The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 9 | Number 3 Article 1

3-1-2007

Marital Jam Sessions on Trial: Ecclesiastical Abstention and Employment Division, Department of Human Resources v. Smith in the Supreme Court of Texas.

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ESSAY

MARITAL JAM SESSIONS ON TRIAL: ECCLESIASTICAL ABSTENTION AND *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH* IN THE SUPREME COURT OF TEXAS

CHARLES FLORES*

I. INTRODUCTION

And if your brother sins, go and show him his fault in private; if he listens to you, you have won your brother.

But if he does not listen to you, take one or two more with you, so that by the mouth of two or three witnesses every fact be confirmed.

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> If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.[1]

In the late 1850's, the divisive character of the Civil War spilled into Kentucky's Walnut Street Presbyterian Church, where divided factions of the congregation began a two decade battle for control over the church's religious identity and physical property.[2] In *Watson v. Jones,*[3] the United States Supreme Court refused to decide the religious merits of the controversy, using a doctrine of ecclesiastical abstention to defer the decision to the Presbyterian Church "judicatory."[4]

In July of 2000, C.L. "Buddy" Westbrook, pastor at the CrossLand Community Bible Church, engaged in a series of marital counseling "jam sessions" with a parishioner named Peggy Penley and her husband.[5] The "jam sessions" failed to rehabilitate Penley's marriage, and Penley soon informed Westbrook of her intent to divorce her husband.[6] Immediately afterward, Westbrook executed his church's biblical disciplinary process—including the command of *Matthew* 18:15-17[7]—by informing the church membership of Penley's intent to divorce, and instructing the church to shun Penley.[8] One hundred and twenty-nine years after the *Watson* decision, ecclesiastical abstention will govern part of *Westbrook v. Penley*, a case before The Supreme Court of Texas that presents several challenging questions of First Amendment jurisprudence.[9]

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1. *Matthew* 18:15-17 (New American Standard) (emphasis omitted).

2. Watson v. Jones, 80 U.S. (13 Wall.) 679, 681 (1871); *see* Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513, 521–22 (1990) (detailing the factual background of the *Watson* case). The dispute in *Watson* split the Walnut Street Presbyterian Church into two factions: pro-slavery and anti-slavery. *Id.* at 521.

3. 80 U.S. (13 Wall.) 679 (1871). *See infra* notes 35–40 and accompanying text.

4. *Id.* at 733–35 (ruling that a decision could not be made because the Court lacked subject matter jurisdiction and discussing the inappropriateness of a civil court to decide matters concerning ecclesiastical questions).

5. Penley v. Westbrook, 146 S.W.3d 220, 224 (Tex. App.—Fort Worth 2004, pet. granted) (op.) (highlighting that Westbrook allegedly "held himself out" as a qualified marriage and family counselor).

6. *Id.* at 224.

7. *Matthew, supra* note 1 ("And if he refuses to listen to them, tell it to the church, let him be to you as a Gentile and a tax collector.").

8. *Penley*, 146 S.W.3d at 225 (noting Westbrook's "tough love" attempt to persuade Penley to regain her senses and return to her marriage).

9. Westbrook v. Penley, No. 04-0838 (Tex. Sept. 26, 2006); Petition for Review at iv, Westbrook v. Penley, No. 04-0838 (Tex. Nov. 26, 2004); *see, e.g., Advice and Consent at the Church*, U.S. NEWS & WORLD REP., Oct. 9, 2006, at Cross Country, *available at* http://www.usnews.com/usnews/news/articles/061001/9cross.htm (debating Westbrook's role as a minister and professional counselor); Eileen E. Flynn, *Lawsuit Issue: Is He Pastor or Ther-*

This note begins by describing the factual background of *Westbrook*, focusing on Pastor Westbrook's dual role as religious leader and licensed professional counselor.[10] The note follows the development of the First Amendment doctrine of ecclesiastical abstention from its origins in *Watson*, through its most recent development in *Jones v. Wolf*.[11] Next, this note argues that The Supreme Court of Texas should not abstain from deciding the merits of *Westbrook* because of Westbrook's unique role as religious leader *and* licensed professional counselor.[12] This note also argues that recent political developments—particularly the emergence of the White House Office of Faith-based and Community Initiatives—amplify the need for clear lines in the ecclesiastical abstention doctrine.[13] Finally, this note suggests that, despite meager treatment by the *Westbrook* parties and The Supreme Court of Texas, *Westbrook* deserves critical evaluation under the framework of *Employment Division Department of Human Resources v. Smith*.[14]

II. THE *WESTBROOK V. PENLEY* BACKGROUND

A. *"Buddy" Westbrook and the CrossLand Community Bible Church*

Pastor C.L. "Buddy" Westbrook is the senior pastor of CrossLand Community Bible Church (CCBC), a "Christ centered church" in Fort Worth, Texas.[15] Along with three other church members, Westbrook administered the membership and disciplinary policies set out in CCBC's statement of faith and constitution.[16] The CCBC Constitution includes explicit disciplinary policies:

> We believe that one of the primary responsibilities of the church is to maintain the purity of the Body. We are directed by God to be holy. In recognition of this obligation, the elders will biblically and lovingly utilize every appropriate means to restore members who find themselves in patterns of serious misconduct. *When efforts at restoration fail, the elders will apply the Biblical teaching on church disci-*

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apist?, AUSTIN AM.-STATESMAN, Sept. 27, 2006, at A01 (emphasizing the particular gravity of the *Westbrook* decision for churches).

10. *See infra* Part II.

11. 443 U.S. 595 (1979) (approving a state's neutral principles approach to church property disputes).

12. *See infra* Part III B.

13. *See infra* Part III C.

14. 496 U.S. 913 (1990) (upholding an Oregon law that prohibited the use of peyote as consistent with the First Amendment's Free Exercise Clause); *see infra* Part IV.

15. *Penley*, 146 S.W.3d at 223. *See generally* CrossLand Community Bible Church, Welcome to Crossland Community Bible Church, http://crosslandchurch.com (last visited Feb. 15, 2007).

16. *Penley*, 146 S.W.3d at 223.

> *pline, which could include revocation of membership, along with an appropriate announcement made to the membership* (Matt 18:15-17; I Cor 5:1-5; Gal 6:1, 2; 2 Thes 3:6).
>
> When a member engages in a pattern of conduct which visibly violates Biblical standards, or which is detrimental to the ministry, unity, peace, or purity of the church, and such a member remains unrepentant, *the elders will follow our Lord's instructions from Matthew 18:15-20. If the member remains unrepentant and chooses not to resign, such member will be removed from membership. This action will be announced to the congregation* in a tenderhearted, discreet manner, followed by prayer, at the first appropriate Sunday service thereafter. The goal of such discipline will be to encourage repentance and restoration of fellowship with the Lord and His people.[17]

While serving as CCBC's pastor, Westbrook also worked as a licensed professional counselor, specializing in marital counseling.[18] Texas imposes a licensing scheme and various statutory requirements on licensed professional counselors, including specific duties of confidentiality between counselor and counselee.[19]

B. *Peggy Penley as Parishioner and Counselee*

In becoming a member of CCBC in 1999, Peggy Penley affirmed her "willingness to abide by the constitution of th[e] church" by writing "[s]ure, I can abide by the church constitution . . . willingly."[20] After Penley encountered marital difficulties, she and her husband separated, and the two began a series of counseling sessions with Westbrook.[21] As part of the counseling, Westbrook hosted weekly counseling "jam sessions," where Westbrook, Penley and her husband, and other couples from CCBC discussed how to avoid divorce and improve their marriages.[22] After several months without success, Penley told Westbrook of her intent to divorce her husband.[23]

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17. *Id.* at 223–24 (emphasis added).

18. *Id.* at 223. Westbrook received his professional counseling license before serving as the pastor at CCBC. *Id.*

19. *See* TEX. OCC. CODE § 503 (Vernon 2006) (establishing the regulatory scheme for licensed professional counselors); 22 TEX. ADMIN. CODE ANN. § 681.41 (Vernon 2006) (outlining the Texas State Board of Examiner of Professional Counselor's Code of Ethics).

20. *Penley*, 146 S.W.3d at 224 (ellipses in original).

21. *Id.*

22. Brief for Petitioner on the Merits at 3, Westbrook v. Penley, No. 04-0838 (Tex. June 18, 2005).

23. *Penley*, 146 S.W.3d at 224 (discussing the Westbrook's recommendation).

Westbrook's reaction to the news of Penley's intent to divorce forms the crux of the *Westbrook* dispute. In November of 2000, Westbrook disclosed Penley's intent to divorce to the other CCBC elders.[24] In addition, Westbrook published a letter to the entire CCBC membership which "informed the congregation that Penley intended to divorce her husband, that there was no biblical basis for the divorce, and that she had engaged in a 'biblically inappropriate' relationship with another man."[25] After citing the church's disciplinary procedures, the letter "encouraged the church body 'to shun' Penley for the purpose of obtaining her repentance and restoration to the church."[26] Penley divorced her husband in March of 2001.[27]

C. *Penley's Lawsuit*

One year after the church letter, Penley sued CCBC, Westbrook, and the three other church elders, seeking actual and exemplary damages.[28] Penley alleged numerous causes of action, including defamation, breach of fiduciary duty, intentional infliction of emotional distress, invasion of privacy, and professional negligence.[29] At trial, Westbrook and the other defendants convinced the court that, as a result of the ecclesiastical abstention doctrine, the court lacked subject matter jurisdiction over all of Penley's claims.[30]

On appeal to the intermediate appellate court, Penley challenged only one ruling—the dismissal of her action for professional negligence against Westbrook.[31] The appeals court conducted a careful search of Penley's pleadings for allegations of a secular act that might trigger liability.[32] After finding a sufficient reference to secular acts of counseling, the court agreed with Penley that the trial court's jurisdiction was not barred by ecclesiastical abstention.[33] Westbrook appealed.[34]

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24. *Id.* at 224–25.

25. *Id.* (quoting the elders' letter).

26. *Id.* at 225.

27. *Id.*

28. *Penley*, 146 S.W.3d at 225.

29. *Id.*

30. *Id.* at 226 (dismissing all of Penley's claims against Westbrook and the three church elders).

31. *Id.*

32. *Id.* at 231–33.

33. *Penley,* 146 S.W.3d at 231–33.

34. Petition for Review, Westbrook v. Penley, No. 04-0838 (Tex. Nov. 26, 2004).

III. The Ecclesiastical Abstention Doctrine

A. *The Ecclesiastical Abstention Doctrine in the United States Supreme Court*

The Supreme Court of the United States first outlined the ecclesiastical abstention doctrine in *Watson v. Jones*, where a divided church congregation disputed the right to exclusive use of certain church property.[35] The Court asserted that, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of . . . church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[36] According to the Court:

> The right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. 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. 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.*[37]

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35. *Watson,* 80 U.S. 679. Church property disputes are the most common subject of ecclesiastical abstention cases in the United States Supreme Court and have produced interesting jurisprudence specific to property disputes. *See* Elizabeth Ehrlich, Note, *Taking the Religion Out of Religious Property Disputes*, 46 B.C. L. Rev. 1069 (2005) (describing various approaches to church property disputes); Gerstenblith, *supra* note 2, at 681. However, instead of the specific rules governing property disputes, this note focuses on the broader rules for ecclesiastical abstention.

36. *Watson*, 80 U.S. at 727. *Watson* also addressed, in dicta, rules for interpreting written grants of property that use religious terms, as well as the distribution of property held by independent congregations. *Id.* at 722–26. Although *Watson* was decided as a matter of federal common law before the incorporation of the First Amendment, the Court would later import the *Watson* opinion into its First Amendment jurisprudence. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115–16 (1952); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–48 (1969).

37. *Watson*, 80 U.S. at 728–29 (emphasis added). *But see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (arguing that the First Amendment commands abstention only "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity"); Md. and Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 369–70 (1970) (Brennan, J., concurring) (arguing that *Watson's* deference to a church's governing body is only ap-

In addition to the subject immediately at issue in *Watson*—church decisions concerning the true identity of congregations—*Watson*'s dicta extended the ecclesiastical abstention doctrine to decisions concerning church membership and excommunication.[38] According to *Watson*, courts "cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church."[39] *Watson* also attempted to broadly demarcate the ecclesiastical abstention doctrine. The Court reasoned that they should abstain where the subject of the action "concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them," but should not abstain where the subject of the action "in no sense depend[s] on ecclesiastical questions."[40] Thus, *Watson* stands for abstention and deference to religious decision making bodies in cases that would require the court to decide a religious controversy.

Some later cases argued for more limited deference to ecclesiastical tribunals. The Court in *Gonzalez v. Roman Catholic Archbishop of Manila*[41] framed the doctrine such that, "*[i]n the absence of fraud, collusion, or arbitrariness*, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive . . . ."[42] However, the fraud, collusion, and arbitrariness standards were never developed, and cases after *Gonzalez* returned to the more categorical approach.[43] While

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propriate where the "appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious policy").

38. *Watson*, 80 U.S. at 730.

39. *Id.*

40. *Id.* at 732–33 (emphasis added). The same logic that bars inquiry into religious subject matter also bars inquiry into the religious tribunal's jurisdiction, the form of proceeding, and other matters underlying the church's judgment. *Id.* at 733–34.

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions. *Id.*

41. 280 U.S. 1 (1929).

42. *Id.* at 16 (emphasis added).

43. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712 (1976) (observing that "the suggested 'fraud, collusion, or arbitrariness' exception to the *Watson* rule was dictum only"). The *Serbian* Court went on to explicitly reject the proposed exception for arbitrariness, arguing that the exception was inconsistent "with the constitutional mandate

"[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property . . . . First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[44]

The Court's most recent treatment of ecclesiastical abstention came in *Jones v. Wolf*,[45] where the Court agreed with *Watson* and its progeny that "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."[46] However, the Court held that the "First Amendment does not dictate that a state must follow a *particular method* of resolving church property disputes."[47] "[A] [s]tate may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[48]

Thus, the application of ecclesiastical abstention remains a nuanced process. Under Georgia's "neutral-principles" approach, approved in *Jones*, courts must "take special care to scrutinize" matters in dispute and sever only secular matters for judicial evaluation.[49] If a court applying the neutral-principles approach encounters "a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[50] Ultimately, the doctrine as asserted in *Jones* focuses on whether the court would be forced to decide an inherently religious question.[51]

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that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.* at 713. Some commentators have also favored modeling the ecclesiastical abstention doctrine after the Court's political question concept of nonjusticiability. *See* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 220 & n.2 (2000).

44. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

45. 443 U.S. 595 (1979).

46. *Jones*, 443 U.S. at 602 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Md. and Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970); *Presbyterian Church in the U.S.*, 393 U.S. at 449–50.

47. *Jones,* 443 U.S. at 602 (emphasis added) (rejecting "a rule of compulsory deference to religious authority in resolving church property disputes").

48. *Id.* (citing Md. and Va. Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 369 (1969) (Brennan, J., concurring)).

49. *Id.* at 604.

50. *Id.*

51. *See* Little v. First Baptist Church, 475 U.S. 1148, 1149 (Marshall, J., dissenting).

> A court may apply neutral principles of secular law to the dispute at hand. When that process requires a court to determine the validity of a church decision, the court ordinarily must discern from the relevant canonical law what body is authorized to make a

B. *Ecclesiastical Abstention in* Westbrook v. Penley

Westbrook v. Penley[52] presents a novel and challenging application of the ecclesiastical abstention doctrine. While Penley initially asserted a number of causes of action at trial, only one cause of action reached the Supreme Court of Texas—a claim for professional negligence based on the statutory duties of licensed professional counselors.[53] Standards of negligence for licensed professional counselors in Texas include a number of statutory obligations.[54] Before engaging in any form of "counseling,"[55] licensees must provide written notice of, among other things, the "counseling purposes, goals, and techniques," as well as "the limits on confidentiality."[56] In addition, "[a] licensee shall set and maintain professional boundaries. Dual relationships with clients are prohibited."[57] Texas also requires licensed professional counselors to abide by a strict code of confidentiality.[58]

Penley alleges that Westbrook acted negligently by disclosing confidential facts concerning her marital relationship to the CCBC elders, and ultimately to the CCBC congregation.[59] Yet Penley and Westbrook's arguments to the court are troubling. Penley's argument assumes that abstention can be avoided only if the counseling sessions and disclosure of information are characterized, at least in part, as secular acts.[60] Similarly, Westbrook argues that ecclesiastical abstention is appropriate whenever

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particular decision within the church, and what decision that body has reached. Having done so, the court may not inquire whether the decision was made arbitrarily or whether it conflicts with the ecclesiastical precepts of the organization. *Id.*

52. Petition for Review, Westbrook v. Penley, No. 04-0838 (Tex. Nov. 29, 2006).

53. *Penley*, 146 S.W.3d at 227.

54. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 (Proposed Final Draft No. 1, 2005) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."); 53 TEX. JUR. 3D Negligence § 11 (2006).

55. "'Counseling' means assisting a client through a therapeutic relationship, using a combination of mental health and human development principles, methods, and techniques, including the use of psychotherapy, to achieve the mental, emotional, physical, social, moral, educational, spiritual, or career-related development and adjustment of the client throughout the client's life." TEX. OCC. CODE § 503.003(b)(3) (Vernon 2006).

56. 22 TEX. ADMIN. CODE § 681.41(e) (Vernon 2006).

57. 22 TEX. ADMIN. CODE § 681.41(k) (Vernon 2006) ("A dual relationship is considered any non-counseling activity initiated by either the licensee or client for the purpose of establishing a non-therapeutic relationship.").

58. 22 TEX. ADMIN. CODE § 681.41(x) (Vernon 2006); TEX. HEALTH & SAFETY CODE § 611.001-611.008 (Vernon 2006).

59. *Penley*, 146 S.W.3d at 225, 231.

60. Brief for Respondent on the Merits at 7–8, 13–17, Westbrook v. Penley, No. 04-0838 (Tex. July 11, 2005).

the conduct can be characterized as "religious," and that abstention can be avoided only in cases of "purely secular conduct."[61] Both parties misconstrue the relevant inquiry.

Ultimately, Penley's claim for professional negligence does not trigger the ecclesiastical abstention doctrine. Both Penley and Westbrook err by emphasizing the secular/religious dichotomy of Westbrook's underlying conduct, instead of emphasizing the nature of a professional negligence claim. The precedents are clear—while the Supreme Court of the United States has abstained from decisions that would have required the Court to answer a question of religion,[62] the Court did not abstain from disputes that, while touching on religious conduct, did not require answers to religious questions.[63] Penley's claim undoubtedly *touches* CCBC's pastor, the CCBC elders, and the CCBC disciplinary process. Matters of religious doctrine and practice are certainly related to this action; for example, whether Westbrook complied with (or departed from) CCBC's disciplinary doctrines and Biblical commands. Yet the claim of professional negligence does not require the court to address those issues. That is, the litigation does not trigger abstention because the claim for professional negligence does not *turn on* a question of religious doctrine or procedure. Instead, the *Westbrook* court can and should resolve all issues of Westbrook's professional liability by utilizing the explicit and neutral principles contained in the Texas statutes and regulations.[64] While this

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61. Brief for Respondent on the Merits at 6–8, 25–29, Westbrook v. Penley, No. 04-0838 (Tex. June 20, 2005).

62. *See Serbian E. Orthodox Diocese*, 426 U.S. at 718, 720–21 (abstaining from deciding whether "the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of the Serbian Orthodox Church" and whether "the Mother Church's reorganization of the American-Canadian Diocese into three Dioceses was invalid because it was in clear and palpable excess of its own jurisdiction" (internal quotations omitted)); *Presbyterian Church in the U.S.*, 393 U.S. at 450 (abstaining from deciding whether "actions of the general church constitute such a 'substantial departure' from the tenets of faith and practice"); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (abstaining from deciding which group within the hierarchical church was entitled to use church property); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929) (abstaining from deciding "what the essential qualifications of a chaplain are and whether the candidate possesses them").

63. *See supra* notes 49–51 and accompanying text (discussing Jones v. Wolf, 443 U.S. 595 (1979), where the Court did not abstain from deciding which faction of a congregation was entitled to control a property); *see also infra* Part IV (discussing Employment Div. v. Smith, 494 U.S. 872 (1990)).

64. *See Watson*, 80 U.S. at 727 (instructing deference only to church adjudications concerning "questions of discipline, or of faith, or ecclesiastical rule, custom, or law"). "When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide." *Id.* at 731 (quoting Harmon v. Dreher, 1 S.C. Eq. (Speers Eq.) 87, 120 (1843)); *accord* Michael William Galligan, Note, *Judicial Resolution of In-*

conclusion eliminates Westbrook's argument for barring the action entirely, it does not prevent him from asserting more typical defenses to tort liability, including a potential First Amendment defense on other grounds.

C. *Ecclesiastical Abstention in the Age of Faith-Based Initiatives*

In many cases, the ecclesiastical abstention doctrine acts to disable suits at the point where courts seek to establish the duty or standard of care of a reasonable religious person.[65] Without a set of purely secular standards of conduct, these courts are unable to establish negligence.[66] In contrast, the result I argue for in *Westbrook* is largely driven by the state's imposition of the professional counselor licensing scheme—an explicit standard of care for tort law's reasonable person. Unlike most religious actors, Westbrook's legal obligations are distinguishable because of his choice to participate in an activity subject to explicit legislative regulation.[67] This unique aspect of *Westbrook* helps illustrate the growing significance of the ecclesiastical abstention doctrine in light of recent national policies.

The White House Office of Faith-based and Community Initiatives and its associated programs and policies[68] (faith-based programs) have created the potential for an explosion in ecclesiastical abstention litigation. In general terms, before the creation of faith-based programs, religious recipients of public funds were required to "secularize" their services and the premises on which they were offered.[69] That and other factors contributed to a low level of religious participation in the public grant pro-

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trachurch Disputes, 83 COLUM. L. REV. 2007, 2029 (1983) (advocating the use of neutral principles along with "functional, administrative investigations of internal church practice").

65. *See, e.g.*, Sanders v. Casa View Baptist Church, 134 F.3d 331, 337 (5th Cir. 1998).

> Defining [the standard of care] could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs. Furthermore, defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them. *Id.*

66. *Id.* (explaining that state courts have "rejected uniformly" malpractice claims against clergy).

67. *See supra* notes 19, 54–58, and accompanying text (outlining the statutory regulations governing professional counselors).

68. *See generally* Kathryn Dunn Tenpas, Associate Director, Univ. of Pa. Wash. Semester Program, Remarks at the Pew Forum, "Can an Office Change a Country? The White House Office of Faith-Based and Community Initiatives, a Year in Review" discussion (Feb. 20, 2002), *available at* http://pewforum.org/events/index.PHP?Event I=23.

69. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-616, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 1 (2006).

grams.[70] Under the new grant regime, religious organizations are eligible to compete for funds on the same basis as secular organizations, and may use federal funds for all but "inherently religious" activities.[71] This new set of faith-based programs will have a number of intriguing effects on ecclesiastical abstention litigation.

First, the faith-based programs will, if successful, increase the interactions between churches and the public.[72] Like any potential tortfeasor, increasing net interactions will increase the opportunities for tortious acts by clergy members.[73] Second, the participation of religious actors in faith-based programs will subject the churches to significant regulation in their conduct as governmental grant executors.[74] The scope of regulatory frameworks for grant recipients is broad, "moving from the noncontroversial health and safety standards; progressing on to nondiscrimination requirements . . . and, most meddlesome, to various degrees of control over the curriculum or program content."[75] As in *Westbrook*, this movement of religious actors into secular regulatory schemes is likely to expose religious groups to more tort litigation without the protection of ecclesiastical abstention. I argue not that the faith-based programs are more likely to produce tortfeasors, per se, but that the faith-based programs will cause members of the clergy to lead more dual lives—sometimes acting in a "secular" role, and other times in a "religious" role. This

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70. *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 5–6 (2001).

> [T]he Supreme Court's decisions about aid to religious schools have for many years cast a shadow on financial relationships between government and religious enterprise—in particular, houses of worship and schools with a strongly religious character. As a result, federal regulations for many years had systematically excluded such entities from federally financed grants and contracts. *Id.*

71. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69 at 2, 12–13.

72. *See* Lupu & Tuttle, *supra* note 70 at 13–14 (observing the difficulties inherent in tracking the net effects of faith-based programs).

73. *See, e.g.,* GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69, at 22. For example, "since the beginning of the initiative, agencies have awarded over $500 million through new competitive grant programs to provide training and technical assistance to faith-based and community organizations and to increase the participation of these organizations in providing federally funded social services." *Id.*

74. *See generally* Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343, 365 (1992) (surveying regulatory burdens placed on recipients of federal funds). Under the faith-based programs, faith-based organizations cannot "discriminate on the basis of religion or religious belief in providing services to clients." GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 70, at 13.

75. Esbeck, *supra* note 74, at 366; Daniel J. Rosenthal, *Charitable Choice Programs and Title VII's Co-Religionist Exemption*, 39 CREIGHTON L. REV. 641, 664 (2006) (addressing "significant questions regarding the participating [faith-based organizations'] discriminatory employment practices").

increasing trend of mixed roles emphasizes the need for a clearly defined ecclesiastical abstention doctrine.

IV. WESTBROOK'S MISSING LINK: *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH*

The result I argue for in *Westbrook*—that courts need not always abstain from deciding whether Westbrook's act of religious discipline constitute torts—raises powerful concerns. Some of these are raised in the *Westbrook* briefs:

> Adjudication of such a claim against Pastor Westbrook is asking a civil court to punish Pastor Westbrook for following the basic church disciplinary process that includes disassociating the congregation from the unrepentant sins of a church member or former church member that resigned instead of repenting of those sins. Such punishment is not only prohibited by the religion clauses of the First Amendment, it serves to chill other pastors from engaging in church discipline or discussing sin in an open and honest manner within the church. In short, adjudication of this case will effectively *destroy church discipline in Texas.*[76]

Or will it? In addition to the questions concerning ecclesiastical abstention, *Westbrook* presents another unique issue in First Amendment jurisprudence: should Westbrook's church disciplinary actions and Texas' professional counselor regulations be subject to scrutiny under *Employment Division, Department of Human Resources v. Smith*?[77]

Smith's central holding is that "the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct."[78] Previous cases had invalidated state laws on the basis that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[79] However, the Court confined those cases to the discreet setting of unemployment benefits and made *Smith*'s less strict

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76. Brief for Petitioner on the Merits at 12, Westbrook v. Penley, No. 04-0838 (Tex. June 18, 2005) (emphasis added).

77. 494 U.S. 872 (1990).

78. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005); *see also The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 40, 198–209 (1990) (contrasting *Smith* with the First Amendment protections under Sherbert v. Verner, 374 U.S. 398 (1963)). *Smith*'s specific holding was that "[b]ecause [the] ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." *Smith*, 494 U.S. at 890.

79. *Smith*, 494 U.S. at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1963)).

framework the general governing standard.[80] *Smith*'s venture into new modes of First Amendment jurisprudence continues to be hotly debated.[81]

Despite the apparent broad reach of *Smith*, courts have excepted clergy cases from *Smith's* general framework. For example, several courts have created a ministerial exception that bars ministers' Title VII[82] claims of employment discrimination against church employers.[83] These courts often argue that, while *Smith* addressed "restrictions on an *individual's* actions that are based on religious beliefs," *Smith* did not address "encroachments on the ability of a *church* to manage its internal affairs."[84] The argument refers to the ecclesiastical abstention cases and contends that *Smith*, "which concerned individual free exercise, did not purport to overturn a century of precedent protecting the church against governmental interference in selecting its ministers."[85]

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80. *Id.* at 882–90 (reserving judgment on a class of "hybrid" cases that present "the Free Exercise Clause in conjunction with other constitutional protections").

81. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 514–15 (1997) (tracking Congressional disagreement with *Smith*); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades . . . . Free exercise is no longer wanting for controversy.").

82. 42 U.S.C. § 2000(e) (2000). "[A]lthough Section 702 exempts religious organizations from Title VII's coverage for religious discrimination, it does not provide a blanket exemption for all discrimination. Title VII still prohibits a religious organization from discriminating on the basis of race, color, sex, or national origin." Combs v. Central Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 346 (5th Cir. 1999) (citing McClure v. Salvation Army, 460 F.2d 553, 554–57 (1972)).

83. Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004) (barring a minister's disability discrimination suit against the church employer); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003) (barring a religious communications manager's national origin and gender discrimination suit against the church employer); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000) (barring a minister's retaliatory conduct suit against the church employer); *Combs*, 173 F.3d at 346 (barring a reverend's sex and pregnancy discrimination suit against the church employer); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (barring a nun's sex discrimination and retaliatory conduct suit against the church employer); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (barring a minister's race discrimination, sex discrimination, and retaliatory conduct suit against the church employer); Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992) (barring a minister's retaliatory conduct suit against the church employer); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) (barring a chaplain's age and sex discrimination suit against the church employer); McClure v. Salvation Army, 460 F.2d 553 (1972) (developing the ministerial exception to Title VII claims).

84. *Combs*, 173 F.3d at 349 (emphasis added); *accord Gellington*, 203 F.3d at 1303–04; *Catholic Univ. of Am.*, 83 F.3d at 461–63.

85. *Combs*, 173 F.3d at 349.

To date, the *Westbrook* litigation has largely ignored the question of whether *Smith* governs the Texas professional counseling regulations and Westbrook's disciplinary actions.[86] Nonetheless, while the Title VII ministerial exception cases certainly deserve some attention, several unique aspects of *Westbrook* warrant a new analysis. The ministerial exception cases generally rely on two contentions to justify a departure from *Smith*, yet neither applies to clergy tort cases such as *Westbrook*.

First, the ministerial exception cases distinguish burdens on *individual action* from burdens on *church decisions*, holding that *Smith* governs only the former.[87] However, Penley does not challenge the propriety of a church decision like the employment decisions in the Title VII cases.[88] Instead, Penley challenges Westbrook's action of disclosing her confidential information to the CCBC elders, and to the CCBC congregation.[89] This distinction between individual actions and church decisions would produce an odd result in *Westbrook*. While the First Amendment would shield the church's decision to direct Westbrook to shun Penley, the First Amendment would not shield Westbrook's individual act of executing the church's direction.[90] As that result suggests, the ministerial exception cases are troubling because they fail to recognize that the ability of the church organization to make religious choices would mean very little if

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> *Smith's* language is clearly directed at the first strand of free exercise law, where an individual contends that, because of his religious beliefs, he should not be required to conform with generally applicable laws. The concerns raised in *Smith* are quite different from the concerns raised by [this] case, which pertains to interference in internal church government.

Id.; *accord Gellington*, 203 F.3d at 1303–04; *Catholic Univ. of Am.*, 83 F.3d at 461–63; *Young*, 21 F.3d at 185–88; *Scharon*, 929 F.2d at 363.

86. *Penley*, 146 S.W.3d 220. Initially, neither the trial court nor the intermediate appellate court addressed the issue. While Penley raised the issue briefly in her initial filing, Penley omitted the argument in her merits brief. *Compare* Response to Petition for Review at 13–14, Westbrook v. Penley, No. 04-0838 (Tex. June 18, 2005), *with* Brief for Respondent on the Merits, Westbrook v. Penley, No. 04-0838 (Tex. July 11, 2005). Westbrook spends a small part of his brief arguing that *Smith* simply "has no application here," and cites directly to the Title VII ministerial exception cases. Brief for Respondent on the Merits at 23–24, Westbrook v. Penley, No. 04-0838 (Tex. Mar. 3, 2005). Only at oral argument did the Court begin to address the issue, albeit sparingly. Oral Argument Audio Recording, Westbrook v. Penley, No. 04-0838 (Tex. Sept. 26, 2006), *available at* http://www.supreme.courts.state.tx.us/oralarguments/2004/04-0838.mp3.

87. *Catholic Univ. of Am.*, 83 F.3d at 462.

88. *See supra* note 83. Indeed, Penley would appear to have no viable claim if the church had simply announced to the world that Penley had violated the disciplinary code of the church without more.

89. *Penley,* 146 S.W. 3d at 225.

90. *Catholic Univ. of Am.*, 83 F.3d at 462 (protecting "the freedom of the church to select those who will carry out its religious mission," but excluding "the freedom of an individual to observe a particular command or practice of his church").

the law could prohibit the church's individual religious actors from executing those decisions. That is, for First Amendment shields to have any meaningful effect, the protections must apply to both collective religious choices *and* religious acts. In any case, Penley's claim escapes this attempt at compartmentalizing burdens because Penley challenges Westbrook's *act* of executing CCBC's disciplinary policy.[91] Thus, the first rationale for removing cases from *Smith*'s reach—the distinction between individual action and church decision—does not apply to *Westbrook* and the clergy tort cases.

In order to justify a departure from *Smith*, the ministerial exception cases rely on a second specific concern—the importance of deciding matters of internal church government.[92] Initially, this rationale is subject to important criticisms. The partitioning of matters of "internal church government" seems to invite judicial parsing of important religious doctrines, a consistently disfavored practice. For example, who constitutes the church government? Only the Pope? Bishops? Priests? Elders? Lay ministers? Sunday school teachers? Despite our cultural familiarity with certain church hierarchies, First Amendment jurisprudence should continue to avoid such dangerous searches for religious truths, even those characterizing church hierarchies.[93] Setting aside these difficulties, *Westbrook* and the clergy tort cases should not be removed from *Smith* because they do not implicate the concern of protecting internal church governance. Instead of relating to the selection of a church's ministers and other persons who speak for the church, *Westbrook* concerns the acts of the church toward its primary subjects, the parishioners. Therefore, the second rationale for removing cases from *Smith*'s rule—the importance of independent internal church governance—does not apply to *Westbrook* and the clergy tort cases.

As a result, *Westbrook* deserves a new analysis under *Smith*. And while a full analysis of *Smith*'s application is beyond the scope of this note, several preliminary observations are notable. First, if *Smith*'s general rule applies, at least some of the Court's language suggests that clergymen in Westbrook's position will not be protected by the First Amendment. For example, parts of *Watson* mirror *Smith*'s general logic, recognizing only the "right to entartain [sic] any religious belief, to practice any religious principle and to teach any religious doctrine which *does not violate the laws of morality and property, and which does not infringe*

91. *Penley*, 146 S.W.3d at 224–25.

92. *See, e.g.*, *Catholic Univ. of Am.*, 83 F.3d at 462.

93. *See* Notes, *Judicial Intervention in Disputes over the Use of Church Property*, 75 HARV. L. REV. 1142, 1143–44, 1160–64 (1962) (outlining the difficulties inherent in identifying exact church hierarchies).

personal rights."[94] Similarly, the circuits acknowledging ministerial exceptions to Title VII obligations recognize that, "whereas the Free Exercise Clause guarantees a church's freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does not guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application."[95] These surface judgments suggest that the First Amendment may not shield Westbrook from liability under the Texas statutes governing licensed professional counselors.

However, *Smith* leaves open the possibility of different treatment for actions that fall within the holdings of the cases using the *Sherbert* framework, as well as the hybrid cases implicating multiple constitutional rights.[96] These and other important implications of *Smith* should be addressed head-on by The Supreme Court of Texas in *Westbrook*. Finally, just like the ecclesiastical abstention doctrine, the increase in clergy tort litigation resulting from faith-based programs will demand clear rules concerning the reach of *Smith*.[97]

V. CONCLUSION

This note argues for two primary results. First, that the Supreme Court of Texas should not abstain from deciding the merits of *Westbrook* because of Westbrook's unique role as religious leader *and* licensed professional counselor. Second, that *Westbrook* deserves careful scrutiny under the law of *Smith*. But the note's overarching theme is that courts should avoid using the doctrine of ecclesiastical abstention as a tool to avoid constitutional confrontation. Instead, courts should confront these difficult issues of "intrinsic importance and far-reaching influence,"[98] for

94. *Watson*, 80 U.S. at 729 (emphasis added); *accord Smith*, 494 U.S. at 882 ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.").

95. *Catholic Univ. of Am.*, 83 F.3d at 463 (exempting church employment decisions from Title VII regulations); *accord* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999) ("[T]his sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws. Otherwise, churches would be free from all of the secular legal obligations that currently and routinely apply to them.").

96. *See* Paul J. Morken, *Church Discipline and Civil Tort Claims: Should Ecclesiastical Tribunals Be Immune?*, 28 IDAHO L. REV. 93, 156–63 (1991) (analyzing ecclesiastical abstention with reference to the cases excluded from *Smith's* framework). Morken argues that "*Smith's* categorical rule is almost inversely related to the Ecclesiastical Abstention Doctrine and the holding in *Serbian* . . . ." *Id.* at 159.

97. *See supra* Part III C.

98. *Watson*, 80 U.S. at 734.

"[b]lessed are they who maintain justice, who constantly do what is right."[99]

99. *Psalms* 106:3 (New American Standard).