UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 90 | Number 1 Article 2

12-1-2011

In Defense of the Ministerial Exception

Christopher C. Lund

IN DEFENSE OF THE MINISTERIAL EXCEPTION*

CHRISTOPHER C. LUND**

Over the past forty years, courts have developed the "ministerial exception," a legal doctrine which immunizes churches from employment-based claims brought by their clergy (and others with significant religious duties). The lower courts all recognize this exception. But its contours remain fiercely disputed. And the Supreme Court has never clarified its boundaries or even confirmed that it exists at all.

This Article defends the ministerial exception and tries to flesh out its various rationales in a systematic and comprehensive fashion. It suggests that the ministerial exception may be profitably thought of not as a single indivisible whole, but rather as the overlap of several different discrete immunities, each backed by different justifications. It divides the ministerial exception into three components—a relational component, a conscience component, and an autonomy component. Examining each component separately, this Article tries to offer a richer explanation as to why we have this thing called the ministerial exception.

This Article comes at an opportune time. Nearly forty years after the birth of the ministerial exception in the lower courts, the first ministerial exception case is now before the Supreme Court of the United States. The case is Hosanna-Tabor v. EEOC, *and the Court will have to decide both whether the ministerial exception*

** Assistant Professor of Law, Wayne State University Law School. I would like to thank a number of people for thoughtful comments at various stages of this Article—Sarah Abramowicz, Richard Albert, Greg Bowman, Kathleen Brady, Kingsley Browne, Marc DeGirolami, Mary Jean Dolan, Chad Flanders, Lance Gable, Rick Garnett, Caroline Giordano, Michael Helfand, Paul Horwitz, John Inazu, Kerry Kornblatt, Douglas Laycock, Justin Long, Michael McCann, Aaron Perzanowski, Eric Rassbach, Steven Smith, Charles Sullivan, Robert Tuttle, Howard Wasserman, and Steven Winter. All errors, of course, are mine. By way of disclosure, I served as counsel of record for the amicus brief filed by the Lutheran Church-Missouri Synod that is cited *infra* in note 150. None of the views expressed here, however, should be attributed to the Lutheran Church-Missouri Synod.

exists and what it covers. After looking at the ministerial exception in general, this Article concludes by offering some thoughts on the issues presented in Hosanna-Tabor.

INTRODUCTION

A hallmark of American law is that employers cannot use things like race, sex, and age as criteria in employment decisions.[1] Whether employers are public or private, the law generally forbids such discrimination. But an equally august principle in American law is

1. *See infra* Part I.A (providing an introduction to employment law).

that of religious liberty. Religious organizations have long had, as a matter of constitutional right, freedom to choose their leaders without being hindered, second-guessed, or supervised by the state.

In recent years, these two principles have collided. The result has been the "ministerial exception." Lower courts have held that churches are generally immune from employment-related claims brought by their ministers (and others with highly religious duties), but that churches have no such immunity from claims brought by other employees.[2]

While courts agree on the broad contours of the ministerial exception, they disagree on many of the specifics. Courts differ on some straightforward matters—like which job positions count as ministerial.[3] But they also divide on trickier and more conceptual questions—like whether the ministerial exception should protect religious organizations in the absence of any religious doctrine requiring discrimination[4] and whether it should apply in cases where the minister continues to work for the church.[5] A storm of recent articles push things in another direction, arguing that the ministerial

---

2. *See* discussion *infra* Part II (providing an introduction to the ministerial exception). This Article uses the word "church" throughout to refer collectively to religious organizations like churches, temples, and mosques without intending any exclusively Christian reference. Other articles do the same. *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 n.2 (1981).

3. Courts have, for example, come to quite different conclusions about whether parochial school teachers fall within the ministerial exception. *Compare* Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 892 (Wis. 2009) (holding that such a teacher falls within the ministerial exception), *and* Clapper v. Chesapeake Conference of Seventh-Day Adventists, No. 97-2648, 1998 WL 904528, at *8 (4th Cir. Dec. 29, 1998) (same), *with* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010) (holding that such a teacher does not fall within the ministerial exception), *and* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) (same).

4. *Compare* Petruska v. Gannon Univ., 448 F.3d 615 (3d Cir. 2006*), withdrawn upon grant of reh'g*, 462 F.3d 294 (3d Cir. 2006), *available at* 2006 U.S. App. LEXIS 13135, at *28 (holding that the ministerial exception generally only shields churches when they argue that the discrimination was required by their religious tenets), *with* Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006) (rehearing the case after the decision in the first *Petruska* and holding that the ministerial exception provides blanket protection for churches with regard to employment discrimination claims by ministers).

5. Courts seem more comfortable deciding such cases because they do not present the danger of a church being forced to rehire a minister against its will. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004) (letting hostile work environment claims proceed). *But see* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010) (holding that such claims are barred by the ministerial exception).

exception should be abolished altogether or at least dramatically narrowed.[6]

This Article defends the ministerial exception against its critics. It aims to provide a fuller account of why a ministerial exception makes some sense. At the conceptual level, it argues against those who would see the ministerial exception as a single entity with a single theory of justification.[7] It proposes instead that the ministerial exception is better viewed as the combination of a number of distinct but overlapping immunities, each backed by a variety of rationales. It suggests that the ministerial exception can be helpfully divided into three component parts—the *relational* component, the *conscience* component, and the *autonomy* component.

First is the relational component. Organizations founded on shared religious principles, simply to exist, must have freedom to choose those religious principles. The laws forbidding religious discrimination make a lot of sense, but they make much less sense when applied to religious organizations. In the context of

---

6. *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1522 (2007) (noting how "[t]he ministerial exception has had its share of critics"). For examples of commentators arguing against the ministerial exception, see generally Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 53–56 (2010); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099 (2004); Lauren P. Heller, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007); Stuart McPhail, *Being FAIR to Religion:* Rumsfeld v. FAIR *'s Impact on the Associational Rights of Religious Organizations*, 3 HARV. L. & POL'Y REV. 221 (2009); Elizabeth R. Pozolo, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in* Petruska v. Gannon University, 57 DEPAUL L. REV. 1093 (2008); Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049 (2009); Katherine Bell, Note, *The Ministerial Exception: Rethinking the Third Circuit's Approach to Ministerial Discrimination*, 46 U. LOUISVILLE L. REV. 753 (2008); Sarah Fulton, Note, Petruska v. Gannon University*: A Crack in the Stained Glass Ceiling*, 14 WM. & MARY J. WOMEN & L. 197 (2007); Benton C. Martin, Comment, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297 (2010).

7. Ira Lupu and Robert Tuttle, two of the finest scholars in the field, remarked about how "the ministerial exception is a doctrine in search of a new and more precise theory of justification." 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, 134 (2009). They continue: "Such a theory is especially important as the exception gets pressed in new and different circumstances, and limitations on it appear." *Id.*

employment, churches should have a relatively free hand to use religion as a criterion. Lutheran churches should be able, as almost a categorical matter, to prefer Lutherans to Presbyterians and Protestants to Catholics.

Second is the conscience component. This is probably what most people instinctively think of as the justification for exempting religious organizations from the anti-discrimination laws. The conscience component allows religious organizations to discriminate when they assert a basis for it in religious doctrine. The intersection of sex and religion offers the most well-known example. Orthodox Judaism, the Greek Orthodox Church, the Catholic Church, and a number of Protestant groups see an all-male clergy as divinely ordained. The conscience component protects them from having to break their religious obligations to adhere to the government's commands. It protects them for the same reasons that one would want to protect the Native American Church's right to use peyote in worship[8] or the right of Orthodox Jews to wear yarmulkes.[9] No one should be punished by the state for doing what his religion commands unless it is absolutely necessary.[10]

Third is the autonomy component (or the ministerial exception *simpliciter*). Perhaps the most important part of the whole, this is what courts have generally referred to as *the* ministerial exception. Here we are talking about a categorical rule barring religious leaders (those with significant religious duties) from bringing any sort of employment-based claim against their churches. After opening with a general defense of such a blanket exception, the Article then demonstrates how there are four discrete and separate problems that would arise if the ministerial exception was not there. These include the *reinstatement* problem, the *restructuring* problem, the *control* problem, and the *inquiry* problem. There is thus no single reason for the ministerial exception. There are instead many reasons—reasons which overlap with each other, like the circles in a Venn diagram. This Article tries to examine those reasons in a more methodical and

8. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990) (involving such a claim).

9. *See* Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (involving such a claim).

10. *See* Braunfeld v. Brown, 366 U.S. 599, 605 (1961) ("In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing [governmental sanction]." (citation omitted)).

comprehensive way, in an attempt both to explain why we have the ministerial exception and to reveal its irreducibly pluralistic roots.

Part I of this Article discusses the necessary background for any understanding of the ministerial exception, providing a general description of statutory anti-discrimination law as well as the constitutional doctrine relating to church autonomy. Part II brings them together and explores the historical development of the ministerial exception. Parts III and IV, respectively, explore the relational and conscience components and the arguments in support of them. Part V, the bulk of this Article, examines the autonomy component, exhaustively organizing and analyzing the various justifications for it. Part VI considers and responds to objections. Finally, Part VII offers thoughts on *Hosanna-Tabor v. EEOC*,[11] the ministerial exception case now before the Supreme Court.

I. SETTING THE STAGE FOR THE MINISTERIAL EXCEPTION

This opening Part sets the stage for the others, providing an overview to statutory employment law, the constitutional principles of church autonomy, and their conflicted history together. We begin first with some basics of employment law and, in particular, employment discrimination law.

A. An Introduction to Employment Law

In the United States, relationships between employers and employees are regulated in a hodge-podge fashion through an assortment of different laws. Some of these laws are well-known. The Fair Labor Standards Act, for example, creates a minimum wage, forbids child labor, and regulates overtime.[12] Others are less well-known. The Employee Polygraph Protection Act prohibits most private employers from subjecting their employees to polygraph tests.[13] These two examples both involve federal statutes. But employees have other rights too, whether under local ordinances, state laws, or the federal Constitution.[14]

---

11. 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3552 (U.S. Mar. 29, 2011) (No. 10-553).

12. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206–207, 212 (2006).

13. *See* Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2002 (2006).

14. For a comprehensive list of the various protections that employees have in this country, see B. Glenn George, *Justice in Simplicity: Perspectives on Knowledge and Access in American Employment Law*, 19 KAN. J.L. & PUB. POL'Y 383, 385–92 (2010).

Anti-discrimination laws make up a crucial component of this effort toward fairness in the workplace. In 1964, Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination on the basis of race, national origin, sex, and religion, as well as retaliation for complaints about acts of discrimination.[15] Statutes enacted later forbid discrimination on the basis of age (the Age Discrimination in Employment Act of 1967 or "ADEA"),[16] pregnancy (the Pregnancy Discrimination Act or "PDA"),[17] and disability (the Americans with Disabilities Act of 1990 or "ADA").[18] Other laws prohibit discrimination against military veterans[19] and against all people on the basis of their genetic information.[20]

From the plain text of these employment discrimination laws, they would seem to apply with full force to churches and other religious organizations. When Title VII was initially drafted, the House version of the bill completely exempted religious groups.[21] But that broad exception was ultimately replaced with a narrower one that shielded religious groups only from charges of religious discrimination, and even then, only with regard to employees doing religious work.[22] This exception was broadened in 1972—as a result, Title VII today exempts religious employers from all claims of religious discrimination.[23] But the text of Title VII gives religious organizations no immunity from claims of retaliation or claims of

15. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (2006)).

16. Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 623 (West 2011).

17. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

18. Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12112 (West Supp. 2011).

19. *See* Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4311 (2006).

20. *See* Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.).

21. *See* H.R. REP. NO. 88-914, at 12 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402.

22. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)); *see also* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 89–91 (2002) (examining the legislative history behind the change).

23. *See* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society . . . ."). There is a separate exception to Title VII's prohibition on religious discrimination specifically for church-owned schools under 42 U.S.C. § 2000e-2(e)(2). There is also the bona fide occupational qualification ("BFOQ") provision, which will be discussed separately. *See infra* notes 25–29 and accompanying text.

race, sex, or national origin discrimination. And none of the subsequently enacted anti-discrimination statutes treat religious organizations any differently either.[24]

There are, however, two aspects to the federal anti-discrimination laws that somewhat indirectly relate to religious organizations. First, there are bona fide occupational qualifications ("BFOQs"). To the extent that protected characteristics like race, sex, age, or religion are "reasonably necessary to the normal operation of [a] particular business," employers (both religious and nonreligious ones) can take them into account.[25] But courts construe this provision quite narrowly.[26] The leading case struck down a battery manufacturer's policy that barred fertile women from jobs involving lead exposure.[27] The Court assumed that the jobs created serious fetal-health risks, but pointed out that fertile women could still physically do those jobs—which is the only relevant consideration under the text of the BFOQ provision.[28] Religious organizations may be able to use the BFOQs to create a kind of ministerial exception, but this is far from clear—who knows what you would get, for example, were you to ask a jury whether sex discrimination in the

24. The Americans with Disabilities Act ("ADA") has a section dealing specifically with religious organizations. It says religious organizations can give "preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities" and that they can "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C.A. § 12113(d) (West Supp. 2011). It is not entirely clear what work this provision is supposed to do. Religious groups obviously do not need to be shielded from claims of religious discrimination under the ADA, because the ADA does not forbid religious discrimination. Maybe the best reading is that religious groups can discriminate on the basis of disability when they do so for religious reasons. But in any event, reviewing courts and the Equal Employment Opportunity Commission ("EEOC") have concluded that this provision really has no weight. *See, e.g.*, Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011, 1018 (N.D. Iowa 2007) (noting the ADA statutory exception but then concluding that the ADA, like Title VII, "treats an employment dispute between a minister and his or her church like any other employment dispute" (quoting Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996, 1000 n.6 (D. Kan. 2004)); 29 C.F.R. § 1630.16(a) (2011) (adopting the same position).

25. Title VII, 42 U.S.C. § 2000e-2(e) (2006); ADEA, 29 U.S.C. § 623(f)(1) (2006). The ADA has somewhat different language, allowing employers to insist on qualifications that are "job-related and consistent with business necessity." 42 U.S.C.A. § 12113(a).

26. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) ("[T]he bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination . . . .").

27. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991).

28. *See id.* at 204–06 (noting that "permissible distinctions based on sex must relate to ability to perform the duties of the job" and "[f]ertile women . . . participate in the manufacture of batteries as efficiently as anyone else").

priesthood is "reasonably necessary to the normal operation" of the Catholic Church.[29]

Second, there is the exception in our federal anti-discrimination laws for small employers. Title VII and the ADA apply only to employers with fifteen or more full-time employees; the ADEA applies only to those with twenty or more.[30] Some religious employers will be protected by these numerical thresholds, as many churches have fewer than fifteen full-time employees. But the story is actually more complicated than that. A small Catholic parish with five full-time employees will still be subject to all these employment-discrimination laws. This is because our laws consider the *whole* Catholic Church—not the individual parish—to be the relevant unit for number-counting purposes. This comes from the "single employer" doctrine, which says that when two businesses are heavily interrelated, "the number of employees of [the] two separate businesses may be combined to meet the fifteen-employee requirement."[31]

One sees immediately how this will differently affect hierarchical and congregational churches. With hierarchical churches (like the Catholic Church), the parish and the higher church are deeply interrelated, so individual parishes become bound by Title VII. With congregational churches (like Baptist churches), there is no higher church—and so such churches become exempt from Title VII. To put it another way, small congregational churches are treated like small employers (exempt from the anti-discrimination laws), while small

---

29. The narrowness of the BFOQs makes this issue more complicated than people sometimes think. The Catholic Church would not get absolute deference on the issue of whether priests really need to be male. *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 423 (1985) (noting that the BFOQs "plainly do[] not permit the trier of fact to give complete deference to the employer's decision"). Many would argue that the Catholic Church's views, though based in theology and tradition, simply lack the sort of objective factual basis required for BFOQs. *See* City of Los Angeles v. Manhart, 435 U.S. 702, 707 (1978) ("Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons . . . .").

30. *See* Title VII, 42 U.S.C. § 2000e(b) (2006); ADA, 42 U.S.C. § 12111(5) (2006); ADEA, 29 U.S.C. § 630(b) (2006); *see also* Jeffrey M. Hirsch, *Revolution in Pragmatist Clothing: Nationalizing Workplace Law*, 61 ALA. L. REV. 1025, 1067 (2010) (questioning why we would have a system where "employers with fifteen to nineteen employees [have] to comply with Title VII and the ADA, but not the ADEA").

31. 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 5.02[5], at 5-15 (2d ed. 2009); *see also* Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1201 (2006) (explaining further how "the 'single employer doctrine' . . . treats affiliated and interrelated corporations as if they are one entity—a 'single employer' ").

hierarchical churches are treated like small parts of a large employer (not exempt). This point may help to explain why one rarely sees ministerial exception cases involving Baptist churches, although such cases involving Catholic churches are frequent.[32]

This disparate impact does not make the numerical thresholds unconstitutional. But they are still problematic. For both congregational and hierarchical churches, church structure matters for deeply theological reasons. Religious freedom, therefore, should mean having free choice among various types of church governance. But Title VII effectively penalizes the hierarchical choice: Hierarchical churches end up bound by the anti-discrimination laws, while congregational churches are not. One sees the problems with this in obvious display with one recent case that involved a sexual harassment suit against an Episcopal church that had only four employees.[33] The court's decision to let the case go forward was grounded entirely on observations about the relatively hierarchical nature of the Episcopalian Church.[34]

B. An Introduction to Church Autonomy

The ministerial exception arises from the conflict between employment laws and constitutional principles of church autonomy. Having introduced the former, we now turn to the latter. Ideas about church autonomy long predate the rise of modern employment law, which means that church-autonomy principles first developed in contexts somewhat removed from that setting. Yet, as we shall

32. For examples of cases involving claims against an entity within the Catholic Church, see generally Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003); EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Rosati v. Toledo, Ohio Catholic Diocese, 233 F. Supp. 2d 917 (N.D. Ohio 2002); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998); Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc., 875 A.2d 669 (D.C. 2005); Archdiocese of Wash. v. Moersen, 925 A.2d 659 (Md. 2007).

33. *See* Krasner v. Episcopal Diocese of Long Island, 431 F. Supp. 2d 320, 323 (E.D.N.Y. 2006).

34. *Id.* at 325 (stressing how the Diocese was intimately involved with the local church generally and with the plaintiff's employment, specifying her job duties, offering her training, providing her with health benefits, and controlling aspects of her compensation and hours).

explore, these principles still have implications for modern employment law.

1. The Religion Clauses in Brief

Insofar as the ministerial exception has roots in the Constitution, those roots are found in the First Amendment of the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[35] The first half of this Amendment is known as the Establishment Clause; the second half is known as the Free Exercise Clause. About fifteen years after they were adopted, Thomas Jefferson summarized their combined effect as "building a wall of separation between Church and State."[36]

Over the past two centuries, the Supreme Court has wrestled with the meaning of these two clauses. On the Free Exercise side, the Court has heard a number of cases involving individual believers asking for exemptions from laws which would otherwise prevent them from following their religions. The Court used to generally require such exemptions, but in recent years it has moved away from that position.[37] On the Establishment Clause side, the Court in the past decade has addressed everything from government-sponsored religious displays,[38] to government-sponsored prayers in the public schools,[39] to voucher programs which include religious schools.[40]

---

35. U.S. CONST. amend. I.

36. *See* Thomas Jefferson, *Letter to the Danbury Baptists (1802), in* FROM MANY, ONE: READINGS IN AMERICAN POLITICAL AND SOCIAL THOUGHT 344–45 (Richard C. Sinopoli ed., 1997).

37. Under the *Sherbert/Yoder* framework, associated with *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), burdens on religious exercise had to be justified by compelling governmental interests. *See Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 215. This changed in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), when the Court held that burdens usually did not require justification if the laws were neutral and generally applicable. *See id.* at 879. The relationship between *Smith* and the ministerial exception is important and will be addressed separately later. *See infra* Part VI (examining the claim that the Supreme Court's decision in *Smith* undermines the ministerial exception).

38. The Court has sometimes upheld them and sometimes struck them down. *Compare* McCreary Cnty., Ky. v. ACLU, 545 U.S. 844, 881 (2005) (striking down a government-sponsored Ten Commandments display), *with* Van Orden v. Perry, 545 U.S. 677, 677 (2005) (upholding a government-sponsored Ten Commandments display). For more on these two cases, see generally Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW. U. L. REV. COLLOQUY 60, 60–61 (2010), http://www.law.northwestern.edu/lawreview/colloquy/2010/22/LRColl2010n22Lund.pdf.

39. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 290 (2000) (striking down a government-sponsored prayer program in the public schools).

One striking aspect is how the Free Exercise and Establishment Clauses have developed along entirely separate tracks with only occasional connections threading the two clauses together. The cases are separate; the principles are separate; the doctrines are separate. All this seems quite curious for a legal provision that mentions the word "religion" only once.[41] Others have searched for a unitary meaning to attach to the Religion Clauses. If forced to do so, I might put it this way: The Free Exercise Clause gives people the right to practice their religion, while the Establishment Clause denies the government the right to practice religion.[42] By requiring the government to stay out of religious affairs, the Constitution commits matters of religious belief and practice exclusively to the private sphere. Religion is put entirely on one side of the state-action line.

On its own, of course, this formulation is too abstract to do much real work. But even at this level of generality, one can begin to see how it might come into play with regard to the matters of church autonomy we are about to investigate. When the government gets involved in church affairs, it creates problems with respect to both clauses. A church losing control of its religious matters implicates the Free Exercise Clause. The government gaining control of those religious matters implicates the Establishment Clause. From this crude starting point, we turn to the Court's church autonomy cases, which provide a fuller picture.

2. Church Autonomy in the Context of Church-Property Disputes

There is one church autonomy case that set the stage for all the others—the Supreme Court's 1871 decision in *Watson v. Jones*.[43] *Watson* involved a fight over control of the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. Slavery had split the church into two factions. The anti-slavery side made up a majority

40. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 639 (2002) (upholding a voucher program that included religious schools).

41. *See* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 311 (2002) ("[T]he First Amendment contains only one religion clause, not two, and the text will not admit of an interpretation that tries to assign two different meanings to the word religion, which appears only once." (emphasis omitted)).

42. For another version similar to mine, see Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991) ("We treat the First Amendment as containing a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom.").

43. 80 U.S. (13 Wall.) 679 (1871). For a helpful overview of *Watson*, see Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456–59 (2009).

of the congregation and was supported by the national church (the General Assembly). The pro-slavery side was a distinct minority of the congregation, but it constituted a majority of both the trustees (who held legal title to the property) and the Session (the elders who governed the church). Both sides went to court claiming to be the true church, entitled to the building's full and exclusive use.[44]

In *Watson*, the Supreme Court first articulated the notion of church autonomy. The Court explained that federal courts had to do their best to stay out of internal church controversies, as churches had rights to govern themselves and resolve their own disputes.[45] *Watson* traced this autonomy back to an idea about "implied consent"—when one joins a church, one implicitly consents to the church making its own decisions.[46] People can choose to leave or they can choose to stay. But so long as they choose to stay, they accept the church doing things its own way. Dissenters cannot use the coercive force of the government to force a change in the church's religious views, practices, or governance.[47]

Watson explained that the overarching desire to maximize church autonomy would require courts to adopt different approaches in church schism cases, depending on whether the church was

---

44. The conflict between the two sides had become basically irremediable all the way back in 1865, when the national Presbyterian body (the General Assembly) held that those who had supported slavery could not be members of any Presbyterian church unless they first repented. *See Watson*, 80 U.S. (13 Wall.) at 691; *see also* Lash, *supra* note 43, at 456 & n.35 (providing more background).

45. *Watson*, 80 U.S. (13 Wall.) at 728–29 ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.").

46. *Id.* at 729 ("All who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it." (emphasis added)).

47. In a case that ultimately reached the Supreme Court, a district court put it in these terms almost a century ago:

> He need associate himself with no religious organization if he does not wish to do so, and he need remain identified with one no longer than he may desire; but when he does unite with a church, and becomes a member of that ecclesiastical body, he voluntarily surrenders his individual freedom to that extent. So long as he desires to avail himself of such a relationship, and to enjoy the privileges and benefits flowing from that association, he must conform to the laws by which it is governed.

Barkley v. Hayes, 208 F. 319, 323 (W.D. Mo. 1913), *aff'd sub nom.* Shepard v. Barkley, 247 U.S. 1 (1918); *see also* Laycock, *supra* note 2, at 1403 ("If one is ill-treated by his church, he can leave it; if he feels bound by faith or conscience to stay in, the government can offer him no remedy.").

hierarchical or congregational. For congregational churches, which recognized no church authority higher than the individual congregation, federal courts would generally give the property to the majority faction.[48] But for hierarchical churches—those congregations who accepted the authority of some larger church body—federal courts had to accept the rulings of that larger church body as determinative.[49] Respecting church autonomy, in other words, required courts to respect a congregation's earlier commitment to be bound by a higher church authority.[50]

Watson v. Jones was not initially a constitutional decision—as a diversity case in 1871, it was decided simply by principles of federal common law.[51] But *Watson* explained its holding in terms of constitutional values. It spoke of how its principles were "founded in a broad and sound view of the relations of church and state."[52] In succeeding cases, the Court adhered to *Watson*'s framework for

48. *See Watson*, 80 U.S. (13 Wall.) at 724–25 (explaining that in "the case of a church of a strictly congregational or independent organization . . . where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations" and so "[i]f the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property").

49. *See id.* at 726–27 (explaining that in cases where "the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control . . . whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them").

50. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 614 (1979) (Powell, J., dissenting) (describing the *Watson* rule as requiring that courts "give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose"). In *Watson* itself, this meant that the federal courts could not quarrel with the General Assembly's conclusion that the anti-slavery side represented the true church and therefore was the true owner of the church property. *See Watson*, 80 U.S. (13 Wall.) at 734–35.

51. Today a federal court hearing a diversity case like *Watson v. Jones* would apply state law. But that was not the approach of federal courts until *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938). When *Watson v. Jones* was decided in 1871, federal courts applied the rule of *Swift v. Tyson*, 41 U.S. 1 (1842), whereby they would themselves create the substantive law that would govern the case. *See Swift*, 41 U.S. at 19. The Supreme Court itself later noted that *Watson* was not initially a constitutional decision. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 344 U.S. 94, 110 (1952) ("The [*Watson*] opinion itself, however, did not turn on either the establishment or the prohibition of the free exercise of religion.").

52. *See Watson*, 80 U.S. (13 Wall.) at 727; *see also Kedroff*, 344 U.S. at 116 ("The [*Watson*] opinion radiates, however, a spirit of freedom for religious organizations [which ultimately must be considered] part of the free exercise of religion . . . .").

resolving church-property disputes.[53] And eventually *Watson*'s principles became constitutional ones. This happened in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of North America*,[54] where the Court held that a New York statute allowing local congregations to split from the Russian Orthodox Church and keep their property violated the First Amendment.[55] Churches now had a *constitutional* right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[56] Since *Kedroff*, the Court has not doubted that church autonomy is a right of constitutional dimension,[57] although the Court has tinkered with what that right means in various different contexts.[58]

---

53. The Supreme Court maintained the distinction it had created between congregational and hierarchical churches. *See* Shepard v. Barkley, 247 U.S. 1, 2 (1918) (applying *Watson*'s principles regarding hierarchical churches to give disputed church property to the national Presbyterian church over the claims of a local Presbyterian congregation); Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 140 (1872) (applying *Watson*'s principles regarding congregational churches to give disputed church property to a faction representing the majority of the congregation).

54. 344 U.S. 94 (1952).

55. *Id.* at 116 (explaining how *Watson*'s principles "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference"). *Kedroff*'s holding was extended in a follow-up case involving the same parties still fighting over the same property. *See* Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 363 U.S. 190, 191 (1960). *Kedroff* had held that New York could not transfer power from the international Russian Orthodox Church to local churches by state statute; *Kreshik* held that New York could not transfer that power through courts utilizing common-law principles either. *See Kreshik*, 363 U.S. at 191 (explaining that "whether [the exercised power is] legislative or judicial, it is still the application of state power" and so "our ruling in *Kedroff* is controlling" (internal quotation marks omitted)).

56. *Kedroff*, 344 U.S. at 116.

57. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 617 n.4 (1979) ("[B]eginning with [*Kedroff*], this Court has indicated repeatedly that the principles of general federal law announced in *Watson v. Jones* are now regarded as rooted in the First Amendment, and are applicable to the States through the Fourteenth Amendment."); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.").

58. *See Mary Elizabeth Blue Hull*, 393 U.S. at 440 (reversing the decision of a state court to award church property to the church faction that the court believed was acting most consistently with church doctrine); *Wolf*, 443 U.S. at 602 (permitting states to "adopt *any* one of various approaches for settling church property disputes" that is consistent with principles of church autonomy, including an approach based on neutral principles of law (quoting Md. & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring))).

Looking at these church-property cases collectively, people sometimes refer to them as establishing a sort of "hands-off" principle,[59] which suggests that courts simply must never intervene in church disputes.[60] This is generally right, but can be a bit misleading—for sometimes church autonomy may actually *require* courts to intervene in internal church disputes. Just consider the facts of an old case, *Bouldin v. Alexander*.[61] There, a small minority of a congregational church tried to seize control by locking everyone else out of the church building and electing new trustees who would then "own" the property.[62] The Supreme Court rightly declared the election invalid, restored the original trustees, and gave the church property back to the majority.[63] From the hands-off standpoint, this can appear as an illicit judicial intervention into church affairs—after all, the Supreme Court just decided an internal church dispute and issued a judicial order undoing a church election. Indeed, some people have seen *Bouldin* precisely this way.[64] But the judicial intervention in *Bouldin* was not inconsistent with proper principles of church autonomy—it was, in fact, *demanded* by those same principles. Like other property rights, rights to church property must be resolved by the state. Otherwise, we would quickly fall into a Hobbesian-like

59. *See, e.g.*, Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 845 (2009) (referring to the "cluster of [church autonomy] cases that seem to illustrate and confirm the hands-off rule"); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1847 (1998) (describing *Watson v. Jones* as "the origin of a 'hands-off' approach").

60. *See, e.g.*, Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discrimination*, 21 HASTINGS CONST. L.Q. 275, 299–300 (1994) ("[T]he Court's early church property decisions indicate[d] that courts should not attempt to resolve 'internal' church disputes."); William Johnson Everett, *Ecclesial Freedom and Federal Order: Reflections on the* Pacific Homes *Case*, 12 J.L. & RELIGION 371, 382 (1995–1996) ("A long series of legal precedents ha[s] confirmed that civil courts cannot interfere in internal church disputes . . . .").

61. 82 U.S. (15 Wall.) 131 (1872).

62. *Id.* at 137–39. Mark Strasser discusses *Bouldin* at length in one recent article. *See* Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 HAMLINE L. REV. 427, 446–48 (2009).

63. *See Bouldin*, 82 U.S. (15 Wall.) at 140 (holding that the original trustees "cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules").

64. *See* Strasser, *supra* note 62, at 448 ("Arguably, *Bouldin* stands for the proposition that although the Court must be deferential in church political matters, that deference is not absolute.").

state of nature, where any faction could commandeer church property so long as it could quickly lock everyone else out of the building.[65]

Church autonomy is thus a principle of deference, not abstention. And as *Bouldin* illustrates, sometimes multiple factions will each claim to be the true church, and courts will have to decide which party is "the church" for purposes of deference.[66] *Watson v. Jones* required courts to defer to the will of the congregation for congregational churches, and to the will of the hierarchy for hierarchical churches.[67] *Jones v. Wolf* allowed courts to alternatively defer to the will of the church as expressed in the secular meanings of its legal documents.[68] The two cases floated different ideas of how to best discern the will of the church. But both required courts to defer to that will when clearly expressed.

3. Church Autonomy in the Context of Church-Clergy Disputes

Most of the Court's church autonomy cases have been over church property. But church-property disputes have occasionally involved interrelated fights over church personnel. Two Supreme Court cases are central here and will be important for our study of the ministerial exception.

The first is a 1929 case: *Gonzalez v. Roman Catholic Archbishop*.[69] A fourteen-year-old boy, Raul Gonzalez, claimed the right to a Catholic chaplaincy in the Philippines over the objections of the Archbishop of Manila. His claim was not as frivolous as it sounds. A century earlier, a relative of Gonzalez had founded an endowed chaplaincy in her will. She had specified that the chaplaincy should be filled, if possible, by her descendants. Most recently, the post had

65. *See* Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 726 (1976) (Rehnquist, J., dissenting) (noting that if "civil courts [were] wholly divested of authority to resolve conflicting claims to real property," then "such claims [would] be resolved by brute force").

66. *See id.* at 725 (White, J., concurring) (noting that for the principles of *Watson v. Jones* to work, courts at least will have to decide whether the church is hierarchical or congregational).

67. *See supra* notes 43–50 and accompanying text.

68. *See* Jones v. Wolf, 443 U.S. 595, 603–04 (1979) ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.").

69. 280 U.S. 1 (1929).

been filled by Gonzalez's father.[70] Yet the Archbishop refused to let Raul take over the chaplaincy, pointing to 1917 Catholic requirements that chaplains be priests and have attended seminary (requirements that Raul obviously did not satisfy).[71] Raul pointed out that no such requirements existed a century ago when the chaplaincy was established, but the Supreme Court still unanimously ruled in favor of the Archbishop, stressing that the Catholic Church had the right to say who was or was not a Catholic chaplain:

> [I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. 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.[72]

The second case is the 1976 case of *Serbian Eastern Orthodox Diocese v. Milivojevich*,[73] which involved a schism in the Serbian Eastern Orthodox Church. Milivojevich had been the presiding bishop for the Church in America when the Mother Church (based in Yugoslavia) removed him and appointed someone else. But Milivojevich declared his removal invalid and filed suit to stop it.[74] With legal title for all the church property in North America resting on its resolution, the issue became who truly was the Bishop of the Serbian Eastern Orthodox Church in America.[75] An Illinois appellate court had ordered a trial court hearing on the question.[76] But the Supreme Court held this to be error. Because this was a hierarchical church, secular courts had to accept the decision of the international Serbian Eastern Orthodox Church back in Yugoslavia. The same principle for hierarchical churches established in *Watson v. Jones* for

70. *Id.* at 12.

71. *Id.* at 13–14.

72. *Id.* at 16. The Court resolved the case by implying a condition in the will, which would allow the Catholic Church to change the requirements for being a chaplain as it wished. *Id.* at 16–17.

73. 426 U.S. 696 (1976).

74. *Id.* at 705–07 (describing these facts).

75. Then-Justice Rehnquist humorously framed the question presented in the case as asking "if the real Bishop of the American-Canadian Diocese would please stand up." *Id.* at 726 (Rehnquist, J., dissenting).

76. *See* Serbian E. Orthodox Diocese v. Ocokoljich, 219 N.E.2d 343, 353 (Ill. App. Ct. 1966).

church-property cases, the Court explained, "applies with equal force to church disputes over church polity and church administration."[77]

Kedroff, *Gonzalez*, and *Milivojevich* together form the backbone for any defense of the ministerial exception. Through a property case, *Kedroff* spoke specifically of a church's right to choose its clergy.[78] And *Gonzalez* and *Milivojevich* held that this right trumped even neutral and generally applicable laws. *Gonzalez* held that the Catholic Church had a right to choose its chaplains, regardless of the law of trusts.[79] *Milivojevich* held that the Serbian Eastern Orthodox Church had the right to choose its bishops, regardless of the laws of contract, property, and agency.[80] Together these cases suggest the possibility that, to the extent employment laws similarly undermine the rights of churches to select their leaders, they too might be similarly held unconstitutional.

4. Church Autonomy Meets Employment Law: The Case of *Catholic Bishop*

As we have seen, the Supreme Court's church autonomy cases have arisen in contexts somewhat apart from employment law. *Gonzalez* and *Milivojevich* are certainly closest. Yet there is one Supreme Court case that does involve the intersection between church autonomy and employment law: *NLRB v. Catholic Bishop of Chicago*.[81]

The controversy in *Catholic Bishop* arose after the National Labor Relations Board asserted jurisdiction over Catholic parochial schools in Chicago and South Bend. The Board ordered union elections and then deemed it an unfair labor practice when the

77. *Milivojevich*, 426 U.S. at 710. The Court added later that "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern" and thus had to be "made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested." *Id.* at 717–18.

78. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107–08 (1952) ("Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion.").

79. *See* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929).

80. In his dissent in *Milivojevich*, Justice Rehnquist stressed that all the lower courts had done was to apply generally applicable principles. *See Milivojevich*, 426 U.S. at 726 (Rehnquist, J., dissenting) (noting that the state courts decided the case "just as they would have attempted to decide a similar dispute among the members of any other voluntary association").

81. 440 U.S. 490 (1979).

Catholic Church refused to bargain with the elected unions.[82] The question became whether the church had a constitutional right to an exemption from the National Labor Relations Act ("NLRA"). The Seventh Circuit concluded that it did, holding that the NLRA unconstitutionally undermined the church's control over its schools and teachers.[83] On appeal, the Supreme Court held that there were indeed "serious constitutional questions"[84] with the Act applying to Catholic schools, as it imposed deeply on "the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion."[85] But the Court did not resolve the constitutional issue, instead interpreting the National Labor Relations Act not to apply to church schools. In its short nine-page opinion, the Court relied heavily on the fact that there was no evidence that Congress consciously intended the NLRA to apply to religious schools.[86] By applying the canon of constitutional avoidance to dodge the issue, the Supreme Court made *Catholic Bishop* into a mysterious anomaly. No one knows whether, if push came to shove, the government could force collective bargaining on Catholic schools.[87] All we have are nine Justices cryptically agreeing that the case presents "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[88]

II. CHURCH AUTONOMY AND EMPLOYMENT LAW TOGETHER: AN INTRODUCTION TO THE MINISTERIAL EXCEPTION

After the passage of the Civil Rights Act of 1964, courts began to develop the constitutional doctrine we now call the ministerial

82. These facts are laid out most clearly in *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1113–15 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979).

83. *Id.* at 1123 ("The Board's order to bargain unquestionably, in our opinion, inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern.").

84. *Catholic Bishop*, 440 U.S. at 501.

85. *Id.* at 496.

86. *Id.* at 504 ("Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools.").

87. Since *Catholic Bishop*, many courts have considered the issue with regard to state labor laws and concluded that the government can do so. *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1658 & n.156 (2004) (noting how many courts "have gone even further and upheld the application of state labor laws to lay teachers at church-operated schools" and providing citations).

88. *Catholic Bishop*, 440 U.S. at 507; *see also id.* at 518 (Brennan, J., dissenting) (agreeing that the constitutional questions were difficult, although concluding that the Court should resolve them).

exception. Perhaps the most important early case involved Billie McClure, an ordained minister in the Salvation Army who worked for the church in a number of capacities.[89] She claimed she was fired by the church for complaining that she got paid less than men in similar positions.[90] Noting that Title VII did not by its own terms exempt religious organizations from claims of gender discrimination or retaliation, the Court concluded that the First Amendment required such an exception. The Court explained its reasoning in a passage well cited by courts and commentators:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.[91]

Over the next thirty years, courts all over the country adopted this basic conception of the ministerial exception—churches had a constitutional right to hire and fire the people performing significant religious duties for them, the employment discrimination laws notwithstanding. As it stands now, every federal circuit has adopted some form of the ministerial exception, with the exception of the Federal Circuit (which has no jurisdiction over such cases).[92] Many state courts too have recognized the ministerial exception.[93] The early cases were about race and sex discrimination.[94] But courts have now

---

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

90. *Id.* For more on the facts of *McClure*, see Brant, *supra* note 60, at 291–93.

91. *McClure*, 460 F.2d at 558–59.

92. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 227 (6th Cir. 2007); Petruska v. Gannon Univ., 462 F.3d 294, 307–08 (3d Cir. 2006); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 800 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362–63 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989).

93. *See, e.g.*, Gunn v. Mariners Church, Inc., 84 Cal. Rptr. 3d 1, 6–8 (Ct. App. 2008); Rweyemamu v. Comm'n on Human Rights & Opportunities, 911 A.2d 319, 331 (Conn. App. Ct. 2006); Pardue v. Ctr. City Consortium Sch. of Archdiocese of Wash., Inc., 875 A.2d 669, 675 (D.C. 2005); Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 892 (Wis. 2009).

94. *See generally* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (sex and race discrimination); EEOC v. Miss. Coll., 626 F.2d 477 (5th

used the ministerial exception to bar claims under the ADEA,[95] the ADA,[96] and a host of state statutes.[97]

As the ministerial exception has developed doctrinally, it has become increasingly controversial. The first area of controversy is simply whether the ministerial exception should exist at all. The Supreme Court has never heard a ministerial exception case and thus never really confirmed its existence. Many now argue that the ministerial exception should simply be abandoned.[98]

A second area of controversy is over the scope of the ministerial exception. Assuming it exists, what does the ministerial exception protect? There are several difficult and interrelated questions here. First, there is the issue of which types of positions the ministerial exception properly covers. It surely would include ordained ministers working in parishes. But churches employ innumerable people in innumerable types of positions—from janitors to organists, from school teachers to assistants to the bishop.[99] Which of these positions should be considered ministerial? Moreover, when can churches invoke the ministerial exception? Do they have to have some religious objection to the anti-discrimination law in question?[100] And does the ministerial exception still apply if the plaintiff is not seeking reinstatement? One example might be when the plaintiff has been fired and only seeks damages; another might be when the plaintiff

---

Cir. 1980) (sex and race discrimination). For a very early and provocative race case, see generally *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974), which involved a race discrimination suit brought in rural Mississippi by a white Methodist pastor who claimed he was fired because his wife was black and because he preached racial equality in the pulpit.

95. *See, e.g.*, *Tomic*, 442 F.3d at 1041; *Scharon*, 929 F.2d at 362–63; Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1356 (D.C. Cir. 1990).

96. *See, e.g.*, *Hollins*, 474 F.3d at 227; Werft v. Desert Sw. Annual Conference of United Methodist Church, 377 F.3d 1099, 1104 (9th Cir. 2004); Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999).

97. *See* Van Osdol v. Vogt, 908 P.2d 1122, 1134 (Colo. 1996) (Colorado state law claims); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820, 827 (Mass. 2002) (Massachusetts state law claims); Weishuhn v. Catholic Diocese of Lansing, 787 N.W.2d 513, 519 (Mich. Ct. App. 2010) (Michigan state law claims); *Coulee*, 768 N.W.2d at 887 (Wisconsin state law claims).

98. *See supra* note 6 (providing citations to these sources).

99. Many courts have applied the ministerial exception beyond the paradigmatic parish priest. *See generally Tomic*, 442 F.3d 1036 (a church organist); Shaliehsabou v. Hebrew Home of Greater Wash. Inc., 363 F.3d 299 (4th Cir. 2004) (a Kosher supervisor); *Starkman*, 198 F.3d 173 (a church choir director); *Scharon*, 929 F.2d 360 (a chaplain of church-affiliated hospital); Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., Inc., 875 A.2d 669 (D.C. 2005) (a principal of Catholic school).

100. *See supra* note 4 (discussing this controversy and providing citations).

complains of an ongoing hostile work environment but continues to work for the church.[101]

Finally, a third area of controversy, obviously related to the first two, is over the justifications for the ministerial exception. What explains the ministerial exception? Why should churches have the right to fire people in ways that would be illegal for everyone else? Courts adopted the ministerial exception almost immediately after Title VII came into existence, believing that it worked some greater good. But what modern purposes does this exception serve?

Most ministerial exception articles begin with the doctrinal questions, exploring the various issues that divide courts and offering targeted resolutions to particular problems. But one thesis of this Article is that this may be the wrong way to approach the ministerial exception. Courts have been answering various doctrinal questions without a conceptual understanding of what the ministerial exception aims to do. By working backwards—first breaking apart the ministerial exception and seeing it for what it is—we can eventually get a better handle on the doctrinal issues that divide courts.

III. THE RELATIONAL COMPONENT

We start with the first of the three parts of the ministerial exception—what we shall call the relational component. Though it may be the most essential to religious freedom, this part of the ministerial exception usually goes unnoticed. Like the larger part of the iceberg which lies unseen below the surface of the water, this right is rarely discussed and almost never litigated. The relational component—which also could be called the associational component—involves the right of religious organizations to discriminate in hiring on the basis of religion (not on the basis of any other characteristic). Although the relational component will overlap significantly with the other parts of the ministerial exception, it is unique in very important respects. So it is essential for conceptual clarity that we locate this right, explain its importance, and properly define its scope.

We begin with a fact that might strike readers as all too obvious. Organizations founded on shared religious principles cannot really exist unless they actually share religious principles. Nothing, therefore, is more at the heart of a religious organization's freedom

101. *See supra* note 5 (discussing this controversy and providing citations).

than the right to choose its staff on a religious basis. Without that right, religious organizations would lose their distinctive character almost immediately. Having to hire Protestants, the Catholic Church could not stay distinctively Catholic; having to hire Christians, Orthodox Judaism could not stay distinctively Jewish (let alone Orthodox). Churches are corporate entities. But, in an important sense, corporate entities are just fictions. To the extent corporate personalities exist, they flow largely from the personalities of the people who make them up. But if we call a church Baptist because it is made up of Baptists, what it means is that a church's right to religiously discriminate in membership and staff is nothing less than its bare right to exist. This is true for all types of organizations, of course, not just religious ones. A group of people selected at random, without any regard to their views about the environment, would make a terrible environmental advocacy organization. Were that legally required of the Sierra Club, it could never accomplish anything.

Applying the religious-discrimination laws to religious groups therefore seems like a categorical mistake. Religious organizations *are* religious discrimination: A Catholic parish only stays Catholic because of numerous, ongoing acts of intentional discrimination on everyone's part. Protestants generally choose not to attend there; Catholics prefer it that way. Protestant ministers generally do not apply to work there; the Catholic hierarchy would reject their applications if they did. And this is true everywhere. Congregants, ministers, congregations, and denominations only find each other through a process of religious sorting that is legally indistinguishable from religious discrimination.

Outside of a few atypical contexts, controversies over the right of religious organizations to discriminate on the basis of religion have not really developed.[102] We might expect such disputes to arise from

102. The issue arises most frequently in the context of government subsidies—that is, when government subsidizes religious organizations that discriminate on the basis of religion, it can seem like the government itself is discriminating on the basis of religion. This can become quite controversial, although it may be more about the line between state and private action and less about the appropriateness of religious organizations engaging in religious discrimination. In 2010, though the Court itself did not get to this exact issue, several Justices offered differing opinions on whether religious groups could be denied access to government property because they discriminate on the basis of religion. *Compare* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2996 (2010) (Stevens, J., concurring) (arguing that religious groups can legitimately be denied access to government property), *with id.* at 3010–11 (Alito, J., dissenting) (arguing that they cannot). For a thoughtful take on this issue, see John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 154 & n.14, 155, 206 (2010).

Title VII, given that Title VII forbids religious discrimination in employment. We might expect to see cases delineating the constitutional protections that religious organizations have from claims of religious discrimination—cases that we could use to flesh out the meaning of the relational component. But those cases do not arise for a very simple reason, which is that Title VII flatly exempts religious organizations from that prohibition:

> 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.[103]

The Supreme Court unanimously approved the constitutionality of this exemption in *Corp. of the Presiding Bishop v. Amos*,[104] a case we will return to later. But this explains why the constitutional rights of religious organizations to religiously discriminate are not litigated. They do not come up because they are not threatened.

Yet this is changing. It is changing principally because of state and local anti-discrimination laws.[105] In some ways, state and local anti-discrimination laws are now significantly more powerful than federal laws like Title VII. Title VII caps damages at certain amounts,[106] but state and local laws often do not.[107] Title VII does not

---

103. 42 U.S.C. § 2000e-1(a) (2006). There is another religious exception in Title VII specifically for church-owned schools. *See* 42 U.S.C. § 2000e-2(e)(2) (2006). There is also an allowance for religious discrimination (even for nonreligious employers) when it constitutes a "bona fide occupational qualification." 42 U.S.C. § 2000e-2(e)(1) (2006); *see also supra* notes 25–29 and accompanying text (discussing the BFOQ provision).

104. 483 U.S. 327 (1987).

105. *See* Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 476 (2006) ("Although numerous states had employment discrimination statutes on the books prior to the enactment of the Civil Rights Act of 1964, Congress's decision to outlaw discrimination in the workplace prompted more states to enact similar statutes and to expand upon the protection afforded under existing state statutes.").

106. *See* 42 U.S.C. § 1981a(b)(3) (2006) (capping Title VII damages from $50,000 to $300,000, depending on the size of the employer).

107. *See* Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 156 (2009) (noting, with citations, how "many states provide *uncapped* compensatory and punitive damages for intentional employment discrimination (or they provide caps higher than those in the federal law)"); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL

apply to employers with less than fifteen employees,[108] but state and local laws often do.[109] The almost universal view is that Title VII does not impose personal liability (that is, liability on discriminators as individuals rather than on the corporations that employ them),[110] but state and local laws frequently do.[111] Giving more in damages and imposing liability more often, state and local anti-discrimination laws may represent the future of employment discrimination litigation.[112]

Title VII exempts religious employers from claims of religious discrimination under Title VII. But it does not protect religious employers from state and local laws.[113] And state and local laws often treat religious organizations like any other corporation. Connecticut, Michigan, Nebraska, North Carolina, North Dakota, and Ohio all forbid religious discrimination in employment across the board

---

LEGAL STUD. 1, 4–5 (2006) (discussing how, in practice, Title VII damage caps have become irrelevant in sexual harassment cases because of state law causes of action).

108. *See* Hirsch, *supra* note 30, at 1066 (noting that Title VII and the ADA apply only to employers with fifteen or more full-time employees while the ADEA applies only to those with twenty or more).

109. *See* Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the* McDonnell Douglas *Monolith*, 44 HOUS. L. REV. 349, 355 n.20 (2007) (providing citations to many state employment discrimination laws and noting that, with one exception, they either have a smaller numerical threshold than Title VII or no numerical threshold at all).

110. *See* Fantini v. Salem State Coll., 557 F.3d 22, 30–31 (1st Cir. 2009) (concluding so and providing voluminous citations). *But see* Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 768 & n.4 (1997) (pointing out the few isolated cases which have imposed liability on individual supervisors).

111. *See* Jill Jensen-Welch, *Suing the Bastard Boss: Personal Liability of Supervisors for Workplace Sexual Harassment*, 69 DEF. COUNS. J. 466, 472–81 (2002) (chronicling the employment discrimination laws of all fifty states and examining which provide for individual liability on the part of supervisors and concluding that the states are relatively split and that "no majority rule emerges from an analysis of state laws and supervisor liability for employment discrimination").

112. *See generally* Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-*Crawford/Burlington Northern *World*, 77 TENN. L. REV. 253 (2010) (arguing for more use of state law to combat discrimination); Sperino, *supra* note 109 (same).

113. Title VII does not preempt state law in this sense. *See* 42 U.S.C. § 2000e-7 (2006) ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 (1983) ("[T]itle VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII . . . .").

without any special exemption for religious organizations.[114] At least some city and county ordinances (which are far harder to track) do the same.[115] Under the laws as written in all of these jurisdictions, religious groups cannot hire (or even prefer) members of their own faith. Catholic schools must give equal consideration to atheistic teachers, and Jewish temples must give equal consideration to Presbyterian cantors. Indeed, the way these laws are written, they do technically forbid Baptist churches from requiring that their ministers be Baptist.[116] There is, unsurprisingly, widespread noncompliance with these laws. But that just means that religious organizations in these places are operating outside the law and can be shut down at will.[117]

Some now argue that the ministerial exception simply should not exist.[118] These laws offer the best practical proof of why some constitutional protection here is necessary. Otherwise, churches will exist only at the sufferance of government—any hostile government could choose to destroy them by simply passing a generally applicable religious discrimination law and then making no exception for religious groups. Under any system committed to religious liberty to any degree, this sort of relational component must exist.

---

114. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-60(a) (West 2009); MICH. COMP. LAWS ANN. § 37.2102(1) (West 2001); NEB. REV. STAT. § 48-1104 (2010); N.C. GEN. STAT. § 143-422.2 (2009); N.D. CENT. CODE § 14-02.4-03 (2010); OHIO REV. CODE ANN. § 4112.02 (LexisNexis Supp. 2011). A helpful table of state employment discrimination laws as they apply to religious organizations can be found in 1 WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 9:37 (2011).

115. *See generally* Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111 (Md. 2001) (involving a case brought against a Christian school for religious discrimination under the Montgomery County Code).

116. So far, the most flagrant conflicts have not developed. Catholic priests have not sued Baptist churches, most likely because Catholic priests do not want to be Baptist ministers. And it probably never even occurs to them that they might have a legal right to force themselves on unwilling Baptist congregations. But there already have been some cases where religious organizations have been sued under state and local religious-discrimination laws by people of other religions. *See infra* notes 122–28 and accompanying text.

117. To be sure, some of the state laws discussed above have BFOQ provisions that religious organizations might use to defend their right to use religion as a criterion in hiring. But, as we said, BFOQs are interpreted narrowly. *See supra* notes 25–29 and accompanying text. And at least some states do not have BFOQs either. *See, e.g.*, N.C. GEN. STAT. § 143-422.2 (2009) (forbidding religious discrimination across the board with no exception for religious organizations and no BFOQs).

118. *See infra* Part VI (explaining this objection).

And indeed, the Court has hinted at the constitutional nature of the relational component, although in a muted and uncertain way. Twenty-five years ago, the Supreme Court decided *Corp. of the Presiding Bishop v. Amos*.[119] The lead plaintiff in *Amos* was a janitor at a Mormon gymnasium who had been fired by the Church of Jesus Christ of Latter-day Saints ("Mormon Church") for failing to qualify for a temple recommend—essentially for failing to be a good Mormon in the eyes of the Mormon Church. He sued the Church for religious discrimination under Title VII. While Title VII exempts religious organizations from the prohibition on religious discrimination, the plaintiff claimed that the exemption itself violated the Establishment Clause.

These days *Amos* is known for its unanimous rejection of the Establishment Clause claim. But, for our purposes, what is more important is how *Amos* assumed that the First Amendment would actually *require* some sort of exemption for religious organizations—*Amos* recognized, in other words, the constitutional dimensions of the relational component. *Amos* left the details profoundly unclear. *Amos* seemed to suggest that religious organizations would have constitutional rights to use religion as a criterion in hiring with regard to at least some employees (those with religious work duties). But this is all admittedly guesswork; *Amos* certainly did not resolve the point.[120]

In deciding on the breadth of the relational component, the key is that it should be broader than the other parts of the ministerial exception. The ministerial exception currently works like this: Churches are completely immune from all claims of discrimination regarding "ministers" (however defined), but they have no immunity

119. 483 U.S. 327 (1987).

120. To fully understand *Amos*'s logic, some chronology becomes important. As it was originally passed in 1964, Title VII only exempted religious groups from claims of religious discrimination brought by employees who did work connected to the group's religious activities. *See* Pub. L. No. 88-352, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (2006)). In 1972, Congress expanded the exemption, immunizing religious organizations from all claims of religious discrimination, regardless of the plaintiff's job duties. *See* Pub. L. No. 92-261, 86 Stat. 103, 104 (codified as amended at 42 U.S.C. § 2000e-1 (2006)). In *Amos*, the Court seemed to assume that the Free Exercise Clause at least required the exemption as it was originally enacted in 1964. *See Amos*, 483 U.S. at 336 ("We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more."). The Court refused to say whether the broader exemption established in 1972 was constitutionally required. *See id.* at 339 n.17 ("We have no occasion to pass on the argument ... that the exemption to which they are entitled under § 702 is required by the Free Exercise Clause.").

from claims brought by non-ministers (however defined).[121] The church's right to discriminate on the basis of religion is thus coextensive with its right to discriminate on the basis of things like age, sex, and disability. But this makes little sense. Any lay person would think it obvious that religious organizations should have a broader ability to discriminate on the basis of religion than on the basis of other criteria—churches should be able to use religion as a criteria in hiring for particular positions where they would not be able to use, say, race.

We see the harmful consequences of this sort of thinking in cases like *Porth v. Roman Catholic Diocese of Kalamazoo*.[122] Porth was working as an elementary school teacher at a Catholic school when the school changed its policy regarding non-Catholic teachers. Wanting to strengthen its Catholic identity, it chose to re-hire only the Catholic teachers. Porth brought suit claiming illegal religious discrimination under Michigan law, which bars religious discrimination without making any exemption for religious organizations.[123] The court assumed that the ministerial exception would not apply.[124] But in making that assumption, the court relied solely on cases of sex and race discrimination.[125] The court's implicit logic was that a Catholic school should only have the right to use religion as a criterion in positions where it could also use race and sex as criteria. Cases like *Porth* are precisely why we should recognize the relational component as distinct from the other parts of the ministerial exception.[126]

Though we cannot expect agreement on the precise reach of the relational component, this Article argues that it should be given quite broad scope. Religious organizations should have control over their religious identity. *Porth* should be an easy case. A case like *Montrose Christian School v. Walsh*[127] should be similarly easy. In *Walsh*, the

121. This conceptual dichotomy runs through all ministerial exception cases. For some prominent ones, see *supra* notes 92–97 (providing citations to various types of ministerial exception cases).

122. 532 N.W.2d 195 (Mich. Ct. App. 1995).

123. *See* MICH. COMP. LAWS ANN. § 37.2102(1) (West 2001).

124. *See Porth*, 532 N.W.2d at 197 n.1.

125. *See id.* at 195–96, 197 & n.1, 198, 199 & n.2, 200.

126. Ultimately, *Porth* was won under the Religious Freedom Restoration Act ("RFRA"). *See id.* at 197. Given that RFRA was invalidated with respect to state law by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), if a religious organization were to win cases like *Porth* today, it would have to be under the ministerial exception.

127. 770 A.2d 111 (Md. 2001).

Montrose Baptist Church ran a Baptist school. When a new pastor came on board, he wanted to employ only members of the congregation as teachers (or, if that was impossible, only Baptists). Several non-Baptists brought suit under the Montgomery County Code, the applicable county law.[128]

Churches should win these sorts of cases. Many churches have religious schools. Sometimes those schools become less religious over time. But that freedom has to go both ways—religious schools should also have the right to become more religious if they so choose. And, of course, these two cases are just the tip of the iceberg. If religious groups were truly bound by the prohibition on religious discrimination, they would have to hire people utterly inconsistent with their mission and utterly opposed to their values. Such a prohibition makes sense for nonreligious employers. Wal-Mart should treat atheists like Catholics; Wal-Mart should treat atheists who impugn Catholicism the same way it treats Catholics who impugn atheism. But it makes little sense for the law to require that of the Catholic Church. The Catholic Church should not have to hire people who openly reject Catholicism as patriarchal and oppressive. It should not even have to hire people lukewarm about Catholicism. Moreover, even when churches hire outsiders, they often would prefer their own members to run their institutions. Catholic schools, for example, give preferences to hiring Catholic priests and Catholic nuns.[129] That would be impossible in a system of religion-blind hiring.

In finishing with the relational component, it is important to stress how it differs from the other parts of the ministerial exception. While it certainly overlaps with the autonomy component and the conscience component, the overlap is imprecise; the relational component clearly covers things that the other two do not. First off, we have already seen how the relational component differs from the autonomy component. The autonomy component, as we shall discuss later, should bar all claims brought by people in high-ranking positions (i.e., ministers). The relational component gives churches greater ability to fire people based on religion. Prevailing doctrine ignores the relational component completely, subsuming it within the

128. *Id.* at 117–18.

129. The Supreme Court has recognized such preferences as ordinary and perfectly appropriate. *See* Lemon v. Kurtzman, 403 U.S. 602, 615–16 (1971) (noting that "the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers").

autonomy component. But this is problematic. Indeed, *Amos* provides a great final example of how the two differ. The Court in *Amos* stressed how the janitor plaintiff had absolutely no religious duties—he was not a minister under any conception of the term.[130] Had he been bringing a race discrimination suit, his claim could have proceeded. But because he was bringing a religious discrimination suit, his claim was barred. The facts of *Amos* thus nicely illustrate how the relational component should apply even in situations where the autonomy component does not.

Moreover, the relational component also differs from the conscience component. The relational component immunizes churches from claims of religious discrimination even when the church does not make any claim of conscience. Again *Amos* itself is such a case. The Supreme Court took special pains to point out that "no contention was made that the religious doctrines of the Mormon Church . . . require religious discrimination in employment."[131] *Porth* and *Walsh* too are such cases. The Catholic school in *Porth* wanted its teachers to be Catholic, but it did not believe itself religiously forbidden from ever hiring Protestants. At bottom, the relational component may overlap deeply with the other components, but it protects something somewhat unique and distinct.

IV. THE CONSCIENCE COMPONENT

We now turn to the conscience component, which is probably the most conspicuous part of the ministerial exception. As soon as one hears that Title VII forbids sex discrimination but makes no exception for churches, one instinctively thinks of the Catholic Church's commitment to having a male-only priesthood. In this section, we explore the conscience component, a small but vital part of the thing we call the ministerial exception.

We start with a preliminary note. If we conceive of the ministerial exception as being entirely about claims of religious conscience, it will be quite narrow indeed. Most employment discrimination laws create no problems of conscience. Few churches have ever been religiously committed to age or disability

130. Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos, 483 U.S. 327, 332 (1987) ("None of [the plaintiff's] duties at the Gymnasium are 'even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration.' " (quoting Amos v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints, 594 F. Supp. 791, 802 (D. Utah 1984))).

131. *Id.* at 332 n.7 (citation omitted).

discrimination. Nowadays churches take firm stances opposing such things.[132] One early ministerial exception case involved a conscience claim relating to race—a rural Mississippi church fired its white pastor for violating church doctrine by being married to a black woman.[133] But such cases now thankfully seem like relics from another century, if not another planet. And if the race issue ever arises again, it may well be on the other side of the aisle: Historically black churches have had an important role in this country's moral and political development, but the very label suggests lawsuits.[134]

The largest conscience problem, of course, arises over issues of sex and gender.[135] Many religious institutions do not ordain women, including Orthodox Judaism; the Greek Orthodox Church; the Catholic Church; some Islamic denominations; and some Lutheran, Baptist, and Presbyterian denominations. The specifics vary, but they all see clerical positions as intended by God to be filled by men alone. Consider the Catholic Church's position:

> Priestly ordination, which hands on the office entrusted by Christ to his Apostles of teaching, sanctifying and governing the faithful, has in the Catholic Church from the beginning always been reserved to men alone.... These reasons include: the example recorded in the Sacred Scriptures of Christ choosing his Apostles only from among men; the constant practice of the Church, which has imitated Christ in choosing only men; and

---

132. *See, e.g.*, UNITED METHODIST CHURCH, THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 430 (L. Fitzgerald Reist et al. eds., 2008) ("[A]ppointments are made without regard to race, ethnic origin, gender, color, disability, marital status or age, except for the provisions of mandatory retirement.").

133. The pastor brought a race discrimination suit under Title VII, arguing that he was fired both because of his interracial marriage and because he preached race equality from the pulpit. The Fifth Circuit dismissed the claim pursuant to the ministerial exception. *See* Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974).

134. This point will also be addressed later, when this Article discusses the potential for large-scale class action lawsuits to be brought against churches. *See infra* Part V.B.

135. Sexual orientation will be a future issue here. Although no federal law currently prohibits sexual orientation discrimination, Congress will likely pass an employment discrimination law protecting gays and lesbians. The introduced bills thus far have completely exempted religious organizations. *See, e.g.*, Employment Non-Discrimination Act of 2009 ("ENDA"), H.R. 3017, 111th Cong. § 6 (1st Sess. 2009); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 304 n.135 (2010) (discussing the ramifications of the proposed bill).

The sexual orientation issue has already arisen with state and local laws that bar sexual orientation discrimination without exempting churches. *See, e.g.*, Thorson v. Billy Graham Evangelistic Ass'n, 687 N.W.2d 652, 658 (Minn. Ct. App. 2004) (holding a religious organization statutorily exempt from claims filed under a Minnesota statute forbidding discrimination against gays and lesbians in employment).

> her living teaching authority which has consistently held that the exclusion of women from the priesthood is in accordance with God's plan for his Church.[136]

The conscience component recognizes that Catholics should be allowed to follow God's will as they perceive it, regardless of whether they perceive that will rightly, regardless of whether that will exists, and regardless of whether such a thing as God even exists. In recent years, some have suggested that perhaps the law should not accommodate illiberal religions like this[137]—perhaps the government should simply break the patriarchy of the Catholic Church, forcing it either to ordain women or disappear. But such views do not yet seem widespread.[138]

Much time could be spent discussing the nature of the conscience component, exhaustively discussing the reasons why churches should have the right to follow their own beliefs. But this ground has been covered innumerable times. Over the past forty years, the Supreme Court has heard a host of cases involving conflicts between religious conscience and government policy—Christians who object to paying social security taxes,[139] Muslims who insist on attending Friday services,[140] and Orthodox Jews who want to wear yarmulkes.[141] The entire modern history of the Free Exercise Clause has been over what

---

136. Pope John Paul II, *Apostolic Letter Ordinatio Sacerdotalis, On Reserving Priestly Ordination to Men Alone*, *in* FROM "INTER INSIGNIORES" TO "ORDINATIO SACERDOTALIS": DOCUMENTS AND COMMENTARIES 185, 185 (L'Osservatore Romano trans., 1998) [hereinafter ORDINATIO SACERDOTALIS], *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html.

137. *See, e.g.*, Brant, *supra* note 60, at 290, 291 & n.83; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1088–91 (1996); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 526–28 (2004).

138. *See* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1169 (2007) ("[H]ardly anyone thinks that government should compel Catholics to ordain female priests . . . ."). Many people feel like Martha Nussbaum, who disagrees with the views of these churches, but is willing to let them live as their values dictate. *See* Martha C. Nussbaum, *A Plea for Difficulty*, *in* IS MULTICULTURALISM BAD FOR WOMEN?: SUSAN MOLLER OKIN WITH RESPONDENTS 105, 114 (Joshua Cohen et al. eds., 1999) ("I don't like the idea of an all-male priesthood any more than Okin does. Nor do I like many of the practices of Orthodox Judaism with respect to sex equality. That is why I am a Reform Jew.").

139. *See* United States v. Lee, 455 U.S. 252, 254–55 (1982) (involving such a claim).

140. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (involving such a claim).

141. *See* Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (involving such a claim).

courts should do when religious conscience clashes with legal obligation.[142] Countless articles have been written on the subject.[143]

But there is a second reason not to go on and on about the conscience component—one deeply tied to the claims of this Article. A thesis of this Article is that courts and commentators have been wrong to limit the ministerial exception to the idea of religious conscience. Some of the strongest reasons for exempting religious organizations from the anti-discrimination laws have nothing to do with conscience at all. We saw this with the relational component, but it will be even clearer with the autonomy component: Even when churches agree with the employment discrimination principles in question, there are good reasons to exempt them.

One final point remains to be made here, which deals with the overlap between the relational component and the conscience component. Imagine the Catholic Church decides that the male-only ordination policy is so important that all priests must agree with it to become ordained. This is, in fact, the natural first reading of the Church's position, though apparently not its practice.[144] In this way, a conscience claim now becomes a relational claim. By refusing to ordain anyone (male or female) who disagrees with its religious policy of a male-only priesthood, the Church has turned a case of sex discrimination into a case of religious discrimination. All this goes to show how twisted up these various components are and how difficult it is to disentangle them.

---

142. *See* Gonzales v. O Centro Espirita Beneficente União Do Vegetal, 546 U.S. 418, 423 (2006); City of Boerne v. Flores, 521 U.S. 507, 511 (1997); Church of the Lukumi Balbalu Aye, Inc. v. Hialeah, 508 U.S. 520, 528 (1993); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990); Hernandez v. Comm'r, 490 U.S. 680, 698 (1989); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 830 (1989); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988); Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 144 (1987); Bowen v. Roy, 476 U.S. 693, 695 (1986); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291–92 (1985); Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983); Thomas v. Review Bd. of the Ind. Emp't. Sec. Div., 450 U.S. 707, 709 (1981).

143. *See* Christopher C. Lund, *A Matter of Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 628 n.4 (2003) (providing citations to several of the most important works).

144. *Ordinatio Sacerdotalis* ends by concluding, "I declare that the Church has no authority whatsoever to confer priestly ordination on women and that this judgment is to be definitively held by all the Church's faithful." ORDINATIO SACERDOTALIS, *supra* note 136, at 191.

V. THE AUTONOMY COMPONENT (THE MINISTERIAL EXCEPTION *SIMPLICITER*)

We now turn to the third part of the ministerial exception, the autonomy component. Here we consider the claim that for a certain range of positions—leadership positions, "ministerial" positions, positions with significant religious duties, positions with religious significance—the government should be flatly barred from interfering with the church's decisions. This issue lies at the heart of the ministerial exception, makes up the bulk of ministerial exception cases, and is now before the Supreme Court in the fall 2011 term. As such, this Article takes a sustained look at this part of the ministerial exception.

While the relational component deals with the special nature of religious discrimination, and while the conscience component deals with the special issues of religious conscience, the autonomy component deals with the special importance of religious leaders in religious life. Choosing a minister is an important act of religious exercise. Religious leaders play fundamental roles in peoples' lives. They bury our parents; they marry us; they care for us when we are dying, sick, or depressed; they baptize and confirm our children. That is not true for everyone, of course. But it is true for religious believers of all stripes—and for them, it is particularly true. And so because selecting a minister is at the heart of religion, the heart of religious freedom lies in having free choice in making that selection.

Conversely, imposing liability on people because of whom they want (or do not want) as their minister burdens that freedom. The Court has wrestled most deeply with these problems in the context of the Free Speech Clause. And there the Court's rule has been both clear and forceful: Liability presumptively cannot attach to speech on important matters—matters of public concern.[145] A similar rule should apply here. Liability presumptively should not attach to religiously important matters—matters of significant religious concern. Hiring a groundskeeper may not be a matter of significant religious concern, but hiring a minister surely is. As a result, a congregation's decision to hire someone as a minister should therefore be protected and immune from liability, whether we are

145. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1216–17 (2011) (reversing a jury verdict that found against a group who picketed a military funeral); Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (reversing a jury verdict against a magazine that ran an incendiary advertisement).

talking about liability under common law principles of tort or under statutorily created ones like the employment discrimination laws.

This point has gotten lost in the debate precisely because so many have thought of the ministerial exception strictly in terms of conscience.[146] Some think that religious groups should perhaps be exempt from anti-discrimination laws to which they have some religious objection, but they should not be exempt otherwise. The Catholic Church could use the ministerial exception to shield its priesthood from claims of sex discrimination but not from claims of age discrimination. Caroline Corbin says this:

> In other words, for churches that do not claim that their tenets require discrimination, a decision influenced by discrimination is a mistake (or worse) from the church's point of view, and the state is merely requiring the church to fix it.[147]

This view has spread in the courts, particularly due to one highly influential Third Circuit opinion, which held that "the ministerial exception [does] not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation."[148] Thus, unless God commands disobedience from the anti-discrimination law in question, there is no proper basis for a religious exemption from it.

There are two issues with this. First, it labors under the old troublesome view that equates religious exercise with the following of commands—the idea being that if the law's requirements do not contradict any of God's commands, then there is no significant burden on religious exercise. But this is not right. Religion is more

---

146. *See supra* Part IV.

147. Corbin, *supra* note 6, at 2023; *see also* Lupu & Tuttle, *supra* note 7, at 129 (pointing out the argument about how anti-discrimination laws might simply help churches to "reinforce their [own] pre-commitments about hiring").

148. Petruska v. Gannon Univ., 448 F.3d 615 (3d Cir.), *withdrawn upon grant of reh'g*, 462 F.3d 294 (3d Cir. 2006), *available at* 2006 U.S. App. LEXIS 13135, at *28. The prominent and thoughtful judge, Edward Becker, continued this way:

> The Constitution protects religious exercise, and we decline to turn the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle. We therefore conclude that under the Free Exercise Clause the ministerial exception will not bar Title VII claims by ministerial employees when an employment decision is not motivated by religious belief, religious doctrine, or church regulation.

Id. After Judge Becker passed away, the case was reheard and a different panel rejected his approach. For more detail on this point, see *supra* note 4.

than just obeying commands. God might not demand that you sing in the church choir or go to church on Sunday rather than Tuesday. But those things are surely religious exercise. And were the government to start forbidding church choirs or Sunday worship, it would just as surely burden the free exercise of religion. This is why the Supreme Court protects acts that are religiously motivated, even when not religiously compelled.[149] Thus, because choosing a minister is a religiously motivated decision, it should not generally be the basis for liability, regardless of whether the church happens to agree or disagree with the anti-discrimination law in question. One could say, of course, that if the church agrees with the anti-discrimination law, any burden the law imposes is not really a burden on *religious* exercise. But you cannot break the decision-making process apart like that. Choosing a minister does not become a secular act because a church uses criteria it pledged not to use.

The second problem is more subtle. Many churches believe that their selection of a certain person as a minister (and not another) *is* something commanded by God—not in the sense that God has commanded disobedience from an anti-discrimination law, but in the sense that God has commanded that a specific person be hired (or not hired) for the job. Indeed, many churches (like the Lutheran church in *Hosanna-Tabor*) do not see themselves as choosing ministers at all. God calls ministers and God ends their calls; God decides who is fit and who is not. Congregations merely try to discern when God has called someone and when God has ended their call.[150] This is not the worldview of many people nowadays. But within this worldview, *every* decision about who is a minister is religiously compelled. Every

149. To give but one example, the Native American practitioners in *Employment Division v. Smith* may not have been religiously required to use peyote, but their use of peyote was still the exercise of religion—and that later point was the only one that the Supreme Court thought relevant. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (describing the exercise of religion as involving "acts or abstentions . . . [that] are engaged in for religious reasons"); *id.* at 893 (O'Connor, J., concurring) ("conduct motivated by sincere religious belief"); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("rooted in religious belief"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("following the precepts of [one's] religion").

150. This is the view of the Lutheran Church-Missouri Synod, the religious denomination running the school in *Hosanna-Tabor v. EEOC*. For a fuller discussion of their views on this issue, see Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner at 2–7, Hosanna-Tabor v. EEOC, No. 10-553 (U.S. June 20, 2011), 2011 WL 2470848, at *2–7.

decision about who is a minister is "motivated by religious belief [and] religious doctrine."[151]

Having laid out this quite general case for a blanket ministerial exception, we now turn to some specific isolated problems that anti-discrimination laws can create for religious organizations. In particular, this section explains how there are four discrete problems with allowing suits brought by ministers to go forward against their churches. These four problems are the reinstatement problem, the restructuring problem, the control problem, and the inquiry problem. Together these variegated concerns push toward an overarching and categorical rule exempting religious institutions from anti-discrimination claims brought by their ministers.

A. The Reinstatement Problem

We start with the reinstatement problem. In most employment discrimination cases, a plaintiff alleges that she should not have been fired and that she has a legal right to be placed back into her old position. But having courts forcibly reinstate ministers raises deep religious liberty problems, and other alternatives are similarly problematic. In this section, we explore these difficulties, which we shall collectively label the reinstatement problem.

Courts frequently say that the preferred remedy in successful employment discrimination cases is reinstatement.[152] In the context of ministerial employment, this means returning a minister to his or her old position within the church, despite the wishes of the church hierarchy or the congregation. This creates a religious liberty problem with both free exercise and disestablishment dimensions. To take the latter first, an essential part of the old established churches was that the government appointed and controlled the clergy. Consider the Anglican establishment in England—the quintessential religious establishment for the framers of our Constitution. It came about in large part because Henry VIII wanted a religious divorce. The Pope was unwilling and Henry had trouble securing support for it from the English clergy. By establishing the Anglican Church, Henry VIII gave

151. *Petruska*, 2006 U.S. App. LEXIS at *28.

152. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (2006) (authorizing courts to order "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"); Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008) (noting that "the presumptively appropriate remedy in a Title VII action is reinstatement" and citing a number of cases on that point).

himself total control to choose the bishops that he wanted, empowering himself while simultaneously undermining Rome.[153]

Among the American colonies with established churches, governmental control over the clergy was a key theme as well. In the American colonies with an Anglican establishment, the King appointed all the clergy. In the American colonies with a Congregational establishment, the voters elected the clergy.[154] Michael McConnell has made a list of the elements of an established church—government control over the clergy is at the top of the list.[155] It has taken centuries for the idea to take hold that churches themselves—that is, the congregation and its officials chosen to lead it—should be the ones choosing clergy. When the government reinstates a plaintiff to a ministerial position through the anti-discrimination laws, that control is undermined.

Any lay person can imagine the serious burden that is placed on churches and congregations who would have to accept a minister whose spiritual authority they reject. Week after week, churches will have to get by with a minister they do not want and that they do not believe God wants them to have. We have rules barring the government from interfering when people choose lawyers.[156] We have rules barring the government from interfering when people choose spouses—a lesson from *Loving v. Virginia*[157] now being repeated in the same-sex marriage cases.[158] Denying people freedom to choose

153. *See* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 134–40 (1997).

154. *See* Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 262 (2009).

155. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2132 (2003) ("The two principal means of government control over the church were laws governing doctrine and the power to appoint prelates and clergy.").

156. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (explaining that the "Sixth Amendment right to counsel of choice" entitles a defendant to "be defended by the counsel he believes to be best"); *see also* Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991) ("Generally, a client may discharge his attorney at any time, with or without cause."); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 878 n.86 (1998) ("The traditional view is that clients have an unqualified right to fire their attorneys for any reason, even reasons that violate public policy.").

157. 388 U.S. 1 (1967).

158. *See* Perry v. Schwarzenegger, 628 F.3d 1191, 1193–94 (9th Cir. 2011) (involving a challenge to a California citizen initiative prohibiting same-sex marriages); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 863 (8th Cir. 2006) (involving a challenge to a Nebraska constitutional amendment prohibiting same-sex marriages).

their minister denies them a similar kind of freedom of intimate association. Of course, church members who reject the authority of the reappointed minister can always leave the church. But that too comes with consequences. Religious people do not see churches as fungible. And religious minorities will often have no good alternatives.

Many of the cases, including *Hosanna-Tabor*, involve plaintiffs demanding reinstatement back into the church that did not want them.[159] But courts have flexibility here. Instead of reinstatement, they can give monetary relief—ordering front pay for the years that the plaintiff would have worked rather than reinstatement for the plaintiff to actually work those years.[160] Some suggest this as a solution to the reinstatement problem.[161] It is an interesting argument. One could draw a nice analogy from the specific performance cases, where courts refuse to order specific performance in the case of personal service contracts but still allow monetary claims.[162]

But giving front pay in lieu of reinstatement does not really fix the core problem. It still gives the government control over the church's clergy, just in a different way: Appoint this minister or pay a fine. If there is a religious liberty problem here, it is not fixed by taxing religious exercise instead of prohibiting it. Giving monetary relief in lieu of reinstatement is also a strange sort of compromise, inconsistent with intuition and without foundation in precedent. Consider *Gonzalez*, the case about the fourteen-year-old boy who wanted to become a Catholic chaplain with the right to the money in the chaplaincy's endowment. It would have made no sense to deny

159. *See* Belcove-Shalin, *supra* note 22, at 149–52 (noting that about half of ministerial exception cases involve requests for reinstatement).

160. *See, e.g.*, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850 (2001) ("Courts recognized that reinstatement was not always a viable option, and that an award of front pay as a substitute for reinstatement in such cases was a necessary part of the 'make whole' relief mandated by Congress . . . ."); *see also* Bruso v. United Airlines, Inc., 239 F.3d 848, 862 (7th Cir. 2001) (noting that reinstatement may become "particularly infeasible if the plaintiff would no longer enjoy the confidence and respect of his superiors once reinstated" or "when the plaintiff holds a management position or would be supervised by the same individuals who discriminated against him in the first place" (citation omitted)).

161. *See* Corbin, *supra* note 6, at 2025 ("[C]ourts can always limit plaintiff's recovery to monetary relief."); Rutherford, *supra* note 137, at 1125–26 (making the same point).

162. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) (stating that "[a] promise to render personal service will not be specifically enforced"). The classic case here is *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 689–90; 1 De G. M. & G. 604, 607–12.

him the position of chaplain but still give him the money in the endowment. The Court thought this point obvious.[163]

The amount of front pay awarded in these cases can be quite substantial. To be sure, courts have discretion over how much front pay to award.[164] But the theory is that front pay should perfectly substitute for reinstatement[165]—courts are supposed to calculate the precise amount of money so as to put the plaintiff "in the identical financial position that he would have occupied had he been reinstated."[166] Under this theory, many courts hold that plaintiffs are presumptively entitled to front pay up to their retirement age[167]—sometimes beyond their retirement age.[168] Front pay awards of ten years of salary (and benefits and pension) are common.[169] Awards of more than twenty years are not out of the question.[170] Of course,

---

163. *See* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 19 (1929) ("Since Raul is not entitled to be appointed chaplain, he is not entitled to a living from the income of the chaplaincy."). For more on *Gonzalez*, see *supra* notes 69–72 and accompanying text.

164. *See* Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 224 (2009) ("Courts already have wide discretion as to the duration of front pay awarded .... Those discretionary choices are rarely reversed under the deferential 'abuse of discretion' standard of review.").

165. *See Pollard*, 532 U.S. at 846 (explaining how "front pay [acts] as a substitute for reinstatement").

166. Bruso v. United Airlines, Inc., 239 F.3d 848, 862 (7th Cir. 2001) (quoting Avita v. Metro. Club of Chi., Inc., 49 F.3d 1219, 1231 (7th Cir. 1995)); *see also* Williams v. Pharmacia, Inc., 137 F.3d 944, 952 (7th Cir. 1988) (explaining that "front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated").

167. *See, e.g.*, Luca v. Cnty. of Nassau, 344 Fed. App'x. 637, 641 (2d Cir. 2009) ("We have repeatedly upheld awards of front pay through retirement ...."); Neufeld v. Searle Lab., 884 F.2d 335, 341 (8th Cir. 1989) ("The Court should presume that [the employee] would have continued to work for [the employer] until retirement age, unless [the employer] provides evidence to the contrary.").

168. *See, e.g.*, Curtis v. Elec. & Space Corp., 113 F.3d 1498, 1504 (8th Cir. 1997) ("There may be a presumption that an employee will retire at a 'normal' retirement age, but such a presumption does not control where there is evidence the employee would have worked beyond that age." (citation omitted)).

169. *See* Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 88 (3d Cir. 2009) (noting various decisions from "other courts of appeals [that have] affirmed front-pay awards of 10 years or more" and going on to similarly approve a front-pay award of ten years).

170. *See* Padilla v. Metro-N. Commuter R.R., 92 F.3d 117, 122 & nn.1–2, 126 (2d Cir. 1996) (approving twenty-four years of front pay); *Luca*, 344 Fed. App'x. at 641 (twenty-three years); Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 511 (9th Cir. 2000) (twenty-two years); Tanzini v. Marine Midland Bank, 978 F. Supp. 70, 81 (N.D.N.Y. 1997) (twenty years).

courts may give less if a plaintiff fails to mitigate his or her damages.[171] But that is unlikely to happen precisely because of the uniqueness of religious employment; fired Methodist ministers do not have to accept jobs in Lutheran churches.[172]

Having to pay twenty years' worth of front pay—along with other potential penalties like uncapped punitive damages in some places[173]—is a serious burden on religious exercise. In effect, churches have to pay for two ministers, one of whom is no longer working for them. The essence of the Establishment Clause was that people should not have to pay for a minister who is not their minister.[174] But that is exactly what the front-pay remedy does: A church has to pay for the state's minister and then find other money to pay for its own.

B. The Restructuring Problem

Our discussion of remedies has thus far focused on the reinstatement problem, which arises when a court forcibly reinstates a minister or alternatively awards him or her damages. But the remedies issue also creates another threat to church autonomy from

171. Title VII does require mitigation. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (2006) ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.").

172. The duty to mitigate only requires that plaintiffs act reasonably. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (explaining that an "unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position"). Courts have consistently held that plaintiffs only have to take jobs that " 'afford[] [them] virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.' " Palasota v. Haggar Clothing Co., 499 F.3d 474, 486 (5th Cir. 2007) (quoting West v. Nabors Drilling USA, Inc., 330 F.3d 379, 393 (5th Cir. 2003)); *see also* Caufield v. Ctr. Area Sch. Dist., 133 Fed. App'x. 4, 11 (3d Cir. 2005) (same quoted language); Shore v. Fed. Exp. Corp., 42 F.3d 373, 378 (6th Cir. 1994) (same quoted language); Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1044 (7th Cir. 1994) (same quoted language); Mitchell v. Humana Hosp.-Shoals, 942 F.2d 1581, 1583 n.2 (11th Cir. 1991) (same quoted language).

173. By way of example, several state laws allow uncapped punitive damages. *See, e.g.*, Dixon v. Int'l Bhd. of Police Officers, 504 F.3d 73, 83 (1st Cir. 2007) ("The Massachusetts employment discrimination statute ... does not limit punitive damages."); Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 111 (Mo. Ct. App. 2006) (finding the same for the Missouri Human Rights Act). There are no damage caps on employment discrimination claims brought under 42 U.S.C. § 1981 either. *See* Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1284–85 (11th Cir. 2008) (" 'Congress has not seen fit to impose any recovery caps in cases under § 1981 ....' " (quoting Swinton v. Potomac Corp., 270 F.3d 794, 820 (9th Cir. 2001))).

174. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947) (noting that "[t]he imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation" and that it "was these feelings which found expression in the First Amendment").

another angle. Churches have more to fear than individual cases of discrimination. We have not yet talked about the potential of class actions. As we will see, without a sufficiently strong ministerial exception, we can expect such suits. The restructuring problem recognizes the distinct problems that would be created if the federal courts began such an overhaul of American religion.

Most people think of employment discrimination laws strictly in terms of individual cases of intentional discrimination. This view is understandable—after all, most employment discrimination cases involve single plaintiffs alleging instances of intentional discrimination.[175] But employment discrimination laws go further than that. All the major employment discrimination statutes allow plaintiffs to bring class actions.[176] Plaintiffs can bring class claims of disparate treatment (claims that a group of people have all been intentionally discriminated against because of their race, gender, age, and so on) as well as class claims of disparate impact (claims that a facially neutral employment practice has caused an unjustified impact on a group of people because of their race, gender, age, and so on).[177] In both types of class actions, plaintiffs can seek damages and reinstatement, along with injunctive relief—they can ask courts to order structural changes to fix the discrimination and to prevent such discrimination from arising in the future.[178]

People have not talked much about the possibility of class action suits brought against churches. Consider Justice Sotomayor's comments in a ministerial exception case that she heard as a circuit judge, *Hankins v. Lyght*.[179] There she considered the *Catholic Bishop*

175. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 750–51 (2005) ("The great majority of employment discrimination suits in federal courts ... are brought by individual plaintiffs asserting disparate treatment claims.").

176. *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1249 (2003) ("The last decade has seen an explosion of employment discrimination class action lawsuits that have been resolved through record breaking settlements.").

177. *See* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 74–77 (3d ed. 2003) (explaining the difference between disparate impact and disparate treatment theories).

178. Michael Selmi provides some excellent examples, including three case studies of class actions brought against Texaco, Home Depot, and Denny's. *See* Selmi, *supra* note 176, at 1268–97. He concludes that money damages, rather than structural relief, is the remedy increasingly sought by plaintiffs and awarded by courts. *See id.* at 1300 (arguing that there has been "a shift in remedial focus from structural change to monetary relief").

179. 441 F.3d 96 (2d Cir. 2006), *aff'd sub nom.* Hankins v. N.Y. Annual Conference of the United Methodist Church, 351 Fed. App'x. 489 (2d Cir. 2009).

case, which exempted religious institutions from the National Labor Relations Act.[180] Justice Sotomayor suggested that the ministerial exception should be interpreted narrowly, despite *Catholic Bishop*, because employment laws simply did not threaten churches like labor laws. While labor laws pervasively regulated religious institutions, employment laws simply did not:

> [T]he ADEA, unlike the NRLA, does not pose the risk of extensive or continuous administrative or judicial intrusion into the functions of religious institutions. Instead, the ADEA involves routine regulatory interaction and requires no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring or close administrative contact between secular and religious bodies.[181]

Other courts too have seen it this way. Eugene Volokh phrased things like this: "Antidiscrimination law, the courts have reasoned, focuses on discrete hiring decisions and thus involves not too much of an entanglement, unlike labor law, which would inject the Board into nearly everything."[182]

There is much truth to this, but it perhaps does not consider enough the possibility of class actions and the structural changes that judges can order when granting relief in them. To understand the issue fully, perhaps an example will work best. Consider one relatively narrow issue—the issue of female clergy. Many Protestant churches (and other groups, like Reform and Conservative Judaism) ordain women and have generally sex-neutral policies. But despite these official stances, women continue to be underrepresented within the clerical ranks. In Protestant denominations, for example, female clergy percentages range from one to about thirty percent—with a general average of about ten to fifteen percent.[183] Women are thus

---

180. *Id.* at 116–17, 118 & n.13 (Sotomayor, J., dissenting). For more on *Catholic Bishop*, see *supra* Part I.B.4.

181. *Hankins*, 441 F.3d at 116 (Sotomayor, J., dissenting) (citations and quotation marks omitted).

182. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1947 (2006).

183. *See* EDWARD C. LEHMAN, JR., PULPIT & PEW RESEARCH REPORTS, WOMEN'S PATH INTO MINISTRY: SIX MAJOR STUDIES 4 (2002), *available at* http://faithandleadership.com/programs/spe/resources/ppr/women.pdf ("Today the proportion of female clergy in most mainline Protestant organizations averages about fifteen percent."); BARBARA BROWN ZIKMUND ET AL., CLERGY WOMEN: AN UPHILL CALLING 71 (1998) ("In our sample, which includes the largest Protestant denominations that grant full-status ordination for women, the percentage of clergy women ranges from

even more underrepresented in church ministry than they are in other professions.[184]

These imbalances create tremendous class action potential. Without a ministerial exception (or with one reduced to claims of conscience), plaintiffs' lawyers could bring large-scale, industrial-strength class actions seeking structural reform of religious denominations. In the attempt to reduce discrimination and disparities, these suits would seek to change how churches operate. They could attack seminaries and rabbinical schools, which sometimes employ students, make decisions about ministry eligibility, and act as employment agencies. They could attack a denomination's ordination process. They could attack how the more hierarchical churches employ and assign clergy among congregations.[185] Academics have spent a lot of time talking about how to restructure the church to ensure gender equality.[186] Without a sufficiently strong ministerial exception, that task will be turned over to Article III judges.

C. The Control Problem

For centuries in this country, churches have generally functioned independently of the state, receiving neither help nor hindrance from the government in running their religious affairs. Leaving churches alone to pursue their own religious goals in their own chosen ways is as much the free exercise of religion as it is with individuals. Allowing ministers to bring claims against their churches disrupts that religious control over religious life. This section catalogues those disruptive effects, collectively labeling them the control problem.

We start with a simple point. Even when churches agree with the principles behind nondiscrimination laws, they still have

---

1% to 30%, averaging 10%."); *see also* Laura R. Olson et al., *Changing Issue Agendas of Women Clergy*, 39 J. FOR SCI. STUDY RELIGION 140, 141 (2000) ("It would be a mistake to assume that women constitute anything but a small minority even within mainline Protestantism . . . .").

184. *See* ZIKMUND ET AL., *supra* note 183, at 70 (stating that women make up, on average, 10% of clergy, but 21% of doctors and 25% of lawyers).

185. Though the class-action threat has not yet materialized, individual plaintiffs have indeed demanded this sort of relief. In one recent case, a plaintiff was refused entry to a seminary run by the Lutheran Church-Missouri Synod. She claimed she had been discriminated against because of her age and sought an order forcing the seminary to take her as a student in their Director of Christian Education program. *See, e.g.*, Green v. Concordia Univ., No. CV 09-1519-AC, 2010 WL 3522352, at *1 (D. Or. June 23, 2010).

186. *See supra* notes 183–84.

understandable reasons to object to the government investigating, adjudicating, and remedying what it decides are discriminatory acts. There is all the difference in the world between a church pursuing its own values and the state enforcing those values back on the church. We recognize this all the time with individuals. Some people believe that they should go to church every week. But almost none of them would want the state to force them. And certainly no one thinks that desiring to go somehow acts to waive the Establishment Clause. This principle is just as true for churches as it is for individuals: There are serious costs when the government coercively imposes its values on people, even when the people happen to share the government's values. Even when churches agree with the nondiscrimination norms being applied to them, secular enforcement of those norms overrides religious control of the institution.

Churches have their own procedures for handling disputes, and these procedures go back centuries.[187] Sometimes these processes are informal, consisting mostly of mediation. Sometimes they are highly formal, involving ecclesiastical courts. Consider *Hosanna-Tabor v. EEOC*.[188] There the teacher, Cheryl Perich, was a commissioned minister in the Lutheran Church-Missouri Synod who taught fourth grade at a parochial school affiliated with a congregation belonging to the Lutheran Church-Missouri Synod. The Missouri Synod has long required that ministers bring disputes with their churches through the Synod's dispute-resolution process.[189] This is both longstanding church tradition and deep theological belief.[190] And in the Synod's

187. For an explanation of how church courts work in a wide variety of denominations, see generally Steven R. Hadley, *Handbook of American Church Courts*, 22 WHITTIER L. REV. 251 (2000).

188. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3552 (U.S. Mar. 29, 2011) (No. 10-553). *Hosanna-Tabor* is discussed in more detail later. *See infra* Part VII.

189. The Synod's rules say that its internal process "shall be the exclusive remedy to resolve such disputes." HANDBOOK OF THE LUTHERAN CHURCH-MISSOURI SYNOD § 1.10.2, at 37 (2004), *available at* www.lcms.org/Document.fdoc?src=lcm&id=926; *see also id.* § 1.10.1.1, at 36 ("The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. Fitness for ministry and other theological matters must be determined within the church.").

190. *See, e.g.*, *1 Corinthians* 6:1 (New English) ("When one of you has a grievance against another, does he dare go to law before the unrighteous instead of the saints?"). This biblical text led to the development of church courts more than a millennium ago. *See, e.g.*, THE COUNCIL OF CHALCEDON, CANON IX, at 97 (Richard Price & Michael Gaddis trans., 2005) (451) ("If any cleric has a suit to bring against a cleric, he is not to leave his own bishop and have recourse to civil courts, but is first to argue the case before his own bishop .... If anyone infringes this, he is subject to the canonical penalties. If a

system, ministers like Perich have significant protections, both procedural and substantive. On the procedural side, Synod rules provide for limited discovery and compulsory process of witnesses, forbid ex parte contacts, protect the right to counsel, establish the right to present evidence, and create an appeal process.[191] Disputes are handled by neutrally selected reconcilers, people randomly chosen from a long, nationwide list of trained personnel maintained by the Synod (not the congregation).[192] Both sides can challenge reconcilers for cause,[193] and both sides have peremptory strikes.[194] On the substantive side, the Synod's courts would only approve of Perich's call being terminated in rare and specifically delineated circumstances, like if she were teaching false doctrine, disobeying church teaching, or living a highly immoral life.[195] Thus, to the extent the church found Perich's disability claim factually supported, she would win her case.

Without a ministerial exception, these well-established systems of church governance become irrelevant. In another illustrative case, an ordained Presbyterian minister sued her church, claiming that its senior pastor had sexually harassed her.[196] She had previously brought the dispute before the internal courts of the Presbyterian Church, where an investigating committee made up of three women and two men unanimously rejected her claims.[197] The Ninth Circuit let her claim go forward, viewing the church's earlier resolution of her claims as immaterial.[198] The court stuck by this conclusion even though the minister had sworn "to be governed by [the] Church's polity, and to bide by its discipline."[199] The Ninth Circuit suggested that such a

---

cleric has a suit against his own or another bishop, he is to plead his case to the synod of the province.").

191. *See* HANDBOOK OF THE LUTHERAN CHURCH-MISSOURI SYNOD, *supra* note 189, § 1.10.7.4(a)–(d), at 42, § 1.10.18.1(a)–(i), at 47–49.

192. *Id.* § 1.10.13.1(a), at 45 (requiring nine names to be randomly chosen from the list of reconcilers nationwide).

193. *Id.* § 1.10.16, at 47.

194. *Id.* § 1.10.13.1(c), at 45 (allowing each side three peremptory strikes).

195. *See* COMMISSION ON THEOLOGY & CHURCH RELATIONS OF THE LUTHERAN CHURCH-MISSOURI SYNOD, THEOLOGY AND PRACTICE OF "THE DIVINE CALL" 25 (2003), *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=410 (explaining the rare instances where called workers can be removed from office).

196. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 953 (9th Cir. 2004).

197. *See id.* at 971 (Trott, J., dissenting).

198. *Id.* at 965 & n.9 (majority opinion).

199. *Id.* at 974 (Trott, J., dissenting) (quoting THE CONSTITUTION OF THE PRESBYTERIAN CHURCH, W.S.A., BOOK OF ORDER § G-14.0405e (1986)). The dissent

promise might well be unconscionable and therefore unenforceable anyway.[200]

Part of the control problem is that the prospect of secular enforcement threatens church autonomy, even when churches agree with the discrimination laws in question. Another part of the problem lies in the fact that churches might agree with the broad abstract ideal of nondiscrimination, but not with the precise details of anti-discrimination laws. One church might interpret God's will as requiring uncompromising colorblindness. Another might see God as demanding an integrated church, which might require intentional racial balancing or affirmative action. The Supreme Court has been deeply split over whether to adopt the former view (nondiscrimination as colorblindness) or the latter view (nondiscrimination as an integrative ideal).[201] Churches will be split as well. Courts should not impose a legal requirement of colorblindness on churches that believe in affirmative action, just as courts should not impose racial balancing on churches that believe in colorblindness.

Frankly, it would be quite surprising if churches happened to agree with all the specifics of nondiscrimination laws. Discrimination means different things to different people.[202] While anti-discrimination laws all try to promote equality, their specific conceptions of equality and the specific ways they try to promote it are highly contingent and sometimes even downright strange. Consider the law regarding disparate impacts. Employers cannot have facially neutral practices that have unjustified disparate impacts on

---

quotes the oath, but the majority also accepts these as the relevant facts. *Id.* at 965 n.9 (majority opinion).

200. *See id.* at 965 n.9 (majority opinion).

201. This point was made vividly in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), where the Court deeply fractured on the validity of the colorblindness theory. *Compare id.* at 748 (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."), *and id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment) ("The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases." (citation omitted)), *with id.* at 862 (Breyer, J., dissenting) ("[I]t is for [the people] to decide, to quote the plurality's slogan, whether the best 'way to stop discrimination on the basis of race is to stop discriminating on the basis of race.' " (citation omitted)).

202. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) ("The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) ("The concept of 'discrimination' . . . is susceptible of varying interpretations . . . .").

the basis of things like race or sex.[203] A test that weeds out female applicants at a substantially higher rate than male ones, for example, is illegal unless it is "job related" and "consistent with business necessity."[204] But employers also are prohibited from fixing disparate impacts unnecessarily—throwing out that test because it weeds out female applicants at a substantially higher rate than male ones is itself illegal, unless there is a "strong basis in evidence" to believe the test was illegal in the first place.[205] No church shares this precise conception of gender equality. In this day and age, most churches see themselves as fully committed to racial justice, to gender equality, to treating the disabled with dignity, and to protecting the elderly. But there is no reason to think that the church's conception of any of these things will match the state's conception.[206] And requiring the two to match denies the church any independent right of conscience.

And if autonomy includes a right to decide on the meaning of one's values, it also includes a right to decide on the priority of one's values. Earlier we discussed the ordination of women and how various Protestant churches and Jewish synagogues ordain women but continue to have few female clergy.[207] At least part of the reason for these imbalances is theological in nature. Many Protestant churches are committed to allowing local congregations freedom to choose their own clergy.[208] But this theological commitment comes

---

203. This prohibition on facially neutral actions that have unjustified disparate impacts goes all the way back to the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

204. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). This is the requirement in Title VII, which applies to considerations of race, national origin, sex, and religion. *See id.* The prohibition on disparate impacts in the context of age is a bit different. *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (explaining why "the scope of disparate-impact liability under ADEA is narrower than under Title VII").

205. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) ("We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."). For more on the *Ricci* case, see generally Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010).

206. For an excellent article making this same point in regard to the *Catholic Bishop* case, see generally Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77 (2004) (pointing out how both the Catholic Church and the National Labor Relations Act are concerned with the rights of workers, but how they disagree deeply on the proper ways of doing so).

207. *See supra* Part V.B (discussing the restructuring problem).

208. This issue was of utmost importance in both the German and English Reformations; people hated that the Catholic Church appointed bishops and priests

with costs—local congregations are often the ones most reluctant about female ministers.[209] These denominations have made a choice. They believe in the principle of gender equality, but they will not force female clergy on unwilling congregations. They value gender equality, but they have other religious commitments too. On July 2, 1965—the day Title VII went into effect—nonreligious organizations had to change their ways overnight.[210] But that should not be forced on Protestant churches who are trying to ordain women without compromising their other religious concerns. If the Catholic Church can refuse to ordain women altogether, Protestant churches should be allowed to ordain women at their own pace. There is also, of course, the flip side. Some Protestant churches engage in affirmative action for women. There are anecdotal accounts of bishops stacking the deck in favor of female applicants for clergy positions (such as by giving a local congregation three choices for its minister, all of which just happen to be female).[211] There is no guarantee that such programs comply with the requirements the Supreme Court has laid out for affirmative action programs.[212] Just as churches should not be sued for integrating women too slowly into the priesthood, they should not be sued for integrating them too quickly either.

---

without caring about what their congregations wanted. *See* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 9 (3d ed. 2011).("Martin Luther (1483–1546), John Calvin (1509–1564), Thomas Cranmer (1489–1556), Menno Simons (1496–1561), and other sixteenth-century reformers all began their movements with a call for freedom: freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privileges, and freedom of the local clergy from both central papal rule and oppressive princely controls.").

209. *See* Patricia M. Y. Chang, *Female Clergy in the Contemporary Protestant Church: A Current Assessment*, 36 J. FOR SCI. STUDY RELIGION 565, 567 (1997) (explaining the "resistance to hiring a female pastor at the local church level" in many Protestant denominations that officially ordain women); *see also* Edward C. Lehman, Jr., *Clergy Women's World: Musings of a Fox*, 43 REV. OF RELIGIOUS RES. 5, 11 (2001) ("On the one hand, most research indicates that a majority of lay church members are open to the idea of having a woman as their pastor. Typically between two-thirds and three-fourths of the members relate to the idea positively .... Yet a woman's candidacy becomes a 'problem' even to them. They typically feel intimidated as the very vocal minority who oppose women in ministry make threats about what they will do if the church installs a woman [like] ... withhold their financial contributions [or] leave the parish." (emphasis omitted)).

210. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971) (discussing the validity of several tests that the Company added "on July 2, 1965, the date on which Title VII became effective").

211. Affirmative action programs for women are discussed in ZIKMUND ET AL., *supra* note 183, at 76–80.

212. Affirmative action programs are regulated under the legal framework arising from the Supreme Court's decision in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

D. The Inquiry Problem

We now turn to our final justification for the autonomy component. At bottom, the inquiry problem is a concern about inaccurate fact finding—the risk that the jury will perceive discrimination erroneously. Such a risk is present in every employment discrimination case, of course. But such risks are heightened in ministerial exception cases because they require juries to resolve thorny questions about religious doctrine and religious motivation. Explaining those risks is the focus of this final section.

Juries and other fact finders make mistakes. Sometimes these mistakes are minor. But sometimes they are severe. An innocent criminal defendant is incarcerated; a corporation that ought to pay a multi-million dollar tort judgment gets off scot-free. Employment discrimination cases are notoriously challenging in this respect. In deciding the issue of discriminatory intent, the jury must draw inferences about what happened in the mind of the person who made the employment decision in question.[213] This is very uncertain terrain. Some argue that juries frequently fail to detect discrimination that exists; others think that juries frequently find discrimination incorrectly.[214] Both sides face the same problem—the truth of what really happened is very hard to discern, even in hindsight.

Any attempt to weigh the costs of applying the employment discrimination laws to religious institutions must consider the risk of error. Employment discrimination cases, like other types of cases, use the preponderance-of-the-evidence standard,[215] which aims at reducing the overall number of errors.[216] A jury that is fifty-one

---

213. *See, e.g.*, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that "[a]ll courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult" as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes").

214. *Compare* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (arguing, in part, that fact finders fail to detect discrimination when it really exists), *with* WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 63 (1997) (arguing, in part, that fact finders detect discrimination when it really does not exist).

215. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) ("Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." (citations and quotation marks omitted)).

216. *See* Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1172 (1983) ("If the goal is to minimize the number of erroneously decided cases or the sum of the wrongful payments that are made, the preponderance-of-the-evidence rule emerges as the superior choice."). In this

percent sure that an employer has committed intentional discrimination will find against him.[217] In the ordinary run of employment discrimination cases, we accept this forty-nine percent risk of error as a necessary cost of our society's commitment to basic equality principles.[218] But religious employment changes the balance in two different ways.

First, mistaken findings of discrimination are more harmful. We explored this in earlier sections. The reinstatement problem dealt with the harm of court-ordered reinstatement of ministers;[219] the restructuring problem addressed the prospect of forced institutional reform;[220] the control problem documented the disruption of church authority.[221] All of these harms are present when a jury accurately finds discrimination. They are just as much of a concern when a jury does so inaccurately.

Second, mistaken findings of discrimination are more likely in the context of religious employment. This brings us to the inquiry problem itself, which can be seen with a simple example. Say a minister is fired. In response, he brings an age-discrimination claim against the church contesting his dismissal. In most cases, the church will contend what defendants usually contend—that there was something wrong with the plaintiff's job performance. Maybe he was bad in the pulpit; maybe people did not like his Bible studies; maybe he was not good at counseling parishioners. The way our employment discrimination laws work, the jury focuses on the church's reasons and decides whether they are pretext for age discrimination.[222] This

---

way the preponderance standard treats every error as equally harmful. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) ("A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion . . . .'" (quoting Addington v. Texas, 441 U.S. 418, 423 (1979))).

217. *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) ("The burden of showing something by a 'preponderance of the evidence' . . . 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence . . . .'" (quoting *In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring))).

218. *See* Laycock, *supra* note 154, at 261.

219. *See supra* Part V.A.

220. *See supra* Part V.B.

221. *See supra* Part V.C.

222. This is the famous burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1474 (1992) (book review) ("Almost all individual cases under *McDonnell Douglas* come down to a determination whether the plaintiff has proved that the legitimate, nondiscriminatory reason offered by the defendant is really a pretext for discrimination." (internal quotation marks omitted)). For a more recent look on the

requires a jury to decide thoroughly religious questions. How good were his sermons, Bible studies, and religious counseling?

Some courts have noticed this problem. The Seventh Circuit phrased these concerns well in a case where a music director of a Catholic diocese brought an age-discrimination lawsuit.[223] Judge Posner dismissed the case because of the inquiry problem that it potentially raised:

> [I]f the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services—and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services. Tomic would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and Tomic might in turn dispute the church's claim. The court would be asked to resolve a theological dispute.[224]

There are cases like *Tomic* which recognize this inquiry problem (though the courts, of course, do not use that phrase). But they have been fiercely criticized and sometimes rejected outright. Commentators have pointed out that this difficulty will not present itself in every case. Say a minister is fired and claims age discrimination. There will be little inquiry problem if the church claims it fired the minister for being an alcoholic, or for being chronically late, or for having been convicted of a felony.[225] Instead of a ministerial exception barring all antidiscrimination claims by ministers, courts should look at the actual facts of the case, decide whether there is an inquiry problem under those particular facts, and only dismiss the case if there is such a problem. Most courts have

---

framework, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745–47 (2011).

223. *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006).

224. *Id.* at 1040 (citation omitted).

225. One commentator points out that there may not have been an inquiry problem in *Tomic* itself. After all, the Seventh Circuit here seems to assume that the church will claim to have fired Tomic for something related to his religious duties. This might not have been the case. *See* Vartanian, *supra* note 6, at 1062 ("*Tomic* . . . exemplifies the excessive speculation that courts often employ to justify dismissal under the doctrine." (citation omitted)).

handled it this way,[226] on a case-by-case basis.[227] Commentators also seem to recommend this way of doing things.[228] But there are several problems with this approach.

First, it gets the proportions of these cases incorrectly. Few of these cases involve churches firing ministers for being alcoholics or felons; none of the decided cases, to my knowledge, look at all like that. Ministers are hired to do religious duties. So when they are fired, it is usually because of a perceived failure to do those religious duties. Cases therefore inevitably involve the jury judging the plaintiff's religious fitness for ministry. Juries have to decide what the plaintiff's religious duties really were, whether the plaintiff did them well, what it means for them to be done well or poorly, and whether they were really so important than the church could not stand getting them done right. And this is true even though the church's stated rationale might not relate on its face to ministry. "Even reasons that sound superficially secular are often religious at their core. For example, decisions about budget are decisions about religious priorities."[229]

Indeed, even if we were to imagine cases where the church's reason was entirely secular, religious considerations would still enter in through the back door. The simple fact is that every employment discrimination case involves the issue of how well the plaintiff was doing her job. Job performance affects everything. When an employee's job performance is good, juries will rightly suspect even

226. *See, e.g.*, DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993) ("There may be cases involving lay employees in which the relationship between employee and employer is so pervasively religious that it is impossible to engage in an age-discrimination inquiry without serious risk of offending the Establishment Clause. This is not such a case."). For other cases adopting this sort of reasoning, see *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008); *Hankins v. Lyght*, 441 F.3d 96, 117 (2d Cir. 2006); *Gargano v. Diocese of Rockville Ctr.*, 80 F.3d 87, 90 (2d Cir. 1996).

227. *See, e.g.*, Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1044 (8th Cir. 1994) ("The case-by-case approach ... is the appropriate method for determining those matters which threaten constitutional infringement."); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990) ("It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy .... On the other hand, it may turn out that the potentially mischievous aspects of Minker's claim are not contested by the Church or are subject to entirely neutral methods of proof. The speculative nature of our discussion here demonstrates why it is premature to foreclose appellant's ... claim. Once evidence is offered, the district court will be in a position to control the case so as to protect against any impermissible entanglements.").

228. *See* Corbin, *supra* note 6, at 2013–22; Vartanian, *supra* note 6, at 1062.

229. *See* Brief for the Petitioner at 29, Hosanna-Tabor v. EEOC, No. 10-553 (U.S. June 20, 2011), 2011 WL 2414707, at *29.

legitimate-sounding reasons as possibly pretextual. And if they find pretext, they will be quick to conclude that discrimination was the real reason. When an employee's job performance is bad, juries will be hesitant to doubt an employer's legitimate-sounding reasons. And if the juries find pretext, they will be quick to come up with some other nondiscriminatory explanation.[230] Thus, when the job involves highly religious duties, juries will inevitably be drawn in every case to the issue of whether the plaintiff did those religious job duties well.

And in doing so, juries will rely on their own preconceptions about religion in passing judgment on religious groups that might think quite differently. A great example of how things might go wrong lies in an older Third Circuit case, *Geary v. Visitation of the Blessed Virgin Mary Parish School*.[231] Geary was a parochial school teacher who was fired by the Catholic Church. She claimed she was fired because of her age.[232] The Church said she was fired for marrying a divorced man, a violation of Catholic doctrine.[233] The Third Circuit rejected the idea that there was any inquiry problem.[234] On one level, this makes sense. After all, a jury can indeed figure out whether Geary married a divorced man and whether that violated Catholic doctrine. But remember that, at trial, Geary could admit that she married a divorced man in violation of Catholic doctrine, but then just argue that the violation of church doctrine was not the real reason she was fired.[235] As part of that, Geary's lawyer would try to subtly persuade the jury that the Church does not really believe its

230. This is what juries are supposed to do. Under the *McDonnell Douglas* framework, a plaintiff must not only prove pretext, he or she must show that the pretext was a mask for intentional discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.").

231. 7 F.3d 324 (3d Cir. 1993).

232. *Id.* at 326.

233. *Id.*

234. *Id.* at 329–30. The Third Circuit ultimately dismissed Geary's ADEA claim on the merits, claiming that Geary had not put forward any evidence that would create a genuine issue of material fact. *Id.* at 332.

235. Pretext exists, even when the asserted nondiscriminatory reason is literally true, if it did not subjectively motivate the employment decision in question. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) ("An employer may not, in other words, prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."). Many lower court cases make this same point. *See, e.g.*, White v. Baxter Healthcare Corp., 533 F.3d 381, 393 (6th Cir. 2008) (noting that a plaintiff can "demonstrate pretext by showing that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action").

stated doctrine—at least not to the point of firing long-standing teachers for trivial violations of it. Geary's lawyer would point out that remarriage is common in our society, that even many American Catholics remarry, and that the Catholic Church hardly deters divorce by firing people who remarry. Any good plaintiff's lawyer would make that argument; he or she would suggest that the Catholic Church's position is so fundamentally unbelievable that it could not really have motivated the defendant's action and therefore must be pretext.[236] Juries who know little about Catholicism might end up agreeing with that. Juries hostile to Catholicism (or this particular tenet of Catholicism) might know better but impose liability anyway. And Catholicism is a well-known religion in this country. Imagine the problems that less mainstream religions will face. Courts in regular employment cases often say that "[t]he more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext."[237] That statement makes sense in the ordinary run of employment discrimination cases, but there are many religions in this country that juries might find idiosyncratic or questionable.

There is a final problem with the case-by-case approach—a problem that becomes obvious if we step back and look at the forest rather than the trees. The case-by-case approach is unworkable. Under it, courts are supposed to dismiss ministerial claims without any inquiry into the facts once the church offers a religious reason for firing the minister. In that rare case when a church offers a nonreligious reason for the firing, the claims can proceed.[238] But think about what will happen. Churches have a lot of control over the nondiscriminatory reasons that they choose to offer. They will often phrase their decisions in religious terms, usually authentically. But plaintiffs will rightly point out the incentive problem here—churches

236. Justice Jackson once feared this very thing—he believed that juries would inevitably be unable to figure out what a defendant honestly believed without relying on their own preconceptions about religion. Unable to see how a defendant could believe something so strange, they would conclude that he must not really believe it. *See* United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) ("I do not see how we can separate an issue as to what is believed from considerations as to what is believable.").

237. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979); *see also* Velázquez-Fernández v. NCE Foods, Inc., 476 F.3d 6, 12 (1st Cir. 2007) (same language); Kautz v. Met-Pro Corp., 412 F.3d 463, 476 (3d Cir. 2005) (Sloviter, J., dissenting) (same language).

238. *See* Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008) (noting that courts "may pretermit any 'plausibility inquiry [because such an inquiry] could give rise to constitutional problems where, as in the case at bar, a defendant proffers a religious purpose for a challenged employment action'" (quoting DeMarco v. Holy Cross High Sch., 4 F.3d 463, 476 (1st Cir. 2007))).

have crass incentives to falsely portray their decisions in religious terms because they get a free pass by doing so. Courts deciding these cases will therefore find themselves at an impasse. If they simply accept the church's reasons at face value, the case-by-case approach will have become a categorical rule in favor of the ministerial exception. But if they submit the factual issue to the jury to decide whose facts are right, then the inquiry problem comes back, and the case-by-case approach will have become a categorical rule against the ministerial exception. All this is to say that a case-by-case approach simply will not work.

VI. THE DOCTRINAL OBJECTION

Throughout earlier sections, this Article has tried to respond to possible objections in the places where such responses made the most sense. It preemptively addressed, for example, claims that church autonomy precedents do not require a ministerial exception,[239] claims that monetary relief is an acceptable alternative to reinstatement,[240] claims that religious exercise is not burdened when a church has no theological objection to the anti-discrimination law in question,[241] and claims that the inquiry problem should be handled case by case.[242] But one objection has been set aside until now that must be addressed head-on. Many have claimed that the Supreme Court's 1990 decision in *Employment Division v. Smith*,[243] which radically changed the nature of the Free Exercise Clause, destroys the ministerial exception.[244] Examining this claim is the task of this section.

---

239. *See supra* Parts I.B.2–4.

240. *See supra* notes 159–74 and accompanying text.

241. *See supra* notes 139–43 and accompanying text.

242. *See supra* notes 223–36 and accompanying text.

243. 494 U.S. 872 (1990).

244. *See* Corbin, *supra* note 6, at 1983 ("Under *Smith*, then, the free exercise clause should not shield religious practices from Title VII."); Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Access to Ministerial Employees*, 74 IND. L.J. 269, 278 (1998) ("*Smith*, therefore, did away with the previous balancing test [which seems to make] any neutral law valid [like Title VII], no matter what the effect on religion."); Hamilton, *supra* note 6, at 1195 ("Strictly speaking, the judicially crafted ministerial exception is inconsistent with ... *Smith*."); McPhail, *supra* note 6, at 232 ("However reluctant courts have been to apply *Smith*'s holding to religious organizations, it is clear that there is little reason for refusing to do so."); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 734 (2005) ("Ministerial exemptions ... inexplicably persist after *Smith* even though the civil rights statutes are not aimed at religion."); Fulton, *supra* note 6, at 209 ("Circuit courts continue to apply the ministerial exception to religion-neutral laws, and *Smith* has effectively been disregarded."); Martin,

Smith is one of the most well-known American church and state cases. At stake in *Smith* was whether members of the Native American Church had the right to use peyote despite an Oregon law generally forbidding its use.[245] The Supreme Court rejected the plaintiffs' particular claim in *Smith.* But even more importantly, the Court changed the test. Before the Court's decision in *Smith*, free exercise cases had been handled under a strict scrutiny framework associated with two cases, *Sherbert v. Verner*[246] and *Wisconsin v. Yoder.*[247] Any burden on religious exercise had to be justified by the government demonstrating a compelling interest pursued by the least restrictive means. *Smith* changed that, saying that burdens on religious exercise required no justification as long as they were neutral and generally applicable.[248] This is where the ministerial exception applies. Given that the employment discrimination laws are surely both neutral and generally applicable, *Smith* seems to overrule the ministerial exception or, at least, be deeply inconsistent with it.[249]

This argument has some force, but there are numerous possible responses. First, *Smith* is a free exercise case. But the ministerial exception is grounded just as much in disestablishment concerns as in free exercise. *Watson v. Jones* directly linked church autonomy with disestablishment.[250] *Kedroff v. Saint Nicholas Cathedral* said its result was required by the "separation of church and state,"[251] a doctrine associated then and now with the Establishment Clause.[252] And

---

supra note 6, at 1302 ("[T]he clear language of *Smith* suggests it may override the ministerial exception.").

245. *Smith*, 494 U.S. at 874–85. For a detailed examination of the *Smith* case, see generally Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953 (1998).

246. 374 U.S. 398 (1963).

247. 406 U.S. 205 (1972).

248. *See Smith*, 494 U.S. at 879.

249. The concepts of both neutrality and general applicability were fleshed out more in a later case, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533–40, 542–46 (1993). But much is still unresolved. *See* Lund, *supra* note 143, at 633–44 (discussing the areas of uncertainty).

250. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 727–29 (1871) (explaining that courts in the United States were ill-equipped to handle ecclesiastical disputes compared to courts in the United Kingdom because courts in the United Kingdom regularly dealt with internal church disputes occurring within the Anglican church).

251. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am., 344 U.S. 94, 110 (1952) ("Here there is a transfer by statute of control over churches. This violates our rule of separation between church and state.").

252. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state."); McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948) ("[T]he clause against

throughout this Article, we have talked about the Establishment Clause rationales for the ministerial exception. The Establishment Clause bars the state from appointing clergy; it makes sense that it would bar the state from reappointing them as well.[253] And the Establishment Clause's ban on government deciding religious questions should prevent juries from passing, as they inevitably will in these cases, on what it means to be a good minister.[254] Should the Court in *Hosanna-Tabor* therefore wish to preserve the ministerial exception, it could speak amorphously about the First Amendment or ground the ministerial exception in the Establishment Clause. It need not address *Smith* at all.[255]

But there is a second and perhaps more obvious way to reconcile *Smith* with the ministerial exception. Near the beginning of the *Smith* opinion, the Court explicitly preserved the church autonomy cases that gave rise to the ministerial exception. Citing those cases approvingly, the Court reaffirmed how, even after *Smith*, government would not be able to "lend its power to one or the other side in controversies over religious authority or dogma."[256] Controversies between a minister and a congregation over who gets to run the church are surely controversies over religious authority.[257] Even by its own terms, then, *Smith* could be read to preserve the ministerial exception.[258]

Third and finally, even if this passage in *Smith* did not exist, *Smith*'s natural scope might not include ministerial exception claims.

---

establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947))).

253. The point was put perfectly in Hosanna-Tabor's opening brief. *See* Brief for the Petitioner, *supra* note 229, at *14. ("The Establishment Clause prevents government from appointing ministers. And it therefore prevents courts from reinstating ministers.").

254. *See supra* Part V.D.

255. There is also the right of expressive association, most often associated with the Supreme Court's decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Usually *Dale* is raised by those who would want to narrow the ministerial exception. *Dale* is a conscience-based right—at best, *Dale* would only give churches the right to avoid anti-discrimination laws to which they religiously object. Relying on the right of expressive association but going beyond *Dale*, Douglas Laycock has very recently argued to the Court that the better analogy is to the Court's political-association cases. *See* Brief for the Petitioner, *supra* note 229, at *33–36.

256. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–52 (1969)); *see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976); *Kedroff*, 344 U.S. at 95–119.

257. *See supra* Part I.B.1.

258. *See* Brady, *supra* note 87, at 1676–79 (making the same sort of claim as in *Smith*).

The church autonomy cases have always represented a distinct line of precedent separate and aside from the conscientious objection cases like *Sherbert* and *Yoder*. *Smith* overruled *Sherbert* and *Yoder*.[259] And *Smith* overruled the compelling interest test that *Sherbert* and *Yoder* had established. But none of the church autonomy cases from this period—not *Jones v. Wolf*, not *Catholic Bishop*, not *Milivojevich*, not *Maryland and Virginia Eldership*, not *Mary Elizabeth Blue Hull*—none of them refer at all to the compelling interest test.[260] None of them quote or even cite *Sherbert* or *Yoder*. Think also about the concerns of the *Smith* court. Justice Scalia talked at length about the uncertainties of what would constitute a compelling governmental interest, the dangers of balancing, and the functional impossibility of a regime where religious objectors could seek exemption from every kind of governmental action.[261] Those concerns do not apply in the context of ministerial exception claims. There is no compelling interest test. There is no balancing. And because the claims here all relate to matters of internal church autonomy, claims of exemption will be limited to those few laws that burden the church's right to self-governance. Simply put, neither the words nor the logic of *Smith* require the destruction of the ministerial exception.

This is not to say that the proponents of the ministerial exception clearly win the battle over *Smith*. *Smith* is flexible. The Supreme Court could interpret *Smith* to preserve the ministerial exception; it could interpret *Smith* to eliminate it. The Supreme Court's hands are simply not tied either way. As a result, whatever direction the Court chooses to go will be determined by the Court's view of the merits of the ministerial exception. It will not be because the Court feels bound by *Smith*.[262]

---

259. The Court purported to distinguish both cases, but most commentators see *Smith* as simply overruling them. *See* Lund, *supra* note 143, at 631 & n.19 (2003) (explaining the point and providing citations).

260. *See generally* Jones v. Wolf, 443 U.S. 595 (1979) (providing no references to the compelling state interest); NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (same); *Milivojevich*, 426 U.S. 696 (1976) (same); Md. & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970) (per curiam) (same); *Mary Elizabeth Blue Hull*, 393 U.S. 440 (1969) (same). There is only one exception, which really proves the rule. *Catholic Bishop* at one point cites *Yoder* on a side point about the difficulty of drawing a line between things that are "completely religious" and "merely religiously associated." *Catholic Bishop*, 440 U.S. at 495.

261. *See Smith*, 494 U.S. at 885–89.

262. The Supreme Court, of course, is not really bound to its earlier precedents anyway. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) (explaining how "[t]he

VII. THE SCOPE OF THE MINISTERIAL EXCEPTION AND A CLOSER LOOK AT *HOSANNA-TABOR V. EEOC*

Once the existence of the ministerial exception is firmly established, the question becomes its scope: If "ministers" are categorically barred from bringing employment discrimination claims against the churches that employ them, then who exactly is a "minister"?

The last part of the Article addresses that question, focusing on the case before the Supreme Court in the fall of 2011, *Hosanna-Tabor v. EEOC*.[263] Resolving the controversy in *Hosanna-Tabor* will probably require the Court to draw some line distinguishing ministers from non-ministers, and this final part offers some suggestions on how to do it.

A. The Facts of Hosanna-Tabor

Given the fact-intensive nature of any minister/non-minister distinction, it is worth spending some time going over the particular details of *Hosanna-Tabor v. EEOC*. Hosanna-Tabor Lutheran Church is a congregation in the Lutheran Church-Missouri Synod ("LCMS"), a conservative Lutheran denomination. As part of its ministry, Hosanna-Tabor ran a small school with around eighty-five students. Cheryl Perich, who taught fourth grade, was one of the seven teachers who taught at the school.[264]

Like other fourth-grade teachers, Perich taught the full range of secular subjects—things like reading, writing, and arithmetic. But, as a teacher at a religious school, she was expected to integrate religion into these generally secular topics. And Perich also provided religious instruction more directly. She taught a thirty-minute religion class four times a week. She prayed with her students three times a day. She led devotions for about five or ten minutes each morning. Each week, she took her students to a thirty-minute chapel service. And

---

doctrine of stare decisis has only a limited application in the field of constitutional law" (citation and quotation marks omitted)).

263. 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3552 (U.S. March 29, 2011) (No. 10-553).

264. *See Hosanna-Tabor*, 597 F.3d at 772; Joint Appendix at 121, Hosanna-Tabor v. EEOC, No. 10-553 (U.S. June 13, 2011), 2011 WL 2940670, at *121 [hereinafter Joint Appendix].

she led that service twice a year, arranging the service, deciding on Bible readings, and crafting a homily.[265]

Perich also was a commissioned minister in the LCMS. LCMS schools distinguish between two kinds of teachers—called teachers (i.e., commissioned ministers) and lay teachers. Called teachers are special. The congregation itself chooses them based on the congregation's belief that the teacher has been "called" by God into the position. Such jobs (referred to as "calls") are open-ended in terms of time and can only be rescinded by the congregation for cause and by supermajority vote. Lay teachers, on the other hand, are hired rather than called. And they are hired by the school board rather than the congregation. Employed exclusively on one-year contracts, lay teachers are not to be used at all unless there is a shortage of called teachers. Lay teachers need not be Lutheran, though they must be Christian and willing to teach Lutheranism.[266]

Becoming a called teacher is a difficult and time-intensive process. One must be an LCMS member who satisfies various educational, moral, and religious standards. One must then get accepted into a Colloquy program at a LCMS seminary, take theology classes, complete an internship, and pass an oral examination. Candidates then become eligible for a call from a congregation. Commissioned ministers are employed in a number of functions within LCMS churches, but most frequently they serve as called teachers.[267]

Turning back to the facts of this case, Perich started as a lay teacher for Hosanna-Tabor in 1999 on a one-year contract, although she was in the process of becoming a commissioned minister and called teacher. She became a commissioned minister in 2002 and received a call from the congregation that same year. In June 2004, before the school year began, Perich developed an illness, later diagnosed as narcolepsy, where she passed out without warning and could not be easily woken up. With no firm diagnosis, Perich agreed to go on disability leave for the coming school year, and it was unclear when (or if) she would be able to return.[268]

---

265. *Hosanna-Tabor*, 597 F.3d at 772–73 (describing these tasks as part of Perich's job duties).

266. *Id.* at 772–73 (describing the teacher selection process).

267. *Id.* at 772; *see also* Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, *supra* note 150, at *2–16 (explaining the process to become a called teacher in more detail).

268. *Hosanna-Tabor*, 597 F.3d at 773–74.

Hosanna-Tabor dealt with the situation initially by combining three grades under one teacher. When this did not work out well, it hired a replacement teacher for Perich's class for the rest of the year. In December 2004, Perich was diagnosed with narcolepsy, started receiving treatment for it, and informed the school that she would return in February or March. The school, however, hesitated. It expressed concerns about Perich's health, her ability to care for students, what to do with the replacement teacher it just hired, and the fact that Perich would have been the third teacher some students had that academic year. The school eventually asked Perich to resign her call with the understanding that it could be renewed the following year. But Perich said that she has gotten a medical release from her doctor and that she wanted to come back right away.[269]

Things came to a head in February 2005 when Perich showed up at the school with little notice, insisting on coming to work and refusing to leave until she got a letter acknowledging that she had reported to work. The school gave her the letter but clearly saw her as somewhat insubordinate and self-centered, more concerned with her own welfare than with the ministry of the school. Everything finally collapsed when Perich threatened to bring suit, which the school saw as a violation of the congregation-clergy relationship and of Lutheran doctrine requiring internal church resolution of internal church disputes. The congregation voted 40 to 11 to rescind Perich's call, and in turn Perich filed suit.[270] Perich ultimately brought two retaliation claims against the church—one based on the ADA and one based on Michigan state law. The district court dismissed Perich's case, finding that Perich was a "minister" for purposes of the ministerial exception.[271] But the Sixth Circuit disagreed and reinstated her case.[272]

As the next section will explore, the Supreme Court in *Hosanna-Tabor* will have to decide on the scope of the ministerial exception. But it is worth a preliminary note to see how *Hosanna-Tabor* illustrates many of the concerns discussed in earlier sections of this Article. There is a concern about conscience. Perich violated the church's long-standing policy that religious disputes be resolved within the church and not by the courts. This dovetails with the control concern. For centuries, these sorts of disputes have been

269. *Id.* at 774.

270. *Id.* at 774–75.

271. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008).

272. *Hosanna-Tabor*, 597 F.3d at 772–73.

resolved internally by the Synod, in accordance with the religious beliefs shared by both sides. The case also presents a problem about reinstatement—both Perich's and the EEOC's complaint demand that Perich be reinstated to her old position.[273] There are also hints of a restructuring problem. Perich asks the court to require the church to adopt unspecified "policies, practices, and programs" to remedy and prevent future problems.[274] Finally, there is an inquiry problem. Perich claims she was fired for threatening to sue the church. But a lot of evidence suggests she would have been fired anyway. By the time she threatened suit, things had already broken down. The school had already asked her to resign. It had already told her that her job would not be available until next year at the earliest. Perich went back to the school anyway, demanding to go back to work immediately, which apparently caused a scene. The school told Perich that she was insubordinate, and that she was putting her desires over the school's ministry. And all this happened before Perich threatened to bring suit. Now Perich's threat might have been the final straw. But that creates a difficult and religiously loaded issue of fact. At trial, the big issue would be whether Perich's insubordination was so bad that it alone would have led to the congregation revoking her divine call. But answering that question would require the jury to decide when the divine call of a commissioned minister is properly revoked. A jury would have to go deep into the religious views of the LCMS, through its theology, policies, practices, and history—all the while being coaxed toward different conclusions by the parties. This is the classic inquiry problem, and it lies at the heart of *Hosanna-Tabor v. EEOC*.

B. The Proper Scope of the Ministerial Exception

As the facts of *Hosanna-Tabor* reflect, the ministerial exception presupposes a distinction between ministers and nonministers that ends up being somewhat messy in real life. The religious significance of a position is a continuous variable, not a dichotomous one—whether someone is a minister is less of a "yes/no" question and more of a "how much" question. To be sure, there are those who are clearly ministers within any definition of the term—parish priests, for

273. This demand appears in both the EEOC's complaint and Perich's complaint. *See* Joint Appendix, *supra* note 264, at *17 (EEOC Complaint); Complaint at 6–7, EEOC v. Hosanna-Tabor, 582 F. Supp. 2d 881 (E.D. Mich. 2008) (No. 07-14124), 2008 WL 2377826, at *6–7.

274. *See* Joint Appendix, *supra* note 264, at *17 (EEOC Complaint); Complaint, *supra* note 273, at 73a (Perich's Complaint).

example. And there are those who are clearly not ministers within any definition of the term—the janitor in *Amos*, for example.[275] But many positions fall somewhere into that hazy middle, where there are no natural points of differentiation. As a result, whatever line the Court ultimately draws will be seen as vague and arbitrary. Yet the Court cannot avoid this line-drawing task, for the alternatives are worse; the Court would have to conclude either that the ministerial exception does not exist at all or that all employees of religious organizations fall within it. Neither of those approaches is acceptable.

Lower courts have adopted a variety of methods for defining the boundaries of the ministerial exception, but the "primary duties" test has become the dominant one.[276] As its name suggests, this test looks at the "primary duties" of the employee and categorizes them as either primarily religious or primarily secular. If primarily religious, the ministerial exception bars the claims in question. If primarily secular, the claims can proceed. Many federal circuits have adopted some form of the primary duties test, including the Sixth Circuit in *Hosanna-Tabor*.[277] But other courts have offered different tests. The Ninth Circuit, for example, used to just ask whether the employee has "some religious duties and responsibilities."[278] The Seventh Circuit adds in a presumption that clerical employees (that is, ordained clergy) are ministers, a presumption that can only be overridden if *all* of the clerical employee's duties are secular in nature.[279] Some courts

275. For more on *Amos*, see *supra* notes 119–20 and accompanying text.

276. *See* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1776 (2008) ("Nearly all courts determine ministerial status under a primary duties test . . . .").

277. *See, e.g.*, *Hosanna-Tabor*, 597 F.3d at 778; Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6 (3d Cir. 2006); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985). The "primary duties" test comes out of an early law review article which proposed it. *See generally* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979).

278. *See* Alcazar v. Corp. of Catholic Archbishop of Seattle, 598 F.3d 668, 676 (9th Cir. 2010). The Ninth Circuit, taking *Alcazar* en banc, subsequently rejected crafting any test at all. *See* Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1292 (9th Cir. 2010) (en banc) ("We leave for another day the formulation of a general test because, under any reasonable construction of the ministerial exception, Rosas meets the definition of a minister.").

279. *See* Schleicher v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008).

have consciously avoided formulating any test, believing things are better handled case-by-case.[280]

This Article will end up criticizing the primary-duties test, but we should begin by emphasizing what the primary-duties test gets right. The primary-duties test rightly recognizes that labels may not match up perfectly with reality—whether a church calls someone a minister should not always control whether that person falls within the ministerial exception. There are problems in both directions. On one hand, a church could simply call someone a minister without that term having much meaning at all.[281] On the other, a church might not call someone a minister, even though he or she performs important religious duties and functions as a minister in every respect.[282] Some religious denominations do not ordain clergy at all, sometimes for theological reasons—surely such groups might still have positions that rightly would fall within the ministerial exception, properly conceived. All this is to say that whether someone is called a minister should not always be dispositive.[283] This also makes sense from another angle, too. We call it the "ministerial exception" as convenient shorthand. But linguistics should not control reality: The scope of the ministerial exception should be determined by the

280. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1243 (10th Cir. 2010); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362–63 (8th Cir. 1991).

281. *See, e.g.*, *Alcazar*, 627 F.3d at 1292 (pointing out that churches cannot "label[] a person a religious official as a mere 'subterfuge' to avoid statutory obligations"); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) (making the same point).

Fifty years ago, the Selective Service laws contained a "ministerial exception" which exempted ministers from the draft. 50 U.S.C. app. § 456(g) (2006). The Court took it as obvious that not every person in a religious organization could qualify as a minister, even if he earnestly believed himself to be. *See* Dickinson v. United States, 346 U.S. 389, 394 (1953) ("Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister.").

282. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) (concluding that "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral missions" (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985))).

283. *See, e.g.*, EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) ("Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" (quoting *Rayburn*, 772 F.2d at 1168)); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. Unit A Jul. 1981) ("While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status.").

breadth of its underlying rationales, not by the semantic meaning of the word "minister." The primary-duties test gets all this right.

But the primary-duties test has some difficulties and some defects—difficulties and defects that can perhaps best be explored by looking at the Sixth Circuit's decision in *EEOC v. Hosanna-Tabor.* The court in *Hosanna-Tabor* rightly examines Perich's work duties; it explains how there are both religious and nonreligious dimensions to her job. But the court resolves the issue by dividing up Perich's work duties between the religious and nonreligious in terms of time, as if Perich were a lawyer billing her work to two different clients. Much of the Sixth Circuit's opinion simply counts minutes on the clock. Thirty minutes a day go to religious instruction (religion class four days a week, chapel on the fifth); five to ten minutes a day are spent on morning devotions; six minutes a day are devoted to prayer (two minutes, three times a day). All told, that is about forty-five minutes on religion. Because that is less than half of the seven-hour school day, Perich is not a minister.[284] This summary somewhat oversimplifies the Sixth Circuit's analysis, but not by much.

The court's analysis strives for objectivity, but it backhandedly illustrates some difficulties with the primary-duties test. First and foremost, it presumes this clear-cut distinction between religious duties and nonreligious duties that just breaks down in practice.[285] The court treats the six-or-so hours spent on topics like reading and

284. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 779–80 (6th Cir. 2010).

285. The Supreme Court has frequently noticed this in other contexts. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident."); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) (noting that separating the secular from the religious is "a difficult and delicate task"); *see also* New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). For another elaboration on this point, consider some remarks by Judge Kleinfeld:

> When the Pope washes feet on the Thursday before Easter, that is not secular hygiene, and the Pope is not a pedicurist. Confession to a priest and confession to a psychiatrist may have the same content, but that does not make confessing to a priest secular. Fitness clubs and Falun Gong both perform calisthenics. Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular. Humanitarian work may be a secular or a religious activity, depending on the motivation and meaning among those who perform it.

Spencer v. World Vision, Inc., 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring).

writing as nonreligious in nature. But it is not clear why. Perich was supposed to integrate religion into every subject; before the litigation began, she spoke enthusiastically about doing so.[286] The Supreme Court used to routinely assume that such integration happened all the time in religious schools[287]—out of this assumption came the ban on government aid to "pervasively sectarian" institutions.[288] Perich's reading and writing duties thus had religious elements in themselves. But they also enhanced the more direct religious instruction she provided. Perich was the students' permanent teacher, someone who saw them all day, every day, someone who taught them authoritatively on every other subject. Coming to trust her on how to read and how to write, her students naturally came to trust what she said about religion. In the end, her "secular" duties do not seem secular at all, and even to the extent they are, they heightened the power of her religious instruction.[289]

We are not done picking on the religious/secular duty distinction. It also suffers from a deep level-of-generality problem. Recall the old story about three masons being interviewed about their work. One

---

286. In an application form filled out while searching for another job, Perich spoke passionately about her ability to bring religion into the classroom, even into ostensibly secular subjects. *See* Joint Appendix, *supra* note 264, at *53 (Lutheran Educator Information Form of Cheryl Perich).

287. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 370 (1975) ("Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."), *overruled by* Mitchell v. Helms, 530 U.S. 793, 808 (2000).

288. Under this old doctrine, educational institutions whose "secular activities cannot be separated from [religious] ones" faced special restrictions on their ability to receive government funds. Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976). While the doctrine is mostly a relic now, it does seem to accurately describe the sort of education that LCMS schools aim to provide. *See, e.g.*, Helms v. Arveson, No. 85-5533, 1994 WL 406406, at *7 (E.D. La. July 25, 1994) (enjoining public funds from going to various schools including a Synod school, Faith Lutheran, because of its pervasively sectarian nature), *rev. sub. nom.* Mitchell v. Helms, 530 U.S. 793 (2000).

289. Many courts have said similar things. *See, e.g.*, Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., Inc., 875 A.2d 669, 677 (D.C. 2005) ("[M]erely enumerating the duties in Pardue's job description, many under secular-sounding headings such as 'materials management' and 'office management,' tells us little about whether her position is important to the spiritual and pastoral mission of the church." (citations and quotation marks omitted)); Weishuhn v. Catholic Diocese of Lansing, 787 N.W.2d 513, 518 (Mich. Ct. App. 2010) ("[T]eaching 'secular' classes is not necessarily 'purely secular' in the context of religious schools." (quoting Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868, 884 (Wis. 2009))); *Coulee*, 768 N.W.2d at 887–88 ("While it may be that the majority of her duties were teaching 'secular' subjects, it does not follow that her 'primary duties' were secular for purposes of determining whether the ministerial exception applies.").

replies that he is cutting stone. Another claims he is crafting an entryway. The third says he is building a cathedral.[290] Because their answers are pitched at different degrees of abstraction, the first two can speak of their work in wholly secular terms and the third can speak in wholly religious terms, without any contradiction. The EEOC sees a school that teaches mostly secular things. But the church only runs a school at all because it wants to provide a kind of religious education that students cannot get in the public schools. Like building a cathedral, running a religious school in a sense involves secular work. But religion is the reason why people run religious schools or build cathedrals in the first place.

There is also, frankly, a practical problem. Applied straightforwardly, the primary-duties test threatens to undermine the very core of the ministerial exception. After all, wasn't Mother Teresa's job primarily secular? Nonreligious people feed and clothe the poor all the time; no one would call those actions inherently religious. Even the work of many parish pastors seems primarily secular. They preach and teach on Sundays, but they also spend a lot of their time running soup kitchens, visiting the sick, arranging car washes, and coordinating potlucks. Surely whether parish pastors fall within the ministerial exception does not depend on how they happen to allocate their time between these various tasks. In the wrong hands, the primary-duties test could well function as a Trojan horse spelling the end of the ministerial exception altogether.

These problems cannot be avoided, but some can be lessened. Courts can avoid having to define "secular" duties and avoid problems of apportioning time between the religious and the secular. Instead, courts can simply ask whether the employee has significant religious duties, which would presumably include those who lead religious activities, engage in religious teaching, or participate in church governance.[291] Of course, any line drawn to separate ministers from non-ministers will be fuzzy and leave much to discretion. But that is a good starting point.

---

290. This story shows up in many places, but Chief Justice Roberts told it recently when he received the Robert Jackson Award from Pepperdine Law School. *See* The Honorable John G. Roberts, Jr., *Thirty-First Annual Pepperdine University School of Law Dinner: Keynote Address*, 37 PEPP. L. REV. 1, 5–6 (2009).

291. This is akin to the Ninth Circuit's old test which only asked whether the employee had "some religious duties and responsibilities." For more on that test, see *supra* note 278 and accompanying text (discussing *Alcazar*).

And this inquiry can be made reasonably objective. By the time of litigation, of course, both parties will describe the plaintiff's role to fit their litigation positions. The church will highlight the plaintiff's religious duties; the plaintiff will minimize them. Courts can look, though, to objective indicators of the parties' joint understanding as it existed before the dispute arose.[292] Positions have job descriptions that specify the important tasks of the job. Employers require certain background credentials—things like religious education, religious training, and earlier experience in religious positions. Employees fill out written job applications and go through interviews. In all these ways, both sides communicate their expectations about the job and are informed about what the other side expects. And in termination cases, there will usually be a track record of how the employee and others similarly situated actually performed their jobs and how they were treated and evaluated by the church. By looking at all these things, a finder of fact can determine the mutual, original understanding of the two parties together. If they originally conceived of the job as having religious significance, that is what matters.

Looking at job duties captures a great deal, but it does not capture everything. Ecclesiastical office should be a separate and independent consideration. Indeed, when it is conferred seriously and not as a subterfuge, ecclesiastical office should put a person within the ministerial exception regardless of his job duties.[293] The Sixth Circuit in *Hosanna-Tabor* treated ecclesiastical office as simply irrelevant. The fact that Cheryl Perich was a commissioned minister in the Lutheran Church-Missouri Synod counted for nothing; the court dismissed it as an irrelevant title. And this makes a certain amount of sense. To the extent that titles are just labels without any underlying reality, they should be irrelevant. But clerical status, in most churches, is not that sort of title. Clerical status signifies a certain type of relationship between a minister and a congregation; it signifies a type of consent by the minister to the church's religious authority.[294]

---

292. *Cf.* Jones v. Wolf, 443 U.S. 595, 614 (1979) (Powell, J., dissenting) (noting how *Watson v. Jones* required courts to defer to "the church government agreed upon by the members before the dispute arose").

293. The Seventh Circuit has adopted this principle, but with the exception that the ministerial exception would not cover an ordained minister if all of his job duties were commercial in nature. *See* Schleicher v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008).

294. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871) ("All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.").

Focusing exclusively on job duties also goes wrong in another way. As the Mother Teresa example reflects, an employee's duties sometimes end up being a poor proxy for the religious significance of the position. Often the higher one goes up in the church, the more one's duties become administrative in character and less obviously religious. The bishop will spend less time performing sacraments than the priest; the parochial school principal will engage in less religious instruction than the teacher. The duties of bishops and principals may come to appear more secular because of their elevated positions in the church. But the ministerial exception should still apply to them. At the end of the day, clerical status is an important independent measure of religious significance. Thus, a twofold theory works better than a purely functional analysis—for purposes of the ministerial exception, an individual should be considered a minister either if he has significant job duties or if he holds clerical status or ecclesiastical office. Given Perich's religious duties and ecclesiastical office, Perich should fall within the ministerial exception, wherever its precise boundaries end up.

CONCLUSION

At the core of the Religion Clauses is the idea that religion should be voluntary. Each person gets to have his own religious beliefs, perform his own religious rituals, and choose his own religious associates. And this insistence that religious exercise be truly voluntary shows up in both Religion Clauses. The Free Exercise Clause protects freely chosen religious exercise done by individuals and in freely chosen groups. The Establishment Clause forbids religious coercion and prevents religious exercise by the state because it is a coerced community. When it comes to groups, to be voluntary, religious liberty has to include two distinct rights—a right to join and a right to leave. We take this as a given when talking about individuals being free to choose their religious communities. They must be free to change their minds. But this is also true of groups, even groups that hire people.

The ministerial exception is part of the voluntary principle. By guaranteeing a right to leave to both ministers and their churches, it guarantees that when they stay together, they do so of their own volition. This phrasing may sound odd, as it implies that ministers too are protected by the ministerial exception. But that is indeed true. The ministerial exception is a form of constitutionalized at-will employment. As such, it gives churches and ministers precisely the

same right—the right to leave. A minister who leaves one church for another cannot be sued for breach of fiduciary duty. He cannot be sued for stealing parishioners, whether under some trade-secret theory or for unfair competition. Nor can the old church discourage him from leaving by suing the new church for tortious interference of contract. The ministerial exception precludes those claims too.

We close with one final analogy. The statute of limitations serves important purposes, but no one really likes it. Its purposes are abstract, while its costs are concrete and imposed on identifiable individuals. The same is true of the ministerial exception. Its costs are highly visible; its benefits important but intangible. This Article has tried to flesh out those benefits, which can be easily lost in the shuffle. As the Supreme Court considers its decision in *Hosanna-Tabor*, it is worth pausing over those benefits—if only to reflect on what will be lost if the ministerial exception is to disappear.