

Hosanna-Tabor, Religious Freedom, and the Constitutional Structure

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*[T]he First Amendment has struck the balance for us.
The church must be free to choose those who will guide it on its way.
—Hosanna-Tabor v. EEOC, 132 S. Ct. 694, 710 (2012)*

I. Introduction

Our Constitution, which is both an act and artifact of “We the People of the United States,” “vest[s]” certain “powers”—some, but not all—in the national government. Those powers are enumerated, and also separated, checked, and constrained. As Chief Justice John Roberts put it last June, this government “possesses only limited powers; the States and the people retain the remainder.”¹ It is designed and structured in such a way as to make it workable, capable, and effective, but also to—by virtue of its design and structure, and not only through explicit prohibitions and guarantees—“ensure protection of our fundamental liberties” and “reduce the risk of tyranny and abuse.”² It is a familiar, but foundational, point: “The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.”³

These “structural” devices and features of the Constitution—the mechanisms by which and the ways in which power is assigned,

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¹ Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 2 (June 28, 2012).

² United States v. Lopez, 514 U.S. 549, 552 (1995) (internal quotation marks and citations omitted).

³ Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1155 (1992).

regulated, limited, and retained—were front and center in the two most anticipated decisions of the Supreme Court’s recent term, *Arizona v. United States* and *NFIB v. Sebelius*. They were also examined closely and defended forcefully in a relatively unnoticed ruling from the previous term, *Bond v. United States*,⁴ in which the justices recalled that the “diffusion” of power, no less than the listing of rights, “protects the liberty of the individual.”⁵ And, we propose, they are at the heart of the Court’s most significant church-state decision in decades, *Hosanna-Tabor v. EEOC*.⁶

Unlike so many of the Court’s recent religion-related cases, *Hosanna-Tabor* was not about the placement of monuments and the parsing of their messages,⁷ but about power and pluralism. It was unanimous, and therefore lacked the end-of-June fireworks, swing-vote drama, and sharp back-and-forths we expect from blockbuster cases. For historical context and content, it reached back not just to Madison but to Magna Carta. The rival authorities in the case were not co-equal federal departments or the federal and state governments. Instead, the competition at issue was the ancient one—one that “profoundly influenced the development of Western constitutionalism”⁸—between religious and political authority, that is, between “church” and “state.” Writing for the Court, Chief Justice Roberts, who would later open his opinion in *NFIB* with a primer on the Constitution’s structural mechanisms for protecting liberty, explained that the First Amendment can and should be seen as another such mechanism: The free-exercise guarantee protects the right of religious institutions and communities to govern themselves with respect to religious matters, and the no-establishment rule denies to governments authority over such matters. The “religion

⁴ 131 S. Ct. 2355 (2011).

⁵ *Id.* at 2364.

⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opp. Comm.*, 132 S. Ct. 694 (2012). See, e.g., Lyle Denniston, Opinion Recap: A Solid “Ministerial Exception,” SCOTUSblog, Jan. 11, 2012, <http://www.scotusblog.com/2012/01/opinion-recap-a-solid-ministerial-exception>; Richard W. Garnett, *Hosanna-Tabor Case to Test Our Church-State Divide*, USA Today, April 25, 2011, available at <http://www.usatoday.com/news/opinion/forum/2011-04-24-Hosanna-Tabor-and-Supreme-Court.htm>.

⁷ Cf., e.g., *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

⁸ Brian Tierney, *The Crisis of Church and State: 1050-1300* 2 (1964). See generally Richard W. Garnett, *The Freedom of the Church*, 4 J. Cath. Soc. Thought 59 (2007).

clauses" work together, and not at cross-purposes, to safeguard freedom by maintaining jurisdictional boundaries, protecting the appropriate authority of the church, and limiting that of the state.

Specifically, *Hosanna-Tabor* dealt with the justification and scope of the so-called ministerial exception, a judicial doctrine that constrains the force of antidiscrimination laws in employment disputes between religious institutions and their "ministerial" employees. *Hosanna-Tabor*, a small Lutheran school in Michigan, contended that the exception reflects religious institutions' constitutionally protected autonomy in matters of internal governance, including religious schools' hiring and firing decisions regarding many teachers. The Equal Employment Opportunity Commission, arguing alongside Cheryl Perich, a recently fired teacher at the school, insisted that no such exception is constitutionally required and that, even if it is, Perich did not qualify as a "minister" because she primarily taught "secular" subjects.

At one level, the argument in *Hosanna-Tabor* was simply about the reach of the Americans with Disabilities Act's prohibitions on discrimination and retaliation. At another, though, it concerned the proper understanding of the separation of church and state, "an often-misunderstood arrangement that is nevertheless a critical dimension of the freedom of religion protected by the First Amendment to our Constitution."⁹ Although the word is not used in the First Amendment's text, the "separation" between religious and political authorities has, again, long been seen as a government-limiting principle that protects individuals by keeping certain aspects of human life beyond the latter authorities' competence and jurisdiction. It was not entirely clear, though, before *Hosanna-Tabor* how this arrangement would interact with the various local, state, and federal employment-discrimination bans. After all, the purpose of these laws is precisely to supervise and second-guess many "internal" decisions of employers, including religious employers. A number of questions about the case's implications remain to be answered, but the Court's bottom line in *Hosanna-Tabor* provides a crucial starting point and touchstone: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who

⁹ Thomas C. Berg et al., *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011).

will preach their beliefs, teach their faith, and carry out their mission. . . . [T]he First Amendment has struck the balance for us.”¹⁰

True, the ministerial exception is not new. The Court didn’t sing its own song in *Hosanna-Tabor*, but rather joined the chorus and affirmed the 40-years-running status quo.¹¹ The justices didn’t say all that there is to say or will need to be said about the doctrine, but what they did say was welcome, important, and—at a time when the Constitution’s special protections for religious freedom are increasingly contested¹²—timely.

II. Historical Background

To understand the result in, and engage the implications of, the *Hosanna-Tabor* decision, it will be helpful to first situate it in the story of Western constitutionalism. Historical accounts and arguments have long been a staple (for better or worse) of the Court’s church-state rulings, but the chief justice looked further back than is typical; past the usual presentation of the Virginia Assessment Controversy, the Northwest Ordinance, and Washington’s Farewell Address, to the Act of Supremacy and “the very first clause of Magna Carta” in which King John promised that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.”¹³ And he could have traveled back in time even further: For centuries, governance in the West had invariably involved, what Harold Berman called, a “fusion of the religious and political spheres.”¹⁴ It could be said, of course, that this fusion was unsettled by Christ, who in the Gospel of Mark tells questioners seeking “to ensnare him” to “repay to Caesar what belongs to Caesar and to God what belongs to God.”¹⁵ It was, in any event, memorably challenged by Pope Gelasius I in the late 5th century, who insisted to Emperor Anastasius I that “[t]wo there are, august Emperor, by

¹⁰ *Hosanna-Tabor*, 132 S. Ct. at 710.

¹¹ See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 20–22 (2011).

¹² See generally, e.g., Micah Schwartzman, *What if Religion Isn’t Special?*, 79 U. Chi. L. Rev. ___ (forthcoming 2013).

¹³ *Hosanna-Tabor*, 132 S. Ct. at 702–04.

¹⁴ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 88 (1983).

¹⁵ Mark 12:13, 17 (New American Bible, Revised Ed.).

which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power.”¹⁶ This Gelasian text has been called the “Magna Carta of the whole ‘freedom of the Church’ in medieval times.”¹⁷

The pope’s challenge notwithstanding, political, civil, royal, and secular authorities, such as there were, continued to assert and exercise control over matters of church governance, including the appointment of ministers. This control was famously resisted and condemned by Pope Gregory VII in his Investiture Crisis standoff with Emperor Henry IV in the 11th century. In a kind of *High Noon* moment, a pope excommunicated a king, which brought the latter penitent and barefoot, in the snow, to a castle near Canossa seeking reconciliation. The *High Noon* comparison is, of course, complicated by the fact that the pope’s win was short-lived and resolved little. Still, the event came to stand, in Berman’s words, for the “principle that royal jurisdiction [is] not unlimited . . . and that it [is] not for the secular authority alone to decide where its boundaries should be fixed.”¹⁸ This principle, in turn, played a vital role in the development of Western notions of pluralism and constitutionally limited government.

Over the next several centuries, as the chief justice described, Europe’s commitment to a pluralistic authority structure waxed and waned. King Henry VIII, for example, secured various parliamentary acts making him the head of the Church of England and giving him the authority to appoint its high clerics.¹⁹ (He and his successors also enjoyed the great benefits that came with acquiring control over the Church’s and religious orders’ property.) It was partly in response to this claim of authority that, eventually, the Puritans decided to leave England and settle in North America, desiring, among other things, to create a society in which they could espouse their own religious beliefs and elect their own ministers to lead the faithful.²⁰ In contrast, southern settlers in the colonies brought the

¹⁶ Garnett, *supra* note 8, at 67.

¹⁷ *Id.* (quoting Alois Dempf, *Sacrum Imperium* (1929)).

¹⁸ Berg et al., *supra* note 9, at 180 (quoting Berman, *supra* note 14, at 269).

¹⁹ *Id.*

²⁰ *Id.*

Church of England along with them.²¹ However, in doing so, they often rejected the idea that colonial officials, representing the English Crown, should control the appointment of their local ministers.²² Thus, either as a matter of policy or practice, the principle that religious liberty and church autonomy are connected was present and influential in the early American colonies.

Without making definitive claims about their “original meaning,” it is still reasonable to propose that the Establishment and Free Exercise Clauses of the First Amendment were written and ratified against the backdrop of this history. It should come as no surprise, then, that many of the Constitution’s own contributors appear to have understood its text as commanding a “hands-off” approach toward matters of church governance, including ministerial selection.²³ In 1783, the Apostolic Nuncio wrote a letter to Benjamin Franklin, then ambassador to France, proposing an agreement with Congress over the appointment of a Bishop-Apostolic for America.²⁴ Franklin responded that “it would be absolutely useless to send it to the congress, which . . . can not . . . intervene in the ecclesiastical affairs of any sect.”²⁵ James Madison, explaining his decision to veto a bill which would have incorporated an Episcopal church in the District of Columbia, declared that such a bill enacted “sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same*; so that no change could be made therein.”²⁶ Thomas Jefferson provided some evidence of what, in his mind, the “wall of separation” between church and state means in his response to a letter written by the Ursuline Sisters of New Orleans concerning the impact of the Louisiana Purchase on their school for orphaned girls. Jefferson assured them that the Constitution guaranteed that

²¹ *Id.* at 703.

²² *Id.*

²³ Paul Horwitz, Act III of the Ministerial Exception, 106 *Nw. U. L. Rev. Colloquy* 156, 160 (2011).

²⁴ Berg et al., *supra* note 9, at 181.

²⁵ *Id.* (quoting 1 Anson Phelps Stokes, *Church and State in the United States* 478 (1950) (quotation omitted)).

²⁶ *Id.* (quoting 11 *Annals of Cong.* 982–83 (1811) (emphasis added)).

“your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority.”²⁷

What these and other events confirm is that many early American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities. And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers.

That the Constitution prohibits governments from intervening in the selection of ministers is supported by Supreme Court cases involving disputes over church property as well as the appointment of church officials. Although not in fact a constitutional case—the Fourteenth Amendment had not yet done its “incorporation” work—*Watson v. Jones*, decided in 1871, was one of the Court’s first attempts to articulate our commitment to the religious-liberty principle of church-state separation.²⁸ In that case, the Court was asked to revise a decision made by the General Assembly of the Presbyterian Church to recognize the interest of an anti-slavery faction over a pro-slavery faction in one of its church properties located in Louisville, Kentucky.²⁹ Declining to do so, the Court explained that “the jurisdiction of civil courts [is] confined to ‘civil actions’”³⁰ and “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”³¹

Decades later, in *Kedroff v. Saint Nicholas Cathedral*,³² the Court constitutionalized its decision in *Watson*.³³ In that case, the Court considered the constitutionality of a New York statute that regulated

²⁷ *Id.* at 182 (quoting Stokes, *supra* note 25 (citation omitted)).

²⁸ 80 U.S. 679 (1871).

²⁹ See generally *id.*

³⁰ *Id.* at 710.

³¹ *Id.* at 727.

³² *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

³³ See generally Richard W. Garnett, “Things That Are Not Caesar’s”: The Story of *Kedroff v. St. Nicholas Cathedral* 171, *First Amendment Stories* (R. Garnett & A. Koppelman, eds.) (Foundation, 2012) Notre Dame Legal Studies Paper No. 11-27.

the Russian Orthodox Church by reallocating “the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy [in Moscow] . . . to the governing authorities of the Russian Church in America.”³⁴ Appellees in that case relied on the statute when they claimed the right to use one of the church’s cathedrals with the approval of the archbishop of New York.³⁵ Holding that the law violated the Free Exercise Clause, the Court explained that “[l]egislation that regulates church administration, the operation of the churches, [and] *the appointment of clergy* . . . prohibits the free exercise of religion”³⁶ as these are “strictly [matters] of ecclesiastical government.”³⁷ Reflecting on *Watson*, the Court noted that it “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, *matters of church government* as well as those of faith and doctrine.”³⁸

The Court had occasion to apply and expound upon the *Watson/Kedroff* rule in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.³⁹ In that case, and in somewhat of a reprise of *Watson*, the dispute was between two local Georgia churches and the general church over the rightful ownership of church property.⁴⁰ After renouncing and withdrawing from the general church and facing eviction from church property in their possession, the two local churches immediately sought an injunction from the civil courts rather than appeal to church tribunals. The local churches relied on Georgia’s “departure-from-doctrine” approach to deciding matters of “trust of local church property,” essentially allowing the jury’s decision to turn on whether the general church “substantial[ly] abandon[ed its] original tenets and doctrines.”⁴¹ The

³⁴ *Id.* at 107.

³⁵ *Id.* at 95–96.

³⁶ *Id.* at 107–08 (emphasis added).

³⁷ *Id.* at 115.

³⁸ *Id.* at 116 (emphasis added).

³⁹ 393 U.S. 440 (1969).

⁴⁰ See generally Richard W. Garnett, Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine, 51 U.C.L.A. L. Rev. 1645 (2004).

⁴¹ *Blue Hull Church*, 393 U.S. at 443.

Court reversed the trial court's ruling for the local churches, holding that "the First Amendment forbids civil courts from . . . interpret[ing] . . . church doctrines and the importance of those doctrines to the religion."⁴² Through this type of engagement, Justice William Brennan warned, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."⁴³

Serbian Eastern Orthodox Diocese v. Milivojevich involved an effort to discipline and remove clergy.⁴⁴ In that case, the Holy Assembly of Bishops for the Serbian Orthodox Church, after a dispute over the administration of its American-Canadian Diocese, suspended, and ultimately removed and defrocked, Dionisije Milivojevich, its bishop. Milivojevich refused to accept the removal, challenging the Holy Assembly's decision on the ground that it had failed to comply with the church's own penal code and constitution. After the Illinois Supreme Court held for Milivojevich on findings that the Holy Assembly had, in fact, violated its own law, the Supreme Court reversed. The Court's decision was motivated by the *Blue Hull Church* concern that the Illinois court's attempt to adjudicate the claim at all led them necessarily into "exactly the [kind of] inquiry that the First Amendment prohibits," one involving questions of how and by what dictates ecclesiastical law affects internal church decision-making.⁴⁵ Merging the holdings of *Watson* and *Kedroff*, the Court further explained that "the constitution[] mandate[s] that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, *internal organization*, or ecclesiastical rule, custom, or law."⁴⁶

The relevant history and Court precedents, then, suggest a deeply rooted understanding that the "separation of church and state" is a dimension of the religious freedom protected by American law and that this "separation" safeguards the authority of religious institutions and communities over internal, religious matters. Another

⁴² *Id.* at 450.

⁴³ *Id.* at 449.

⁴⁴ *Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich*, 426 U.S. 696 (1976).

⁴⁵ *Id.* at 713.

⁴⁶ *Id.* (emphasis added).

important part of *Hosanna-Tabor's* context, however, is the enactment in recent years of a wide range of laws regulating employment practices.

The modern statutory landscape of anti-discrimination law began to take shape a half-century ago, with the Civil Rights Act of 1964.⁴⁷ Title VII of that law prohibits employment discrimination on a number of grounds, including race, national origin, sex, and religion, and also forbids retaliation against an employee for challenging such discrimination. On the heels of Title VII, Congress followed up with additional regulations, protecting individuals from discrimination in employment on the basis of age and disability.⁴⁸ In general, these and other employment discrimination laws did not speak clearly to the question whether religious employers' decisions regarding the hiring and firing of clergy, ministers, and religious teachers were exempt (as church-state "separation" would seem to require).⁴⁹

In response to this failure, the U.S. Court of Appeals for the Fifth Circuit created and applied the modern-day ministerial-exception doctrine in 1972.⁵⁰ Although it took time for the "ministerial exception" to get its name, it was designed and applied to give effect to the rule that civil courts may not "intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."⁵¹ Expressly included in these "matters," the court noted, are "relationship[s] between an organized church and its ministers," as "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose."⁵² Responding to these same concerns in like fashion, all other federal and several state courts embraced the doctrine over the course of the next 30 years.⁵³

To sum up: The history of Western constitutionalism and the American experience, along with 150 years of legal precedent, evinces a principled (if not always consistent) effort to "separate"

⁴⁷ 42 U.S.C. §2000e (1964).

⁴⁸ Lund, *supra* note 11, at 7.

⁴⁹ *Id.* at 7–8.

⁵⁰ McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

⁵¹ *Id.* at 560.

⁵² *Id.* at 558–59.

⁵³ Lund, *supra* note 11, at 21.

the institutions and authorities of church and state, in part, by limiting the government's jurisdiction over internal church decisions, particularly those concerning the qualifications and selection of ministers. On the other hand, present-day employment regulations seem to assert such jurisdiction and call for second-guessing by officials, judges, and juries of such decisions. The ministerial exception was created, and has long and widely been seen as constitutionally required, to curtail this overreach. In *Hosanna-Tabor*, the Court was asked to weigh in on the matter.

III. The *Hosanna-Tabor* Case

Hosanna-Tabor grew out of the decision to fire Cheryl Perich, a teacher at Hosanna-Tabor Evangelical Lutheran School. First employed by Hosanna-Tabor in 1999, Perich worked as a "lay" teacher, instructing kindergarteners and eventually fourth graders in secular subjects such as math, science, and music, but also teaching religion classes four times a week and leading twice yearly chapel services. Upon her completion of a "colloquy" program at a local Lutheran college, which included eight courses of theological study, Hosanna-Tabor extended an invitation to Perich to become a "called" teacher, a special designation that gave her an open-ended term of employment as well as the formal title "Minister of Religion, Commissioned."⁵⁴ Perich accepted the call and continued to teach at the school, performing the same functions she had previously performed as a "lay" teacher.

In 2004, Perich became ill and was subsequently diagnosed with narcolepsy, a disorder that includes sudden and involuntary bouts of deep sleep. Due to her condition, she began the 2004–2005 school year on disability leave and Hosanna-Tabor was eventually forced to hire a replacement teacher after holding her job open for her for over six months. It did so after continuing to pay Perich full salary throughout the fall and enduring complaints from parents over the school's decision to combine three grades into one classroom due to its short staff. In January 2005, after Perich finally notified the school that she could return to work, the school principal informed her that her position had been filled for the remainder of the year and expressed doubts about her ability to resume working. Later

⁵⁴ *Hosanna-Tabor*, 132 S. Ct. at 699.

that month, Hosanna-Tabor's congregation met and decided to offer Perich a "peaceful release" from her call, which included partial health-insurance payments in return for her resignation.⁵⁵ However, Perich refused to resign, and instead presented herself at the school, demanding documentation acknowledging that she had reported to teach. After being told that she would likely be fired if she did not resign, Perich threatened to bring a lawsuit against the school for wrongful termination. In response, the congregation voted to rescind her call, sending her a letter in April to that effect. The letter cited Perich's "threat[] to take legal action" as grounds for its decision as the threat violated the church's religious commitment to resolving disputes among its members internally.⁵⁶

Making good on her threat, Perich filed a charge with the Equal Employment Opportunity Commission, which subsequently brought suit on her behalf for violation of the Americans with Disabilities Act. The specific charge was that, in firing her, Hosanna-Tabor unlawfully retaliated against Perich for threatening to assert her rights under the ADA. The district court applied the ministerial exception, noting that the First Amendment makes "federal courts inept when it comes to religious issues."⁵⁷ In doing so, the court chose not to apply the ministerial exception in a "purely quantitative" way by looking at the breakdown of Perich's secular versus religious functions.⁵⁸ Instead, it concluded, on the basis of the relevant facts and circumstances, that Hosanna-Tabor sincerely believed it had hired Perich to act as its minister and had held her out to the world as such.

The U.S. Court of Appeals for the Sixth Circuit vacated summary judgment and remanded the case after performing the crabbled quantitative assessment of Perich's job functions that the district court had rejected.⁵⁹ The court noted that "the overwhelming majority of courts . . . have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial

⁵⁵ *Id.* at 700.

⁵⁶ *Id.*

⁵⁷ *EEOC v. Hosanna-Tabor Evangelical Church & Sch.*, 582 F.Supp.2d 881, 891 (E.D. Mich. 2008).

⁵⁸ *Id.* at 890 (quoting *Clapper v. Chesapeake Conf. of Seventh-Day Adventists*, No. 97-2648, 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. 1998)).

⁵⁹ *EEOC v. Hosanna-Tabor Evangelical Church & Sch.*, 597 F.3d 769 (6th Cir. 2010).

employees”⁶⁰ and that “activities devoted to religion consumed approximately forty-five minutes of [Perich’s] seven hour school day.”⁶¹ The court also brushed off the district court’s worry that a trial would involve an analysis of church doctrine and said that, even if it did, the “[c]ourt would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor’s actions.”⁶²

At the Supreme Court, *Hosanna-Tabor* took on a different character. Given that the Court had never considered the constitutionality of the ministerial exception, the arguments centered more on the doctrine’s existence than on its scope and application. For the United States, the solicitor general made the bold—or as Justice Antonin Scalia would incredulously remark, “extraordinary”⁶³—decision to argue not only that the ministerial exception is not rooted in the religion clauses at all, but that the religion clauses provide no additional protection to religious institutions from anti-discrimination laws beyond those already afforded by the Court’s expressive-association cases⁶⁴—protections that can be overcome by a compelling governmental interest.⁶⁵ That argument tacked closely to one advanced by a group of legal academics who, in their brief as *amici curiae*, contended that First Amendment protection of church-minister relationships “[d]epend[s] on how the Court weighs the state’s antidiscrimination goals against the religious institution’s [right to] *free speech*”—not freedom of religion.⁶⁶ The availability of such protection, according to the government, “provides a full response” to the concerns of religious institutions.⁶⁷ In addition, the government pressed the much more plausible argument that the Supreme Court’s

⁶⁰ *Id.* at 778.

⁶¹ *Id.* at 779.

⁶² *Id.* at 782.

⁶³ Tr. of Oral Arg. at 28, 132 S. Ct. 694 (2012) (No. 10-553).

⁶⁴ See generally Brief for the Federal Respondent, 132 S. Ct. 694 (2012) (No. 10-553).

⁶⁵ Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 *Wm. & Mary Bill of Rts. J.* 43, 50 (2008).

⁶⁶ Brief of Amici Curiae Law and Religion Professors in Support of Respondents at 30, 132 S. Ct. 694, (2012) (No. 10-553) (emphasis added).

⁶⁷ Brief for the Federal Respondent, *supra* note 64, at 31.

decision in *Employment Division v. Smith*,⁶⁸ which affirmed the constitutionality of neutral and generally applicable laws that incidentally affect the exercise of religion, precludes an exception for Hosanna-Tabor from the neutral and generally applicable ADA.

Responding to the argument that Hosanna-Tabor's defense should be analyzed under freedom of association principles, the chief justice called the contention "untenable" and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."⁶⁹ He went on to describe the view as "remarkable,"⁷⁰ adding a third adjective to "extraordinary"⁷¹ and "amazing"⁷² previously proffered by Justices Scalia and Elena Kagan at oral argument. All nine justices, then, affirmed that religion and religious liberty are distinctive and special in our Constitution, and that—at least in some circumstances—it is not enough to treat a church or other religious institution like the Boy Scouts or other expressive associations.⁷³

The chief justice then turned to *Smith*, which had involved the burden on religious liberty created by an Oregon statute criminalizing the ingestion of peyote, a drug used in the rituals of the Native American Church. At oral argument, Justice Scalia—the author of the *Smith* opinion—insisted that *Smith* "had nothing to do with who the church could employ" and that he failed to "see how [*Smith* had] any relevance to [*Hosanna-Tabor*]."⁷⁴ Similarly, in his opinion, Chief Justice Roberts distinguished the ADA from the law in *Smith*, holding that the regulation of the ingestion of peyote represents the "regulation of only outward physical acts" whereas the ADA, "in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."⁷⁵ He also wrote that *Smith* had cited the inability of a civil court to "lend

⁶⁸ 494 U.S. 872 (1990).

⁶⁹ *Hosanna-Tabor*, 132 S. Ct. at 706.

⁷⁰ *Id.*

⁷¹ Tr. of Oral Arg., *supra* note 63, at 28.

⁷² *Id.* at 38.

⁷³ Cf. Richard W. Garnett, Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?, 22 St. John's J. Legal Comment. 515 (2007).

⁷⁴ Tr. of Oral Arg., *supra* note 63, at 38.

⁷⁵ *Hosanna-Tabor*, 132 S. Ct. at 707.

its power to one or the other side in controversies over religious authority or dogma.”⁷⁶

The Court turned next to the application of the ministerial exception in Perich’s particular case. After expressing its “reluctan[ce] . . . to adopt a rigid formula” for addressing the question of who qualifies as a minister, the Court quickly found “that the exception covers Perich, given all the circumstances of her employment.”⁷⁷ By “all the circumstances,” the chief justice was referring to several specific points, including Ms. Perich’s formal title of “Minister of Religion, Commissioned”;⁷⁸ the “significant degree of religious training followed by a formal process of commissioning” that went into acquiring the title;⁷⁹ the fact that Perich “held herself out as a minister of the Church”;⁸⁰ and the “important religious functions she performed for the Church,” including, but not limited to, her role as a religion teacher and leader of the school’s chapel services.⁸¹

Reviewing the Sixth Circuit’s analysis, Chief Justice Roberts first announced that the lower court had “failed to see any relevance in the fact that Perich was a commissioned minister” by title.⁸² Although not dispositive, he insisted that such a title is “surely relevant.”⁸³ Next, the Sixth Circuit “gave too much weight” to evidence that showed that both “lay” and “called” teachers at Hosanna-Tabor performed the same religious functions.⁸⁴ Again, this evidence was “relevant, [but not] dispositive . . . particularly when, as here, [‘lay’ teachers performed religious functions] only because commissioned ministers were unavailable.”⁸⁵ Finally, “the Sixth Circuit placed too much emphasis on Perich’s performance of secular duties.”⁸⁶ According to the Court, an employee’s ministerial status is not an issue

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 708.

⁷⁹ *Id.* at 707.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

“that can be resolved by a stopwatch.”⁸⁷ Indeed, even though Perich spent the vast majority of her time teaching secular subjects, the “nature of [her] religious functions performed and the other considerations [previously discussed]” outweighed this fact.⁸⁸

Again, Chief Justice Roberts did not set out a single test or rule for identifying ministerial employees, perhaps because it was possible to secure unanimity on the question in Perich’s case only by declining to provide one. Several concurring justices, however, put some flesh on the bones of the Court’s holding. Justice Clarence Thomas urged an approach focused on the “religious organization’s good-faith understanding of who qualifies as its minister.”⁸⁹ Reminding us that questioning who acts as a minister “is itself religious in nature,”⁹⁰ Justice Thomas insisted that devising a “bright-line test or multi-factor analysis” risked disadvantaging little-known or unpopular religious groups and could lead to a chilling effect among churches that attempted to conform their hiring practices to secular demands in fear of litigation.⁹¹ Justice Samuel Alito, along with Justice Kagan, wrote to cabin the “surely relevant”⁹² but vaguely defined impact an employee’s ministerial title and ordination has in future cases. In their view, “courts should focus on . . . function[.]”⁹³ applying the ministerial exception “to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”⁹⁴ Title and ordination are, thus, “neither necessary nor sufficient.”⁹⁵

IV. What This Means for the Future

What should we make of *Hosanna-Tabor* and what is likely to follow? We believe that the decision was, among other things, “a

⁸⁷ *Id.* at 709.

⁸⁸ *Id.*

⁸⁹ *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring).

⁹⁰ *Id.*

⁹¹ *Id.* at 711.

⁹² *Id.* at 708.

⁹³ *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring).

⁹⁴ *Id.* at 712.

⁹⁵ *Id.* at 713.

major win for religious freedom”⁹⁶ and “a resounding defeat for those who seek to deny [it].”⁹⁷ Michael Stokes Paulsen does not go too far in saying that the ruling was “an occasion for celebration, for dancing in the streets,” as it was “truly a shout of praise to first principles of the First Amendment.”⁹⁸ That said, and again, the Court did not answer—because it did not need to—all the questions that have arisen and will arise regarding the ministerial exception’s foundations, content, application, and limits.

For example, the Court “express[ed] no view” on the applicability of the ministerial exception to cases involving breach of contract or tort claims.⁹⁹ An overview of ministerial-exception cases decided among the lower courts yields far more disputes involving these sorts of claims than those of the anti-discrimination variety at issue in *Hosanna-Tabor*.¹⁰⁰ However, even though some courts had distinguished breach of contract from anti-discrimination claims before *Hosanna-Tabor*, there was a strong tendency to dismiss those cases as well—even those that appeared entirely “secular”—“under fear of entanglement” in religious issues.¹⁰¹ Alternatively, one scholar speculates, “[p]erhaps courts will now construe the torts exception expansively due to the dicta in *Hosanna-Tabor*.”¹⁰² The proverbial elephant in the room is the unfortunate likelihood that future tort cases will involve retaliatory-termination claims brought by employees who report alleged instances of sexual abuse by clergy to the police, possibly under the compulsion of state law. The courts will

⁹⁶ Thomas Messner, Supreme Court Decision in *Hosanna-Tabor* a Major Win for Religious Freedom, *The Foundry*, Jan. 11, 2012, <http://blog.heritage.org/2012/01/11/supreme-court-decision-in-hosanna-tabor-a-major-win-for-religious-freedom>.

⁹⁷ Michael Sean Winters, *Hosanna-Tabor v. EEOC*, *National Catholic Reporter*, Jan. 12, 2012, available at <http://ncronline.org/blogs/distinctly-catholic/hosanna-tabor-v-eecoc>.

⁹⁸ Michael Stokes Paulsen, *Hosanna in the Highest!*, *Public Discourse: Ethics, Law, and the Common Good*, Jan. 12, 2012, available at <http://www.thepublicdiscourse.com/2012/01/4541>.

⁹⁹ *Hosanna-Tabor*, 132 S. Ct. at 710.

¹⁰⁰ Mark E. Chopko & Marissa Parker, Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor*, 10 *First Amend. L. Rev.* 233, 294 (2012).

¹⁰¹ Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 *Ind. L.J.* ____ (forthcoming 2013).

¹⁰² *Id.*

have to deal with those cases not so much “if” but “when they arise.”¹⁰³

It would be a mistake to reject *Hosanna-Tabor*, or the ministerial exception, out of fear that they make it difficult to respond appropriately to cases involving allegations of sexual abuse. As Professor Douglas Laycock emphasized at oral argument, it is in those instances where the government’s interest is preventing discrimination where “we are squarely within the heart of the ministerial exception.”¹⁰⁴ “If the government’s interest is . . . protecting . . . children” and not “ministers as such,” however, the Court would be free to independently assess whether that interest is “sufficiently compelling to justify interfering” in the relationships.¹⁰⁵ Whether one agrees or not that such an exception is possible, it is clear that, too often, the ministerial exception is misunderstood or condemned by scholars as putting churches and other religious institutions “above the law.”¹⁰⁶ One scholar asserts that one of *Hosanna-Tabor*’s “sins” is that it “entitles [religious] institutions to disobey the law.”¹⁰⁷ These criticisms miss the mark, however. Religious freedom’s “separation” dimension does not obstruct or hamstring all criminal and civil laws, “it simply reminds us that the law’s reach is limited.”¹⁰⁸

Moving forward, the key challenge will be to develop tools, methods, inquiries, and standards for identifying those employees who are “ministerial” in a way that is consistent with the “balance” that, in Chief Justice Roberts’ words, the First Amendment has “struck . . . for us.” We know that the Sixth Circuit’s “stopwatch” approach does not satisfy the Constitution and that the category of “ministerial” employees is not limited to those who engage in full-time religious instruction or ministry. The category includes more—many more, we think—than formally ordained and trained clergy, and yet it

¹⁰³ *Hosanna-Tabor*, 132 S. Ct. at 710.

¹⁰⁴ Tr. of Oral Arg., *supra* note 63, at 6.

¹⁰⁵ *Id.* at 6–7.

¹⁰⁶ Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *Fordham L. Rev.* 1965 (2007).

¹⁰⁷ Griffin, *supra* note 101.

¹⁰⁸ Richard W. Garnett, *Column: Hosanna-Tabor Ruling a Win for Religious Freedom*, USA Today, Jan. 11, 2012, available at <http://www.usatoday.com/news/opinion/forum/story/2012-01-11/hosanna-tabor-church-state-case/52500140/1>.

would not seem to include all those employees who get their paychecks from a religiously affiliated organization.

It has been suggested by some experts that it makes sense to ask, as a threshold question, whether the position at issue is “linked to the core religious expressions for which the organization exists.”¹⁰⁹ Others, like Justice Thomas, would defer to the religious institution’s “good-faith understanding” of who acts as its own ministers.¹¹⁰ Still others, including Justices Alito and Kagan, believe that despite different views among religious groups as to who and what a “minister” is, “it is nonetheless possible to identify a general category” by examining whether an employee performs essentially religious “functions.”¹¹¹ In any event, “no circuit has made ordination status or formal title determinative of the exception’s applicability.”¹¹² The Constitution protects more, after all, than churches’ sacraments of ordination against government interference.

Reflecting on the ministerial exception’s scope, Professor Thomas Berg has observed, first, that “when you win on the facts of a case, you typically also get language earlier in the opinion that supports your side more broadly.”¹¹³ Second, he notes that although Chief Justice Roberts’ opinion was “case-specific on who counts as a minister,” the three concurring justices “endorse a broader definition.”¹¹⁴ What’s more, the Court’s opinion actually does include some broad and instructive language. For example, the chief justice characterizes the ministerial exception as a doctrine that protects those hires reflecting “more than a mere employment decision,” adding that churches must not be interfered with when selecting employees who will “personify [their] beliefs.”¹¹⁵ If this expansive language ends up having any real bite, it may craft a stronger ministerial exception on multiple fronts. The language, “more than a mere employment decision,” echoes Justice Thomas’s “good-faith” deference. After all,

¹⁰⁹ Chopko & Parker, *supra* note 100, at 286.

¹¹⁰ Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring).

¹¹¹ *Id.* at 712 (Alito, J., concurring).

¹¹² *Id.* at 714.

¹¹³ Thomas C. Berg, More on *Hosanna-Tabor*, *Mirror of Justice*, Jan. 11, 2012, <http://mirrorofjustice.blogspot.com/mirrorofjustice/2012/01/more-on-hosanna-tabor.html>.

¹¹⁴ *Id.*

¹¹⁵ Hosanna-Tabor, 132 S. Ct. at 706.

wouldn't a church be in a better position than a court to conclude whether its own employees were hired through a process that treated them as, and by an administration that considered them to be, "more than mere employees"? And one need not lead religious worship or teach religious doctrine in order to "personify [the] beliefs" of a religious community or institution. Even if, for example, Perich had taught only math, the context in which she taught it, and the pervasive, animating religious mission of the school, would still suggest that she expressed, carried, and "personified" the faith commitments and aspirations of Hosanna-Tabor—commitments and aspirations she could no longer personify effectively given her public departure from Lutheran doctrine.

In our view, the best reading of *Hosanna-Tabor*—the one that takes seriously and to heart the close connections drawn by the Court among the ministerial exception, the fundamental right to religious freedom, and the role played in Western constitutional traditions by the distinction between religious and political authority—points to a generous and deferential approach to the "who is a minister?" question. The scope of the ministerial exception should be "informed by the purposes of the exception, the history of disputes over the selection of religious leaders, and the practical realities of litigation."¹¹⁶ So informed, the exception would include a variety of employees charged with duties "to lead the religious organization, teach the faith, or participate in the spiritual or moral formation of community members."¹¹⁷ It would be sensitive, in the way called for by Justices Alito and Kagan, to the fact that "[r]eligious organizations have multiple ways of structuring themselves and characterizing their leaders."¹¹⁸ In short, the ministerial exception would err on the side of the liberty to choose ministers. It would be deferential, which is not to say it would function simply as a rubber stamp.

An obscure but important aspect of the Court's opinion is its brief observation, in a footnote, that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a

¹¹⁶ Brief Amicus Curiae of Professor Eugene Volokh, et al., in Support of Petitioner at 28, 132 S. Ct. 694 (2012) (No. 10-553).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 29.

jurisdictional bar.”¹¹⁹ This is a matter that has divided courts and commentators. Before *Hosanna-Tabor*, the circuits were split: Some dismissed ministerial-exception cases for want of subject matter jurisdiction, while others did so for failure to state a claim.¹²⁰ Clarifying how the rule actually operates is “crucial to a proper understanding of the role that the ministerial exception plays as a constitutional protection for the religious freedom of churches and other religious institutions.”¹²¹ On his part, Professor Gregory Kalscheur presses the point that the exception must operate “as a subject matter jurisdiction defense,”¹²² squaring his understanding with the fact that, in Title VII cases, “the [ministerial] plaintiff would seem to be able to state a claim establishing all the essential elements for relief.”¹²³ Thus, he contends that dismissal signals the fact that “the First Amendment removes such cases from the adjudicatory power of the courts.”¹²⁴

The Court in *Hosanna-Tabor* rejected this reasoning, expressing its view that, following the assertion of “an otherwise cognizable claim, . . . the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has the ‘power to hear [the] case.’”¹²⁵ Despite this apparent failure to establish the ministerial exception in jurisdictional terms and, thus, “make a powerful statement about the foundations of limited government,”¹²⁶ the rule is nonetheless best understood as a “jurisdictional” doctrine. Explaining his own agreement with the Court’s decision, while continuing to embrace his understanding of the ministerial exception in jurisdictional terms, Professor Howard Wasserman offers a distinction in civil jurisdiction, between that of courts and Congress. In his view, “[c]onstitutional existence conditions limit prescriptive jurisdiction,” meaning Congress’s power to

¹¹⁹ *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

¹²⁰ Kalscheur, *supra* note 65, at 45 n.5.

¹²¹ *Id.* at 45.

¹²² *Id.* at 43.

¹²³ *Id.* at 72.

¹²⁴ *Id.*

¹²⁵ *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (quoting *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)).

¹²⁶ Kalscheur, *supra* note 65, at 43.

regulate in a given area is constitutionally limited.¹²⁷ One such condition is the First Amendment, which, as was affirmed in *Hosanna-Tabor*, limits the government's ability to regulate ministerial relationships. In perhaps more familiar instances, Congress declines to pass laws, enacts narrow laws, or provides express exceptions to broader regulations in keeping with these constitutional limits on its own jurisdictional reach. However, when this level of care is not exercised, or the limitations are simply ignored, and Congress enacts a law that, by its terms, extends to a constitutionally precluded realm, the jurisdiction of government is exceeded and must be denied. The ministerial exception is merely a reminder of this deprivation, operating as a kind of "FYI" to Congress that the First Amendment ensures that it never had the authority to regulate the employment relationships between religious institutions and ministers in the first place. It makes certain that provisions of statutes purporting to regulate such relationships may not so operate. And, since part of any good merits claim requires a plaintiff to point to that part of the underlying statute reaching the conduct at issue, a ministerial plaintiff can never succeed in an anti-discrimination suit on the merits.

With this outlook, the question of the "jurisdiction" of courts to adjudicate ministerial exception cases comes into sharper focus. Certainly, there are powerful reasons to question the competence of courts to decide essentially religious issues.¹²⁸ In a normative sense, with "competence" meaning something akin to "qualifications," courts lack the competence to accept an appeal of a case from a religion's highest ecclesiastical authority dealing with entangled religious issues.¹²⁹ In a jurisdictional sense, the competence of courts is to "protect the decision" made by "religious bodies following their own internal rules," not to "re-litigate the questions," as is taught in cases like *Watson* and *Milivojevich*.¹³⁰ Thus there is still room for discussion regarding the jurisdictional limitations on courts to hear ministerial-exception cases, notwithstanding the Court's ruling in *Hosanna-Tabor*. However, these limitations are, as Professor

¹²⁷ Howard M. Wasserman, Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption, 160 U. Pa. L. Rev. 289, 299 (2012).

¹²⁸ See generally Richard W. Garnett, A Hands Off Approach to Religious Doctrine: What Are We Talking About?, 84 Notre Dame L. Rev. 837 (2009).

¹²⁹ Chopko & Parker, *supra* note 100, at 258–59.

¹³⁰ *Id.* at 259.

Paul Horwitz says, mere “surface matters, conclusions that follow from deeper premises.”¹³¹ They are, in Professor Wasserman’s words, “incidental to the broader limitation on legislative power and on the reach and scope of the substantive law Congress can enact.”¹³² These sentiments reflect the distinction within what Professor Berg calls substantive nonentanglement—the real issue in *Hosanna-Tabor*—as opposed to decisional nonentanglement, the relative non-issue summarily disposed of in a footnote.¹³³

“Footnote four,” then, has more to offer to supporters of the ministerial exception than might appear at first glance. It confirms plaintiffs’ ability to—within appropriate limits and in appropriate ways—discover and present facts and evidence regarding their ministerial status, or lack thereof. True, the conclusory manner in which the Court dealt with the issue is worrisome.¹³⁴ By not providing guidance as to the application of the affirmative defense, the Court left lower courts the discretion to apply the ministerial exception at any time during adjudication.¹³⁵ Although the constitutionality of the exception suggests strongly that courts treat its application as a threshold question, ensuring dismissal of impotent claims at the earliest stage, courts may opt instead to allow cases to proceed through trial before recognizing the defense.¹³⁶ In the best instance, such administration will ultimately vindicate religious institutions, but not before subjecting them to extensive and costly litigation, not only financially but also with regard to the distraction it becomes to those institutions simply seeking to return to their ministry. In worse cases, the idea of prolonged litigation or the drain it ultimately becomes could convince defendants to settle, effectively requiring them to absorb an unconstitutional injury. To avoid this, one expert insists that the ministerial determination should be presented—as in the government-officer-immunity context—as a “threshold legal

¹³¹ Horwitz, *supra* note 23, at 161.

¹³² Wasserman, *supra* note 127, at 304.

¹³³ *Id.*

¹³⁴ *Id.* at 295.

¹³⁵ See Chopko & Parker, *supra* note 100, at 291–92 (recognizing the possibility that the ministerial exception may be applied by some courts as a “garden-variety affirmative defense” if those courts know “that they are disabled from deciding questions that depend on some religious matter.”).

¹³⁶ *Id.* at 292.

question,” focusing on “producing a narrow decision” and allowing “prompt [interlocutory] appeal” of an adverse ruling.¹³⁷

V. Conclusion

The ministerial exception is constitutionally required, and it coheres well with our religious-freedom and limited-government traditions. At the same time, it is misnamed. That is, the ministerial exception is neither strictly “ministerial” nor an “exception.”¹³⁸ Its force and protections are not limited to cases involving “ministers” and, more importantly, it is not so much an “exception” as an implication of the constitutional limits on political authorities’ regulatory power. It is not that the rule is an exemption or accommodation—a generous concession that could just as well be denied or withdrawn—but is, instead, a boundary.

It is true that, sometimes, courts have used the language of abstention, prudence, and modesty in ministerial-exception and other cases that threaten to entangle religious and political authority. Certainly, there are many good, practical reasons for political decisionmakers and civil courts to avoid making “religious” decisions. But this is not why the ministerial exception exists. It exists not because decisions about selecting ministers are tricky, but because religious communities have a First Amendment right to make them. The term “exception,” which suggests a kind of carve-out, can confuse. Our nation’s constitutional commitment to religious liberty means (among other things) that legislatures should sometimes stay their hands and forgo applying regulations to conduct that would otherwise be within their jurisdiction. Such accommodations show respect for religious believers and often make life easier for regulators.

The ministerial exception, though, is different. The reason why a secular court cannot tell, say, the First Baptist Church that it unlawfully failed to hire John Smith to be its minister is not because the government has made a concession, but because the government is constrained. It might look like the government is generously granting an exception from its generally applicable and valid employment discrimination laws, but in fact it is acknowledging a limitation,

¹³⁷ *Id.* at 293.

¹³⁸ Cf. Wikipedia.org, Coffee Talk, http://en.wikipedia.org/wiki/Coffee_Talk (last visited July 2, 2012) (“Rhode Island is neither a road, nor is it an island. Discuss.”).

imposed by the First Amendment, and by the Constitution's structuring of power, on the reach of its regulatory authority.

It should be emphasized, in conclusion, that although the ministerial exception is constitutionally required and valuable, it does not rest on an assumption that religious institutions and employers never behave badly. Of course, they sometimes do. Its premise is not that churches are somehow "above the law." They are not. Its point is not "discrimination is fine, if churches do it." It is, instead, that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach, and some relationships—such as the one between a religious congregation and the teachers to whom it entrusts not only the "secular" education but also the religious formation of its children—that government should not presume to supervise.¹³⁹

¹³⁹ Brief Amicus Curiae of Professor Eugene Volokh, et al., *supra* note 116.