Sacred Disputes? On the Ministerial Exception and the Constitution

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I. Introduction

Federal courts have long been hearing church disputes, for example, concerning conflicting claims regarding the rightful possession and use of church property. However, there is no clear understanding concerning the contours of the constitutional limitations on the courts when one of the parties before them is a religious organization. The conflicting jurisprudence may be clarified in the 2011-2012 term when the Court hears and decides Hosanna–Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission.\(^1\) However, there is reason to be pessimistic, because the jurisprudence that has developed in the circuits has mischaracterized the Court’s First Amendment jurisprudence, and the Court has had ample opportunities in the past to correct the mischaracterizations and has thus far failed to do so. This article lays out the relevant jurisprudence as presented by the United States Supreme Court on the one hand and as developed in the lower courts on the other, specifically focusing on the application of the “ministerial exception.”

Part II of this article discusses the Court’s jurisprudence in this area, noting the ways in which it is much more qualified than is commonly appreciated. Part III discusses the robust “ministerial exception” that has been developed in the circuits, which is neither required by the Constitution nor even internally consistent. The article concludes by suggesting ways that the Court could make the doctrine more reflective of constitutional requirements and more consistent with good public policy.

\(^1\) 131 S.Ct. 1783 (2011).
II. Church Disputes and the Constitution

Many of the earlier church disputes heard by the federal courts involved conflicting claims to church property. A congregation part of a hierarchical religious organization might decide to break away because of a theological dispute, and the local and national organizations might each claim ownership of the church building or property. Or, there might be a schism within a church, and different groups within the church might each claim to be the “true” church. The Court has provided some guidance with respect to the roles the civil courts can play in such disputes and with respect to the degree to which generally applicable laws can be applied to religious organizations. The Court’s understanding of the limitations imposed by the Constitution has been much more measured than is commonly described, and leaves ample room for the courts to provide a remedy when religious organizations act contrary to neutral, generally applicable laws.

A. Property Disputes and the First Amendment

Watson v. Jones\(^2\) involved a schism within a church,\(^3\) where two distinct bodies each claimed to represent the true church.\(^4\) The Watson Court distinguished among different types of possible church disputes: (1) a dispute between parties involving property that, for example, by the express terms of a will, has been “devoted to the teaching, support, or spread of some specific form of religious doctrine or belief;”\(^5\) (2) a dispute involving church property where the congregation is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority;\(^6\) and (3) a

\(^2\) 80 U.S. 679 (1871).
\(^3\) Id. at 717.
\(^4\) Id. (“This is a case of a division or schism in the church. It is a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church.”).
\(^5\) Id. at 722.
\(^6\) Id.
property dispute where the local religious congregation is “but a subordinate member of some
general church organization in which there are superior ecclesiastical tribunals.”\textsuperscript{7}

With respect to the first kind of case, the \textbf{Watson} Court was confident that there would be clear cases in which civil courts could decide, for example, whether a religious organization had complied with the terms of a will. Suppose that someone dedicated a house of worship “to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and plac[ed] it under the control of a congregation which at the time holds the same belief.”\textsuperscript{8} Suppose, further, that there was a change in the composition and beliefs of the congregation over time. The Court suggested that the law could “prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship.”\textsuperscript{9} Admittedly, the task in such a case might be “delicate”\textsuperscript{10} and “difficult.”\textsuperscript{11} Nonetheless, “when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down,”\textsuperscript{12} courts were not only permitted but obligated “to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust.”\textsuperscript{13}

In some cases, courts are not only permitted but required to enforce the provisions of a will against an independent church. Thus, it is “not in the power of the majority of … [a] congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine.”\textsuperscript{14} Further,
this constraint is not confined to independent churches. Even if a particular church is part of a hierarchical organization, it will not be permitted to keep property in support of a doctrine that substantially conflicts with the conditions that had been clearly laid down in a will.\textsuperscript{15}

Suppose that the terms of a legal instrument are not involved and that there is a dispute within an independent church. The \textit{Watson} Court suggested that the right to use the property at issue should be “determined by the ordinary principles which govern voluntary associations.”\textsuperscript{16} If, for example, a congregation abided by the principle of majority rule, then a minority who separated themselves from the church and refused to accept the authority of the majority could “claim no rights in the property from the fact that they had once been members of the church or congregation.”\textsuperscript{17}

In the case at bar, the schism was between a local church and the hierarchical organization of which it was a part. Where a religious organization has its own tribunals, deference on theological issues is the rule.\textsuperscript{18} It was in the context of discussing a schism within a hierarchical church that the \textit{Watson} Court declared that the “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”\textsuperscript{19} The Court cautioned against depriving religious “bodies of the right of construing their own church laws,”\textsuperscript{20} and resisted permitting civil courts to decide “ecclesiastical questions.”\textsuperscript{21}

\begin{itemize}
  \item[15] Id. at 723-24 (“Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same.”).
  \item[16] Id. at 725.
  \item[17] Id.
  \item[18] Id. at 727 “([W]henever 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, in their application to the case before them.”).
  \item[19] Id. at 728.
  \item[20] Id.
  \item[21] Id. at 734.
\end{itemize}
While the Watson Court was clearly suggesting deference with respect to a determination of doctrinal questions, it must be remembered that the Court also said that a church might lose control of property if its doctrine (as determined by the Church itself) was in substantial nonconformity with the dictates of the testator. It is no surprise, then, that the Court described the civil court’s task in certain cases as difficult and delicate, because the civil court was left to determine whether in certain cases the evolution of doctrine was sufficiently great to require the return of property. But such a decision would itself require a court to make a theological determination, because judgments about which doctrinal changes were substantial rather than minor would themselves be the kinds of judgments precluded under a very deferential approach.

A variation of the hypothesized case involving an independent church discussed in Watson was at issue before the Court in Bouldin v. Alexander. There, the Court was asked to decide which of two rival factions represented the true church. One faction, a “small minority,” had attempted to replace the trustees and remove the majority of the congregation from membership at a non-regularly scheduled set of meetings. The Court held that the minority’s actions were

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22 See Fiona McCarthy, Note, Church Property and Institutional Free Exercise: The Constitutionality of Virginia Code Section 57-9, 95 Va. L. Rev. 1841, 1862 (2009) (“This principle was first enunciated by the Court in 1871, in Watson v. Jones, when it approved a “deference” approach requiring courts to defer to the judgment of hierarchical churches’ highest tribunals on issues of doctrine or polity.”); Elizabeth Ehrlich, Note, Taking the Religion out of Religious Property Disputes, 46 B.C. L. Rev. 1069, 1078 (2005) (discussing “the compulsory deference approach as spelled out by the Supreme Court in 1872 in Watson v. Jones”).

23 Lawrence C. Marshall, Comment, The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations, 80 Nw. U. L. Rev. 204, 251 (1985) (“it is interesting to note that even Watson v. Jones required that the Court apply express terms without deferring to the church hierarchy.”).

24 82 U.S. 131 (1872).

25 Id. at 140 (“we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be excisced, was not the action of the church, and that it was wholly inoperative”).
without force. “In a congregational church, the majority, if they adhere to the organization and to
the doctrines, represent the church. An expulsion of the majority by a minority is a void act.”

Even here, however, the Court seemed to permit civil courts to make doctrinal decisions in
certain instances. By adding the proviso “if they adhere … to the doctrines,” the Court seemed
to countenance the possibility that a civil court would determine whether the majority had indeed
adhered to the prevailing religious doctrine and thus was entitled to determine the future of the
church.

Arguably, the Bouldin decision resulted in the removal of the pastor, because he was in the
minority that had attempted to remove the majority from the congregation. While he was not
removed because his doctrinal approach differed from the Court’s, it is nonetheless true that the
Court’s approval of the use of neutral principles resulted in a change in (although some would
say clarification of) church leadership.

Gonzalez v. Roman Catholic Archbishop of Manila reaffirmed the requirement that civil
courts defer to church authorities on religious matters. “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.” However, the Gonzalez Court left open what would happen if “fraud, collusion,
or arbitrariness” could be established and, further, seemed to undermine or ignore Watson with respect to how wills should be treated when designating the use of an estate.

At issue in Gonzalez was whether a particular individual had the right to be appointed chaplain, and whether he was entitled to the monies accrued by virtue of the position having been vacant for a period of time. After a bequest had already established the chaplaincy, the conditions for appointment to it were modified by the Church. The petitioner could not meet the new requirements, and an important issue was whether those new requirements were applicable with respect to who could be appointed to the chaplaincy. Rather than address whether the new requirements substantially deviated from the previous requirements, the Court reasoned that neither the “foundress, nor the church authorities, can have intended that the perpetual chaplaincy created in 1820 should, in respect to the qualifications of an incumbent, be forever administered according to the canons of the church which happened to be in force at that date.” The Court seemed not to appreciate that such a position undercut the Watson example of an individual who dedicated a building for those who believed in the Holy Trinity, since one would infer from Gonzalez that a testator should expect that even basic doctrine would and should change in over time.

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31 Id.
32 Id. at 10 (“The subject-matter is a collative chaplaincy in the Roman Catholic Archdiocese of Manila, which has been vacant since December 1910. The main questions for decision are whether the petitioner is legally entitled to be appointed the chaplain, and whether he shall recover the surplus income accrued during the vacancy.”).
33 Id. at 11 (“The chaplaincy was founded in 1820, under the will of Dona Petronila de Guzman.”).
34 Id. at 13 (“The new Codex Juris Canonici, which was adopted in Rome in 1917 and was promulgated by the church, to become effective in 1918, provides that no one shall be appointed to a collative chaplaincy who is not a cleric.”).
35 Id. at 14 (“It is also conceded that he lacked, then and at the time of the entry of the judgment, other qualifications of a candidate for a collative chaplaincy essential, if the new Codex was applicable.”).
36 Id. at 17.
37 See notes 8-13 and accompanying text supra.
The doctrine of deference was amplified in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*. At issue was whether the patriarch appointed by the Russian Orthodox Church in North America rather than the patriarch appointed by the Russian Orthodox Church had the right to possess and use the Saint Nicholas Cathedral in New York City. The New York Court of Appeals had ruled in favor of the patriarch appointed by the Russian Orthodox Church in North America, and the United States Supreme Court reversed. The Court read *Watson v. Jones* as radiating a “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,” concluding that the freedom to “select the clergy, where no improper methods of choice are proven, … must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”

*Kedroff* seems to offer robust protections for religious entities, making clear that our system of government permits “no statute, state or national, that prohibits the free exercise of religion.”

While admitting that there are times “when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property,” the Court explained that “when the property right follows as an incident from decisions of the church custom or law

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38 344 U.S. 94 (1952).
39 Id. at 97 (“The Court of Appeals of New York, reversing the lower court, determined that the prelate appointed by the Moscow ecclesiastical authorities was not entitled to the Cathedral and directed the entry of a judgment that appellee corporation be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.”).
40 See id. at 121.
41 60 U.S. 679 (1871).
42 *Kedroff*, 344 U.S. at 116.
43 Id.
44 Id. at 120.
45 Id.
on ecclesiastical issues, the church rule controls. Yet, even Kedroff includes an important qualification with respect to something as central as the choice of clergy, namely, that such decisions must not be disturbed by the state “where no improper methods of choice are proven.”

The Court’s understanding of the deference required by the Constitution was reiterated in the context of a local church’s secession from a hierarchical church in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church. Two local churches in Savannah, Georgia, believed that the general church had violated the organization’s constitution and had departed from church doctrine. A trial court found that the general church had indeed abandoned the original tenets and doctrines of the church. The Georgia Supreme Court upheld the trial court determination in favor of the local churches. In reversing the Georgia Supreme Court, the United States Supreme Court reiterated that it is “wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions.” Thus, the Court made clear that civil courts should not decide doctrinal questions. However, it is also true that the Court did not simply mandate deference to the hierarchical church. On the contrary, the Court noted that there are “neutral principles of law” that could be used. Thus, the Court seemed to adopt a kind of middle ground. While making clear that First Amendment guarantees are at risk when civil

46 Id. at 120-21
47 Id. at 116.
49 See id. at 442.
50 Id. at 443-44.
51 See id. at 444.
52 Id. at 445-46.
53 Id. at 449.
courts attempt to resolve “controversies over religious doctrine and practice” and that the First Amendment precludes use of the “organs of government for essentially religious purposes,” the Court also made clear neutral principles of law can be used without offending the First Amendment.

In his concurrence, Justice Harlan explained that neutral principles would permit the courts to intervene if the hypothetical suggested in *Watson* were to come before a court. “If, for example, the donor expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder … or never amend certain specified articles of the Confession of Faith, he is entitled to his money back if the condition is not fulfilled.” Harlan wrote that the “church should not be permitted to keep the property simply because church authorities have determined that the doctrinal innovation is justified by the faith's basic principles,” apparently rejecting the *Gonzalez* assumption that an individual would of course understand that church doctrine would not remain static.

*Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich* provides a cautionary note to courts who might be overly confident that their (civil) legal skills would readily translate into an ability to discern the best understanding of religious doctrines and practices. The Holy Assembly of Bishops and the Holy Synod of the

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54 Id.
55 Id.
56 Id.
57 Id. at 452 (Harlan, J., concurring) (citing *Watson*, 80 U.S. at 722-24).
58 Id. (Harlan, J., concurring). See also *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368-69 (1970) (Brennan, J., concurring) the States may adopt the approach of *Watson v. Jones*, 80 U.S. 679 (1872), and enforce the property decisions made within a church of congregational polity ‘by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,’ and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, unless ‘express terms’ in the ‘instrument by which the property is held’ condition the property’s use or control in a specified manner.
59 See note 36 and accompanying text supra.
60 426 U.S. 696 (1976).
Serbian Orthodox Church removed respondent Dionisije Milivojevich as Bishop of the American-Canadian Diocese. However, the Illinois Supreme Court held that the process and reasoning used to bring about that result were flawed in light of the Church’s own requirements, and thus that the removal was “arbitrary and invalid.” The United States Supreme Court reversed, because the Illinois Supreme Court had impermissibly rejected the “the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes.” Instead, the Illinois court should have deferred to the decisions of the highest religious tribunal. The Constitution requires that where a dispute cannot be resolved without “extensive inquiry by civil courts into religious law and polity,” the civil courts must accept the decision of the highest ecclesiastical court on those matters. The United States Supreme Court further pointed out that even if the Illinois court had been able to read and understand the relevant texts, that court still would not have been in the best position to weigh conflicting testimony about whether church practices had been followed properly, and thus should have deferred.

61 See id. at 697-98.
62 Id. at 698 (“the Supreme Court of Illinois held that the proceedings of the Mother Church respecting Dionisije were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid”).
63 Id.
64 See id. at 725.
65 Id. at 708.
66 Id. at 709.
67 Id. at 718

[The court evaluated conflicting testimony concerning internal church procedures and rejected the interpretations of relevant procedural provisions by the Mother Church's highest tribunals. The court also failed to take cognizance of the fact that the church judicatories were also guided by other sources of law, such as canon law, which are admittedly not always consistent, and it rejected the testimony of petitioners' five expert witnesses that church procedures were properly followed.
As an additional matter, the Milivojevich Court clarified the Gonzalez exception regarding “fraud, collusion, or arbitrariness,” explaining that there is “no ‘arbitrariness’ exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations.” Rather, the Constitution requires civil courts to defer on “matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.” It is simply an open question how the fraud or collusion exceptions should be treated.

In yet another schism case, the Court in Jones v. Wolf was afforded the opportunity to explain its neutral principles of law approach more fully. The Vineville Presbyterian Church was affiliated with the Presbyterian Church in the United States (PCUS). However, a majority of the congregation later voted to separate from PCUS, and a suit was filed to determine whether the majority rather than the minority had the right to the exclusive possession and use of the church property. The Georgia court ruled in favor of the majority after applying a neutral principles of law approach, which had been adopted in Georgia in response to Presbyterian Church in the United States. The Georgia Supreme Court affirmed. The United States
Supreme Court agreed that as a general matter “the ‘neutral principles of law’ approach is consistent with … constitutional principles,” although the Court remanded the case because the grounds of the decision were not adequately articulated. The Jones Court expressly rejected a policy of mandatory deference, denying that “the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.”

At least with respect to the cases involving religious property disputes, the Court has articulated a few different principles. First, the civil courts cannot decide theological questions, although even with respect to church doctrine and polity the Court has issued a few caveats. For example, in particular kinds of cases involving legal instruments, the civil courts can and must determine whether there has been substantial compliance with the terms of the instrument, which presumably means that the civil courts can perform the difficult and delicate task of deciding whether a particular theological position (as determined by religious authorities) substantially deviates from the express terms incorporated in a document. Second, courts can apply neutral principles of law when resolving church property disputes without violating constitutional guarantees. Third, the Court has left open what should be done in cases involving fraud or collusion, and has suggested that even the choice of clergy may not be immune from scrutiny where “improper methods of choice are proven.”

77 *Jones*, 443 U.S. at 599.
78 Id. at 602. *Cf.* Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (“Since, however, the Maryland court's resolution of the dispute involved no inquiry into religious doctrine, appellees' motion to dismiss is granted, and the appeal is dismissed for want of a substantial federal question.”).
79 See *Jones*, 443 U.S. at 609-10 (“Since the grounds for the decision that respondents represent the Vineville church remain unarticulated, the judgment of the Supreme Court of Georgia is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.”).
80 Id. at 605.
81 *Kedroff*, 344 U.S. at 116.
B. Religion Cases Where Ownership of Real Property Was Not at Issue

There are different ways to read the Watson—Jones lines of cases. For example, it might be argued that the Court was adopting the neutral principles of law approach in the disputed property cases because, after all, the courts simply could not sit on the sidelines—someone has to be recognized as having the right to possess and use the contested property.\(^{82}\) However, it might be thought, the neutral principles approach should not be used outside of the context of a property dispute,\(^{83}\) and Court’s frequent trumpeting of the importance of deference suggests that the state should refrain from injecting itself into church matters whenever possible.\(^{84}\) Yet, such an approach does not represent the Court’s decisions involving religious entities where real property is not at issue.

**National Labor Relations Board v. Catholic Bishop of Chicago**\(^{85}\) might be read as ambiguous with respect to whether the Constitution requires the state to refrain from injecting itself into church matters whenever feasible. At issue was whether the National Labor Relations Act was applicable to church schools. The Court noted that if it were applicable, the National Labor Relations Board might have to inquire in a particular case into the “good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission.”\(^{86}\) Rights guaranteed by the Religion Clauses might thereby be violated, not only by the Board’s

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\(^{82}\) Cf. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) (“[F]ederal courts cannot always avoid taking a stand on a religious question. In the seizure case, there might be a dispute over whether, under the internal law of the sect in question, local church property was owned by the congregation or by the sect. The court would have to answer the question in order to determine whether to issue the injunction.”).

\(^{83}\) See Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (suggested that the neutral principles doctrine should only be used in property disputes).

\(^{84}\) Cf. Thomas C. Berg, Civility, Politics, and Civil Society: Response to Anthony Kronman, 26 Cumb. L. Rev. 871, 879 (1995-1996) (“We should want to maintain religion and the family as largely ‘private’ rather than ‘public’ matters—private not in the sense that they bear no relation to the concerns of public and social life, but only in the sense that government should refrain from intruding on them except in cases of necessity.”).


\(^{86}\) Id. at 502.
conclusions, but also by “the very process of inquiry leading to findings and conclusions.” One possible way to read the Court’s having recounted these dangers would be to conclude that the state must refrain from getting involved in church affairs whenever possible.

After examining the statute and the legislative history, the Court concluded that “Congress simply gave no consideration to church-operated schools.” These considerations militated in favor of the Court’s finding the Act inapplicable to such schools, a position that offered the additional benefit of permitting the Court to avoid “difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.” For example, the schools had claimed that the “challenged actions were mandated by their religious creeds.”

In his dissent, Justice Brennan argued that the National Labor Relations Act did include church-operated schools. While admitting that “the resolution of the constitutional question is not without difficulty,” he suggested that it was “irresponsible to avoid [that difficulty] by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent.” While suggesting that the constitutional questions should be addressed, he expressly refrained from discussing how he would have resolved the constitutional issue.

It is unclear how to read Catholic Bishop of Chicago. The Court might have been suggesting that the state simply should not inject itself into religious affairs. Or, the Court might merely

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87 Id.
88 Id. at 504-05.
89 Id. at 507.
90 Id. at 502.
91 Id. at 518 (Brennan, J., dissenting) (“the NLRA includes within its coverage lay teachers employed by church-operated schools”).
92 Id. (Brennan, J., dissenting).
93 Id. (Brennan, J., dissenting).
94 See id. (Brennan, J., dissenting) (“I do not now do so [discuss the constitutional issue] only because the Court does not.”)
have been suggesting that it will not address the implicated constitutional issues where Congress has not made its intentions sufficiently clear.\textsuperscript{96} Some of the subsequent case law suggests that the stumbling block was the absence of clear congressional intent\textsuperscript{97} rather than a required hands-off policy.

Ohio Civil Rights Commission v. Dayton Christian Schools, Incorporated\textsuperscript{98} is helpful to consider when trying to sort out some of the related issues. At issue was the firing of a teacher, Linda Hoskinson. She had informed the principal of her school that she was pregnant, and was later told that her contract would not be renewed the following year “because of Dayton's religious doctrine that mothers should stay home with their preschool age children.”\textsuperscript{99} She consulted an attorney, who threatened litigation under federal and state sex discrimination laws if the school did not change its nonrenewal decision.\textsuperscript{100}

Hoskinson was then suspended immediately, because she had challenged the nonrenewal decision in a “manner inconsistent with the internal dispute resolution doctrine.”\textsuperscript{101} The statement of faith that was required of all teachers included a belief in the “internal resolution of disputes through the ‘Biblical chain of command,’”\textsuperscript{102} which at its core stood for the proposition that “one Christian should not take another Christian into courts of the State.”\textsuperscript{103} By threatening

\textsuperscript{96} Catholic Bishop of Chicago, 440 U.S. at 506 (“The absence of an ‘affirmative intention of the Congress clearly expressed’ fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.”).

\textsuperscript{97} Cf. Footwear Distributors and Retailers of America v. U.S., 852 F. Supp. 1078, 1091 (CIT 1994) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”) (citing Catholic Bishop of Chicago, 440 U.S. at 499-501, 504).

\textsuperscript{98} 477 U.S. 619 (1986).

\textsuperscript{99} Id. at 623.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 622-23.

\textsuperscript{103} Id. at 623.
litigation rather than making use of internal appeal procedures, Hoskinson was deemed to have violated her statement of faith.

The board of directors of the school then rescinded the nonrenewal decision, allegedly because Hoskinson had not had adequate notice of a mother’s duty to stay home with her young child, and stated that the “sole reason for her termination was her violation of the internal dispute resolution doctrine.” In response, Hoskinson filed a complaint with the Ohio Civil Rights Commission, alleging that the nonrenewal constituted illegal sex discrimination. The Commission found that there was reason to believe both that the nonrenewal constituted sex discrimination and that the firing was in retaliation for her attempting to assert her rights.

When the Commission initiated administrative proceedings against the school, the school claimed that the First Amendment “prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs.” The United States Supreme Court did not address the substance of the response, expressing confidence that there would be an “adequate opportunity” for the school to raise its constitutional claims. The Court pointed out, however, that even “religious schools cannot claim to be wholly free from some state regulation.” and that “the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson’s discharge in this case, if only to ascertain whether

104 Id. (“Instead of appealing this decision internally, Hoskinson contacted an attorney.”).
105 Cf. id. (“She subscribed to the Statement of Faith and expressly agreed to resolve disputes internally through the Biblical chain of command.”).
106 See id.
107 Id.
108 Id.
109 Id. at 623-624.
110 Id. at 624.
111 Id.
112 Id. at 628.
113 Id.
the ascribed religious-based reason was in fact the reason for the discharge.”

In his concurrence in the judgment, Justice Stevens explained that “neither the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment.”

The Court’s points are important to consider, because they suggest that the Commission’s investigating the complaint does not itself violate constitutional guarantees, which clearly runs counter to a robust hands-off policy. Further, permitting the Commission to investigate whether the religion-based reason was in fact the basis for discharge implies that civil institutions can play an active role in such disputes. The Court was not suggesting that civil institutions can decide, for example, whether a particular religious doctrine holds that mothers must stay home with their young children—that would be a matter for religious authorities to decide.

Nonetheless, civil authorities were not to be entirely excluded from deciding whether the firing or nonrenewal was lawful.

The constitutional permissibility of the state’s playing a role with respect to the operation of religious institutions was also evident in *Tony and Susan Alamo Foundation v. Secretary of Labor*, where the Court addressed whether the Fair Labor Standards Act (FLSA) was applicable to employees of a religious foundation engaged in commercial activities. The Tony and Susan Alamo Foundation was a nonprofit religious organization that derived its income from a variety of commercial activities. The businesses were staffed by associates, most of whom were “drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation.” While the associates did not receive salaries, they were provided food, clothing

114 *Id.*
115 *Id.* at 632 (Stevens, J., concurring in the judgment).
117 See *id.* at 291-92.
118 *Id.* at 292.
and shelter among other benefits. The Court explained that two conditions must be met for the Foundation’s commercial activities to be subject to FLSA: “First, the Foundation's businesses must constitute an ‘enterprise engaged in commerce or in the production of goods for commerce.’ Second, the associates must be ‘employees’ within the meaning of the Act.” The Court held that both prongs were met in this case, and that applying the Act to the Foundation's commercial activities was “fully consistent with the requirements of the First Amendment.” At the very least, Tony and Susan Alamo Foundation suggests that neither the state nor the courts must simply adopt a hands-off policy with respect to religious organizations.

It might be thought that Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos suggests a contrary position. At issue was the discharge of a building engineer for religious reasons, which the Court held was constitutionally permissible. Congress had specifically exempted religious groups from a statutory ban on religious discrimination in employment, and the Court reasoned that Congress’s doing so did not violate constitutional guarantees. “A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose.” Yet, this case was not about what the Constitution requires but about what it permits, because the statute was permitting religious

119 Id.
120 Id. at 295 (citing 29 U.S.C. § 203(s)).
121 Id. at 306 (“The Foundation’s commercial activities, undertaken with a ‘common business purpose,’ are not beyond the reach of the Fair Labor Standards Act because of the Foundation’s religious character, and its associates are ‘employees’ within the meaning of the Act.”).
122 Id.
124 Id. at 330 (“Appellee Mayson worked at the Gymnasium for some 16 years as an assistant building engineer and then as building engineer. He was discharged in 1981 because he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.”).
125 See id. at 340.
126 See id. at 336.
127 Id. at 337.
128 Id. 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.”).
institutions to discriminate even with respect to individuals who were not in fact performing a religious function. The Constitution protects a religious organization’s choosing members of that faith to perform religious functions. Yet, a religious organization being permitted to discriminate in employment on the basis of religion does not entitle such organizations to be immune from all neutral laws when no such immunity has been provided.

Jimmy Swaggart Ministries v. Board of Equalization of California illustrates the point. At issue was whether California’s generally applicable sales and use tax could be applied to the “distribution of religious materials by a religious organization” without offending constitutional guarantees. The Court upheld the application of the tax, because there was no evidence that the state was targeting religion and no reason to think that the tax would in some way compromise sincerely held religious beliefs. Indeed, there was no claim that the payment of taxes violated religious beliefs, although such a belief would likely have proven unavailing in any event.

129 See id. at 332 (“none of Mayson’s duties at the Gymnasium are ‘even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration.’”) (citing Amos v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 594 F.Supp. 791, 802 (Utah 1984)).
130 Id. at 335-36 (“§ 702 provided adequate protection for religious employers prior to the 1972 amendment, when it exempted only the religious activities of such employers from the statutory ban on religious discrimination.”).
131 Id. at 342-43 (Brennan, J., concurring in the judgment) (“if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities”).
133 Id. at 695 (noting that California imposed its “its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature”).
134 Id. at 380.
135 Id. at 392 (“We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs.”).
136 Id. at 390 (“There is no danger that appellant’s religious activity is being singled out for special and burdensome treatment.”)
137 Id. at 391 (“There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs.”).
138 Id. (“appellant's religious beliefs do not forbid payment of the sales and use tax”).
139 See U.S. v. Lee, 455 U.S. 252, 255 (1982) (refusing to grant an exemption notwithstanding that “the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system”).
A case often thought to establish that religious actors are not immune from neutral, generally applicable laws is Employment Division, Department of Human Resources of Oregon v. Smith, which involved a constitutional challenge to the denial of unemployment benefits to individuals who had lost their jobs because of their use of peyote in a religious context. The Smith Court explained that the “free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” The Court cited Presbyterian Church in the United States, Kedroff, and Milivojevich with approval, although characterizing those decisions as standing for the proposition that the government may not “lend its power to one or the other side in controversies over religious authority or dogma.” But many of the cases involving the ministerial exception do not involve controversies over authority or dogma but, instead, allegations of illegal practices having nothing to do with doctrine.

The Court announced that the right of free exercise does not immunize an individual from the “obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),’” although the Court seemed to realize that such a robust position did not capture all of the relevant case law unless suitably amended. “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in

140 See Cynthia Koploy, Note, Free Exercise Clause? Whether Exorcism Can Survive the Supreme Court's “Smith Neutrality,” 104 NW. U. L. Rev. 363, 376 (2010) (“This “Smith neutrality,” which largely remains in effect today, means that religious actors are not immune from tort liability under secular laws or regulations whether or not they are justified by a compelling governmental interest.”).
142 Id. at 874.
143 Id. at 877.
144 See id.
145 Id.
146 Id. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment)).
conjunction with other constitutional protections.”¹⁴⁷ The Court further noted that prior cases in which exemptions had been granted for religious reasons lent themselves to individualized assessment.¹⁴⁸ While such an approach might seem to put religious groups at risk, the Court offered the consolation that “a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”¹⁴⁹

The cases in which church property was not at issue also suggest that the courts can play an active role in assuring that generally applicable laws are enforced, as long as those laws do not target religion. While none of these cases suggests that the courts should be making decisions about theology, these cases nonetheless suggest that religious institutions are not immune from generally applicable laws including non-discrimination laws, as long as the basis of the law is not religious in nature. While discrimination by religious organizations would presumably be permissible if in accord with theological dictates, these cases suggest that civil courts: (1) can play a role in determining whether discrimination by a religious organization is in fact based on religious reasons, and (2) can impose some statutorily authorized sanctions when religious organizations engage in non-religiously-based discriminatory practices.

III. The Development of the Ministerial Exception

The lower federal courts have considered the jurisprudence precluding civil courts from deciding matters involving religious doctrine or polity and have created a “ministerial exception.” Some applications of the exception seem to follow pretty directly from the existing...

¹⁴⁷ Id. at 881. A separate issue is whether even this qualified characterization accurately captured the previous jurisprudence. See, for example, Mark Strasser, Marriage, Free Exercise, and the Constitution, 26 Law & Ineq. 59, 78 (2008) (“Smith's characterization of the pre-existing jurisprudence is inaccurate.”).

¹⁴⁸ Smith, 494 U.S. at 884 (“our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason”) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

¹⁴⁹ Id. at 890.
jurisprudence, but other applications seem to go far beyond constitutional requirements and thereby impinge on Congress’s powers.

A. The Creation of the Ministerial Exception

The Fifth Circuit created the ministerial exception in McClure v. Salvation Army. The court made clear both that the Salvation Army is a church and that Mrs. Billie McClure was one of its ordained ministers. Mrs. McClure claimed that she had been discriminated against on the basis of sex with respect to her employment duties and compensation. The court recognized that while Title VII exempted religious organizations from non-discrimination requirements on the basis of religion, there was no similar exemption with respect to discrimination on the basis of race, sex, or national origin.

Once determining that Congress had indeed intended to subject religious organizations to some nondiscrimination requirements at least as a general matter, the court sought to determine whether the Salvation Army was protected in this case by constitutional guarantees. Citing Watson, Gonzalez, Kedroff, and Presbyterian Church in the United States, the court concluded that an investigation and review of the relevant practices would put the state in the position of

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150 460 F.2d 553 (5th Cir. 1972)
151 Id. at 554.
152 See id. at 555 (“she alleged that she had received less salary and fewer benefits than that accorded similarly situated male officers”).
153 Id. at 558. See also E.E.O.C. v. Pacific Press Pub. Ass’n, 676 F.2d 1272, 1276 (9th Cir. 1982) (“Title VII provides only a limited exemption enabling Press to discriminate in favor of co-religionists.”); Christopher C. Lund, Understanding the Ministerial Exception, North Carolina Law Review (forthcoming), SSRN pg 22 (“Organizations founded on shared religious principles cannot exist unless they actually share religious principles. Nothing therefore is more at the heart of a religious organization’s autonomy than the right to choose its staff on a religious basis—that is, to discriminate on religious grounds.”).
154 McClure, 460 F.2d at 558 (“The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.”) See also Pacific Press Pub. Ass’n, 676 F.2d at 1277 (“Every court that has considered Title VII’s applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin.”).
155 McClure, 460 F.2d at 559-60.
intruding upon "matters of church administration and government," which were of singular importance. The "relationship between an organized church and its ministers is its lifeblood." Because the "minister is the chief instrument by which the church seeks to fulfill its purpose," the court cautioned that matters involving the minister-church relationship are of "prime ecclesiastical concern." Noting that applying Title VII provisions in the minister-church employment setting might violate First Amendment guarantees, the Fifth Circuit concluded that Congress had not intended to "regulate the employment relationship between church and minister."

Certainly, a court would be encroaching upon an area reserved by the First Amendment for the religious organization were the court to say, for example, that one minister’s doctrinal view was preferable to or more accurate than another’s. Further, it is a possible although not necessary reading of the governing jurisprudence that courts cannot require a religious organization to choose one clergyperson rather than another, although Kedroff left open what remedies were available where "improper methods of choice are proven." Suppose, then, that the Supreme Court were to hold that the First Amendment precludes a court from ordering that a particular minister be hired or retained. Such a holding would not itself establish that no damages could be awarded for a violation of law. Thus, the Court holding that a civil court employing neutral

\footnotesize{156 Id. at 560.  
157 Id. at 558. Cf. Kaufmann v. Sheehan, 707 F.2d 355, 359 (8th Cir. 1983) ("[I]t is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization. Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.")  
158 McClure, 460 F.2d at 559.  
159 Id. at 559.  
160 Id. at 560-61.  
161 Kedroff, 344 U.S. at 116.  
162 Cf. Simpson v. Wells Lamont Corp., 494 F.2d 490, 492 (5th Cir. 1974) ("This case involves the fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church.")}
principles of law could not order the hiring or retention of a minister\textsuperscript{163} would not mean that the courts were precluded from entering this zone at all but merely that they were precluded from ordering certain kinds of remedies.\textsuperscript{164}

Professor Laycock argues, “If a pastor is dismissed for reasons of race or sex, that is unfortunate, but it would be worse if a judge erroneously found discrimination where the pastor had really been dismissed because his performance was unsatisfactory, or if the judge imposed an unwanted spiritual leader on a church.”\textsuperscript{165} Yet, Laycock has limited the possible choices too severely, because courts might order damages in suitable cases without in addition ordering that a particular individual be rehired. It is for this reason among others that the Seventh Circuit mischaracterized what was at stake when commenting that the purpose of the ministerial exception “is to avoid judicial involvement in religious matters, such as claims of discrimination that if vindicated would limit a church's ability to determine who shall be its ministers.”\textsuperscript{166}

Vindicated claims of discrimination might yield damages rather than a ministerial post.\textsuperscript{167}

B. Development of the Ministerial Exception

Courts in the circuits have followed the 5\textsuperscript{th} Circuit’s lead in McClure and have contributed to the developing ministerial exception jurisprudence. A district court in New York explained that McClure did not preclude the imposition of damages against a religious organization for employment discrimination based upon race when the employee was a typist-receptionist rather

\textsuperscript{163} But see Bouldin v. Alexander, 82 U.S. 131 (1872) (employing neutral principles of law in a way resulting in a change in church leadership).


\textsuperscript{166} Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008).

\textsuperscript{167} A separate issue is whether a church would always be hurt if a court were to order someone reinstated as minister. See Corbin, supra note 164, at 2023 (“Indeed, if discrimination distorted the decision-making process, reinstatement might actually benefit the church. Reinstatement in this situation restores to the church someone who would have been chosen but for discrimination and aligns church practices with beliefs.”).
than a minister. By the same token, a religious organization like a sectarian college would not be immune if it were to discriminate on a prohibited basis against professors who were teaching non-doctrinal subjects.

The 5th Circuit recognized in Equal Employment Opportunity Commission v. Mississippi College that where a religious group disapproves of discrimination on the basis of race or sex, an investigation into allegations of such discrimination would at most involve a minimal intrusion upon religious beliefs or practices. If a court were to find that a particular institution had indeed engaged in discriminatory practices of which the religion disapproved, then a range of remedies might be available. As the 5th Circuit recognized, “the government has a compelling interest in eradicating discrimination in all forms.”

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168 See Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F.Supp. 1363, 1368 (D.C.N.Y.1975) (‘‘The facts here do not fall within the holding of McClure. In this case we are dealing with the discharge of a typist-receptionist, not a minister.’’)

169 See E.E.O.C. v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980)

The College is not a church. The College's faculty and staff do not function as ministers. … That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern. The employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII.

170 626 F.2d 477 (5th Cir. 1980).

171 Id. at 488 (“no religious tenets advocated by the College or the Mississippi Baptist Convention involve discrimination on the basis of race or sex”). See also Pacific Press Pub. Ass’n, 676 F.2d at 1279 (“Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on the basis of race, religion, sex, age, or national origin.”).

172 Mississippi College, 626 F.2d at 488 (“Because no religious tenets advocated by the College or the Mississippi Baptist Convention involve discrimination on the basis of race or sex, an investigation by the EEOC will only minimally intrude upon any of the College's or Convention's religious beliefs.”). See also Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1397-98 (4th Cir. 1990) (suggesting that the pay requirements of the Fair Labor Standard Act “do not cut to the heart of Shenandoah beliefs [and that the … fact that Roanoke Valley must incur increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim”).

173 Christopher Lund notes, “Churches might believe in non-discrimination without necessarily agreeing with the precise details of our anti-discrimination laws.” See Lund, supra note 153, at SSRN pg 44. But testimony could be offered that the challenged action was in accord with religious practices, and deference would be given to the Church’s understanding of its own doctrine.

174 Mississippi College, 626 F.2d at 488 (“To the extent that the College's practices foster sexual or racial discrimination, the EEOC, if unable to persuade the College to alter them voluntarily, could seek a court order
One of the confusing aspects of the ministerial exception involves figuring out who counts as a minister. The 5th Circuit discussed this issue in *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*.\(^{176}\) The school had three distinct categories of employees: faculty, administrative staff, and support staff.\(^{177}\) The court found that the faculty were ministers for Title VII purposes, in part because most had been ordained, in part because they were supposed to model the ministerial role for the students,\(^{178}\) and in part because they were teaching doctrine to the students.\(^{179}\)

It might seem surprising that the court would mention each of these elements, given that so many of the faculty were themselves ordained. However, the 5th Circuit made clear that merely having been ordained would not suffice to establish that one was a minister for Title VII purposes. Some of the support personnel were ordained ministers. However, these individuals did not count as ministers for purposes of the exception,\(^{180}\) because they were not “engaged in activities traditionally considered ecclesiastical or religious”\(^{181}\) in their jobs.

The court illustrated some of the fine distinctions that the ministerial exception requires when it distinguished among the administrative staff with respect to who counted as a minister for Title VII purposes. The ministers included the “President and Executive Vice President of the Seminary, the chaplain, the deans of men and women, the academic deans, and those other personnel who equate to or supervise faculty,”\(^{182}\) but did not include those administrators whose

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\(^{175}\) Id.
\(^{176}\) 651 F.2d 277 (5th Cir. 1981).
\(^{177}\) Id. at 283.
\(^{178}\) Id.
\(^{179}\) Id. at 283-84.
\(^{180}\) Id. at 284.
\(^{181}\) Id.
\(^{182}\) Id. at 284-85.
functions related “exclusively to the Seminary's finance, maintenance, and other non-academic departments,” even if they were considered ministers by the Seminary. Needless to say, this will involve the courts in some very difficult line-drawing, both because ministers might only have secular duties and because lay individuals might be given religious duties.

One issue is whether an individual alleging discrimination comes within the ministerial exception. Even if that hurdle is overcome and the court can proceed to the merits, a separate question for the trial court is whether the adverse treatment of the individual is for legitimate rather than invidious reasons. In many individual cases, there may be some difficulty in figuring out whether an adverse action was taken for invidious reasons or, instead, doctrinal ones. However, it is not as if courts must simply make a guess—on the contrary, they can consider whether the alleged basis for adverse employment decision is consistent with the applicable rules and policies, whether the alleged basis for the adverse action has resulted in similar treatment for other individuals who had committed the same infraction, or whether the governing policy had only been articulated after the action had been taken.

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183 Id. at 285.
184 See id.
185 Cf. Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 362 (8th Cir. 1991) (“It is without consequence that she also may have performed many secular duties. She was not a secular employee who happened to perform some religious duties; she was a spiritual employee who also performed some secular duties.”).
186 See DeMarco v. Holy Cross High School, 4 F.3d 166, 168 (2nd Cir. 1993) (“Although a layperson, DeMarco had certain religious duties, including leading his students in prayers and taking them to Mass.”).
187 Id. at 169 (“The majority of courts considering the issue have determined that application of the ADEA to religious institutions generally, and to lay teachers specifically, does not pose a serious risk of excessive entanglement.”).
188 Cf. Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 332 (4th Cir. 1997) (“While it is possible that the Presbyterian Church may have harbored hostility against Bell personally, it is also possible that the church may have been acting in good faith to fulfill its discernment of the divine will for its ministry.”).
189 See DeMarco, 4 F.3d. at 171 (“The pretext inquiry thus normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated
While the fact of ordination does not establish that one is subject to the ministerial exception, the fact that one has not been ordained does not preclude an individual from being considered a minister for purposes of the ministerial exception under Title VII. In Rayburn v. General Conference of Seventh-Day Adventists, the 4th Circuit addressed a claim of race and sex discrimination brought by Carole Rayburn, who was an “associate in pastoral care.” While the Seventh Day Adventist Church does not permit women to be ordained, an associate in pastoral care may be asked to engage in a number of religious practices including “teaching baptismal and Bible classes, pastoring the singles group, occasional preaching …, and other evangelical, liturgical, and counselling responsibilities.”

Rayburn applied for two different positions within the Church and was awarded neither. There was some evidence that the denial had been based in part on her sex and in part on “her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII.”

The 4th Circuit first addressed whether Title VII included a ministerial exception to the prohibition of race- and sex-based discrimination, rejecting the McClure approach which read Title VII to include such an exception and refusing to “impose upon a statute a limiting construction where to do so would strain congressional intent.” The court instead concluded

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191 See Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (noting that the ministerial exception “does not depend upon ordination but upon the function of the position”).
192 See id. at 1165.
193 Id.
194 Id.
195 Id.
196 Id. See also id. at 1165 (“Rayburn did submit some evidence to support her claims of sexual and racial discrimination.”).
197 Id. See note 160 and accompanying text supra.
198 Rayburn, 772 F.2d at 1167.
that Title VII “applies to the employment decision in this case,”\textsuperscript{200} and then set about examining whether Congress was exceeding its constitutional power by doing so.

The court began its discussion by noting that the “right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.”\textsuperscript{201} Yet, the 4\textsuperscript{th} Circuit’s citing to Kedroff is at the very least ironic, because Kedroff is the very decision in which the Court qualified its discussion of the deference to be given to ministerial selection by noting that a different analysis might apply where “improper methods of choice are proven.”\textsuperscript{202}

Perhaps there were religious reasons that Rayburn was not appointed an associate in pastoral counseling. But those reasons could not be discovered, because the Rayburn court held that it could not “inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief.”\textsuperscript{203} Instead, the court said that it simply had to “decline examination of the Seventh-day Adventist Church's decision here.”\textsuperscript{204}

As the United States Supreme Court suggested the year after Rayburn was decided,\textsuperscript{205} the civil court might at least have sought to discover whether the refusal to hire had been based on doctrinal reasons rather than on invidious discriminatory reasons. Such a court would defer with respect to doctrinal matters, but might try to decide whether doctrine had played any role in the employment decision.

\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} at 1167-68 (citing Kedroff, 344 U.S. at 116).
\textsuperscript{202} Kedroff, 344 U.S. at 116.
\textsuperscript{203} Rayburn, 772 F.2d at 1169.
\textsuperscript{204} \textit{Id.} at 1170.
\textsuperscript{205} See notes 113-15 and accompanying text \textit{supra} (discussing Dayton Christian Schools).
Suppose that such a court were to conclude that the refusal to hire had been invidiously motivated. Even so, the court might order money damages rather than installation of the rejected applicant.

In Minker v. Baltimore Annual Conference of United Methodist Church, the District of Columbia Circuit addressed whether a claim of age discrimination could be maintained by a minister who claimed that he had been subjected to discriminatory treatment in violation of the Age Discrimination in Employment Act and the Maryland age discrimination provision. Because the Church allegedly opposed age discrimination, the plaintiff claimed that there should be no bar to his suit. He sought monetary damages and an injunction against future discrimination. The court held that his suit was barred by the Free Exercise Clause.

One explanation of the Minker ruling was that the court sub silentio was less confident than the plaintiff that the Church was committed to nondiscrimination on the basis of age. While the court stated that it was unwilling "to interpret the antidiscrimination provision of the Book of Discipline" because doing so would require the court "to interpret or enforce matters of essential religious dogma," it nonetheless pointed to a passage suggesting that the Church’s commitment to nondiscrimination was not as robust as the plaintiff seemed to think. That said, however, the court suggested that an issue that could be addressed was whether “the district

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206 894 F.2d 1354 (D.C. Cir. 1990).
208 See id. (“Appellant argues that since the Church has already declared its opposition to age discrimination in employment decisions in the Book of Discipline, it cannot now claim that it has a religious belief supporting age discrimination.”) See also id. at 1358 (“Section 529.1 of the Book of Discipline states that ‘appointments are to be made without regard to race, ethnic origin, sex, color, or age, except for the provisions of mandatory retirement.’”)
209 See id. at 1356.
210 Id.
211 See notes 212-14 and accompanying text infra.
212 Minker, 894 F.2d at 1358.
213 Id.
214 See id. at 1356 (examining a passage and concluding that it “suggests that, the nondiscrimination provision notwithstanding, the Methodist Church does have an asserted ecclesiastical interest in considering age in appointing pastors”).
superintendent did in fact promise to provide appellant with a congregation more suited to his training and skills in exchange for his continued work at the Mount Ranier Church.” The court reasoned that because money damages alone would suffice, there was “no potential for distortion of church appointment decisions from requiring that the Church not make empty, misleading promises to its clergy.”

While the circuit courts have treated the existing jurisprudence as affording robust protection to church employments decisions of individuals falling within the ministerial exception, courts have had to contend with Employment Division v. Smith’s apparent willingness to limit free exercise claims when confronting neutral laws of general applicability. Some courts have contended that Smith only has consequences for individuals. Thus, in Equal Employment Opportunity Commission v. Catholic University of America (CUA), the D.C. Circuit examined a claim of sex discrimination in the tenure denial of Sister Elizabeth McDonough in the Department of Canon Law, where canon law is Roman Catholic Church’s “fundamental body of ecclesiastical laws.” The Department had granted tenure to two men, and the issue largely focused on a comparison of the quality and quantity of her scholarship compared to theirs. The trial judge expressed his uneasiness at “sitting on the qualifications of an expert in canon law” and ultimately dismissed the case without reaching the merits. He found that “Sister McDonough's primary role in the Department of Canon Law was the functional

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215 Id. at 1359
216 See id. at 1360,
217 Id.
218 See McClure, 460 F.2d 569-60 (discussing Watson, Gonzalez and Kedroff); Rayburn, 772 F.2d 1167-68 (discussing among cases Kedroff and Milivojevich).
219 83 F.3d 455 (D.C. Cir. 1996).
220 Id. at 457.
221 Id. at 459.
222 Id.
223 Id.
224 Id. at 460.
equivalent of the task of a minister,” and concluded that the Free Exercise Clause precluded review.

When upholding the district court, the circuit court discussed Rayburn, noting that the ministerial exception has been applied to those teaching and spreading the faith. Perhaps McDonough’s scholarship, although excellent, involved a view that the University believed was contrary to established teachings.

One of the interesting aspects of the CUA opinion was its treatment of Smith. McDonough had argued that “Smith rejected the compelling interest test in the case of religion-neutral laws of general application with the result that the ministerial exception has been stripped of its constitutional foundation.” The CUA court noted the Smith Court’s explanation that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” However, the court then reasoned that it “does not follow, however, that Smith stands for the proposition that a church may never be relieved from such an obligation.” The circuit court further noted that “[p]rotecting the authority of a church to select its own ministers free of government interference does not empower a member of that church, ‘by virtue of his beliefs, to become a law unto himself.’

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225 Id. (citing E.E.O.C. v. Catholic University of America, 856 F.Supp. 1, 10 (1994)).
226 Id. (citing E.E.O.C. v. Catholic University of America, 856 F.Supp. 1, 11 (1994)).
227 See id. at 461 (citing Rayburn, 772 F2d at 1169).
228 Cf. Maguire v. Marquette University, 814 F.2d 1213, 1218 (7th Cir. 1987) (rejecting that Marjorie Maguire had been denied a teaching position because of her sex when a man with a similar position on abortion would also have been denied a position).
229 CUA, 83 F.3d at 461-62.
230 Id. at 462 (citing Smith, 494 U.S. at 879) (emphasis in CUA opinion).
231 Id. (emphasis in original).
232 Id. (citing Smith, 494 U.S. at 885).
Yet, the court’s reasoning is unpersuasive. First, while the Smith Court talks about an individual, it does not say “an individual believer.” The Court’s reasoning could apply both to an individual (human) person and to an individual religious institution. Indeed, the Ninth Circuit read Smith to apply to religious institutions as well.233 Second, the court’s comments about an individual’s becoming a law unto himself could apply both to an individual (human) person and to a church, since what is at issue is whether generally applicable neutral laws also apply to religious institutions.

As further support for its contention that the ministerial exception survives Smith, the CUA court noted that there is a long jurisprudence that affords protection to religious institutions, including Watson, Gonzalez, and Kedroff, that must be taken into account.234 While the court is correct that these cases must be taken into account, the court is incorrect that they afford the generalized immunity that might be inferred from a discussion of “a spirit of freedom for religious organizations, an independence from secular control or manipulation.”235

Suppose, however, that one reads Watson, Gonzalez, and Kedroff as standing for the proposition that a “church’s selection of its own clergy is one such core matter of ecclesiastical self-governance with which the state may not constitutionally interfere.”236 Even so, that would not imply that the protections under the ministerial exception have to be as broad as they are commonly construed.

233 See American Friends Service Committee Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991) (“But after AFSC filed this appeal, the Supreme Court handed down its decision in Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). That case dramatically altered the manner in which we must evaluate free exercise complaints like that of AFSC, and requires that we affirm the district court's dismissal.”).
234 See CUA, 83 F.3d at 462.
235 Id. at 462-63 (citing McClure, 460 F.2d at 560).
236 Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999).
Consider a pastor who allegedly has been sexually harassed in the workplace, perhaps by another pastor. Even were the Constitution to preclude an order of reinstatement in a case in which the victim had been fired, other remedies might be available, and could be imposed without intruding on religious practice.

Or, someone hoping to become a priest might be subjected to sexual harassment. Assuming that such harassment was not religiously condoned, the ministerial exception should not be thought to offer protection for such behavior, even if the victim was seeking to become a member of the clergy.

A sexual harassment case might be more complicated. Gellington v. Christian Methodist Episcopal Church, Incorporated involved the following scenario: Veronica Little, a minister, alleged that her immediate supervisor had made sexual advances toward her on more than one occasion. She reported this to Lee Gellington, a minister with whom she worked. He helped

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237 See Black v. Snyder, 471 N.W.2d 715, 717 (Minn. App. 1991) (“Susan Black was hired as an associate pastor. … Black filed a discrimination charge against her supervising pastor, William Snyder … [alleging] that Snyder repeatedly made unwelcome sexual advances toward her.”).

238 See id. at 718 (“Less than three months after her report to the Human Rights Department, the church held a congregational meeting at which it voted to discharge Black.”).

239 Id. at 721 (noting that the plaintiff “does not seek reinstatement but only monetary damages”).

240 Id. (“Black’s sexual harassment claim does not involve scrutiny of church doctrine, interfere in matters of an inherently ecclesiastical nature, or infringe upon the church’s religious practice.”). See also Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 954 (9th Cir. 2004)

241 See Bollard, 196 F.3d at 944 (Bollard “alleges that the harassing conduct was so severe that he was forced to leave the Jesuit order in December 1996 before taking vows to become a priest.”).

242 Id. at 947 (“The Jesuits’ disavowal of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines.”).

243 203 F.3d 1299 (11th Cir. 2000).

244 See id. at 1301.

245 See id.
Little prepare a complaint to the church elders. Shortly thereafter, he was reassigned to a different church 800 miles away at a substantially reduced salary. Reasoning that the ministerial exception is still good law after Smith, the 11th Circuit upheld the district court’s denial of any relief for Gellington.

Certainly, it might be argued that permitting such suits to be maintained might have an effect on whom a congregation might choose as its minister—choosing clergy who might engage in such behavior and refusing to hire or retain someone on a forbidden, non-doctrinal basis would both be disincentivized. But disincentivizing such hiring and retention practices should be encouraged rather than precluded. Further, it will not do to say that the First Amendment precludes incentivizing or disincentivizing clergy hiring practices in any way. Such an argument proves too much. For example, it would suggest that parishioners could not be allowed to sue clergy for sexual impropriety, because that would chill the hiring or retaining of certain individuals. As Judge Fletcher has pointed out,

This argument proves too much. Under … [such] reasoning, an altar boy’s suit against the church for sexual abuse by a minister is constitutionally forbidden. Damages in such suits are likely to be higher than the limited damages available in Title VII sexual harassment suits brought by ministers. In addition, the number of sexual abuse suits brought by parishioners dwarfs the few sexual harassment

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246 Id.
247 Id.
248 See id. at 1303. See also Combs v. Central Texas Annual Conference of United Methodist Church, 173 F.3d 343, 348 (5th Cir. 1999) (holding that the ministerial exception survives Smith).
249 Cf. Lund, supra note 153, at SSRN pg 37 (“[G]iving damages 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.”).
250 See Mississippi College, 626 F.2d at 488 (“the government has a compelling interest in eradicating discrimination in all forms”)
251 See Bollard, 196 F.3d at 947-48 (“[W]e intrude no further on church autonomy in allowing this case to proceed than we do, for example, in allowing parishioners' civil suits against a church for the negligent supervision of ministers who have subjected them to inappropriate sexual behavior.”).
suits that have been, and are likely to be, brought by ministers. The effect of
sexual abuse suits brought by parishioners on the employment practices of the
church is thus almost certain to be far greater than the effect of sexual harassment
suits by ministers. 252

The circuits have construed the ministerial exception as covering a broad range of positions.
It might include someone who is in charge of making sure that dietary laws are observed, 253
someone who is in charge of the music for the ministry, 254 and someone who acts as a press
secretary. 255 But the very breadth of the exception undermines the argument that the ministerial
exception protects the “lifeblood” 256 of the church. Indeed, the McClure court emphasized that
the “minister is the chief instrument by which the church seeks to fulfill its purpose,” 257 and it is
utterly implausible to describe all of these kinds of positions as equally essential. 258

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252 Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring in the order
denying rehearing en banc)
August 2000, Ferman Shaliehsabou, an Orthodox Jewish man, worked at the Hebrew Home of Greater Washington
(the Hebrew Home) as a mashgiach. The term mashgiach is defined as ‘an inspector appointed by a board of
Orthodox rabbis to guard against any violation of the Jewish dietary laws.’”) (citing Random House Webster's
Unabridged Dictionary 1181 (2d ed.1998)).
254 Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999) (“The job description for Director of Music, states that ‘the
Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and
congregational participation in all aspects of this ministry at Munholland United Methodist Church.’”) See also
E.E.O.C. v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 797 (4th Cir. 2000) (“The EEOC alleged that the
church discriminated against Joyce Austin on the basis of her sex through a series of adverse employment actions
relating to her positions as the Cathedral's Director of Music Ministry and a part-time music teacher at the Cathedral
elementary school.”); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006)
   Richard Tomic was employed as the music director and organist both of a Roman Catholic church
in Peoria (St. Mary's Cathedral) and of the Peoria diocese itself. The job description for the
diocesan position required him “to assist the Office of Divine Worship in preparing and
celebrating various diocesan liturgies” and “in planning and celebrating liturgical events as
requested.” The description of his church job required him to play the organ for masses and other
events, including weddings and funerals, and, in his capacity as music director, to “prepare music
for all Parish masses and liturgies ... in consultation with the Rector/Pastor where necessary,” as
well as to recruit, train, direct, and rehearse the members of the chorus.
255 See Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003).
256 McClure, 460 F.2d at 558.
257 Id. at 559. See also Kaufmann v. Sheehan, 707 F.2d 355, 359 (8th Cir. 1983) (“It is apparent that the priest or
other member of the clergy occupies a particularly sensitive role in any church organization. Significant
Certainly, there are religious dimensions to a variety of jobs and the adverse employments actions taken may have been justified in particular cases. Nonetheless, the ministerial exception affords the kind of immunity from law that various Supreme Court cases have refused to confer.

A separate issue involves what kind of process should be used so that courts can uncover invidious discrimination without treading on areas that are appropriately reserved for religious authorities. The New Jersey Supreme Court suggested that if “the dispute can be resolved by the application of purely neutral principles of law and without impermissible government intrusion (e.g., where the church offers no religious-based justification for its actions and points to no internal governance rights that would actually be affected), there is no First Amendment shield to litigation.” The claim here is not that the task set out for the courts by the New Jersey Supreme Court would be easy to perform. On the contrary, in the words of the Watson Court, the task might be “delicate,” “difficult,” and quite complicated.

Consider Elvig v. Calvin Presbyterian Church, which involved allegations of sexual harassment and retaliation. Monica Elvig, an ordained minister and associate pastor, made a responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.”

Bruce Bagni recognized that some kinds of positions within religious institutions are more essential for religious purposes than others. See Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1544 (1979). He argues that the employment discrimination cases involving religious institutions “can be explained easily under the concentric circles theory.” Basically, a “minister falls squarely in the epicenter,” whereas other positions are more peripheral. For example, “a church's employment relationship with a clerical employee who performs exclusively nonspiritual duties bears no relationship to worship and the practice of religion.”

Cf. Roman Catholic Diocese of Raleigh, 213 F.3d at 798 (“A 1995 parish survey revealed general dissatisfaction with the music program, and the parishioners voiced the need for improvement in the Cathedral's music ministry.”).
formal complaint to her Church against the pastor of her Church.\textsuperscript{266} She claimed that the Church took no action to “stop the harassment or alleviate the hostile working environment.”\textsuperscript{267} After she filed a charge of discrimination with the EEOC, she was placed on unpaid leave and the Presbytery then voted to terminate her employment.\textsuperscript{268} In addition, the Committee on Ministry refused to allow her to circulate her church resume, which effectively prevented her from getting a pastoral position in any Presbyterian church in the country.\textsuperscript{269}

When allowing her sexual harassment claim to proceed, the Ninth Circuit tried to explain the kinds of harms for which damages could be awarded. It reasoned that “the termination of Elvig's ministry and her inability to find other pastoral employment are consequences of protected employment decisions. Consequently, a damage award based on lost or reduced pay Elvig may have suffered from those employment decisions would necessarily trench on the Church's protected ministerial decisions.”\textsuperscript{270} However, some of the other damages based on the harassing conduct itself or by the retaliatory harassment would be compensable.\textsuperscript{271}

It is not clear, however, that damages for an unlawful firing would be constitutionally barred where the plaintiff could establish that her firing was not doctrinally based and was instead in violation of a neutral, generally applicable law. As the 7\textsuperscript{th} Circuit has suggested, the ministerial exception is “a rule of interpretation, not a constitutional rule,”\textsuperscript{272} and such a rule of interpretation might be made more nuanced than the current courts seem willing to admit.

\textbf{C. The Test Case of Hosanna-Tabor}

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{266} \textit{Id.} at 953-54.
  \item \textsuperscript{267} \textit{Id.} at 954.
  \item \textsuperscript{268} \textit{Id.}
  \item \textsuperscript{269} \textit{Id.}
  \item \textsuperscript{270} \textit{Id.} at 966.
  \item \textsuperscript{271} \textit{Id.}
  \item \textsuperscript{272} Schleicher, 518 F.3d at 475.
\end{enumerate}
\end{footnotesize}
The Sixth Circuit recent decided Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church and School. Cheryl Perich, a “commissioned minister” who taught the 3rd and 4th grades, alleged that her employer, the Hosanna-Tabor Evangelical Lutheran Church and School, had improperly fired her in violation of the Americans with Disabilities Act.

A little background is helpful to understand the issue before the 6th Circuit. The Hosanna-Tabor school employed two kinds of teachers, “lay” or “contract” teachers on the one hand and “called” teachers on the other. Lay teachers were hired for one-year renewable terms, whereas called teachers, who were approved by the congregation, were hired on an open-ended basis and could not be dismissed without cause. A condition of being “called” was the completion of various classes. Perich started out as a lay teacher but, after completing the relevant classes, was later hired as a “called” teacher.

Perich’s duties were identical whether her employment status was “lay” or “called.” She taught a variety of secular classes—math, language arts, social studies, science, gym, and reading. She also taught a religion class four days per week for thirty minutes and attended a

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273 597 F.3d 769 (6th Cir. 2010)
274 Id. at 772.
275 Id.
276 E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School, 597 F.3d 769, 775 (6th Cir. 2010).
277 See id. at 721 (citing 42 U.S.C. §1217(a)).
278 Id. (“The school teaches kindergarten through eighth grades. The faculty consists of two types of teachers: (1) “lay” or “contract” teachers, and (2) “called” teachers.”).
279 Id.
280 Id.
281 Id.
282 Id.
283 Id.
284 Id.
chapel service with her students.\footnote{285 Id.} She led a chapel service twice a year (in rotation with the other teachers), and led each class in prayer three times per day.

All teachers were supposed to act as Christian role models.\footnote{286 Id. at 772-73.} That said, however, Petrich taught the secular subjects using the textbooks commonly used in public schools and she introduced religious topics into the secular studies extremely rarely.\footnote{287 Id. at 773.} Further, Hosanna-Tabor did not require teachers to be “called” or even Lutheran,\footnote{288 Id.} and all teachers, whether or not Lutheran, had the same responsibilities, including teaching religion classes and leading chapel service.\footnote{289 Id.}

Perich became ill and had to take a medical leave of absence.\footnote{290 Id. at 774, Id. at 774.} She was eventually diagnosed with narcolepsy, and was told that she could return to work once her medication was stabilized.\footnote{291 Id.} Perich kept her employer apprised of her medical progress, and eventually reported to work after having been released by her doctor.\footnote{292 Id. at 773.}

During the period that she was away from work, she was repeatedly asked to resign her call,\footnote{293 Id. at 774, Id. at 774.} which she refused to do. When she was well and showed up for work, there was no job for her, because the substitute taking her place had been awarded a year-long contract.\footnote{294 Id. at 773, Id. at 773.}

Perich was informed by her principal that she would likely be fired.\footnote{295 Id. at 774.} Perich responded that she would assert her legal rights if a compromise could not be reached.\footnote{296 Id.}
The congregation eventually voted to rescind her call, and Perich filed a charge of discrimination and retaliation with the EEOC. The EEOC filed a complaint against Hosanna-Tabor in district court, and the district court granted summary judgment in favor of Hosanna-Tabor.

The Sixth Circuit began its analysis by noting that Congress had also intended ADA protections to apply to religious institutions, with a “narrowly drawn religious exemption.” The central issue before the court at this stage was whether Perich’s “primary duties” triggered the exception. Many courts have considered whether elementary school teachers fall within the ministerial exception and the “overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception.” Those teachers who had been considered ministers for Title VII purposes “have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church.”

The court concluded that Perich’s “primary duties were secular,” both because “the overwhelming majority of her day teaching secular subjects using secular textbooks” and because “nothing in the record indicates that the Lutheran church relied on Perich as the primary

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297 Id. at 775.  
298 Id.  
299 Id.  
300 Id. at 777. See also id. at 776-77 (“Title I of the ADA includes an exception—known as the ‘ministerial exception’—which allows religious entities to give ‘preference in employment to individuals of a particular religion’ and to ‘require that all applicants and employees conform to the religious tenants of such organization.’ 42 U.S.C. § 12113(d).”)  
301 Id. at 778.  
302 Id.  
303 Id. at 779.  
304 Id. at 781.  
305 Id.
means to indoctrinate its faithful into its theology.” 306 The court noted that this case could be decided without any analysis of church doctrine—the “trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich.” 307 Further, “the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws,” 308 and “none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures.” 309 The Sixth Circuit remanded the case to permit the district court to make a finding on the merits. 310

The Sixth Circuit’s finding that Perich did not fall within the ministerial exception 311 meant that the court did not have to deal with another element of the case. Shortly after Perich had informed the principal that she would be able to come back to work within about a month, 312 the principal and school board expressed their opinion at the annual congregational meeting that Perich was unlikely to be physically capable of returning “that school year or the next.” 313 It was after having been so informed that the congregation adopted the Board’s proposal that Perich be asked to resign her call voluntarily in exchange for some coverage of her health care premiums

306 Id.
307 Id. at 781-82.
308 Id. at 782.
309 Id.
310 See id. at 782.
311 See id. (“the ministerial exception does not bar Perich's claims against Hosanna-Tabor”).
312 Id. at 773 (“On January 27, 2005, Perich wrote to Hoeft that she would be able to return to work between February 14 and February 28, 2005.”)
313 Id. at 774.
for the remainder of the year. It is simply unclear what the congregation had been told when a few months later they voted to rescind her call.

The United States Supreme Court has suggested that deference is required “to the decisions of the proper church tribunals on matters purely ecclesiastical,” absent fraud or collusion. Further, the freedom to select the clergy has constitutional protection as long as “no improper methods of choice are proven.” The Court has neither spelled out what kind of fraud or collusion must be established to permit civil courts to interfere in clergy selection decisions nor has discussed what kinds of improper methods would remove the federal constitutional protections for decisions about clergy. Were Perich found to be within the ministerial exception, a separate issue would be whether these long-dormant exceptions might now be wakened.

The Sixth Circuit’s analysis of why Perich did not fall within the ministerial exception was well within the jurisprudence established in the circuits. As the Southwestern Baptist Theological Seminary court recognized, even ordained ministers fall outside of the exception where they were not “engaged in activities traditionally considered ecclesiastical or religious” in their jobs. Hosanna-Tabor’s willingness to have Perich’s employment duties performed by lay teachers who might not even be Lutheran severely undercut the plausibility of its claim that her position triggered the ministerial exception. Indeed, one might wonder why the United States Supreme Court granted certiorari to hear this case.

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314 Id.
315 See id. at 775.
316 Gonzalez, 280 U.S. at 16
317 Id.
318 Kedroff, 344 U.S. at 116.
319 Southwestern Baptist Theological Seminary, 651 F.2d at 284.
320 See Hosanna-Tabor, 597 F.3d at 779.
IV. Conclusion

The United States Supreme Court had decided many cases that attempt to spell out the limitations on civil courts when a religious institution is one of the parties in interest. While the Court has consistently stated that civil courts should defer on ecclesiastical matters, the Court has often qualified the deference owed by suggesting that exceptions apply when there is fraud or collusion or where improper methods can be proven. Further, it is clear that the deference allegedly accorded by the Constitution has been overstated. The Watson Court gave civil courts the responsibility in some cases of deciding when the religious doctrine had substantially changed, the Bouldin court seemed to give courts the responsibility of deciding when the majority of a congregation had adhered to doctrine, and Gonzalez, Milivojetich, and Kedroff all referred to conditions that would defeat the requirement of deference. The neutral principles approach discussed in Jones and Presbyterian Church in the United States is an alternative to an approach of robust deference. Dayton Christian Schools, Jimmy Swaggart Ministries, Tony and Susan Alamo Foundation, and Smith all suggest that neutral, generally applicable laws can be applied to religious institutions in many instances.

The ministerial exception, which has been developed in the circuits, is often interpreted to offer robust protections to religious institutions in the employment context so that civil courts do not have to enmesh themselves in religious matters. Yet, as Judge Kozinski has observed, the ministerial exception itself requires that courts make determinations that one might have thought forbidden, if only in figuring out who counts as a minister for purposes of that exception.321

321 Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (“The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.”) But see Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test, 121 Harv. L. Rev. 1776, 1777 (2008) (“Courts could cure the constitutional problems inherent in the primary duties test by adopting a rule of deference to a religious organization's reasonable claim concerning the spiritual
Further, courts conveniently forget that the exception has been expanded so much that it cannot plausibly be thought merely to be protecting the lifeblood of religious institutions. In any event, because courts have a range of possible remedies that they might order, they may well be able to compensate individuals victimized by illegal practices without going so far as to order a clergyperson hired or reinstated.

The Court has the opportunity to clarify the jurisprudence when it hears and decides Hosanna-Tabor. For example, it might limit the ministerial exception, either with respect to the individuals to whom it might apply or with respect to the way it might be used, e.g., limit the kinds of remedies that victims might be awarded rather than preclude them from receiving any compensation whatsoever. However, the Court has not taken advantage of opportunities to clarify the jurisprudence in the past, and there is reason to be pessimistic that the Court will grasp this opportunity to provide clear and principled guidance to the lower courts.