

**STILL A THRESHOLD QUESTION:  
REFINING THE MINISTERIAL EXCEPTION  
POST-*HOSANNA-TABOR***

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I. INTRODUCTION

Of crucial significance to the singular freedom ascribed to religion in the United States is religious institutions' ability to select "ministers."<sup>1</sup> Ministers are the leaders, proclaimers, evangelizers, and teachers for the faith community. These persons respond to a "call" in many traditions, believed to be divinely-inspired, to devote one's talents to building up the world, starting from within the faith tradition. They have a special role in the community, and from their "positions of ministry," they carry out those functions through which the community advances the very purpose of religion: to preach, teach, evangelize, heal and serve. Because the qualities for positions of ministry are defined by faith communities based on their own religious doctrines and practices, traditionally, the courts have acknowledged that they are not competent

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1. See *McClure v. Salvation Army*, 460 F.2d 553, 559–60 (5th Cir. 1972); *Alicia-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003).

to adjudicate claims brought by “ministers”<sup>2</sup> against their “churches”<sup>3</sup> arising out of “the terms and conditions of ministry.”<sup>4</sup> The principle whereby the secular courts have no competence<sup>5</sup> to review the employment-related claims of ministers against their employing faith communities is often referred to as the “ministerial exception.”<sup>6</sup> By this term, courts refer to the doctrine, rooted in constitutional law, that those who occupy positions of ministry in faith communities may be employed, disciplined, and terminated according to the internal practices of those communities and may not contest these employment decisions through the secular courts. It is an “exception” only in this sense: the secular rules of labor and employment law that would govern if a “faith community” were deemed a secular employer are displaced in an express acknowledgement by the courts that the government may not interfere in the internal affairs of religious bodies (including the selection of ministers).<sup>7</sup> The promise of the First Amendment that excludes the government from the oversight of internal working relationships with ministers however is no “exception”; it is at the core of religious freedom that is our common heritage as citizens.<sup>8</sup>

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2. As explained below, this article uses the term “ministers” as a generic term for those basic roles within a faith community regardless of how those roles are named within that tradition or according to its practice or doctrine.

3. Likewise this article uses the term “church” to describe the religious institution, and embracing houses of worship (however named) and other institutions used by religion through which they conduct their religious work.

4. *McClure*, 460 F.2d at 559.

5. This article uses the term “competence” to denote jurisdiction and authority, not expertise in religious subject matter. See discussion of *Watson v. Jones*, *infra* at notes 145–57 and accompanying text.

6. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 705 (2012).

7. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (“Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”); *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (holding that determination of whether an individual was fit for chaplaincy was a “purely ecclesiastical” decision left to church’s discretion and generally not reviewable by secular courts).

8. See *Kedroff*, 344 U.S. at 115–16 (discussing the “spirit of freedom for religious organizations” that runs through Court precedents regarding matters of church government, faith, and doctrine).

On January 11, 2012, a unanimous Supreme Court agreed with every other court to have addressed these issues and acknowledged the existence of the ministerial exception, springing from the Religion Clauses of the First Amendment, in a suit alleging discrimination in employment and retaliation under the anti-discrimination laws.<sup>9</sup> Reflecting the facts before it, and emphasizing that by imposing an unwanted minister, the state infringes upon the Free Exercise and Establishment Clauses, the Court declared that the ministerial exception “ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.”<sup>10</sup> The Court also held that suits seeking money damages, rather than reinstatement, under the anti-discrimination laws effectively penalized churches for making constitutionally-protected employment decisions, but declined to address whether the exception bars contract and tort suits by ministers.<sup>11</sup> Nonetheless, the Court did decide one further important issue—in the absence of any briefing or argument from the parties—that the exception operates as an affirmative defense, not a jurisdictional bar.<sup>12</sup> These issues, one open as to the scope of the exception and one closed as to procedure, are likely to perplex or even vex courts and litigants in their applications.

This article advocates that the application of the ministerial exception as a threshold legal determination is necessary to preserve foundational religious rights, indeed the very rights advanced unanimously by the Court. In order to preserve the exception as an essential element of religious freedom, it must also be inscribed with deference to religious organizations’ powers of self-government and should encompass all possible permutations of claims arising out of ministerial employment disputes. How ministry is defined and which entities are religious (enough) to assert constitutional rights must still be resolved. This body of law, despite the Court’s unanimity, will continue to be litigated and where the exception begins and ends will be highly debated. The definitional edge necessarily belongs to the “church” rather

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9. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706–07, 709.

10. *Id.* at \_\_\_, 132 S. Ct. at 709.

11. *Id.* at \_\_\_, 132 S. Ct. at 710.

12. *Id.* at \_\_\_, 132 S. Ct. at 709 n.4.

than the “state.”<sup>13</sup> Otherwise, the governmental pressure to define and redefine the boundaries of ministry will chill and limit religious freedom, an outcome that the First Amendment does not allow.<sup>14</sup> The principles and observations in this article are informed by contemporary litigation experiences, and the recommendations herein are designed to bring more certainty and structure to litigation involving religious employers and ministerial employees.

*A. Background: The Separation of Church and State*

Since the dawn of the Republic, religious organizations have played a fundamental role in shaping the way Americans think about the world around them.<sup>15</sup> Religious institutions developed great engines of education and welfare in this country in response to the needs of society.<sup>16</sup> Government was small.<sup>17</sup> Religious affiliations defined people; they marked those journeying in to the New World seeking to be free from religious prejudices and persecution.<sup>18</sup> That world—before the Revolution—was characterized in many places, however, with official and established relations between religious organizations and governments.<sup>19</sup> In the northern colonies, it was the Congregationalist church.<sup>20</sup> In the southern colonies, it was the Church of England.<sup>21</sup> When

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13. *Id.* at \_\_\_\_, 132 S. Ct. at 710–11 (Thomas, J., concurring).

14. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 343–46 (1987) (Brennan, J., concurring) (warning that weakening respect for the notion of church autonomy ran the risk of chilling legitimate expressions of religious exercise); *see also Catholic Charities of Sacramento Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004) (upholding as constitutional a state statute defining “religious employer” so narrowly that few religious institutions meet the definition, thus requiring them to provide health care plans which cover contraception); Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 129–31 (2004) (discussing cases that form the roots of the church autonomy doctrine).

15. *See generally* THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

16. *See id.* at 121–22.

17. *See id.* at 55.

18. *See id.* at 3, 29.

19. *See id.* at 28–29, 55, 83.

20. *See id.* at 166–68.

21. *See id.* at 135.

Americans banded together to throw off the yoke of the English Crown, a theme in the writings of such revolutionary thinkers as Thomas Jefferson and James Madison was to disentangle crown and church.<sup>22</sup> Disestablishment, for these leaders, meant specifically breaking the power that linked the crown to church and state, which created pressures on non-adherents and led to numerous abuses.<sup>23</sup>

But throwing off the yoke of established religion did not mean that the new government was ignorant of the relationships between religious organizations and their adherents.<sup>24</sup> Rather, it meant that the government had no role in setting and enforcing religious obligations (such as tithing), selecting and paying clerics, and otherwise policing the internal affairs of religious organizations.<sup>25</sup> For the Framers, this distaste for the role of government in helping to shape religious doctrine, dating from the time of the emperors and continuing through the times of Reformation, was reflected in this “hands off” approach to religion, at least as the new “federal” government was concerned.<sup>26</sup> Part of this was to free the nascent government to develop without the fear that it could be captured by powerful institutional interests.<sup>27</sup>

Fundamentally, the business of religion is not the business of government. Historically, in established churches, the government paid clergy, taxed the people to support those institutions, and had a hand in

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22. See *id.* at 135–36. For example, the American Revolution disestablished churches, including the Church of England. See *Turpin v. Lockett*, 10 Va. 113, 141–43, 167–68 (1804) (opinions of Tucker, J. and Roane, J.), available at 1804 WL 549, at \*14, \*28 (Va. 1804) (noting that the Church “changed” after the Revolution from preferred public institution to private actor).

23. See Curry, *supra* note 15, at 105; JOHN NOONAN, *THE LUSTRE OF OUR COUNTRY*, 69–70 (1998). Madison specifically addresses these concerns in his famous Memorial and Remonstrance. See JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* 5–7 (1819).

24. See Michael W. McConnell, *Religion and Its Relation to Limited Government*, 33 HARV. J.L. & PUB. POL’Y 943, 944 (2010).

25. See *id.* at 947–48.

26. *Id.* at 946–47. In contrast, individual states’ relationships with the church varied after the Revolution, when leaders in many states sought to reestablish a church to instill piety and morality in their citizenry. *Id.* at 946. For instance, from 1780 Massachusetts required every man to belong to a church and permitted each church to tax its members, but forbade any law requiring that it be of any particular denomination. *Id.* at 947. This was not abolished until 1833. *Id.*

27. See generally *id.*

selecting church leaders.<sup>28</sup> Today still, in the Church of England, the Queen formally makes the appointment of bishops to dioceses.<sup>29</sup> That has never been the American experience. In 2004, in rejecting a free exercise demand for inclusion of theological preparation within the state scholarship program, a majority of the Court<sup>30</sup> traced the history of disestablishment which severed the link between governmental support of clerics and religious ministry.<sup>31</sup> Disestablishment strongly endorsed the notion that government has no role, direct or indirect, in the licensing, selection, education, assignment, or other matters concerning the terms and conditions of those who would occupy positions of ministry within religious organizations.<sup>32</sup>

The story is told of Benjamin Franklin, then minister to France, encountering the papal nuncio in the palace at Versailles.<sup>33</sup> After acknowledging the likely victory of the American patriots, the nuncio pointedly asked how the new government would want to structure relationships between Catholics and the Church.<sup>34</sup> Franklin demurred to consult with his compatriots.<sup>35</sup> Communications being what they were, a few years later after deliberation with the American Congress, the American ambassador reported to the nuncio: it was none of the business of the new government how Catholics related to their Church.<sup>36</sup> This was a matter for religion, not for government.<sup>37</sup> Plainly the world was entering a new phase, where for the first time a government disclaimed any role in setting and enforcing religious matters for its citizens.

More than two centuries later, the world is a much different place. The institutions of education and service are largely in the hands

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28. *Id.* at 946.

29. See Archbishops' Secretary for Appointments, *Briefing for Members of Vacancy in See Committees*, THE CHURCH OF ENGLAND (2009), <http://www.churchofengland.org/media/35871/dbnam3.pdf>.

30. *Locke v. Davey*, 540 U.S. 712 (2004).

31. *Id.* at 725.

32. See *id.* at 722–25.

33. ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 479 (1950).

34. *Id.* at 477–78.

35. *Id.*

36. See *id.* at 479.

37. See *id.*

of big government. Religion still holds sway in the populace<sup>38</sup> and organized religion is still an important aspect of the delivery of services, often in partnership (not competition) with government.<sup>39</sup> And government and institutional religion contend over the barrier separating Church and State as never before.<sup>40</sup>

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38. See *How Religious Is Your State?*, PEW FORUM ON RELIGION & PUBLIC LIFE (Dec. 21, 2009), <http://www.pewforum.org/How-Religious-Is-Your-State.aspx> (revealing survey results showing that 56% of Americans said religion was “very important in their lives,” 58% prayed at least once a day, and 71% believed in God with “absolute certainty”).

39. The best example of this is the White House Office established by President George W. Bush via executive order not long after his inauguration in January, 2001. Exec. Order No. 13,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C. ch. 2 (Supp. V 2005). Continued under President Barack Obama, the office “forms partnerships between government at all levels and non-profit organizations, both secular and faith-based, to more effectively serve Americans in need.” *About the Office of Faith-based and Neighborhood Partnerships*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ofbnp/about> (last visited Feb. 1, 2012).

40. The struggle over the application of secular workplace norms in religious institutions is an example, but not the only one, of the efforts to redraw the boundaries between religious institutions and governmental oversight. The narrowed definition of “religious employer” in the *Catholic Charities* litigation, *see Catholic Charities of Sacramento Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004), has been replicated in U.S. Department of Health & Human Services interim final rules that implement recent health care reforms. *See* 76 Fed. Reg. 46621, 46623 (to be codified at 45 C.F.R. pt. 147) (defining “religious employer” for purposes of exemption from health care plan requirements as an employer that: “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code”). The interim final rules govern what must be included in health insurance plans, and they expressly include drugs and devices that some religious bodies find immoral. *Id.* The rule has been the subject of widespread protest by religious groups. *See* Kristen Day, *Should the Government Force Religious Employers to Pay for Birth Control*, THE CHRISTIAN POST BLOG GUEST VOICES (Jan. 2, 2012, 11:57 PM), <http://blogs.christianpost.com/guest-views/2012/01/should-the-government-force-religious-employers-to-pay-for-birth-control-02/>. As another example, the Catholic Bishops of Illinois recently abandoned adoption services rather than conform to new state definitions of marriage. Laurie Goodstein, *Illinois Bishops Drop Program Over Bias Rule*, N.Y. TIMES, Dec. 29, 2011, at A16.

*B. The Ministerial Exception Dispute in Hosanna-Tabor*

This article is set against the backdrop of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>41</sup> the Supreme Court's first pronouncement on the ministerial exception.<sup>42</sup> Cheryl Perich, supported by the Equal Employment Opportunity Commission and the United States of America, filed an employment discrimination suit against her previous employer, the Hosanna-Tabor Lutheran School in Michigan, a ministry of the Lutheran Church-Missouri Synod.<sup>43</sup> Perich suffered from narcolepsy, a medical condition that required her to step away from her work as a primary school teacher.<sup>44</sup> When she was preparing to return to work, the school leadership advised that it had hired a replacement lay teacher for the remainder of the school year, raised concern about Perich's fitness to return, and offered her a "peaceful release" from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher.<sup>45</sup> Perich perceived this response as a hostile action and threatened the school with a complaint to the civil authorities.<sup>46</sup> The school viewed this act of frustration as a violation of the school's commitment to Biblical peacemaking and dispute resolution principles.<sup>47</sup> The EEOC viewed it as retaliation and filed suit.<sup>48</sup>

In the lower courts, the dispute centered on whether Perich was a "minister."<sup>49</sup> The parties contended over the nature of her duties and the

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41. \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (2012).

42. *See id.* at \_\_\_, 132 S. Ct. at 707.

43. Brief for the Federal Respondent at 3–4, 8, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553).

44. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 700.

45. *Id.* at \_\_\_, 132 S. Ct. at 700.

46. *Id.* at \_\_\_, 132 S. Ct. at 700. After she was medically cleared for work, Perich presented herself at the school and refused to leave until school officials gave her written documentation that she had reported to work. *Id.* at \_\_\_, 132 S. Ct. at 700. The principal later called Perich and told her that she would likely be fired. *Id.* at \_\_\_, 132 S. Ct. at 700. "Perich responded that she had spoken with an attorney and intended to assert her legal rights." *Id.* at \_\_\_, 132 S. Ct. at 700.

47. *Id.* at \_\_\_, 132 S. Ct. at 700.

48. *Id.* at \_\_\_, 132 S. Ct. at 701.

49. *See EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.* (*Hosanna-Tabor Appeal*), 597 F.3d 769, 778 (6th Cir. 2010), *rev'd*, *Hosanna-Tabor*,

relationship of those duties to the religious mission of the school.<sup>50</sup> The government applied a quantitative approach, adding up the amount of Perich's day it felt she spent on "religion" and concluding that she was a teacher first and a religion instructor second.<sup>51</sup> The school noted the role of teachers in its evangelizing mission and that Perich in particular was "commissioned"; a designation that required theological preparation and a "call," or approval, by the congregation of the sponsoring church.<sup>52</sup> The District Court agreed that Perich's suit was barred by the ministerial exception and granted summary judgment in Hosanna-Tabor's favor.<sup>53</sup>

Perich prevailed before the United States Court of Appeals for the Sixth Circuit, which accepted the government's test to determine whether her employment was ministry, a quantitative approach that measured time spent during the school day on various tasks.<sup>54</sup> The test used to resolve whether she was a "minister" in the Sixth Circuit conflicted with the process used in other circuits,<sup>55</sup> setting the stage for

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\_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (identifying "primary issue" in case as being whether Perich served as a ministerial employee); EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch. (*Hosanna-Tabor Trial*), 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008) *vacated*, 597 F.3d 769 (6th Cir. 2010).

50. See *Hosanna-Tabor Appeal*, 597 F.3d at 779–80.

51. *Id.*

52. See *Hosanna-Tabor Trial*, 582 F. Supp. 2d. at 891–92 (explaining that titles of "commissioned minister" and "called" teacher conferred special status on Perich within church and that courts should defer to church's designation of Perich as minister in absence of any showing that the church designated her as "minister" after the fact solely to avoid liability).

53. *Id.*

54. See *Hosanna-Tabor Appeal*, 597 F.3d at 779–81 (emphasizing repeatedly that Perich spent only a fraction of her work day engaged in "activities devoted to religion" as basis for conclusion that Perich was not ministerial employee).

55. See, e.g., *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (employing multi-factor, qualitative test and holding that church choir director fell within ministerial exception); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528 (4th Cir. 1998) (unpublished table decision), at \*7 (rejecting strictly quantitative approach to ministerial exception analysis in favor of totality of circumstances approach that examined both quantitative and qualitative factors); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (stating that if the employee's position is "important to spiritual and pastoral mission of the church," the employee is "clergy" within the meaning of the ministerial exception) (quoting *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); *Young v. N. Ill.*

Supreme Court review to resolve the conflict. The Court granted certiorari in March of 2011.<sup>56</sup>

In contrast to the appellate court briefing, which focused on the definition of “minister,” briefing in the Supreme Court engaged a different set of questions.<sup>57</sup> Despite the fact that every federal court of appeals uniformly accepted the principle that religious institutions possess a fundamental right, rooted in the First Amendment, to be free from civil litigation by their ministers arising out of the terms and conditions of ministry,<sup>58</sup> that principle had never been the subject of Supreme Court adjudication.<sup>59</sup> Coming to the question of who is a

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Conference of the United Methodist Church, 21 F.3d 184, 186 (7th Cir. 1994) (holding that focus of ministerial exception inquiry should be on whether position in question was “important to the spiritual and pastoral mission of the church” (quoting *Rayburn*, 772 F.2d at 1169)); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991) (holding that it was “without consequence” that the chaplain performed “many” secular activities in the course of her position and that this did not remove her from ministerial exception).

56. *Hosanna-Tabor* Docket, Supreme Court of the United States (Sept. 1, 2010–Jan. 12, 2012), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-553.htm>.

57. See generally Brief for Petitioner, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (2012) (No. 10-553); Brief for Respondent Cheryl Perich, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553); and Brief for the Federal Respondent, *supra* note 43 (revealing an underlying dispute between the parties about the existence, breadth, and applicability of the “ministerial exception”).

58. The inferior courts take the law as it is, and there is uniformity in all the courts about the existence of the ministerial exception. See, e.g., *Rweyamamu v. Cote*, 520 F.3d 198, 204–10 (2d Cir. 2008); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–27 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006); *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100–04 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655–57 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800–05 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301–04 (11th Cir. 2000); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347–50 (5th Cir. 1999); *Catholic Univ. of Am.*, 83 F.3d at 460–63; *Scharon*, 929 F.2d at 362–63; *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576–78 (1st Cir. 1989).

59. The Supreme Court, by contrast to the inferior courts, gets to say what the law is. Samuel J. Levine, *Hosanna-Tabor And Supreme Court Precedent: An*

minister at this stage in the litigation is like coming into the middle of a movie: the parties below had assumed the existence and constitutionality of the ministerial exception, but they argued over its applicability.<sup>60</sup> In the Supreme Court, however, when the government disclaimed the existence of the exception, the Court faced a more fundamental question—was there a ministerial exception? If so, what are its doctrinal roots? To whom does it nominally apply? What countervailing interests of the State can prevail over it and in what circumstances?<sup>61</sup> Oral argument on October 5, 2011 contended over this definitional and doctrinal turf, and less over whether the exception applied in the case at bar.<sup>62</sup>

The Supreme Court unanimously recognized that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”<sup>63</sup> The Court traced the historical tensions between church and state from the Magna Carta and subsequent founding of the United States, recognizing this landscape as the foundation for the First Amendment.<sup>64</sup> While confirming that the “ministerial exception” is constitutionally rooted and applies to suits by or on behalf of ministers themselves, the Court was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister,”<sup>65</sup> leaving open the hard questions that pervade these types of disputes.<sup>66</sup> It is to those issues that this article gives attention.

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*Analysis Of The Ministerial Exception In The Context Of The Supreme Court's Hands-Off Approach To Religious Doctrine*, 106 NW. U. L. REV. 120, 121 (2011) (“[T]he Supreme Court may use *Hosanna-Tabor* to address, for the first time, the broader issue of the ministerial exception, providing guidance and direction for deciding future employment disputes involving religious organizations.”).

60. See *Hosanna-Tabor Appeal*, 597 F.3d 769, 777–78 (6th Cir. 2010) (discussing analytical framework of ministerial exception and arguing over applicability to Perich).

61. See generally Brief for Petitioner, *supra* note 57; Brief for Respondent Cheryl Perich, *supra* note 57; Brief for the Federal Respondent, *supra* note 43 (revealing an underlying dispute between the parties about the existence, breadth, and applicability of the “ministerial exception”).

62. Transcript of Oral Argument, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-553.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf).

63. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 702.

64. *Id.* at \_\_\_, 132 S. Ct. at 702–04.

65. *Id.* at \_\_\_, 132 S. Ct. at 707. The Court concluded Perich plainly was a minister “given all the circumstances of [Perich’s] employment,” namely “the formal

*C. Overview and Summary of the Ministerial Exception*

This article examines the nature of the ministerial exception, beginning with fundamental principles of constitutional law; the scope and application of those principles of law to the relationships between religious organizations and those who hold positions of ministry; how such disputes—when they inevitably arise—should be resolved in the civil courts; and the reach of required accommodations in both directions. In the end, this article advocates for the proposition that a “minister”<sup>67</sup> may not sue her “church”<sup>68</sup> in the “civil courts” for claims “arising out of the terms and conditions of her ministry.”<sup>69</sup> Although the Court nominally vindicated a principle like the one we advocate,<sup>70</sup> we go forward to examine the concepts from which the ministerial exception is built. Each of these noted textual “concepts” figures in how we here explicate and defend the ministerial exception.<sup>71</sup> Effectively this means that the content, conditions, communications, discipline, and termination involving positions of ministry are off-limits to the government. It does not preclude litigation based on claims that do not arise out of the terms and conditions of ministry, that is, claims for personal injury unrelated to the content of ministry.<sup>72</sup>

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title [of ‘Minister of Religion, Commissioned’] given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.” *Id.* at \_\_\_, 132 S. Ct. at 707–08. The Court criticized the Sixth Circuit for failing to see the relevance of Perich’s title and job responsibilities, giving too much weight to the job similarities between lay and commissioned teachers, and placing too much emphasis on Perich’s secular duties. *Id.* at \_\_\_, 132 S. Ct. at 708–09.

66. The question of who is a minister is poised for much debate. The concurring opinions of Justice Thomas and Justice Alito (with whom Justice Kagan joined) grapple with who will make this determination and what factors may weigh more heavily. *See infra* Section II.

67. *See supra* note 2.

68. *See supra* note 3.

69. *See McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

70. *See id.*

71. *See* Mark E. Chopko, *Constitutionally Protected Church Autonomy: A Practitioner’s View*, in *CHURCH AUTONOMY* 95 (Gerhard Robbers, ed., 2001).

72. A similar example might be a clear written contract providing for wages paid over a specific period. *See Dobrota v. Free Serbian Orthodox Church St. Nicholas*, 952 P.2d 1190, 1195–97 (Ariz. App. 1998).

We begin with a recitation of some examples that help illustrate questions at the margins of the legal doctrine not yet addressed by the Court,<sup>73</sup> and then explore the doctrinal roots of the ministerial exception, examining the jurisprudential contours of institutional autonomy as contrasted with the otherwise prevailing regime of neutral principles analysis that colors Religion Clause jurisprudence.<sup>74</sup> We then proceed to evaluate these claims against secular concerns and conditions, proposing four operating principles for use in disputes between a “church” and “minister”:<sup>75</sup>

1. As an essential element of church autonomy rules, there exists a ministerial exception, rooted in the rights of church self-governance and internal administration according to religious norms.
2. The exception bars litigation in the civil courts by ministers against their churches, arising out of the terms and conditions of ministry.
3. The exception as applied should be a threshold legal determination.
4. The exception precludes litigation designed to attack churches for making decisions that are constitutionally protected, such as claims by now-former ministers that sound in defamation, contract, or intentional infliction of emotional distress, which if allowed would circumvent and avoid the constitutional barrier against employment litigation over ministry.

While the Court in *Hosanna-Tabor* endorsed some of these principles, in the end, others of the principles noted above, as we develop

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73. See *infra* Section II.

74. See *infra* Section III.

75. See *infra* Section IV.

them within, will not be settled absent litigation involving religious institutions and their employees.<sup>76</sup>

## II. ILLUSTRATIVE EXAMPLES FROM CASE LAW

The instances of litigation that may invoke the “ministerial exception” are wide-ranging and hotly disputed. What starts out as a garden variety dispute over an unremarkable workplace issue fomented into a constitutional question. It may even blindsides a claimant to learn that he or she is considered a “minister” for purposes of the constitutional argument raised by institutions defending themselves against employment-related litigation. Consequences are steep, therefore, for both sides. On the one hand, claimants are fighting for their jobs and for some relative measure of workplace justice, advancing important issues embodied in state and federal legislation concerning workplace nondiscrimination and other rights, such as to a good reputation or fair treatment. On the other hand, religious institutions are upholding a significant constitutional principle but with an eye on the bottom line: litigation is divisive, vexatious, expensive, diverting, and in the end, often wasteful, costing more to litigate over the principle than simply “paying off” the now former minister. The “easy cases” are the ones that involve disputes about orthodoxy, the qualities of sermons, or other matters of theology or religious practice, disputes that claimants will not admit in lawsuits. The hard cases—the ones at the margin—involve competing claims of workplace justice and institutional issues of religious autonomy that go beyond the lines drawn in *Hosanna-Tabor*.<sup>77</sup>

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76. See *infra* Section V.

77. The Court circumscribed its application of the ministerial exception by stating that “[w]hen a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 710 (2012). As the illustrations show, the tension inherent in determining who is a “minister” and who is a “church” will undoubtedly weigh on trial courts faced with difficult fact patterns.

• *Should a Jury Apply the Exception?*<sup>78</sup> A teacher in a religious elementary school is terminated after she discloses to the school principal that she is pregnant and yet unmarried.<sup>79</sup> The church with whom the school is integrally related condemns premarital sex and has a strict code of moral conduct that it has incorporated in its employment contracts.<sup>80</sup> The teacher asks for forgiveness and pleads for her job. The school is happy to forgive; the job is another matter.<sup>81</sup> More than three years of litigation later, after the federal district court has twice refused motions for summary judgment premised upon the ministerial exception,<sup>82</sup> the court grants a directed verdict for the school based in part on the teacher's own testimony about the religious content of her job and her own personal religious aspirations for conduct in the classroom.<sup>83</sup>

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78. This fact pattern is based upon the case *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006); *see also* Associated Press/Sandusky Register, *Ohio Mom Says Baby Worth Fight With Church*, ASSOCIATED PRESS, Jan. 16, 2011, <http://www.sanduskyregister.com/news/2011/dec/31/00266bc-oh-pregnantteacherfxml> (discussing similar case involving an unmarried woman who was artificially inseminated while working for a Catholic school and fired as a result).

79. *Redhead*, 440 F. Supp. 2d at 214.

80. *Id.* at 215–16.

81. *See generally id.* at 215 (discussing the teacher's termination due to pregnancy).

82. *See Redhead v. Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (denying defendant's renewed motion for summary judgment after the Second Circuit issued its decision in *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008)); *Redhead*, 440 F. Supp. 2d at 211 (E.D.N.Y. 2006) (denying defendant's motion for summary judgment). Mr. Chopko was engaged as co-counsel before the matter was tried in the U.S. District Court.

83. After the close of the evidence, the District Court granted a directed verdict on constitutional grounds noting sympathy with the plaintiff but finding itself bound by the law. The directed verdict was read into the trial transcript, and the court further ordered that the case was therefore dismissed and the file closed. Transcript of Trial at 232–39, *Redhead*, 440 F. Supp. 2d 211 (E.D.N.Y. 2008) (No. CV-03-6187) (on file with the author). The District Court thereafter ruled that plaintiff's

A juror remarks afterwards in interviews with counsel that she thought the church should have been more forgiving. “After all, isn’t that what churches are supposed to do?”<sup>84</sup> The example of course illustrates how preconceived notions of religion and religious issues may obscure the resolution of a case.

• *Do “Neutral” Statutory Claims Trigger the Exception?*<sup>85</sup> The director of religious formation in a religious organization comes to a parting of ways with her employer.<sup>86</sup> She claims that the Bishop really didn’t understand how to deal with women and she further claims, “on information and belief,” that similarly-situated men were paid more than women.<sup>87</sup> Acknowledging that she was hired for a position of ministry, she nonetheless disclaims that she actually performed ministry but was, in fact, really an administrator.<sup>88</sup> Moreover, she argues that her Equal Pay Act demands are neutral and secular and can be resolved without resort to any religious testimony or differences of opinion and therefore should be allowed to proceed to verdict.<sup>89</sup> The

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attempt to extend the times for appeal was itself untimely and beyond the power of the court to remedy. *See* Summary Order, *Redhead*, 440 F. Supp. 2d. 211 (No. CV-03-6187).

84. Mr. Chopko served as co-counsel for the Adventist School and the comments were made by jurors privately for the benefit of counsel. In the interest of full disclosure, he also served as co-counsel to the religious defendants in the cases noted immediately below in the Supreme Court.

85. This fact pattern is based upon the case *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), *cert. denied*, No. 10-789, 2012 WL 117541 (Jan. 17, 2012).

86. *Id.* at 1240–41.

87. *Id.* at 1241.

88. *See generally id.* at 1234 (discussing how to classify the director’s position).

89. The federal trial court’s determination that she was a minister and that therefore her workplace related claims were barred was affirmed on appeal. *See*

example raises the issue of scope. It is one thing to apply the exception where the statutory sweep is broader, but may be quite another where the mandate is clear.

• *Does the Exception Cover Derivative Claims?*<sup>90</sup>

An interim pastor withdraws funds from a church account, and routine bookkeeping reveals that the withdrawal was allegedly not authorized by church leadership.<sup>91</sup> The church leadership terminates the pastor and reads a letter from the pulpit to the congregants explaining the results of the audit *and* questioning the integrity of the former pastor.<sup>92</sup> The former pastor claims that no one will give him a pastoral call (appointment),<sup>93</sup> but does not contest the termination, only the comment to the community.<sup>94</sup> The trial court allows the case to proceed on a defamation claim, and the jury awards the former pastor money damages, concluding that he was defamed.<sup>95</sup> The example raises the issue of whether allowing derivative claims is just as invasive to the rights of the church.

Litigation is a cost of doing business. After all, it is no secret that employees may feel aggrieved or dissatisfied by their employers' decisions. In difficult economic times, more people may be tempted to

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*generally id.* at 1246. Petition for certiorari was denied, *Skrzypczak*, No. 10-789, 2012 WL 117541.

90. This fact pattern is based upon the case *Tubra v. Cooke*, 225 P.3d 862 (Or. App. Ct. 2010), *review denied*, 237 P.3d 221 (Or. 2010), *cert. denied*, 131 S. Ct. 1569 (U.S. 2011).

91. *Id.* at 864–65.

92. *Id.* at 865–66.

93. *Id.* at 866.

94. *Id.* at 866–67.

95. *Id.* at 867.

resort to litigation over the loss of employment.<sup>96</sup> The above examples demonstrate the wide range of claims and questions that necessarily raise the applicability of the exception, which is often removed from the hands of jurors. Are the expectations of fair treatment and equality of treatment, which other businesses have to shoulder, irrelevant inside churches? After all, churches aspire to equality, fairness, and justice. They condemn discrimination and hostility.<sup>97</sup> Although one might infer a strong constitutional basis for defending churches in each of the cases noted above, even after the *Hosanna-Tabor* decision, the battle lines will be manned by staunch supporters on both sides. There appears to be little ground for compromise. The issue is not simply what the law permits. Rather, the issue will continue to be how the First Amendment applies to churches, two centuries after the Framing generation and in a very different, complex, and litigious world.

### III. WALKING THE LINE OF RELIGIOUS AUTONOMY

#### A. Free Exercise

Prior to 1990, the Supreme Court treated religion, like other enumerated rights in the Bill of Rights, as subject to strict scrutiny whenever there was a state-imposed burden on its exercise.<sup>98</sup> Once the religious proponent showed a state infringement of a religious right, the burden of proof would shift to the state.<sup>99</sup> Unless the state could prove

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96. Dean Nicholas Cafardi reminds us that litigation is the way in which Americans show their displeasure. Nicholas P. Cafardi, *Giving Legal Life to the "Ex Corde Ecclesiae" Norms*, 25 J.C. & U.L. 751, 765 (1999).

97. Some litigants alleged no constitutional issue in pressing their claims by citing the specific anti-discrimination statements made by their employers. *See, e.g., Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 185–87 (7th Cir. 1994) (outlining and rejecting plaintiff's argument that the First Amendment presented no bar whatsoever to applying Title VII to her discrimination claims against the church).

98. *Cf. Emp't Div. v. Smith*, 494 U.S. 872 (1990) (holding that the State of Oregon could deny unemployment compensation to employee who had been discharged for using peyote on religious grounds and finding constitutional a state statute prohibiting the use of peyote even for religious purposes).

99. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

that the net impact of the regulation on religious exercise was the least restrictive way of accomplishing a truly compelling state interest, the religious proponent's right would prevail.<sup>100</sup> Although that was the general rule, strict scrutiny was anything but strict in practice except in a few limited areas.<sup>101</sup> Gradually, and in some ways imperceptibly, the standard applicable to Free Exercise perceptibly began to shift.<sup>102</sup> In the 1980's, the Court was providing less protection for religious exercise and some members of the Court seemed to be concerned that the vindication of religious rights might occur at the expense of vital (but perhaps less than "compelling") interests of the state.<sup>103</sup>

For example, the government needs an individually-specific way, such as a Social Security number, to track, classify, and assign people within its programs, whether to provide benefits like drivers' licenses or medical assistance or to enforce obligations like the payment of taxes. Should a religious person have the right to prevent the

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100. *See id.* (requiring state to show that "a compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right"); *see also Smith*, 494 U.S. at 907 (Blackmun, J., dissenting) (citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (observing that the Court had previously upheld statutes that burdened free exercise only where they were "justified by a compelling interest that cannot be served by less restrictive means"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987); *Bowen v. Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part); *United States v. Lee*, 455 U.S. 252, 257–58 (1982); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

101. *Compare Thomas*, 450 U.S. at 718–19 (holding that Jehovah's Witness employee who quit his job due to religious conviction that prevented him from manufacturing war materials could not be denied state unemployment benefits, but noting that, while least restrictive means test applied, "[t]he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted"), *with Lee*, 455 U.S. at 255, 260–61 (concluding, without applying least restrictive means test, that an Amish man who raised free exercise objection on behalf of himself and his Amish employees to paying Social Security taxes was required to pay them, even though the Amish "believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system").

102. *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624 (9th Cir. 1988) (Noonan, J., dissenting).

103. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

government from assigning such a number to a person who claims a biblical reason not to have one, either for external purposes such as a driver's license or internal purposes such as for recordkeeping and tracking of benefits? When a case involving the government's own recordkeeping was presented in *Bowen v. Roy*,<sup>104</sup> the Court essentially said that the Free Exercise Clause acts as a shield, preventing the government from doing something to the individual, but not as a sword—it does not allow the individual to prevent the government from doing something within its own operations.<sup>105</sup> That decision laid the groundwork for the conclusion reached by the majority in a case involving the rights of Native Americans who objected to the building of an Interior Department road through federal land.<sup>106</sup> The claimants said that the road would destroy the spiritual character of a particular portion of that land which they imbued with religious qualities essential to the conduct of their worship.<sup>107</sup> The majority of the Court, through Justice Sandra Day O'Connor, found no constitutionally significant injury.<sup>108</sup> Such an injury would exist, if at all, only if the government proscribed what the religion prescribed (or vice versa).<sup>109</sup> Here, tribal members could still come onto the land to worship.<sup>110</sup> They could not use constitutional litigation, however, to dictate the business of the

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104. 476 U.S. 693 (1986).

105. In some ways the rule acts like an extension of injury in fact for standing purposes. An individual cannot shape the government's general program to his or her belief system (so long as the person is not directly targeted). See *Bowen*, 476 U.S. at 699 (majority opinion). The Court stated:

Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.

*Id.*

106. *Lyng*, 485 U.S. at 440.

107. *Id.* at 447–50.

108. *Id.* at 441–42.

109. See *id.* at 453 (noting that a law prohibiting the Native American respondents from visiting the area of land at issue “would raise a different set of constitutional questions”).

110. See *id.* at 449.

government to the government.<sup>111</sup> “Even if we assume that . . . the [] road will ‘virtually destroy the . . . Indians’ ability to practice their religion,’” the Court noted, the Constitution was not offended.<sup>112</sup> This result is a far cry from the development of the compelling interest doctrine.

During most of the twentieth century, the Court’s protection of religious rights remained steadfast. In 1940, the Free Exercise Clause was incorporated against the States through the Fourteenth Amendment in *Cantwell v. Connecticut*.<sup>113</sup> In *Cantwell*, the local government fined Jehovah’s Witnesses for failing to acquire a license for solicitation and for disturbing the peace by playing an anti-Catholic recording on the city streets.<sup>114</sup> The Court said that only a clear and present danger to interests of the highest order, such as public health and safety, could be invoked by the government to circumscribe religious exercise.<sup>115</sup> The Court’s reasoning in *Cantwell* appears to draw as much on free speech/freedom of expression notions as it does on free exercise ideals, which is not surprising given the dual nature of the activity as religious speech.<sup>116</sup> At the end of the opinion, as World War II threatened to encompass the United States, the Court reminded the country that our civil liberties were protected robustly, without expressly stating but contrasting its result for the Jehovah’s Witnesses with the treatment of Jews in Germany.<sup>117</sup> The pieces of this doctrine fell more sharply into place as Free Exercise in 1963, when the Court held in *Sherbert v. Verner*<sup>118</sup> that the State of South Carolina had violated Mrs. Sherbert’s religious rights by denying her unemployment compensation based upon her refusal to violate a cardinal

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111. *See id.* at 452–53.

112. *Id.* at 451–52 (quoting *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986)). Essentially the Court concludes there is no constitutionally significant burden absent some direct penalty or prescription to a person on account of religion. *See id.*

113. 310 U.S. 296 (1940).

114. *Id.* at 300–03.

115. *Id.* at 308.

116. *Id.* at 306–07, 311 (discussing time, place, manner restrictions, and mentioning both speech and free exercise concerns).

117. *See id.* at 310 (discussing the “essential” nature of the Constitution’s religion and speech protections and special necessity of such liberties in a multiracial and religiously pluralistic society).

118. 374 U.S. 398 (1963).

principle of her religion, Sabbath-keeping.<sup>119</sup> There, the Court announced the analytical pieces of the compelling interest test: when a state action, even a neutral and generally applicable one, burdens a religious adherent, the state must prove that burden is the least restrictive way to accomplish a truly compelling interest.<sup>120</sup>

By the end of the 1980's, however, the robust compelling interest doctrine was in retreat. Judges<sup>121</sup> and commentators<sup>122</sup> noted that courts more routinely accepted as "compelling" any government assertion of an important interest and seemed to be relaxing the requirement that the invasion be the least restrictive way of accomplishing this purpose.

Then in 1990, without notice and completely by surprise, a majority of the Supreme Court rewrote the law concerning the Free Exercise of religion in *Employment Division v. Smith*,<sup>123</sup> entirely abandoning the compelling interest test for religion as the benchmark analytical tool in all cases in which there is a burden on religion.<sup>124</sup> In *Smith*, the Court said that the state need not justify its neutral and generally applicable rules through a compelling interest analysis even if

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119. *See id.* (holding that disqualification of an unemployment compensation claimant from benefits because of her refusal, based on religious beliefs, to accept employment which would require her to work on Saturday imposed a burden on the free exercise of her religion).

120. *Id.* at 406. *Sherbert* was decided the same day as *School District of Abington v. Schempp*, 374 U.S. 203 (1963), which describes the demanded separation between church and state under the Establishment Clause as "complete and unequivocal." *Id.* at 219–20 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

121. *See, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624 (9th Cir. 1988) (Noonan, J., dissenting) (surveying numerous cases in which Supreme Court upheld legislation in the face of free exercise claims).

122. *See, e.g.*, Michael W. McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416–20 (1990) (reviewing the Supreme Court's free exercise jurisprudence from *Sherbert* to the eve of *Employment Division v. Smith*, 494 U.S. 872 (1990), and concluding that "what once appeared to be a jurisprudence highly sympathetic to religious claims now appears virtually closed to them").

123. 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2011).

124. *See id.* at 884–85 (holding the *Sherbert* test inapplicable to challenges to generally applicable criminal statutes).

those rules have an incidental burden on religious adherents.<sup>125</sup> Religious adherents had no special basis to claim exemption from these generally applicable rules.<sup>126</sup> Without conformity to these rules, the majority wrote, the country courted anarchy, and the compelling interest regime that made government regulation subject to ready challenge was “a luxury” that the country could no longer afford.<sup>127</sup> Henceforth, if a religious adherent or institution wanted an affirmative exemption from a state-imposed requirement, one should seek it through the political process.<sup>128</sup> If this meant that minority views were less likely to prevail, the majority noted, that was a consequence of living in a democratic society.<sup>129</sup>

Religious institutions gasped: the litigants had not even presented, briefed, or argued the issue.<sup>130</sup> Those who spoke for religion were angry.<sup>131</sup> But political efforts to restrain or overturn the decision<sup>132</sup> were rebuffed by the Court,<sup>133</sup> and the *Smith* rule for free exercise

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125. *Id.* at 878, 884–85.

126. *Id.* at 885–86.

127. *See id.* at 888. The Court maintained:

Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

*Id.* (citation and quotation omitted).

128. *Id.* at 890.

129. *Id.*

130. *See City of Boerne v. Flores*, 521 U.S. 507, 546 (1997) (O’Connor, J., dissenting) (“In *Smith*, five members of this Court—without briefing or argument on the issue—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual’s religious beliefs, so long as the prohibition is generally applicable.”)

131. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism & the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) (lamenting that the Court, in *Smith*, “had abandoned the compelling interest test”); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990) (“In two opinions last term [including *Smith*], the Supreme Court rewrote the law of free exercise.”).

132. *See, e.g.*, Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

133. *City of Boerne*, 521 U.S. 507 (striking down RFRA as beyond Congress’s powers under U.S. Const. amend. XIV, § 5).

purposes has now colored the work of a generation of lawyers, administrators, and jurists.<sup>134</sup>

To attempt to reconcile the non-conforming precedent in *Smith*, the Court carved out a number of exceptions to this neutrality rule. First, if the government had singled out religious entities or religious people for discriminatory treatment, this targeting would be subject to strict scrutiny, setting up the presumption that the government would not prevail in these circumstances.<sup>135</sup> Second, if the government allowed for a process of making individualized exceptions on nonreligious grounds, it could not exclude religious grounds from that analysis.<sup>136</sup> Third, if the issue presented religious rights joined with another protected constitutional right, such as parental rights, strict scrutiny might be triggered based on a hybrid rights theory.<sup>137</sup> Fourth, the Court exempted

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134. In other words, nearly a generation has now passed for whom the application of “compelling interest” analysis in Free Exercise cases is nearly always academic. The legal regime in their experience is *Smith*’s application of rational basis scrutiny and neutral and generally applicable rules trump religious concerns.

135. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 521 (1993); *see also Emp’t. Div. v. Smith*, 494 U.S. 872, 888 (1990) (observing that one effect of applying strict scrutiny to regulations burdening religion was that such laws were presumptively invalid).

136. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Smith*, 494 U.S. at 883. Note that these first two “exceptions” to this neutrality rule are not so much exceptions as examples of situations where the rule is not neutral. In the first, the rule is not neutral because it targets religious people or entities. In the second, the rule is not neutral as to all persons because individualized exceptions are available on nonreligious grounds, but not on religious ones.

137. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 205–06, 213–14 (1972) (holding that Free Exercise Clause, plus fundamental rights of parents to rear children as they see fit, exempted Amish children age fourteen and up from compulsory public education); *Smith*, 494 U.S. at 881. On this point, it is noteworthy how poor the Court’s craft was in *Smith*. Justice Scalia’s opinion for the majority relied on *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940), to support the claim, “We have never held that an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,” without noting that *Gobitis* was overruled in *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 625 (1943). *Smith*, 494 U.S. at 878–79. Perhaps more to the point, the *Yoder* Court expressly stated that “there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.” *Yoder*, 406 U.S. at 220 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Murdock v.*

the line of cases dealing with the rights of religious institutions from the threshold *Smith* analysis.<sup>138</sup> This line of cases begins in *Watson v. Jones*<sup>139</sup> in 1871 and ends a little more than a century later in *NLRB v. Catholic Bishop of Chicago*<sup>140</sup> in 1979. A full exploration of these cases is beyond the scope of this article, but the cases yield some key factors on which the body of law rests.<sup>141</sup> In the *Hosanna-Tabor* decision, the Court distinguished *Smith* from the ministerial exception, notwithstanding the neutrality and general applicability of the Americans with Disabilities Act, finding that the claimed religious conduct in *Smith* was external (“government regulation of only outward physical [criminal] acts [of individuals]”)<sup>142</sup> while the conduct in *Hosanna-Tabor* was “an internal [institutional] church decision.”<sup>143</sup> Given that litigation will persist in exploring the reach of the Court’s embrace of institutional rights, the doctrine on institutional freedom must be examined.

### *B. Self-Governance and Institutional Freedom*

Before and after the Civil War, factions within America’s religions contended over the rejection of slavery as an article of faith.<sup>144</sup> One such controversy that erupted into civil litigation centered on the ownership of a Presbyterian Church in Louisville, Kentucky, producing the seminal decision *Watson v. Jones*.<sup>145</sup> The pro-slavery faction contended that the rejection of slavery was a shift in doctrine and that the property had been acquired with resources contributed at a time when the

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Pennsylvania, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

138. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708–25 (1976); *Smith*, 494 U.S. at 877.

139. 80 U.S. 679 (1871).

140. 440 U.S. 490 (1979).

141. The Supreme Court expressly rejected the contention that *Smith* precluded recognition of the ministerial exception. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 706–07 (2012).

142. *Id.* at \_\_\_, 132 S. Ct. at 706–07.

143. *Id.* at \_\_\_, 132 S. Ct. at 707.

144. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 595–98 (3d ed. 2011).

145. 80 U.S. 679 (1871).

denomination supported slavery.<sup>146</sup> For that reason, the pro-slavery group attacked the new doctrine as a violation of the terms of a restricted trust obligation, arguing that the support of slavery was an implicit condition according to which donors/congregants had financially supported the church.<sup>147</sup> The anti-slavery section contended that the question of doctrine was a religious question, settled by the highest body of the church and beyond the power of the civil courts to adjudicate.<sup>148</sup> The anti-slavery faction prevailed in a significant decision about the rights of religious people and religious institutions.<sup>149</sup>

The Supreme Court in *Watson* rejected the English trust law rule relied on by the pro-slavery faction, and instead adopted a rule based on the incompetence of the civil courts to adjudicate religious disputes.<sup>150</sup> The Court's treatment of religious questions as ones of "competence" rested on two definitions of that term. First, the Court said that, with respect to religious questions, where the religious body had spoken, as in this case,<sup>151</sup> the appeal was from the "more competent" panel to the "less

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146. *See id.* at 690–92, 701–05.

147. *See id.*, at 704–08 (presenting arguments of the pro-slavery faction that in property disputes arising from church schisms, trust law required that the faction that had adhered to all original beliefs and principles of church (i.e., the pro-slavery side in this case) owned the church property, and the Court should hold that civil courts were competent to make such determinations).

148. *Id.* at 726–27.

149. *Id.* at 734 (holding that pro-slavery faction had no right to church property in dispute because that faction had attempted to evade authority of Presbyterian Church, which had concluded that slavery was sinful).

150. *See id.* at 727–30 (discussing *Craigdaillie v. Aikman*, 3 Eng. Rep. 601, 2 Bligh 529, 1 Dow. 1 (1813)). Under this rubric, the maintenance of the integrity of mission and unity of purpose is deemed to be an essential condition for the generosity of donors. *See id.* at 722–24. A change in doctrine would violate that condition and render the gift voidable. *Id.* The pro-slavery faction wanted to retain church property, arguing that the doctrinal shift violated the conditions under which their generosity (and that of their predecessors) was obtained. *Id.* at 704–08. Church leadership in the national church body saw the gifts as to the church, and the evolution of doctrine as something that happens over the life of a church. *See id.* at 726–27.

151. On June 1, 1867, the General Assembly of the Presbyterian Church in the United States of America declared that the Presbytery and Synod recognized by the pro-slavery faction were "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly," and therefore permanently banned the pro-slavery faction from the General Assembly.

competent.”<sup>152</sup> In some ways, the Court notes the limitations of civil magistrates on religious issues. Second, the Court also meant more precisely to speak to the lack of power of the civil courts to adjudicate a religious question; an issue every first-year law student learns is a question of “competence.” For inspiration, the Court drew on the law of associations.<sup>153</sup> Where a church was hierarchical, and the highest church body had spoken on the question in dispute, the civil courts were directed to defer to the decision reached by church authorities and not to substitute their judgments for those of the church leaders.<sup>154</sup> Where a church was organized as a congregational body, the courts’ role lay in confirming that the body had followed its own internal rules expressed in its authoritative documents.<sup>155</sup> In both instances, the role of the civil courts was to protect the decision that was in fact made, or intended to be made, by the religious bodies following their own internal rules.<sup>156</sup> After all, the Court reasoned, where people of faith have bound themselves together into a religious community and have established an internal procedure for the resolution of important questions, it would be a “vain consent” to allow the unsuccessful party from an internal church process to re-litigate the questions in the civil courts.<sup>157</sup> That, too, is an issue of competence.

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*Id.* at 692. “By the same resolution the Synod and Presbytery adhered to by [the anti-slavery faction] were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.” *Id.*

152. *Id.* at 729.

153. Specifically, the Court maintained:

We come then to the great question of the case; one touching the character and extent of jurisdiction vested by our law in those voluntary associations sometimes called ecclesiastical courts, and how far they are independent of control by the civil,—a question of magnitude every way; one which determines the relations of the church to the state in this country, and whether the church in relation to its civil interests is organized under the authority of law or above it.

*Id.* at 702–03.

154. *Id.* at 726–27.

155. *Id.* at 724–26.

156. *See id.* at 725.

157. *Id.* at 729.

Although the Court has expounded upon aspects of this doctrine of autonomy over the intervening century, as we explore the issues in the context of the ministerial exception, the principles set forth in *Watson* still apply. Moreover, as noted in the discussion above, although the matter in dispute was about property ownership, the principles, like the real dispute, went much deeper, implicating issues of theology and the application of doctrine.<sup>158</sup>

Almost sixty years later in 1929, the Court, construing a trust, held that the civil courts had no power to adjudicate religious questions that were committed to religious authorities.<sup>159</sup> *Gonzalez v. Roman Catholic Archbishop of Manila*<sup>160</sup> involved a bequest promising provision of religious services for the repose of the soul of the benefactor, which in turn required the appointment of a chaplain.<sup>161</sup> Between the time when the bequest was made and when the dispute arose, the rules for the appointment of chaplain priests changed with the adoption of a new Code of Canon Law for the Catholic Church in 1917.<sup>162</sup> Seminary preparation was required, and no suitable chaplain was available in the donor's family line.<sup>163</sup> The Archbishop of Manila, therefore, rejected the proffered applicant, Gonzalez, as not trained (and not of the age where he could attend seminary) and appointed a priest to honor the donor's bequest (and presumably acquire the income).<sup>164</sup> Although the Court summarily rejected the suggestion that the civil courts lacked subject matter jurisdiction to adjudicate the dispute because it involved the law of trusts,<sup>165</sup> this ostensibly secular dispute turned on a

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158. See *supra* notes 144–57 and accompanying text.

159. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), *abrogated in part by* *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

160. *Id.*

161. *Id.* at 11.

162. *Id.* at 13.

163. *Id.* at 10–14.

164. *Id.* at 11–14.

165. *Id.* at 16. The Archbishop had argued that the terms of the trust were for spiritual purposes and therefore beyond the powers of the court to adjudicate. *Id.* at 15–16. The Court rejected this argument as “not sound,” concluding that it had subject matter jurisdiction over the dispute, “[f]or the petitioner’s claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.” *Id.* at 16. One would have thought that the Court in *Hosanna-Tabor* would have cited

point of disputed religious law that demanded deference to religious authorities.<sup>166</sup> In other words, the courts lacked the competence to involve themselves in a dispute ultimately about whether a particular person had (or lacked) the qualities required for ministry.<sup>167</sup> Moreover, *Gonzalez* posited that civil courts were only competent to review church decisions in cases of fraud, collusion, or arbitrary behavior.<sup>168</sup>

In 1952, the Court resolved the dispute provoked by the New York Legislature that had statutorily decided that the St. Nicholas Cathedral of the Russian Orthodox Church in New York City should belong to a splinter American Church rather than the Church in Moscow.<sup>169</sup> The American branch had rejected the Moscow patriarch.<sup>170</sup> At the height of the Cold War, the Legislature was persuaded that the Russian line of the church had been “captured” by Communist authorities, and the only way to protect the property from being an instrument of communism was to recognize the American group as its proper and rightful owner.<sup>171</sup> The *Kedroff* decision, ten years after the incorporation of the Religion Clauses,<sup>172</sup> deferred to constitutional

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*Gonzales* to support its conclusion that the ministerial exception applies as an affirmative defense, but it does not figure in the Court’s conclusion. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_ n.4, 132 S. Ct. 694, 709 n.4 (2012).

166. *Gonzales*, 280 U.S. at 13–18. The trust law was deemed generally applicable, which further dovetails this line of autonomy cases with employment-discrimination claims. *See id.* at 16–17.

167. *See id.* at 16 (concluding that appointment to position of chaplain was “a canonical act”).

168. *Id.* “In 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.” *Id.* Subsequently in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), “arbitrariness” was dropped as a category. *Id.* at 713; *see also infra* notes 169–78 and accompanying text.

169. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 95–97 (1952).

170. *Id.* at 105.

171. *See id.* at 106–07 n.10 (discussing the New York State Legislature’s motives in enacting the law at issue).

172. Until *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the First Amendment applied only to actions of the federal government. In *Cantwell*, for the first time, the Supreme Court applied the Free Exercise clause through the Fourteenth Amendment

principle, not political expediency. Relying expressly on Free Exercise principles, the Court ruled that the New York Legislature lacked the authority to engage this question.<sup>173</sup> Although the matter appeared on its face to be a property dispute, it involved New York authorities making independent determinations about the faithfulness of one branch versus another branch of the Russian Orthodox Church, sifting competing claims of legitimacy between rival factions.<sup>174</sup> The Court, writing in broad strokes, reinforced the line drawn between church and state, excluding civil authorities from interfering in the internal affairs of religious organizations.<sup>175</sup> The Court effectively constitutionalized the decision in *Watson*, noting that it:

Radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.<sup>176</sup>

The Court recognized again that the civil courts may be drawn into disputes about property or other kinds of secular questions.<sup>177</sup> “Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule

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to the States, and seven years later, acknowledged the same application of the Establishment Clause in *Everson v. Board of Education*, 330 U.S. 1 (1947).

173. *Kedroff*, 344 U.S. at 107–08.

174. *Id.*

175. *See id.* at 119 (“By fiat [the statute] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another” and “thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.”).

176. *Id.* at 116.

177. *Id.* at 120–21.

controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.”<sup>178</sup>

In 1976, the Court strengthened the principle that the civil courts are disabled from reviewing religious questions in a case involving the discipline of a Bishop of the Serbian Orthodox Church.<sup>179</sup> In *Serbian Eastern Orthodox Diocese v. Milivojevich*,<sup>180</sup> the Court abandoned the notion that civil courts have any role in resolving a claim that the religious entity acted arbitrarily,<sup>181</sup> and strongly supported the ability of a church to discipline its own clergy without interference from the civil courts.<sup>182</sup> There, a deposed bishop challenged his removal as the responsible religious authority for North America and the division of the North American territory into three separate dioceses.<sup>183</sup> The case was tried in the Illinois courts and both sides offered expert opinion on the meaning of the church rules and the way in which they had been exercised by church authorities.<sup>184</sup> The complaining Bishop prevailed in the Illinois courts, which decided that the church had acted arbitrarily in not following its own doctrine.<sup>185</sup> In a 7-2 decision, the U.S. Supreme Court reversed, stating that state courts had no business reviewing how religious authorities disciplined their clergy.<sup>186</sup> Of particular interest for the discussion advanced herein, the Court highlighted the split of expert ecclesiastical opinion about the meaning and interpretation of religious doctrine by the trial court as a specific tactic that was unconstitutional.<sup>187</sup>

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178. *Id.* The Court later confirmed that the Constitution disables the courts as well as the legislature from acting on these questions. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam).

179. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 697–98 (1976).

180. *Id.*

181. *Id.* at 712–13.

182. *Id.* at 724–25.

183. *Id.* at 704–08.

184. *Id.* at 707.

185. *Id.* at 706–08 (discussing the state courts’ decisions).

186. *See id.* at 724–25 (holding that the First and Fourteenth Amendments permit religious organizations to create rules for internal discipline and tribunals for resolving disciplinary matters, and that when religious organizations do create such internal dispute resolution procedures, decisions of ecclesiastical tribunals are binding on civil courts).

187. *Id.* at 720–21.

Three terms later, in 1979, a dispute between the National Labor Relations Board (“NLRB”) and the Catholic Archdiocese of Chicago reached the Court.<sup>188</sup> The NLRB had intervened in attempts by teachers in the primary and secondary Archdiocesan schools to organize themselves and bargain collectively with the Archbishop.<sup>189</sup> The Archdiocese had argued successfully in the Seventh Circuit that the National Labor Relations Act (“NLRA”) could not constitutionally be applied to regulate a religious workplace.<sup>190</sup> The Circuit Court held that the prospect of state interference in the exercise of religion was significant, and therefore unconstitutional.<sup>191</sup> The Supreme Court agreed, but construed the NLRA so as not to apply expressly to the religious schools and thus avoided an unconstitutional result.<sup>192</sup> The prospect of NLRB interference was significant, and if it occurred, would create impermissible state interference in the relationships between religious authorities and key employees involved in the religious mission of the Archdiocese, for reasons noted by the Circuit Court.<sup>193</sup> Crucial to the jurisprudential landscape, the Court emphasized that aside from the unconstitutional end result, the “very process of inquiry” itself could lead to an unconstitutional entangling relationship between government and religion.<sup>194</sup> That decision was the last direct clash in the Supreme Court over the regulation of ministerial employees by their religious employers. Although *Watson* and *Kedroff* explicitly figured in the Court’s analysis in *Hosanna Tabor, Catholic Bishop of Chicago* does not.<sup>195</sup>

Three other developments in the institutional rights jurisprudence bear mention. First, as the Court notes in *Hosanna-Tabor*, many religious institution cases deal with resolution of property

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188. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

189. *Id.* at 493–95.

190. *Id.* at 495–96.

191. *Id.* (discussing the Seventh Circuit’s decision and reasoning).

192. *Id.* at 504–06.

193. *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1123–25 (7th Cir. 1977).

194. *NLRB*, 440 U.S. at 502.

195. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 704–05 (2012). While not explicitly referenced, the strong religious autonomy principles evident in *Catholic Bishop* are quite consistent with the Court’s discussion in *Hosanna-Tabor*. Compare *Catholic Bishop of Chi.*, 559 F.2d at 1123–25 with *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706.

questions.<sup>196</sup> The cases involving religious institutional rights often concern the procedure for the adjudication of such questions, rather than the substance.<sup>197</sup> That is, they may not necessarily implicate religious issues but can be resolved by resorting to title documents and even the documents of the religious body. Significantly, in the 1960's, the Court, while not overturning the deferential approach in *Watson*,<sup>198</sup> validated that civil courts could resolve aspects of property disputes as long as the disputes were adjudicated on the basis of neutral and secular rules.<sup>199</sup> The capstone of this movement occurred in 1979 in *Jones v. Wolf*,<sup>200</sup> where a 5-4 majority found that states, as a matter of federal constitutional law, could allow such "neutral principles of law" and, under that approach, courts could scrutinize various documents (*e.g.*, articles of incorporation, deeds, title documents, mortgages, trusts, and even religious documents) without overstepping constitutional boundaries.<sup>201</sup> Such judicial review was limited to an examination of these documents in a neutral and secular fashion.<sup>202</sup> If a court found that a question inevitably led it into a dispute over religious doctrine, the court was required to defer to the decisions of proper religious authorities.<sup>203</sup> The Court has not engaged religious property issues since that time, and the "neutral principles review" has occasionally been conflated with the "neutral and generally applicable" rubric or the "deference approach."<sup>204</sup> As they concern the rights of religious institutions, the cases seem to open a door to more, not less, involvement of the courts in overseeing the internal business of religious institutions so long as one could persuade a court that the

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196. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 704.

197. See NOONAN & GAFFNEY, *supra* note 144, at 981–82.

198. See *supra* notes 145–58 for a discussion of *Watson v. Jones*, 80 U.S. 679 (1871).

199. *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367 (1970) (*per curiam*).

200. 443 U.S. 595 (1979) [hereinafter *Wolf*].

201. *Id.* at 602–04.

202. *Id.* at 604. The Court did not explain how to review and apply denominational books of rules in a secular fashion. See *id.* at 602–04.

203. *Id.* (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)).

204. See *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 738–39, 738 n.3 (D.N.J. 1999) (discussing progeny of cases from *Watson* and application of "neutral principles" review).

scrutiny was only neutral and secular. An example relevant here is whether the extension of labor law principles is one such secular measure.

Second, in 1978, a state court treated the denomination of the United Methodist Church as a unitary enterprise for purposes of contract liability in *Barr v. United Methodist Church*.<sup>205</sup> The dispute started with the collapse of a local Methodist retirement community owned by a separately incorporated regional judicatory, but it ultimately involved the national church-wide organization as a potential deep pocket to underwrite the losses experienced by residents that exceeded the assets of the regional sponsor.<sup>206</sup> The Church complained that the treatment of the denomination as a unitary entity for liability purposes was unconstitutional as it violated its self-understanding, and sought a stay of the California court's decision while it petitioned for Supreme Court review.<sup>207</sup> Then-Circuit Justice Rehnquist, one of the two dissenters in *Serbian*, denied the request for a stay and distinguished between the line of cases protecting the internal autonomy of religious organizations against government interference from cases involving claims filed by "third parties" alleging some form of tort or contract liability.<sup>208</sup> While the former may be protected as involving some constitutional concerns, the latter was subject to review in the secular courts on the same footing as any other kind of claim against a religious body.<sup>209</sup> Justice Rehnquist did not endeavor to delineate that line, and no Supreme Court case since then has directly addressed that question.<sup>210</sup> Whether the employment cases that arise in religious bodies are cases involving members barred under *Watson* or "third parties" entitled to pursue contract and tort claims

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205. See *Barr v. United Methodist Church*, 153 Cal. Rptr. 322, 324 (Cal. Ct. App. 1979) (providing background on the state court case).

206. *Id.* at 325.

207. *Gen. Council on Fin. & Admin. of the United Methodist Church v. Sup. Ct. of Cal.*, 439 U.S. 1369 (1978).

208. *Id.* at 1372-73.

209. See *id.*

210. Mark Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOC. 289, 331 (1993) (noting that the *Barr* case "remains a singular example of how far courts can go to find responsible parties, even among unincorporated associations, in circumstances when, in the court's view, to allow for avoidance of liability would simply be unfair").

is another theme implicated in the current treatment of the ministerial exception.

Third, there is a line of cases involving commercial businesses operated by religious institutions or religious people in which some government regulation was resisted under the First Amendment. Although they raise issues about whether the extension of government regulation invades the rights of religious people and/or institutions, those cases, for a variety of reasons, have been largely unsuccessful. In *Tony & Susan Alamo Foundation v. Secretary of Labor*,<sup>211</sup> the Department of Labor sought to enforce the Fair Labor Standards Act with respect to volunteer workers in a gas station and convenience store owned by the religious entity.<sup>212</sup> The substance of the case was about the entity's bookkeeping, and the regulation was not considered significantly intrusive upon religious beliefs.<sup>213</sup> The same result was reached by the Court in *United States v. Lee*,<sup>214</sup> involving a carpentry business whose Amish owner claimed a constitutional right to avoid payment of the employer's share of Social Security taxes into the system.<sup>215</sup> Although individual Amish enjoy a statutory exemption from required payments in respect of their religious principles,<sup>216</sup> the Court found that secular profit-making businesses, coincidentally owned by Amish, would not be entitled to the same exemption as a matter of constitutional law.<sup>217</sup> Moreover, the government had a compelling interest in the uniformity of the tax system against those who would resist it.<sup>218</sup> Finally, in *Jimmy*

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211. *Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

212. *Id.* at 290.

213. *Id.* at 303–06. Moreover, the Court conflated individual and institutional religious concerns in ruling that the government's minimal intrusion was not unconstitutional. *Id.* at 306.

214. 455 U.S. 252 (1982).

215. *See id.* at 254–55.

216. *See* 26 U.S.C. § 1402(g) (2006) (allowing for religious exemption from Social Security contribution requirements).

217. *Lee*, 455 U.S. at 256 (finding that “[t]he exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees”).

218. *Id.* at 258–59 (finding that “the Government’s interest in assuring mandatory and continuous participation in and contribution to the social security system is very high”).

*Swaggart Ministries v. Board of Equalization*,<sup>219</sup> the Court rejected Free Exercise and Establishment Clause objections to the collection of sales tax on religious items sold by the Ministries at its revival meetings.<sup>220</sup> The Ministries did not help itself by showing that it had already separated strictly religious items from nonreligious items (and paid taxes on the latter); but there was no right, the Court said, to avoid the payments of generally applicable taxes on account of religious conscience.<sup>221</sup>

Together, these cases yield a number of legal principles: deference to the decision of religious authorities on religious questions,<sup>222</sup> the incompetence of a court to assess religious matters,<sup>223</sup> and the inability of the courts to scrutinize the qualities and qualifications for ministry.<sup>224</sup> All of these principles are incorporated by the Court in *Hosanna-Tabor*, although the Court does not agree that courts are jurisdictionally “incompetent” as in *Watson* but only functionally unable

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219. *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990).

220. *Id.* at 384–97 (holding that the “generally applicable tax . . . imposes no constitutionally significant burden on appellant’s religious practices or beliefs” and did not create “an excessive entanglement between church and state”).

221. *See id.* at 392. The Court thus closed the loop left open by its fractured decision in *Texas Monthly, Inc. v. Bullock*. 489 U.S. 1, 17–20 (1989) (plurality opinion) (striking down Texas’s tax exemption for religious publications and rejecting Texas’s argument that the exemption was necessary to avoid a Free Exercise Clause violation). *Swaggart Ministries* can also be seen as an extension of the Court’s conclusion in *Bowen v. Roy*, 476 U.S. 693 (1986), that the government is not required to “conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” *Bowen*, 476 U.S. at 699 (rejecting a man’s religious objection to the government’s use of a Social Security number to identify his daughter).

222. *See, e.g., Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (refusing to adjudicate an issue that ultimately turned on a religious law and deferring to the decisions of religious authorities).

223. *See, e.g., Watson v. Jones*, 80 U.S. 679 (1871) (adopting the rule of incompetence with respect to religious questions brought before civil courts).

224. *See, e.g., Serbian Eastern Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that civil courts cannot review how religious organizations discipline their clergy).

to judge “matters ‘strictly ecclesiastical’” as in *Kedroff*.<sup>225</sup> On the one hand, these principles bear on the validity and application of the ministerial exception in specific cases. The Court’s willingness to consider applying some secular rules sounding in tort and contract, for example, where they do not necessarily interfere with questions of religion, also leaves space where the ministerial exception may not be helpful to churches.<sup>226</sup>

### C. Establishment Clause

As with Free Exercise jurisprudence, a similar doctrinal shift occurred in the Court’s more recent construction of the Establishment Clause, moving away from strict separation to a more nuanced treatment of the Clause that depended less on the religious identity of the entity involved and more on the nature and purpose of the government action measured by its “neutrality.” From 1971 until 1985, a majority of the Court invalidated a series of government programs designed to provide assistance to nonpublic/religious schools as violative of the Establishment Clause. These cases, from *Lemon v. Kurtzman*<sup>227</sup> to *Aguilar v. Felton*,<sup>228</sup> set the bar high against potential government entanglement in religious institutions. In *Lemon*, the Court articulated a now-familiar three-part test to measure validity under the Establishment Clause.<sup>229</sup> Not only must there be a secular purpose and a secular primary effect for the government action under review,<sup>230</sup> but also the

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225. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 704–05, 709 (2012) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)); *but see id.* at \_\_\_ n.4, 132 U.S. at 709 n.4.

226. *See infra* Section IV.

227. 403 U.S. 602 (1971).

228. 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

229. *See Lemon*, 403 U.S. at 612–13, 621–22, 625. Despite constant critiques from members of the Court, it continues to be applied as the signal test. *See McCreary County v. ACLU*, 545 U.S. 844, 863–66 (2005) (applying purpose prong of *Lemon* test); *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–70 (2002) (O’Connor, J., concurring) (explaining that majority opinion did not abandon *Lemon* test and harmonizing majority opinion with *Lemon*).

230. *See Lemon*, 403 U.S. at 612–13 (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be on that neither

government must ensure that no government aid seeps into religious functions.<sup>231</sup> The process of monitoring the interaction between religion and government to protect against any possible or hypothetical constitutional violation created the prospect of “excessive entanglement,” which independently required the invalidation of the government program.<sup>232</sup> The entanglement did not have to be actual and invasive but only theoretical for a court to declare that government involvement with religion violated the Establishment Clause.<sup>233</sup>

Many of the cases involved aid to religious schools, and the involvement of the government was earnestly sought by the religious authorities.<sup>234</sup> A central presumption of those rulings was that the schools were the means by which the young were inculcated with religious values, and teachers were the agents of evangelization.<sup>235</sup> Government programs were therefore seen as aiding evangelization. At the same time, however, a majority of the Court, relying on this presumption, invalidated the application of the National Labor Relations Act to the organizing efforts of unions inside Catholic schools, as discussed above.<sup>236</sup> A concern for the Court was that the “very process of inquiry” by the NLRB to resolve a labor claim could create an entangling relationship between religion and government in violation of the

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advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’” (internal citations omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970))).

231. *See id.* at 621–22, 625.

232. *See, e.g., Aguilar*, 473 U.S. at 412–14.

233. *Id.* at 414.

234. *See, e.g., id.* (ruling that New York’s use of Title I funds to pay the salaries of public school teachers working in religious schools was a violation of the Establishment Clause); *Lemon*, 403 U.S. at 606–07 (striking down two states’ statutes that provided funding to religious schools as an unconstitutional entanglement between the government and religion).

235. *See Lemon*, 403 U.S. at 615 (highlighting that two-thirds of the teachers within the Rhode Island sectarian school were nuns and commenting that “[t]heir dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools”); *Aguilar*, 473 U.S. at 411 (noting that sectarian schools have “as a substantial purpose the inculcation of religious values” (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 758 (1973))).

236. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *see also supra* Section III.B.

Establishment Clause.<sup>237</sup> Teachers in religious schools were presumed to be the agents of religion, even when they were paid by the government.<sup>238</sup>

Twelve years later, the Supreme Court expressly abandoned a number of the presumptions on which that line of cases rested, including a presumptive disqualification of religious institutions from participating in government programs. Specifically, as it might concern government regulation, in reversing *Aguilar* in *Agostini v. Felton*,<sup>239</sup> the Court said that the “excessive entanglement” factor should be but one of several factors employed by courts to determine whether the primary effect of a particular program was to advance (or inhibit) religion (or not).<sup>240</sup> At least for purposes of government benefits, entanglement was no longer an independent criterion in contrast to the framework of the original 1971 Establishment Clause analysis.<sup>241</sup> Three years later in *Mitchell v. Helms*,<sup>242</sup> a plurality of the Court upheld a government program of material assistance (computers, research books, and other classroom aids for teachers) in which religious schools benefited.<sup>243</sup> The specific assistance under scrutiny in the case was deemed to be assistance to the children, not to the schools.<sup>244</sup> Writing separately and in concurrence,

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237. *NLRB*, 440 U.S. 502; *see also supra* Section III.B.

238. *See Aguilar*, 473 U.S. at 412 (striking down New York City’s use of federal funds to pay salaries of public employees who taught in parochial schools as causing excessive entanglement, in violation of *Lemon*, reasoning that “because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message”).

239. 521 U.S. 203 (1997).

240. *Id.* at 223.

241. *See id.* at 232–33 (surveying Establishment Clause cases since *Lemon* and concluding that entanglement notion was best treated as an aspect of the primary effect factor of the *Lemon* test, rather than as its own factor). By contrast in *Lemon*, the Court cited entanglement as an independent test that the government program must pass. *See generally* *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

242. 530 U.S. 793 (2000) (plurality opinion).

243. *Id.* at 801.

244. *See id.* at 829, 831 (stating that children were “ultimate beneficiaries” of the federal program providing aid to public and private schools, some of which happened to be sectarian; observing that the program “determine[d] eligibility for aid neutrally, allocate[d] that aid based on the private choices of the parents of schoolchildren, and [did] not provide aid that ha[d] an impermissible content,” and concluding that the program therefore did not violate *Agostini*).

Justice O'Connor specifically noted that the Court would not presume that teachers, who promised to adhere to the program's conditions against "religious uses" of materials, would abandon their oath and begin to use the materials to proselytize.<sup>245</sup> If there was evidence, she wrote, of actual diversion, the application of the program would have been in jeopardy.<sup>246</sup> But she would not presume that teachers would violate their professional responsibility.<sup>247</sup> The two decisions, *Agostini* and *Mitchell*, created a more open atmosphere for religious institutions to participate on an equal footing with non-religious participants in government programs without violating the Establishment Clause.<sup>248</sup>

In embracing the ministerial exception, in *Hosanna-Tabor* the Supreme Court took a step back from pure neutrality, turning its focus to the unique freedoms afforded religious organizations under *both* Religion Clauses.<sup>249</sup> The Court did not find persuasive Perich's argument that *Agostini* and *Mitchell* heightened the standard for "entanglement" as to government regulation of the employment relationships between religious institutions and their employees.<sup>250</sup> While the "right to freedom of association is a right enjoyed by religious and secular groups alike," the text of the First Amendment includes two more Clauses that give "special solicitude to the rights of religious organizations."<sup>251</sup> Thus, the Court decided that a "special rule" was necessary to protect religious freedom principles, refusing to accept "the remarkable view that the

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245. *Id.* at 840 (O'Connor, J., concurring in the judgment) (citing *Agostini*, 530 U.S. at 226–27) ("[N]o evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students.").

246. *Id.* at 841–42.

247. *See id.* at 840–42.

248. *See Agostini*, 521 U.S. at 230 (holding that "placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination"); *Mitchell*, 530 U.S. at 835 (majority opinion) (ruling that "[w]e are unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable . . . program into a law that has the effect of advancing religion").

249. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 705–06 (2012).

250. *Id.* at \_\_\_, 132 S. Ct. at 706.

251. *Id.* at \_\_\_, 132 S. Ct. at 706.

Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."<sup>252</sup>

*Hosanna-Tabor*, however, did not ameliorate or address the practical implications of these two lines of parallel development in Free Exercise and Establishment jurisprudence, moving from a strict separation of religion and government for both benefits and regulation, to greater involvement so long as the government is acting neutrally and even-handedly. Anecdotally, though, churches report more litigation filed against them by former employees.<sup>253</sup> Religious organizations report confronting more forms and layers of regulation.<sup>254</sup> And exemptions are harder to come by as government increasingly sees religion as just another political interest. Yet, in the inferior federal and state courts, despite the diverse approaches and inconsistent tests and results, all the courts acknowledge the vitality of institutional religious rights even when they reject their application to a case.<sup>255</sup>

In some ways, the societal interest in equality has resonated with the message of religious institutions seeking equal treatment at the hands of the government. Government should not treat religion in two different

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252. *Id.* at \_\_\_, 132 S. Ct. at 706.

253. *See* Petition for a Writ of Certiorari at 32–34, *Cooke v. Tubra*, 225 P.3d 862 (2011) (No. 10-559), *cert. denied*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1569 (2011). We do not think that litigation by former employees will be blunted by the Court's decision. Rather, we think the nature of the claims will shift to contract and tort issues, *see Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 710, until some better lines are drawn in harder cases.

254. *See, e.g.*, Press Release, Martha Coakley, Mass. Att'y Gen., AG Coakley Unveils Proposed Amendments to Regulations Governing Religious Charities (Dec. 29, 2011), <http://www.mass.gov/ago/news-and-updates/press-releases/2011/ag-proposes-amendments-to-charities-regs.html>. *See also supra* note 40 (discussing the narrowing of the religious employer exemption in the HHS Interim Final Rules on insurance plans).

255. For example, many cases decided since *Smith* have either implicitly or explicitly rejected the argument that *Smith* eroded church autonomy rights. *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–05 (3d Cir. 2006); *Bryce v. Episcopal Church*, 289 F.3d 648, 656–57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302–04 (11th Cir. 2000); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.\* (4th Cir. 2000); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 348–50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–63 (D.C. Cir. 1996).

ways with respect to the two clauses of the First Amendment.<sup>256</sup> The touchstone cannot be “equality” for participation in government programs, but “exemption” when one is dealing with regulation. In examining workplace rules, the government is not stepping into the internal affairs of religious organizations, but only allowing former members to adjudicate statutory and other secular claims to collect money damages related to their illegal treatment by former (religious) employers. Is this not, after all, the heart of equal treatment? The insistence that there are neutral, secular, and generally applicable norms that override all claims of special treatment went to the heart of the government’s litigation position in the dispute between Cheryl Perich and the Hosanna-Tabor school.<sup>257</sup> The government’s adoption of this position sheds a surprising light on the perceived state and status of religious institutions, a light that would have been shocking to those who drafted and ratified the Religion Clauses of the First Amendment. The Court’s rejection of that position confirms that, in the mind of the Court, religious institutions are different and should be given distinctive treatment, at least in the ministerial exception cases. That body of cases, however, is only one of several areas of dispute between government and religious institutions.

#### *D. The Singularity of Religious Institutional Rights*

Less invasive but, from the perspective of religious institutions, every bit as coercive and corrosive, is the power of the government to regulate some aspect of institutional life either directly by changing the definitions and scope of various exceptions or indirectly by permitting litigation privately to affect certain changes. Particular tax exemptions or treatment may turn upon the implementation of a mandatory employment policy.<sup>258</sup> Religious schools may adjust curricula to meet state guidelines

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256. *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

257. See Brief for the Federal Respondent, *supra* note 43, at 10–15.

258. A Connecticut tax program would have conditioned exemption for hospitals on the provision of reproductive services, effectively asking Catholic and Baptist institutions to choose. The proposal was abandoned in the face of public outcry on behalf of religious hospitals. See Chopko, *supra* note 14, at 136–37 (discussing growing trend toward conditioning tax-exempt status of religious institutions on those institutions’ conformity with public policy/secular norms).

contingent for funding.<sup>259</sup> Rising employment-related litigation encourages more legalistic employment contracts with terms, concessions, and obligations that trend away from the utopian (and perhaps preferred) approach of “do unto others.”<sup>260</sup> In such circumstances, churches find themselves faced with a “Hobson’s choice”: adjust religious exercise to prevailing secular norms or suffer civil penalties or litigation.

A current example of the dilemma confronting religious entities is the narrowing of the definition of “religious employer” for the application of certain healthcare rules. Religious entities provide health benefits for their workforce as a matter of course, but do so in accordance with internal religious principles. Ten years ago, California and New York (and other states) passed laws requiring access to contraceptive drugs and devices as part of employer-provided health plans.<sup>261</sup> The laws contain an exceedingly narrow definition of “religious employer,”<sup>262</sup> effectively classifying among admittedly religious agencies. Applying this definition to religious institutions means that, for this regulatory purpose, very few will be able to be considered “religious” by the government; by definition, the rest are effectively “secular” (non-religious). Paying the employer share, from the perspective of the religious institutions, required the religious institutions

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259. For example, to participate in a state voucher program, Cleveland religious schools must adhere to content-based curriculum guides that dictate what cannot be taught; specifically, such schools may not teach “hatred of any person or group on the basis of . . . religion.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 713 (2002) (Souter, J., dissenting) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2002)). Such interference by the state on religious schools’ curricula opens the door to more content-based regulation in exchange for money in the form of school vouchers.

260. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 343–46 (Brennan, J., concurring) (warning that weakening respect for the notion of church autonomy ran the risk of chilling legitimate expressions of religious exercise).

261. *See Catholic Charities of Sacramento, Inc. v. Sup. Ct. of Sacramento Cnty.*, 85 P.3d 67, 75 (Cal. 2004) (discussing California statute); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 462 (N.Y. App. Div. 2006) (discussing New York statute).

262. *See Catholic Charities of Sacramento*, 85 P.3d at 75; *Serio*, 859 N.E.2d at 462.

to make a public statement at odds with their moral views.<sup>263</sup> Constitutional objections to the imposition of the mandate and to the narrow scope of the exemption were rejected, and the state laws prevailed.<sup>264</sup>

Besides the currency of a narrowed definition of “religious employer”<sup>265</sup> to the ministerial exception, which is a concern for some religious agencies, a broader concern is the way in which at least one court conceived of the role of government vis-à-vis the management of the workforce of religious institutions. The New York Court of Appeals in *Catholic Charities v. Serio*<sup>266</sup> expressed concern that, if the government did not intervene on behalf of a nonconforming employee, the employee could be subject to adverse treatment by the religious employer for exercising a right or a privilege available under the law over the religious employer’s objections.<sup>267</sup> In other words, the court thought that intervening in the employment relationship to assure the ability of an employee to resist a religious condition of his religious employer was a legitimate role for government.

The United States Supreme Court adopted the opposite view in *Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*<sup>268</sup> in which it upheld as constitutional application of a broad religious employment definition in an exemption from Title VII, recognizing that in the process of vindicating religious institutional rights, individual employee preferences might be harmed.<sup>269</sup> Casting the rule in favor of the employee over her religious employer, the Court

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263. In other words, the religious institutions argued that money equals speech. That argument split the intermediate appellate bench in the New York Courts in *Serio*. See generally *Serio*, 808 N.Y.S.2d 447. Such an argument might be even stronger now, in light of the Court’s decision in *Citizens United v. FEC*, 558 U.S. \_\_\_, 130 S.Ct. 876 (2010), which had not been decided at the time either *Serio* or *Catholic Charities of Sacramento* were decided.

264. *Catholic Charities of Sacramento*, 85 P.3d at 73–74; *Serio*, 859 N.E.2d at 461.

265. See *supra* note 40 for a discussion of the narrowing definition of “religious employer” in many statutes and regulations.

266. 859 N.E.2d 459 (N.Y. 2006).

267. *Id.* at 468.

268. 483 U.S. 327 (1987).

269. *Id.* at 327, 337 n.15 (1987); *id.* at 340–41 (Brennan, J., concurring in the judgment).

wrote, could chill the legitimate exercise of protected constitutional interests.<sup>270</sup> The tension between religious institutional rights and individual employee rights is palpable, and heightened the necessity for clear direction from the Court to balance these competing concerns, expressly evident in *Hosanna-Tabor*, in recognizing the ministerial exception.<sup>271</sup>

#### IV. SCOPE AND ATTRIBUTES OF THE MINISTERIAL EXCEPTION

*A “Minister” May Not Sue Her “Church” in the “Civil Courts” for Claims “Arising Out of the Terms and Conditions of Her Ministry”*

While the Court strongly endorsed a broad ministerial exception in cases like *Hosanna-Tabor*, plainly the meaning of the current decision will be explicated in the cases to follow. As a guide to those cases, we think the above summary captures what we regard as its key attributes. Effectively, the doctrine, which is rooted in First Amendment principles and robustly applicable to religious institutions, means that civil claims related to the qualities of a position of ministry are beyond the competence of the civil courts to adjudicate. A person who occupies a position of ministry must pursue remedies internal to the religious community, and not relief in the civil courts absent extreme circumstances. To provide additional definition, this summary is refined into four operating principles, each noted in turn in the text below.

First, as an essential element of the church autonomy rules developed above, there exists a ministerial exception, rooted in the rights of church self-governance and internal administration according to religious norms. This much was confirmed by the Court in *Hosanna-Tabor*.<sup>272</sup> It is well-established that the law knows no orthodoxy or heresy<sup>273</sup> and that whether a person professes that “there are twenty gods,

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270. *See id.* at 342–44.

271. *See generally* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (2012).

272. *Id.* at 8–14.

273. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (citing *Watson v. Jones*, 80 U.S. 679, 728 (1871)).

or no god . . . [i]t neither picks my pocket nor breaks my leg.”<sup>274</sup> Thus, the internal body of law and custom that reflects religious principles held dear by their adherents is truly separated from the ability of secular government to monitor or police. Whether the rules are rational, politically correct, or appeal to some broader secular “orthodoxy” is entirely irrelevant. The doctrinal threads that emerge in the various cases and other legal principles that operate in this area are found mostly in the First Amendment Religion Clauses and Speech Clause, as the Court acknowledged in *Hosanna-Tabor*.<sup>275</sup> For example, as exemplified in *Serbian, Kedroff*, and *Gonzalez*, government may not interfere in the ability of religious authorities to autonomously govern the internal affairs of religious entities according to religious law.<sup>276</sup> This is true for a variety of reasons; among them, according to the Court in *Watson*, is the incompetence of civil entities to resolve religious questions.<sup>277</sup>

If the First Amendment means anything, it means people may believe things that they do not see and cannot prove for reasons entirely personal to them, accepted on faith. The government does not exist to mediate relations between Man and their Maker.<sup>278</sup> Religious bodies, all of them, rely on people to carry out various offices and ordinances to advance their own unique cosmological views.<sup>279</sup> The qualities that religious bodies believe their ministers should have are themselves uniquely religious questions. For that reason, the State, after the Revolution, disclaimed the power or ability to license, train, and commission ministers.<sup>280</sup> Who speaks for the religious body is a concern

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274. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden, ed., 1955).

275. See generally *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694.

276. See *supra* notes 159–87 and accompanying text.

277. See *supra* notes 145–58 and accompanying text.

278. See generally MADISON, *supra* note 23.

279. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 28; Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981).

280. See MADISON, *supra* note 23, at 5–7. The Court recently reaffirmed this notion. See *Locke v. Davey*, 540 U.S. 712 (2004) (upholding state limits on theology scholarships as vindicating that historic limitation on government).

for the religious body.<sup>281</sup> The power and significance of a religious body's choice in minister was first formalized as a "ministerial exception" by the Fifth Circuit's opinion in *McClure v. Salvation Army*.<sup>282</sup> *McClure* held that application of an equal employment statute to the relationship between the Salvation Army and its employee-minister would run afoul of the First Amendment.<sup>283</sup> *McClure*, a female ordained minister, sued the Salvation Army for wrongful termination and sex discrimination.<sup>284</sup> The district court dismissed the case for lack of jurisdiction to apply Title VII to the Salvation Army, a recognized religious body.<sup>285</sup> The Fifth Circuit affirmed, expressly limiting its decision to the church-minister relationship.<sup>286</sup> After discussing the development of the seminal case law that gave life to the contours of the Religion Clauses, the Fifth Circuit emphasized that:

an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was said by Justice Clark in *School District of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent."<sup>287</sup>

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281. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 706, 709 (2012).

282. 460 F.2d 553 (5th Cir. 1972).

283. *Id.*

284. *Id.* at 555.

285. *McClure v. Salvation Army*, 323 F. Supp. 1100, 1106 (N.D. Ga. 1971). It is significant to note that Mrs. McClure performed some functions which only an officer (ordained member) might perform. *Id.* at 1103–04. It is even more significant that plaintiff affirmed that she considered herself performing a religious function while doing certain mundane tasks, such as typing. *Id.* at 1104. These activities when considered as an integral whole, demonstrate adherence to ethical standards and a spiritual discipline. *See id.* at 1103–04.

286. *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

287. *Id.* at 560.

“Almost every circuit court has followed *McClure* and none has rejected its approach.”<sup>288</sup>

For example, the Seventh Circuit affirmed dismissal of a gender and national origin discrimination suit brought by the former Hispanic Communications Manager of the Archdiocese of Chicago.<sup>289</sup> The district court accepted the church’s arguments that the Religion Clauses of the First Amendment precluded federal subject matter jurisdiction over the claims “because both the nature of the claims and [plaintiff’s] unique responsibilities at the Church would require the court to engage in excessive entanglement in matters of Church policy.”<sup>290</sup> The circuit court rejected the argument that analyzing the plaintiff’s Title VII claims would engender excessive entanglement, but held that it lacked subject matter jurisdiction because the plaintiff’s particular employment position could “functionally be classified as ministerial.”<sup>291</sup>

More recently, the Third Circuit formally adopted the ministerial exception in *Petruska v. Gannon University*,<sup>292</sup> holding that “it applies to any claim, the resolution of which would limit a religious institution’s right to choose who will perform particular spiritual functions.”<sup>293</sup> The court emphasized that the institution’s right to select its ministers is *per se* a religious exercise because a minister “is the embodiment of [the church’s] message” and “serves as the church’s public representative, its

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288. Ira C. Lupu & Robert W. Tuttle, *The Forms And Limits Of Religious Accommodation: The Case Of RLUIPA*, 32 CARDOZO L. REV. 1907, 1913 n.32 (2011). See *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 298 (3d Cir. 2006); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003); *Bryce v. Episcopal Church in the Diocese*, 289 F.3d 648 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

289. See *Alicea-Hernandez*, 320 F.3d 698, 700.

290. *Id.*

291. *Id.* at 703.

292. 462 F.3d 294 (3d Cir. 2006).

293. *Id.* at 299.

ambassador, and its voice to the faithful.”<sup>294</sup> That right was “squarely at issue” in the complaint, as was the church’s right to decide matters of governance and internal organization.<sup>295</sup> Thus, the termination of the former chaplain of the private Catholic diocesan college through an employment restructuring constituted a decision about who would perform spiritual functions and about how those functions would be divided.<sup>296</sup> Therefore, the ministerial exception barred the Title VII discrimination and retaliation claims.<sup>297</sup>

The ministerial exception, as a mechanism of Free Exercise protection, acknowledges that the government’s manipulation of the process by which religious bodies assess the qualities of persons they would hold out as ministers in the community deeply offends the rights of people to free exercise.<sup>298</sup> The promise of religious liberty to all means at least that.

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294. *Id.* at 306.

295. *Id.* at 306–07.

296. *Id.* at 307.

297. Applying the ministerial exception, the Third Circuit dismissed Petruska’s Title VII discrimination and retaliation claims, as well as her state civil conspiracy, negligent retention and supervision, and fraudulent misrepresentation claims, but remanded her breach of contract claim for further analysis of whether it could be decided “without wading into doctrinal waters.” *Id.* at 312. On remand, the plaintiff proposed to replead her Title VII claims as Title IX claims, and the district court rejected them as equally barred by the ministerial exception:

Plaintiff’s argument rests on a fundamental misunderstanding about the underpinnings of the ministerial exception. By assuming that the only possible First Amendment defense available to Defendants is the one expressly provided by Congress [in Title VII], Plaintiff overlooks the fact that the ministerial exception is rooted in a source of law higher than legislative enactments—namely, the First Amendment of the Constitution.

Petruska v. Gannon Univ., No. 1:04-cv-80, 2008 WL 2789260, at \*5 (W.D.Pa. March 31, 2008).

298. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 706 (2012); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

Buttressing the right to free exercise is the limitation on government power embodied in the Establishment Clause.<sup>299</sup> While the United States as a nation has never had a “religious establishment,” the sweep of the Establishment Clause goes farther and forbids steps along the process towards “respecting an establishment of religion.”<sup>300</sup> Thus, the incompetence of the government to answer religious questions is as much about the lack of civil power to embrace such questions—a power affirmatively withheld from government by the Framers—as it is a protection against offending religious rights held dear by religious people and their institutions.<sup>301</sup> And, the lack of power to embrace such questions extends beyond the actual interference—the end result—but also embraces the “very process of inquiry” by which the government might troll through the values of a religious institution and assign its own conclusions.<sup>302</sup> Judicial review necessarily interposes the government’s impression of which values are central to a religion’s observance or whether a religion’s leaders are sincere about them.<sup>303</sup> Stated differently, incompetency precludes the government from examining whether the religious basis asserted for some particular employment decision is a pretext. The process of sifting and weighing a religious decision-making process, having experts testify about the meaning and weight of various doctrines, and ultimately deciding, on balance, whether the religious values should trump the State’s is a paradigm example of what the Establishment Clause forbids.

The ministerial exception also embraces a set of rights protected under the Speech Clause as a form of expressive association.<sup>304</sup> The

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299. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706; *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

300. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 612 (1971).

301. See Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119 (2009).

302. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

303. Justice Scalia in *Smith* discusses this idea in rejecting courts’ assessing the sincerity or centrality of some religious practice to an adherent or her religion. *Emp’t Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

304. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706 (recognizing free associational rights of religious and secular organizations). This was the only aspect of the ministerial exception that the United States said was worthy of support in its

Court in *Watson*, in the 19th century, used the law of associations to conclude that persons having consented to be associated together and governed under a set of internal (religious) norms could not ordinarily litigate internal disputes in civil courts.<sup>305</sup> The dissenters in *Serbian* reached a contrary result when asked the same question, arguing that the Illinois Supreme Court could preside over an internal dispute submitted by the religious body, if it remained neutral on matters of religious doctrine.<sup>306</sup> The leveling effect of the associational laws as uniquely applied inside religious institutions over the course of the century after *Watson*, with the incorporation of the First Amendment,<sup>307</sup> of course, created the set of “hands-off” rules for judicial review of internal association action.<sup>308</sup> Among these rules was the organization’s right to pick its leaders, and for those who aspire to leadership to consent to the rules and regulations of the “religious” community as a condition of office.<sup>309</sup>

Organizations may legitimately expect some form of institutional loyalty from their employees or adherents. For example, no one would contend that General Motors could not, legitimately, terminate an employee who spends his free time on the Internet blogging about the monopolistic and predatory business practices of his employer. A political party might expect that it can deny membership, and certainly leadership, to an activist of an opposing political party bent on infiltration and destruction.<sup>310</sup> Mission-driven organizations that have an

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brief in opposition to the petition for certiorari *Hosanna-Tabor*. See Brief for the Federal Respondent in Opposition at 22 n.8, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553) (applying *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and noting that the Supreme Court “has recognized that freedom of expression protects a right to discrimination where the discrimination itself is integral to the expressive activity”).

305. *Watson v. Jones*, 80 U.S. 679, 725 (1871).

306. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 735 (1976) (Rehnquist, J., dissenting).

307. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating Free Exercise Clause).

308. See *supra* Section III.B.

309. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706.

310. See *N.Y. State Club Ass’n, Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988) (“If a club seeks to exclude individuals who do not share the views that the club’s

established moral code for positions of leadership have the right to enforce those rules even when they occasionally conflict with society's anti-discrimination rules.<sup>311</sup> Mission-driven organizations may also, from time to time, legitimately change their minds about who should lead and who should follow, a process protected under the First Amendment for religious organizations.<sup>312</sup> These considerations are already embodied in expressive association principles and the expectation that those wearing the uniform play for the same team. The Court in *Lemon* noted that religious authority purposefully pervades a parochial school system operated by teachers whose mission includes inculcation of the faith.<sup>313</sup> The expectation is that those in positions of ministry are precisely who serve the community in and through those positions.

Vindicating these religious autonomy norms means re-examining the limits placed on the ministerial exception by competing norms offered in *Smith* for the Free Exercise Clause, "neutral [and] generally applicable,"<sup>314</sup> and in *Wolf* for the Establishment Clause, "neutral principles" review.<sup>315</sup> The majorities in both cases anticipated neutrality would cede whenever the resolution of a case premised upon a constitutional principle inside a religious organization clashes with a profoundly religious question.<sup>316</sup> While the Court distinguished *Smith* based on the asserted religious conduct,<sup>317</sup> that distinction does not give

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members wish to promote, the Law erects no obstacle to this end."). The Court has permitted restrictions on access to a limited public forum, where the barrier is reasonable and viewpoint neutral, but the Court may reach a different conclusion where there is actual infiltration by people seeking to sabotage the group. *See Christian Legal Soc'y v. Martinez*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 2971, 2984 (2010); *Id.* at \_\_\_, 130 S. Ct. at 3000 (Kennedy, J., concurring in the judgment).

311. *See supra* notes 78–84 (discussing *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006)).

312. *See Watson v. Jones*, 80 U.S. 679 (1871); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

313. *Lemon v. Kurtzman*, 403 U.S. 602, 618–19 (1971).

314. *See Emp't Div. v. Smith*, 494 U.S. 872 (1990).

315. *See Jones v. Wolf*, 443 U.S. 595 (1979).

316. *See Smith*, 494 U.S. at 886–87 (discussing inappropriateness of courts attempting to judge whether certain religious beliefs or practices are "central" to a religion); *Wolf*, 443 U.S. at 602 ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.").

317. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 706–07 (2012).

full credit to the doctrinal core of the cases and their accommodation (not distinction) of the ministerial exception.<sup>318</sup> Although the case law under both the Free Exercise and Establishment Clauses has drifted towards a broader equality norm for purposes of regulation and benefit, both sets of cases arising under each doctrinal source recognize that the State's power ends where the religious question begins.<sup>319</sup> Thus, the question of who is qualified to hold a position of ministry, including the content, conditions, discipline, termination, and even communication about that ministry, is a religious question. It is not the kind of question under any set of circumstances that courts should allow jurors, who may not share or understand these principles, to decide.

Second, the “ministerial exception” principle bars litigation in the civil courts by ministers against their churches, arising out of the terms and conditions of ministry.<sup>320</sup> Many of the decisions focus on whether the qualifications of the person dismissed from a position are “ministerial.”<sup>321</sup> Indeed the split in the circuit courts of the United States, functionally related to the test by which courts should determine who is and who is not a minister, was not resolved by *Hosanna-Tabor*.<sup>322</sup> Fundamentally, a “minister” is a person who occupies a “position of ministry” for his or her religious community. Given the variety of religious experiences in the United States, unleashing litigation about the multiplicity of roles and qualifications that candidates bring to ministry jobs may seem akin to the *Smith* majority's fear of “courting anarchy.”<sup>323</sup> By contrast, we submit that the business of religion reflects certain key ideas: preaching, teaching, proselytizing, inculcating, caring, curing, and other actions expressing religious beliefs in the community and the

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318. *See supra* Section III.B

319. *See supra* Section III.A. & C.

320. *See Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 705–06.

321. *See, e.g., id.* at \_\_\_, 132 S. Ct. at 707–08. *See also supra* Section III.

322. *See* Brief of Amici Curiae Religious Organizations & Institutions in Support of Petitioner at 10–14, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553) (discussing how inconsistent treatment by courts of the ministerial exception requires religious organizations to engage in a “guessing game” over who is or is not a “minister” for purposes of the exception); *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 707; *id.* at \_\_\_, 132 S. Ct. at 710–11 (Thomas, J., concurring); *id.* at \_\_\_, 132 S. Ct. at 713 (Alito, J., concurring).

323. *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990).

world. The issue therefore might be more easily joined as asking religious institutional litigants, as a threshold consideration, how the challenged employment positions are linked to the core religious expressions for which the organization exists. Applying this analysis to *Hosanna-Tabor*, it is easy to conclude that Cheryl Perich is a “minister” of her church, given the important and central role that the church ascribes to teachers in the evangelization of the young.<sup>324</sup>

Linking the definition of ministry to “positions of ministry” rather than “persons performing ministry,” we think, also provides a better benchmark for a reviewing court to differentiate core positions within religious communities from non-ministerial positions. It would also distinguish employment cases that arise in some faith communities that profess that all the baptized exercise ministry.<sup>325</sup> In a broad sense, it may be true that all ministers/members are enjoined to bring the “gospel” into the world. But insofar as the organization goes, the church would be entitled to a ministerial exception defense only over the claims of those which it employed specifically to carry out its religion.

Determining the scope and meaning of “church” is a more difficult definitional question, and one on which reasonable people may differ. First, in the formulation used in this article, “church” means any religious employer of any denomination, intended to apply broadly and across denominational and belief lines. Certainly a “church” includes a house of worship. Moreover, depending upon the role of primary and secondary (and even tertiary) education within the religious principles professed by a denomination, one could easily see that “schools” fit within the framework of institutions presumptively entitled to claim

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324. Brief for the Petitioner, *supra* note 57, at 4–6. In addition to her job responsibilities, Perich had the title of a “called” teacher, which reflected theological study and a form of commissioning by the congregation, a title which she used to distinguish herself. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 707.

325. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 708 (stating that a title of minister “by itself, does not automatically ensure coverage”); *id.* at \_\_\_, 132 S. Ct. at 713–14 (Alito, J., concurring) (noting that “some faiths consider the ministry to consist of all or a very large percentage of their members” and observing that this may be why no circuit has made ordination status or formal title of minister determinative of the applicability of the ministerial exception). But it is fairly straight-forward to ask: is the claimant someone who was employed in a position of ministry within the faith community?

protection of the ministerial exception for some positions. Whether a university, hospital, or charitable agency serving the public (perhaps even the recipient of some public funding for a particular project) is considered a “church” for purposes of this article’s definition of the ministerial exception will vary, and each example will need to be assessed on its own facts and circumstances. It is the relationship of the “position of ministry” that is at the heart of the dispute with the employing agency that will color whether that agency is a “church” for purposes of the application of the ministerial exception.<sup>326</sup> On establishing that link, “churches” should have the burden of proof.

Religious organizations have high expectations of those who serve in the role of teacher. Beyond academic competence and aspiration towards excellence, religious schools very often extend those expectations into the realm of personal ethics and morality.<sup>327</sup> Failing to adhere to these religious norms that address expected behavior or personal morality often creates conflict with religious authorities, even where the particular behavior, such as an unintended pregnancy, may be protected by some general secular equality or anti-discrimination rule.<sup>328</sup> But the further one moves from commonly accepted and understood core religious experiences (prayer, worship, celebration) into broader ministries of public service, the more important it will be both for religious organizations to explain and defend—and for government institutions and courts to understand and respect—why some religious principle may bar the government’s ability to police relationships between those religious employers and employees who occupy positions necessary to the religion’s ministry. Religious institutions bear the burden of showing those connections, rooted in the teaching and doctrine of the faith community.<sup>329</sup>

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326. *See, e.g.*, *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008) (holding that a second-hand clothing store operator was a “minister” for purposes of the ministerial exception because, *inter alia*, “salvation through work is a religious tenet of the Salvation Army”).

327. *See, e.g.*, Brief for Petitioner, *supra* note 57, at 4–6; *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006).

328. *See supra* notes 78–84 (discussing *Redhead*, 440 F. Supp. 2d 211).

329. It may make sense (as we develop later) for these principles to be embodied in written job descriptions or other readily accessible and understandable form. Not only might it prevent needless litigation by clarifying pre-existing

As noted above, the “terms and conditions of ministry” in our statement of legal principles involves more than simply the content of the job.<sup>330</sup> The concept embraces things such as qualifications and conditions under which ministry is employed. The reservation of the ordained priesthood in the Catholic tradition for males, is one of those terms and conditions. In other traditions, such as the Greek Orthodox Church, ethnicity or national origin might likewise be a condition under which ministry is exercised. In some instances, changing leadership means changing interpretations of discretionary religious principles, which often results in changed conditions.<sup>331</sup> The ministerial exception doctrine effectively means that those questions are not subject to periodic litigation every time a new set of religious leaders reinterprets religious principles and how those religious principles should be played out in a particular religious setting.<sup>332</sup> The doctrine also bars litigation over seemingly mundane conditions, such as hours and other conditions,<sup>333</sup> so important is the principle that courts should not allow ministers to litigate ministry against their employing churches.<sup>334</sup> For purposes of federal anti-discrimination law, the Title VII religious employer exemption already strikes a fairly robust stance in favor of protecting religious

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expectations, but it might help persuade reviewing courts why the secular employment law should not be applied to resolve the disputes that do occur.

330. *See supra* notes 314–20 and accompanying text.

331. *See generally* *Petruska v. Gannon Univ.*, 462 F.3d 294, (3d Cir. 2006).

332. The *Nicosia* case is a principal example. *Nicosia v. Diocese of Reno*, No. 3:10-cv-00667-HDM-RAM, 2011 WL 1447686 (D. Nev. 2011). One Bishop allowed for pastoral administration to be performed by laypeople. Complaint at 2–3, *Nicosia*, 2011 WL 1447686 (no. 3:10-cv-00667-HDM-RAM). The successor Bishop designated a priest as pastor and replaced the lay administrator, who in turn sued for discrimination. *Id.* at 3, 8, 11.

333. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010), *aff'd*, 627 F.3d 1288 (9th Cir. 2010) (en banc).

334. *See Dobrota v. Free Serbian Orthodox Church St. Nicholas*, 952 P.2d 1190, 1195 (Ariz. App. 1998) (“[O]ne who enters the clergy forfeits the protection of the civil authorities in terms of job rights.”). There is, however, an outer limit to this line. In *Dobrota*, the court rejected a formerly-employed priest’s tort claims alleging that the church had stolen his belonging and cut off his utilities in firing him, but held that a civil court can enforce an ecclesiastical decision authorizing an award of damages to the priest, as long as enforcement of that award does not entangle court in matters of church doctrine. *Id.* at 1195–97.

rights.<sup>335</sup> Here, the ministerial exception effectively extends the scope of the Title VII exemption beyond federal claims and claims expressly premised upon religion and would override other workplace norms. It would also, under many factual scenarios as described below, extend to certain forms of contract and tort claims.

Third, the principle as applied should be a threshold legal determination. There is a split among the courts about whether the application of the ministerial exception is a question of subject matter jurisdiction or whether it is simply an affirmative defense.<sup>336</sup> Without briefing or argument on this point, the Supreme Court attempted to resolve this conflict in passing by proclaiming the exception an affirmative defense.<sup>337</sup> This superficial yet seemingly clear resolution

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335. See 42 U.S.C. § 2000e-1(a) (2011) (“This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).

336. Compare *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, (4th Cir. 1998) (unpublished table decision) (affirming dismissal of dispute between former employee and religious employer for lack of subject matter jurisdiction), and *Young v. N. Ill. Conference of the United Methodist Church*, 21 F.3d 184, 188 (7th Cir. 1994), with *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (affirming summary judgment for religious employer on First Amendment grounds), and *Redhead v. Conference of Seventh-day Adventists*, 566 F.Supp. 2d 125 (E.D.N.Y. 2008) (denying religious employers motion for summary judgment on First Amendment grounds and allowing case to proceed to trial).

337. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_ n.4, 132 S. Ct. 694, 709 n.4 (2012). Notably, the Sixth Circuit Court of Appeals recognized that the district court dismissed the suit for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 775 (6th Cir. 2010) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). The appellate court noted that

[a]lthough the district court issued its decision in the context of a summary judgment motion, the court dismissed Perich’s claim based on a lack of subject matter jurisdiction and did not reach the merits of the claim. In addition, this Circuit has treated the “ministerial exception” as jurisdictional in nature and an appropriate ground for a motion to dismiss pursuant to Rule 12(b)(1).

will leave litigants and jurists wanting, as the practical implications are most severe at the outset of litigation: the allocation of the burden of proof, the burden of production, and the vulnerability of conversion of a motion to dismiss to one for summary judgment.<sup>338</sup> Because the Court's ruling did not address claims outside of federal statutory discrimination claims,<sup>339</sup> in resolving other kinds of claims, there may be a threshold procedural vehicle for testing the Court's simple conclusion.

In the Second Circuit's express adoption of the ministerial exception in affirming dismissal of a race discrimination complaint in *Rweyemamu v. Cote*,<sup>340</sup> the court noted that, while the exception has been widely accepted, its procedural application had not been uniform.<sup>341</sup> Four circuits treated the exception as an affirmative defense that can be raised on a Rule 12(b)(6) motion to dismiss.<sup>342</sup> Two circuits construed the

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*Id.*

338. A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction effectively terminates a lawsuit, often as quickly and cheaply as possible, even if limited discovery is ordered. FED. R. CIV. P. 12(b)(1). Rule 12(b)(1) motions must be considered before any others "because if [the court dismisses] the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot." 5C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1350 (3d ed. 1997–present). Affirmative defenses, on the other hand, are properly raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim, so a defendant raising the ministerial exception as a defense after *Hosanna-Tabor* always runs the risk of the motion being converted to one for summary judgment under Rule 56. FED. R. CIV. P. 12(d). Courts have "complete discretion to determine whether or not to accept the submission of any material beyond the pleadings" in a 12(b)(6) motion, and therefore, whether to convert it to a summary judgment motion. WRIGHT & MILLER, *supra*, at § 1366. As a result, the Court's decision to treat the ministerial exception as an affirmative defense still leaves defendants at a risk of the increased time and expense associated with summary judgment.

339. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 710.

340. 520 F.3d 198 (2d Cir. 2008).

341. *Id.* at 206 n.4 (holding that the ministerial exception barred an African-American priest's claim that the Roman Catholic Diocese and Bishop discriminated against him on the basis of race in violation of Title VII when they denied him a requested promotion to parish administrator, then terminated him).

342. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006); *Bryce v. Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989).

ministerial exception as jurisdictional in nature and an appropriate ground for a Rule 12(b)(1) motion to dismiss.<sup>343</sup> And two circuits treated the exception as a command to interpret Title VII not to apply to claims between a church and its ministers.<sup>344</sup> This variety of treatment underscored the complexity and discomfiture with the ministerial exception's doctrinal roots and role in modern litigation. The Court's resolution of the procedural question in some ways over-simplifies the way in which the body of law has grown and in other ways cannot be squared with its own holding in *Hosanna-Tabor*. Subject matter jurisdiction—always a question of law for the judge—cannot be waived; affirmative defenses can be.<sup>345</sup> If the ministerial exception reflects a rule that denies to civil magistrates the power to reach “an internal church decision that affects the faith and mission of the church itself,”<sup>346</sup> that issue presents not an affirmative defense, but an exercise of “competence” as *Watson* used the word.<sup>347</sup>

Thus, regardless of the label, we think these cases will continue to present questions of “competence” and therefore present threshold legal questions. Even though the Court in *Hosanna-Tabor*,<sup>348</sup> like the Court in *Gonzalez*,<sup>349</sup> may view anti-discrimination claims as clearly within the nominal subject matter jurisdiction of the courts (assuming the other requirements for jurisdiction such as standing are met by the

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343. See, e.g., *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006).

344. See, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302–04 (11th Cir. 2000); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972); cf. *Hankins v. Lyght*, 441 F.3d 96, 117–18 (2d Cir. 2006) (Sotomayor, J., dissenting).

345. In *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996), it was the district judge, not the parties, who identified the case as involving the ministerial exception and thus viewed the case as off-limits. Subject matter jurisdiction is an issue that courts may not ignore and they can be raised at any time including on appeal.

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

347. See *supra* Section III.B.

348. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_ n.4, 132 S. Ct. at 709 n.4.

349. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 6–7 (1929).

litigants), that should not end a church's ability to make a "speaking motion" to the court's competence.<sup>350</sup> Those courts that recognize that they are disabled from deciding questions that depend on some religious matter may defer decisions on the application of the ministerial exception from the threshold of the adjudication until later in the judicial process.<sup>351</sup> On balance, the likelihood is that those courts that apply the *Hosanna-Tabor* ruling literally as a garden-variety affirmative defense will allow cases to proceed beyond a threshold determination, and may even reserve a decision on the merits, or even on judgment notwithstanding the verdict, until after a jury decides otherwise.<sup>352</sup> Courts might also think, just as the jurors did in *Redhead*,<sup>353</sup> that religious organizations should be more understanding and forgiving, and therefore continue the case in the hopes of brokering some form of settlement.

The problem with this manipulation of the doctrine is the offense to constitutional rights. It is axiomatic that constitutional rights matter and their slight infringement constitutes injury sufficient to confer standing to seek relief.<sup>354</sup> Thus, whether presented as a question of subject matter jurisdiction or a question of affirmative defense, it is important that these questions be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury as well as to give the litigants a clear picture of how the court sees the claims and defenses and how the case ought to

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350. *Id.* at 15–16 (rejecting the archbishop's arguments that the Court lacked personal and subject matter jurisdiction over the dispute).

351. *See, e.g.,* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1241 (10th Cir. 2010) (discussing how the trial court converted the diocese's motion to dismiss for lack of subject matter jurisdiction into one for summary judgment and requested supplemental briefing from the parties); Nicosia v. Diocese of Reno, No. 3:10-cv-00667-HDM-RAM, 2011 WL 1447686, at \*2 (D. Nev. Apr. 14, 2011) (rejecting the diocese's motion to dismiss based on the ministerial exception, as well as its argument that applicability of the exception must be determined at the outset of a case, and concluding that discovery was needed to determine if the exception applied).

352. *See* *Tubra v. Cooke*, 225 P.3d 862 (Or. App. Ct. 2010), *review denied*, 237 P.3d 221 (Or. 2010), *cert. denied* 131 S. Ct. 1569 (U.S. 2011).

353. *See supra* notes 78–84 and accompanying text (discussing *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006)).

354. *See* *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

proceed.<sup>355</sup> If the resolution of the claim would involve the court in scrutinizing the internal rules and expectations of the church and weighing them against secular norms, for pretext or other evaluative purposes, the character of the claim is not secular and neutral, but akin to a dispute over a “term and condition” of ministry. Moreover, if the prospect exists that either the judge or the jury will be asked to substitute their judgment for that of religious authorities on the suitability of a person for a position, that kind of question also should be explicitly recognized as seeking to litigate a “term and condition” of ministry. In addition, the litigation of a “term and condition” of ministry may be more subtle, such as a demand to shape a church’s will to some secular employment norm or standard of care.<sup>356</sup> In those circumstances, like the other examples, a judge (not a jury) should consider whether the question presented to the court requires an answer that is reserved, under constitutional law, to a religious body.

Similarly, the judicial process employed to resolve this threshold legal question should focus on: (1) producing a narrow decision as to whether the ministerial exception applies or not, and (2) allowing a prompt appeal of a negative decision so as not to force the religious body through years of expensive litigation, simultaneously wearing down its resources and its will to stand on principle. For example, where permitted, discovery should be directed towards answering questions that would highlight the clash of principles present in these cases, and should not encompass the entire merits of the claim or all of the other various issues that might be implicated in the case. Discovery, like other litigation expenses, compounds the injury that attends the invasion of this constitutionally protected turf. Courts necessarily should be sensitive to

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355. This approach parallels the well-established treatment of a governmental party’s qualified immunity. “Qualified immunity is a complete immunity from suit, not just a defense to liability, and is considered at the earliest possible stage of proceedings, apart from the analysis of the underlying claim itself.” Giles v. Kearney, 571 F.3d 318, 325–26 (3d Cir. 2009).

356. See, e.g., Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441 (Me. 1997) (rejecting, on church autonomy grounds, a claim that the church should be liable for negligent supervision of priest who initiated sexual relationship with adult church member). See also Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J. L. & PUB. POL. 387, 436, 439 (2005).

the implications of over-extending discovery and perhaps, in the process, invading or chilling protected constitutional rights. Moreover, to the extent the Establishment Clause may be implicated, the government lacks the power to invade religious precincts.<sup>357</sup> The “church” should be obliged to produce evidence demonstrating that it is a religious body entitled to assert the defense, that the plaintiff holds or held a “position of ministry” related to some core religious function for that religious body, and that the dispute necessarily implicates the qualities (not just the qualifications) necessary for that position. Given the importance of a prompt and threshold determination, it is axiomatic that a refusal to dismiss a claim against the religious-body defendant based on the ministerial exception is effectively final and should ordinarily be permitted to be tested on interlocutory appeal. Forcing the parties through years of expensive litigation, where churches may weary of the diversion of resources away from mission,<sup>358</sup> is precisely the kind of equitable consideration, coupled with the importance of the threshold constitutional question, that warrants an immediate appeal.

Fourth, to address an issue left open in *Hosanna-Tabor*, the ministerial exception principle precludes litigation designed to attack churches for making decisions that are protected by the ministerial exception, such as claims by now-former ministers that sound in defamation, contract, or intentional infliction of emotional distress. The root case, *McClure*, involved both anti-discrimination and breach of contract claims.<sup>359</sup> An examination of the actual claims in the cases to which the ministerial exception applies yields many more examples of tort and contract claims than statutory anti-discrimination claims.<sup>360</sup> For

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357. The Court in *Lemon* made plain that a purpose of the Establishment Clause was to preclude the invasion of the institutions of government into the precincts of religion (and vice versa). *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

358. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) (“The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities.”).

359. *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972).

360. *See generally Guerrier v. S. New England Conference Ass’n of Seventh-Day Adventists, Inc.*, No. CV085007824, 2009 WL 4282894 (Conn. Super. Ct. Nov. 12, 2009) (for an example of applying the ministerial exception to several tort and contract claims).

analytical purposes, that a (former) minister advances a contract or tort claim does not necessarily avoid the preclusive effect of the rule of law if the claim is rooted in the content of ministry. Just as the Court in *Hosanna-Tabor* recognized that allowing money damages claims exacted a penalty for protected conduct,<sup>361</sup> so too the Court should recognize the constitutional right is offended if courts allow a minister to plead a common law tort claim to get around a religious body's decision about his or her ministry and thus to evade a threshold dismissal.<sup>362</sup> What is protected is the nature of the relationship between faith communities and those whom it chooses to place into positions of ministry according to its own religious law, tradition, and customs. It is not about avoiding litigation; that is not the injury. The injury is the judicial interference through oversight of a ministerial relationship. Thus, however a claim is framed or labeled, if it is reasonably related to what happened in a selection, personnel, disciplinary or other internal religious process, including how the religious body communicated its decision to congregants as a matter of common importance and interest, then the constitutional barrier applies and the case should be dismissed.

From the perspectives of both principle and practicalities, the above framework addresses and resolves some of the more contentious questions in litigation. Who is a minister is related to whether that person occupies a position of ministry. The question is resolved by the expectation that the religious body will present evidence that shows a link between the position occupied by the (former) minister and some core religious function for that body. If a religious body is unwilling or unable to make that kind of showing, or if the showing is, on its face, fraudulent or concocted for purposes of the litigation alone, it may be disregarded. Courts are allowed to inquire into the basis for a religious entity's assertion that a party plaintiff is raising claims rooted in the plaintiff's holding some position of ministry in the faith community.

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361. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 709 (2012).

362. *Guerrier*, 2009 WL 4282894, at \*4–5. All the claims in *Guerrier* sounded in contract or tort. *Id.* at \*1. But *Guerrier* was a minister who was suing his faith community to be reinstated as a minister or compensated for not being reinstated. *Id.* If *Guerrier*, like *Dobrota*, *supra* note 72, were pursuing some claim for a sum certain unequivocally owed under a contract, that would have been a different case.

How else could a court decide whether a claim is legitimate? This is qualitatively different from taking testimony about the origin, centrality, or sincerity of some religious doctrine. The permitted inquiry examines the basis for and source of the assertion of religiosity; the unpermitted inquiry invites a court to decide the relative weight or importance of a religious doctrine as disputed by the claimant.

What claims are barred is answered by returning to the construct of the “terms and conditions” of ministry. Plainly, the ministerial exception does not bar the litigation of an injury to the person or the property of a minister, such as consequences of a sexual assault or a car accident, clearly divorced from the terms and conditions of employment of the minister. In addition, the breadth of the framework we describe here offers a rational basis for courts to decide, as they have since *McClure*, that if contract and tort claims, like antidiscrimination or statutory claims, arise out of the terms and conditions of ministry as construed here, those claims should be barred under the exception.<sup>363</sup>

The current, uncertain framework for addressing the ministerial exception creates conflicting outcomes and leaves litigants only to guess at how their case may resolve in the courts. Take, for example, *Tubra*, which both the Oregon and U.S. Supreme Court declined to grant a writ of certiorari.<sup>364</sup> The trial court concluded, in a judgment notwithstanding the verdict, that the Free Exercise Clause deprived it of jurisdiction to adjudicate the defamation claim brought by plaintiff—a pastor—against his church, for statements made by the church to the congregation about plaintiff after he was terminated from his employment.<sup>365</sup> Despite the fact that *Tubra* framed his claim as one undeniably bound up in a church-minister employment relationship, the appellate court reversed and reinstated the jury verdict, inscribing a seemingly non-existent secular meaning onto the comments made by a church about its minister’s fitness to serve its congregation.<sup>366</sup>

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363. In our view, to remain consistent with the ministerial exception, permissible contract claims would arise only from written contracts. Oral contracts would therefore be unenforceable.

364. *Tubra v. Cooke*, 225 P.3d 862 (Or. App. Ct. 2010), *review denied*, 237 P.3d 221 (Or. 2010), *cert. denied*, 131 S. Ct. 1569 (U.S. 2011).

365. *Id.* at 863–64, 867.

366. *Id.* at 873. The court reasoned:

Contrast *Cha v. Korean Presbyterian Church of Washington*,<sup>367</sup> where a former pastor sued the church and members of its hierarchy for wrongful termination, tortious interference with employment, and making allegedly defamatory statements questioning the pastor's honesty and integrity with respect to the misuse of church funds.<sup>368</sup> The trial court determined that it lacked subject matter over all the claims because adjudication of the claims would require the court to "involve itself in ecclesiastical concerns" involving "questions of faith or doctrine."<sup>369</sup> The defendants' alleged actions were therefore protected by the First Amendment and the equivalent provision in the Virginia Constitution.<sup>370</sup> The State Supreme Court affirmed, stressing that the alleged wrongdoing by the church and its deacons would have involved the court in matters of church governance and "limited the church's right to select its religious leaders."<sup>371</sup> Neither the U.S. Constitution nor the Virginia Constitution permitted a court "to substitute its secular judgment for a church's judgment when the church makes decisions regarding the selection or retention of its pastor," and accordingly, the trial court properly dismissed the complaint for lack of subject matter jurisdiction.<sup>372</sup> Not only did *Tubra* and *Cha* reach differing results, but

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If, however, the statements—although made by a religious organization—do not concern the religious beliefs and practices of the religious organization, or are made for a nonreligious purpose—that is, if they would not "always and in every context" be considered religious in nature—then the First Amendment does not necessarily prevent adjudication of the defamation claim."

*Id.* at 872 (quoting *Christofferson v. Church of Scientology of Portland*, 644 P.2d 577, 603 (Or. Ct. App. 1982)). How much of the court's result might have been dictated by the adverse jury verdict implying that the statements about *Tubra* were false and not privileged, one can only speculate.

367. 553 S.E.2d 511 (Va. 2001).

368. *Id.* at 513.

369. *Id.* at 512.

370. *Id.*

371. *Id.* at 515.

372. *Id.*

the amount of time (and consequent expenditure of money and judicial resources) devoted to each case varied widely.<sup>373</sup>

In sum, the importance of the constitutional principle requires that civil courts not embrace causes over which they lack competence. To do so, as noted above, not only infringes the constitutional rights of religious institutions but also wastes time and expense for those bodies. Of even more importance, to protect religious institutional rights in the context of employment litigation brought by ministers, the courts should draw those boundaries against secular litigation broadly, so as not to allow for marginal cases to press into space protected under the First Amendment. That resolution ultimately provides the best assurance that constitutional rights are not infringed and it would discourage attempts to create openings in the wall of separation between church and state.

#### V. IMPLICATIONS

The consequences of the ministerial exception cases are substantial for all involved. The employee stands to lose much both by way of statutory and judicial protections ordinarily afforded to other employees, while the religious institution loses the formerly robust protections enjoyed under the First Amendment. Because the Supreme

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373. The dismissal of *Cha* occurred on August 23, 2000, and the Virginia Supreme Court's decision was handed down on November 2, 2001. *See Cha v. Korean Presbyterian Church of Wash. (Cha Trial)*, 55 Va. Cir. 480, 480 (Va. Cir. Ct. 2000); *Cha (Cha Appeal)*, 553 S.E. 2d at 511. The suit thus concluded a little less than two years after the cause of action arose. *See Cha Appeal*, 553 S.E.2d at 513 (stating that alleged defamatory statements occurred on December 5, 1999 and that plaintiff was terminated on December 18, 1999). In *Tubra*, the plaintiff was told to leave the church on September 17, 2004. *Tubra v. Cooke*, 225 P.3d 862, 865 (Or. Ct. App. 2010). The *Tubra* trial concluded in November, 2006. Order Granting Defendants' Motion for Judgment Notwithstanding the Verdict at 1, *Tubra v. Cooke*, No. 0509-10015, 2006 WL 4807730 (2006). The Oregon intermediate appellate court did not hand down its decision under January 27, 2010, and the Oregon and U.S. Supreme Courts had not denied review until July, 2010 and February, 2011, respectively. *Tubra*, 225 P.3d at 862 (stating date of decision); *Tubra v. Cooke*, 237 P.3d 221 (2010) (unpublished table opinion) (stating date of decision denying review as July 29, 2010); *Cooke v. Tubra*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1569 (2011) (Mem.) (stating date of decision denying certiorari as February 28, 2011). Thus, in *Tubra*, it took nearly six years to reach the same procedural posture as *Cha*, and nearly six and a half to reach a final conclusion, given the continuing appeals.

Court left open certain kinds of employment-related actions sounding in contract or tort, one can reasonably predict that soon all terminations of “ministerial” employees will invoke those characteristics of claims permitted by the Court, leading to more, not less, litigation. And given the ruling that constitutional rights of churches are an “affirmative defense,”<sup>374</sup> the resolution of these claims will take longer and be more expensive and contentious. Thus, despite its vigorous pronouncement of First Amendment rights for some classes of claims and claimants,<sup>375</sup> the consequences for churches of unraveling and clarifying the reach of *Hosanna-Tabor* could be substantial. Smaller churches, often equipped with only modest resources, will be confronted with the need to make some sort of accommodation if the cost of litigation cannot be sustained for the many months or years it takes to resolve it.<sup>376</sup> Perich’s case from Michigan began in 2004, and did not resolve until the Supreme Court issued its opinion in 2012.<sup>377</sup> And along the way, the school has closed.<sup>378</sup> One can only speculate whether, without the stress, spectacle, and expense of litigation, the school might be open and educating students today.

Even without the cost and expense of litigation, the cost of handling more cases against churches can be measured in the damage to and diversion from mission and ministry. Churches would be less likely to engage in otherwise protected personnel actions and may be forced to keep employing a person in a position of ministry despite the church leadership’s belief that the person is unsuitable to the job. One can imagine, therefore, that there will be substantial consequences by way of tension and division within a community that is forced to live under these circumstances. The longer that such a conflict persists, the longer and more severe could be the consequences for members, donors, and other

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374. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, \_\_\_ U.S. \_\_\_, \_\_\_ n.4, 132 S. Ct. 694, 709 n.4 (2012).

375. See *id.* at \_\_\_, 132 S. Ct. at 706.

376. The adverse consequences go beyond finances; negative publicity and community strife resulting from a dispute may also inhibit a religious entity’s ability to carry out its mission.

377. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 700.

378. Reply Brief for the Petitioner, at 3 n.1, *Hosanna-Tabor*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 694 (No. 10-553) (The *Hosanna-Tabor* brief in the Supreme Court noted that the school operated at a deficit and closed in 2009).

community supporters of the church. In other words, opening the door to more litigation will likely have a chilling effect on the behavior of churches that would otherwise be exercising a protected liberty interest to avoid these consequences.<sup>379</sup>

By permitting litigation of specific species of claims, such as claims sounding in tort or contract for money damages, there would likely be enough litigation trying to exploit that opening in the wall of separation that churches would feel the consequences.<sup>380</sup> In resolving these claims, in some future case, if the Court were to declare that there must be advance notice to an employee of a church that his or her position is considered integral to ministry and that the employee may therefore forego the protections of the labor laws or other laws that might apply in secular employment, such a ruling would trigger written job descriptions signed by job-holders, re-making some religious employment relationships now based on discernment and vocation into ones based on contract.<sup>381</sup> As noted earlier, the First Amendment protects churches against actions that others may see as irrational and unreasonable. Over time, litigation will interpose the seemingly rational (job descriptions, hiring standards, contracts) over the irrational

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379. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340–46 (1987) (Brennan, J., concurring).

380. Many cases cite *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), for that proposition after the ruling in that case. However, one recognizes that if such an exception were allowed, it would certainly and swiftly become the rule.

381. Justice Breyer had asked in oral argument whether Perich knew of the faith-based requirement to avoid litigation. Transcript of Oral Argument, *supra* note 62, at 19:24–22:16 (colloquy between Justice Breyer and Douglas Laycock, counsel for Hosanna-Tabor). *Jones v. Wolf*, 443 U.S. 595 (1979), allowed churches to rely on canonical provisions to dictate results in property cases. And some churches immediately amended their internal law to adopt such rules. *See* Episcopal Diocese of Rochester v. Harnish, 899 N.E.2d 920, 924–25 (N.Y. 2008) (noting the adoption of the Dennis canon in 1979 and its application to parish founded in 1927); Episcopal Church Cases, 61 Cal. Rptr. 3d 845, 882–83, 895 (Cal. Ct. App. 2007), *aff'd* 169 P.3d 94 (Cal. 2007) (same, parish founded in 1947). *Cf.* Bishop & Diocese of Colo. v. Mote, 716 P.2d 85, 105, n.15 (Colo. 1986) (noting adoption of the Dennis canon confirming an express trust obligation on constituents). On amendments after *Wolf* generally, see Thomas Berg, *Religious Structures Under the Federal Constitution*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES, 148 n.125–26 (Serritella et al. eds., 2006).

(discerning and accepting a call to ministry).<sup>382</sup> Over time, the consequences of allowing money damages for common law claims might be so substantial that a church would rather continue employing a minister than risk the expense. In other words, the First Amendment implications for allowing even limited civil litigation of the kinds of employment claims brought by ministers against their churches arising out of the terms and conditions of ministry could be substantial, if they cause churches to alter the ways in which they conduct themselves based entirely on litigation-avoidance strategies. Such considerations would erode the very foundation the Court in *Hosanna-Tabor* pronounced is the right of all churches.<sup>383</sup>

On the other hand, closing the door to litigation sacrifices other sorts of norms and principles that society takes for granted. Among them is a commitment to workplace equality. Despite their aspirations, churches are run by imperfect people. They may occasionally take what to the secular world looks like arbitrary action contrary to secular norms.<sup>384</sup> The fact that actions are open to scrutiny by the courts might make some religious actors reconsider a course of conduct or plot a new course.<sup>385</sup>

Like the Court, we believe, as a matter of doctrine, the set of assumptions embodied in constitutional text since the Framing generation, and which courts have applied consistently across the decades, are operative in today's complex and highly-regulated world.<sup>386</sup> We think the constitutional text specifically excludes the state from any role in the internal affairs of churches, including their working relationships with ministers. Framing the scope of the exception as

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382. Chopko & Moses, *supra* note 356, at 436 (applying secular hiring criteria, the Apostle Paul would not have survived the cut).

383. See *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 706–07.

384. The resolution of *Redhead* or similar cases are examples where religious expectations look unfair or unreasonable. See *supra* notes 78–84 and accompanying text.

385. Moreover, closing the door to litigation between churches and ministers may have implications for those churches that need, on occasion, to file suit against a former minister, to recover property or, in some instances, to enjoin them from access to the building. The converse application of the ministerial exception could conceivably limit churches' desired reach into the civil courts.

386. *Hosanna-Tabor*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 702–05.

focusing on those claims that arise out of the terms and conditions of ministry would give judges a way to distinguish those claims which are therefore barred, from those harms directly related to something that the minister experienced (like an assault or accident) which are not. Going further, to avoid the compounding of any injury to religion and constitutional values, any ministerial exception claim should be evaluated at the threshold of all litigation as a legal question. That question should focus on the competence—or more precisely, the incompetence—of the civil magistrate to rule on questions that are committed to religious discretion.

## VI. CONCLUSION

Viewed from the perspective of the Framers, the thought that the great engines of government, through the processes of regulation and litigation, would have some role to police working relationships between ministers and their churches would seem offensive. What the current administration proposed as the law for religious organizations today, that the Religion Clauses did not protect against these intrusions, contradicts the Framers' core values.<sup>387</sup> The Court properly rejected the notion that broadly intrusive secular workplace norms are “neutral and generally applicable,” or not entangling with religious questions for religious employers.<sup>388</sup> While the consequences for religious institutions were potentially substantial, the consequences for basic civil liberties of all citizens were alarming. As noted at the outset, religious institutions are core mediating bodies in the Nation's cultural landscape. Whether the government could intrude into their central governance was really the principal contest. The Court's return to foundational principles of religious freedom in explicitly adopting the ministerial exception is significant in its broad simplicity, and no small feat in light of the Court's neutrality-centered jurisprudence over the last twenty years.

We now look to the next stage of application, to the harder questions and cases on the margins, the cases that reside in the wide space we believe was intended for religious institutional freedom under

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387. See generally Brief for the Federal Respondent, *supra* note 43.

388. Justice Scalia called it “extraordinary,” and Justice Kagan, “amazing,” in oral argument. Transcript of Oral Argument, *supra* note 62, at 35:35, 38:30.

the First Amendment. Without that institutional freedom, the quality of our shared experience and common heritage is tarnished.