions . . .").

207. Mitchum v. Foster, 407 U.S. 225 (1972) (holding that where Congress has provided express authorization to do so, federal courts may enjoin state court proceedings).

208. *See supra* Part II.C.3.a–b.

permanently bar a state court from proceeding without conducting a full hearing on the merits and after a prima facie case is made that the proceeding would violate the First Amendment. Even though such procedural checks may inconvenience the state courts, such burdens are clearly outweighed by the need to halt unconstitutional adjudications arguably occurring in the state judicial arena.

History chronicles the struggle of the American people to secure religious freedom.[209] From the first landing of religious travelers on the shores of the Eastern seaboard,[210] to the enactment of the First Amendment by the young American Republic,[211] and the eventual application of the First Amendment to the states through the Fourteenth Amendment,[212] the freedom from government entanglement in religious affairs has been an integral part of the American experiment.[213] The legacy of these struggles should remind each

---

209. LEO PFEFFER, CHURCH, STATE, AND FREEDOM 148 (1967) (noting that "[i]n [the United States] . . . the struggle for religious liberty was a facet of the struggle for disestablishment" and the struggle continued "until separation [of church and state] was achieved.").

210. *Id.* at 71 (noting that early colonialists to the New World were "religious laymen . . . who fled to the wilderness to find a haven where they might practice their own version of Christianity").

211. ROBERT S. ALLEY, JAMES MADISON ON RELIGIOUS LIBERTY 219–20 (1985) (noting that the First Amendment was adopted as a result of demands from Americans and the colonial states that the United States Constitution contain a provision that would guarantee "religious freedom and freedom from taxation for the support of religion." In response to these demands, the First Amendment was ultimately ratified on December 15, 1791.).

212. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 115 (2000) (noting that the "[i]ncorporation doctrine was a small part of an emerging constitutional nationalism that insisted on the guarantees of fundamental liberty and rule of law for all").

213. *See* WILLIAM LEE MILLER, THE FIRST LIBERTY 230 (1986).

> [R]eligious liberty was more central to the nation's original moral self-definition than is comprehended by a modern generation's routine inclusion of . . . 'freedom to go to the church of your choice.'. . . It had a depth and centrality not comprehended by—for example—the modern journalist for whom the phrase 'the First Amendment' simply means an absolute grant to the press. For Madison and Jefferson and the 'republicans' on the one hand, and for the enthusiasts, dissenters, and sectarians on the other hand, the First Amendment, and the Bill of Rights in the states, contained something more basic. Liberty of 'conscience,' meaning freedom of religious belief and conviction and activity, was near the center, or at the center, of the whole revolutionary American project.

Id. William Lee Miller further notes:

> [T]hose [founding] fathers . . . establish[ed] the framework of principle . . . called

American generation of the need to vigilantly preserve and uphold the religious freedoms afforded by the First Amendment to the Constitution. After all, the religious clauses of the First Amendment are the supreme law, and when they are violated by state or federal actors, reprisal should be swift. It is the position of this Comment that unconstitutional adjudications of torts against ecclesiastic bodies are presently occurring in courts of the several states. To remedy these violations, Congress should employ its Section 5 power against the states to enforce the religious freedoms guaranteed by the First Amendment.

RYAN G. LEE*

---

religious liberty, and the framework of independence of religious and civic institutions each from the other, a framework now formed not only in constitutional law but also . . . in the mind of . . . public—that is, in the ethos. [I]t is reinforced by the groundwork of a reciprocally balancing diversity—a diversity that the tradition [of separation of church and state] itself helped to create and that gives the principle framework . . . a realistic foundation in . . . the population.

Id. at 231.

* The author would like to thank Professor Scott C. Idleman for his advice and encouragement throughout the process of writing this Comment.