Making the Anomalous Even More Anomalous: On Hosanna-Tabor, 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. Recently, the federal circuits have recognized a ministerial exception in a certain subset of cases, refusing to afford a remedy when religious institutions have allegedly violated antidiscrimination laws by subjecting certain employees to adverse employment action for prohibited reasons. Before this year, the Supreme Court had never made clear whether the First Amendment includes a ministerial exception and, if so, how it should be applied.

In Hosanna–Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, the Court held that the First Amendment incorporates the ministerial exception and, further, found that the plaintiff, Cheryl Perich, fell within that exception and so could not press her claim. However, courts and commentators hoping for clarification of the Religion Clauses jurisprudence more generally or even for a firm constitutional grounding of the ministerial exception may well be disappointed. The Court has raised more questions than it has answered, and has provided such little helpful guidance to the lower courts that the decision is likely to lead to greater confusion in the lower courts and to greater inconsistency in the judgments issued when religious employees have allegedly been subjected to prohibited discriminatory practices.

Part II of this article discusses the background behind Hosanna-Tabor as well as the Court’s presentation of the prevailing jurisprudence. Part III discusses the Supreme Court caselaw in this area, noting the ways in which it is much more qualified than would have been understood from the Hosanna-Tabor Court’s presentation of it. Part IV discusses the robust “ministerial exception” that has developed in the circuits, which is neither required by the Constitution nor even internally consistent. The article concludes by situating the Hosanna-Tabor opinion within the prevailing jurisprudence, discussing the difficulties that future courts will now face when attempting to apply the relevant doctrine.

II. Hosanna-Tabor

Someone reading the Hosanna-Tabor opinion might assume that the constitutional issues were rather straightforward. Possibly sympathetic facts notwithstanding, the Constitution does not permit the state to intrude upon something so central to religious autonomy as who will speak for a religious institution on matters of doctrine. Yet, such a reading of the jurisprudence is inaccurate—the Hosanna-Tabor Court failed to focus on some of the salient facts in the case itself and also failed to focus on what the Court has said and done previously in various cases involving religious entities. While the Constitution imposes some restrictions on the civil courts with respect to the kinds of matters that can be addressed when a religious institution is one of the parties, those restrictions are not nearly as robust as might have been inferred from the Hosanna-Tabor Court’s opinion.

A. Hosanna-Tabor Background

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2 See id. at 706. (“Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”).
Cheryl Perich, a "commissioned minister" who taught kindergarten and the 4th grade, alleged that her employer, the Hosanna-Tabor Evangelical Lutheran Church and School, had improperly fired her in violation of the Americans with Disabilities Act. Hosanna Tabor "argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers." A finding for Hosanna-Tabor would mean that there would be no need to remand the case to discover whether Perich had in fact been fired because of her disability. A finding for Perich would mean that there would be a remand to discover whether Perich had been fired for non-religious reasons.

A little background is helpful to understand whether the Constitution recognizes a ministerial exception and, if so, the conditions under which such an exception will be triggered. 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. To be “called,” one had to satisfy certain academic requirements, e.g., “take eight courses of theological study, obtain the endorsement of their local Synod district, and pass

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3 Id. at 700.
4 Id.
5 See id. at 701 (citing 42 U.S.C. §12101).
6 Id.
7 Caroline Mala Corbin, The Irony of Hosanna-Tabor Lutheran Church & School v. EEOC, 106 NW. U. L. REV. COLLOQ 96, 105 (2011) (“letting a religious organization claim that a minister who insists on compliance with the law is spiritually unfit creates a potentially limitless loophole and allows it to be a ‘law unto itself’”) (citing Employment Division v. Smith, 494 U.S. 872, 879 (1990)).
8 E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School, 597 F.3d 769, 782 (6th Cir. 2010), rev’d Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C. 132 S. Ct. 694 (2012) (“Because the ministerial exception does not bar Perich's claims against Hosanna-Tabor, we VACATE the district court's order entering summary judgment on behalf of Defendant and REMAND with instructions that the district court make a finding on the merits of Perich's retaliation claim under the ADA.”).
10 Id. at 700.
11 Id. at 699.
an oral examination by a faculty committee.”12 Perich started out as a lay teacher but, after meeting the relevant requirements, was later hired as a “called” teacher.13

Perich’s duties were the same whether her employment status was “lay” or “called.”14 She taught a variety of secular classes—math, language arts, social studies, science, gym, art and music.15 She also taught a religion class four days per week for thirty minutes and attended a chapel service with her students.16 She led a chapel service twice a year.17

All teachers were supposed to act as Christian role models.18 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.19 Further, Hosanna-Tabor did not require teachers to be “called” or even Lutheran,20 and all teachers, whether or not Lutheran, had the same responsibilities, including teaching religion classes and leading chapel service.21

Perich became ill and had to take a medical leave of absence at the beginning of the 2004-2005 school year.22 She was eventually diagnosed with narcolepsy.23 On December 16, Perich informed her principal that she would be able to return to work within two or three months once her medication had been stabilized.24 On January 27, 2005, Perich notified the principal that she

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12 Id. at 699.
13 Id. at 700.
14 Id.
15 Id.
16 Id.
17 Id.
18 Hosanna-Tabor, 597 F.3d at 772-73.
19 Id. at 773.
20 Id.
21 Id.
22 Hosanna-Tabor, 132 S. Ct. at 700.
23 Id.
24 Hosanna-Tabor, 597 F.3d at 773.
would be able to return to work the following month.\textsuperscript{25} The principal responded that the school had already contracted with a lay teacher to fill Perich’s position for the remainder of the school year.

On January 30, the school administrators reported to the congregation that “Perich was unlikely to be physically capable of returning to work that school year or the next.”\textsuperscript{26} The Court does not mention whether the administrators made clear to the congregation that their prediction about when Perich could return was neither supported by Perich herself nor by Perich’s doctor.\textsuperscript{27} The Court does mention that after having been advised that Perich would not be able to return for at least an additional year, the “congregation voted to offer Perich a ‘peaceful release’ from her call, whereby the congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher.”\textsuperscript{28}

When informed of the congregation’s offer to help pay premiums in exchange for her resignation, Perich declined the offer, instead producing documentation from her doctor that she would be ready to work the following month.\textsuperscript{29} The date upon which she was deemed ready for work was important. Once cleared by her doctor for work, Perich would no longer be eligible for disability coverage.\textsuperscript{30} Further, once she was cleared, her refusal to report to work promptly might be construed as a voluntary termination of the employment relationship.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{25} \textit{Hosanna-Tabor}, 132 S. Ct. at 700.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} See \textit{id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} See \textit{Hosanna-Tabor}, 597 F.3d at 774.
\item \textsuperscript{31} See \textit{id.} See also Corbin, supra note 7, at 96 (“Her doctor released her to return to work on February 22, 2005, effectively ending her disability coverage.”).
\end{itemize}
On February 22, the first day cleared for work, Perich reported at her place of employment.\textsuperscript{32} The principal asked her to leave,\textsuperscript{33} although Perich refused to do so until she had something in writing confirming that she had come to work.\textsuperscript{34} Later that day, the principal called Perich informing her that she would likely be fired.\textsuperscript{35} Perich responded that she had spoken to an attorney and would seek to vindicate her legal rights if no compromise could be reached.\textsuperscript{36} The congregation eventually voted to rescind Perich’s call,\textsuperscript{37} and Perich filed a charge of discrimination and retaliation with the EEOC.\textsuperscript{38} The EEOC filed a complaint against Hosanna-Tabor in district court, and the district court granted summary judgment in favor of Hosanna-Tabor.\textsuperscript{39} The Sixth Circuit vacated the district court decision and remanded the case so that the district court could make a finding on the merits in light of the ADA.\textsuperscript{40}

B. Hosanna-Tabor on the Past Jurisprudence

The Hosanna-Tabor Court implied that the relevant case law was not particularly extensive\textsuperscript{41} and that it clearly established that the state could not intrude on church autonomy.\textsuperscript{42} The Court explained that the jurisprudence had touched on “questions about government interference with a church’s ability to select its own ministers”\textsuperscript{43} only indirectly “in the context of disputes over church property.”\textsuperscript{44} Nonetheless, the Court implied, those decisions clearly established that “it is

\begin{itemize}
\item \textsuperscript{32} Hosanna-Tabor, 132 S. Ct. at 700.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} See Hosanna-Tabor, 597 F.3d at 774.
\item \textsuperscript{37} Hosanna-Tabor, 132 S. Ct. at 700.
\item \textsuperscript{38} Id. at 701.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} See Hosanna-Tabor, 597 F.3d at 782.
\item \textsuperscript{41} Cf. Hosanna-Tabor, 132 S. Ct. at 704 (“it was some time before questions about government interference with a church's ability to select its own ministers came before the courts”).
\item \textsuperscript{42} See id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\end{itemize}
impermissible for the government to contradict a church's determination of who can act as its ministers.”

The Court began its discussion by reviewing Watson v. Jones, which involved a disagreement between antislavery and proslavery factions in the Walnut Street Presbyterian Church in Louisville, Kentucky. The Court noted that the “General Assembly of the Presbyterian Church had recognized the antislavery faction,” and that the Wolf Court had “declined to question that determination.” The Hosanna-Tabor Court then quoted some very deferential language contained in the Wolf opinion: “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”

The Hosanna-Tabor Court next mentioned Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, noting the Kedroff Court’s explanation that the “‘[f]reedom to select the clergy, where no improper methods of choice are proven,’ is ‘part of the free exercise of religion’ protected by the First Amendment against government interference.” This, too, seemed to establish that the Constitution requires the state to defer to a religious institution when the selection of clergy is at issue.

Next in the Court’s quick rundown of the relevant cases was Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, which involved “a dispute over control of the American–Canadian Diocese of the Serbian Orthodox Church, including its property and

45 Id.
46 80 U.S. (13 Wall.) 679 (1872)
47 Hosanna-Tabor, 132 S. Ct. 704.
48 Id. (citing Wolf, 80 U.S. at 727)
50 Hosanna-Tabor, 132 S. Ct. at 704 (citing Kedroff, 344 U.S. at 116).
51 426 U.S. 696 (1976),
After noting that the “Church had removed Dionisije Milivojevich as bishop of the American–Canadian Diocese because of his defiance of the church hierarchy,” the Hosanna-Tabor Court explained that the Illinois Supreme Court had reinstated Milivojevich “on the ground that the proceedings resulting in his removal failed to comply with church laws and regulations.” But the United States Supreme Court reversed, reasoning that “by inquiring into whether the Church had followed its own procedures, the State Supreme Court had ‘unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals’ of the Church.”

After offering this brief discussion, the Hosanna-Tabor Court noted that it had not yet “had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.” The Court found that the Constitution requires a ministerial exception, because forcing “a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.” In addition, such an imposition “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” The Court explained that both the Free Exercise Clause and the Establishment Clause precluded the state from imposing its will on a religious institution in this way. “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious

52 Hosanna-Tabor, 132 S. Ct. at 705.
53 Id.
54 Id. at 705 (citing Milivojevich, 426 U.S. at 708).
55 Id. (citing Milivojevich, 426 U.S. at 720).
56 Id.
57 Id. at 706.
58 Id.
group's right to shape its own faith and mission through its appointments.”

In addition, as an independent justification for denying Perich’s claim, the Hosanna-Tabor Court explained, “According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”

The Court understood that its holding that the Free Exercise Clause protected Hosanna-Tabor in this case might seem to be precluded by Employment Division v. Smith. The Smith Court had held that it was constitutional for Oregon to criminalize the ingestion of peyote even when done for sacramental purposes: “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).’” The Hosanna-Tabor Court admitted that the “the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability.” However, the Court explained that “Smith involved government regulation of only outward physical acts.” In contrast, the Hosanna-Tabor case “concerns government interference with an internal church decision that affects the faith and mission of the church itself.” Because of that difference, the Court rejected the “contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses.”

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59 Id.
60 Id.
61 See id. (“The EEOC and Perich also contend that our decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), precludes recognition of a ministerial exception.”)
63 Id. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment).)
64 Hosanna-Tabor, 132 S. Ct. at 707.
65 Id.
66 Id.
67 Id.
III. 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.\(^68\) 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 the Hosanna-Tabor Court implied, 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

The first case discussed by the Hosanna-Tabor Court was Watson v. Jones,\(^69\) which involved a schism within a church,\(^70\) where two distinct bodies each claimed to represent the true church.\(^71\) A large faction in the local church represented the pro-slavery group,\(^72\) whereas a smaller faction

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\(^69\) 80 U.S. 679 (1871).
\(^70\) Id. at 717.
\(^71\) 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.”).
\(^72\) See id. at 691-92 (discussing members of the local church criticizing the hierarchical church for its anti-slavery doctrine).
and the hierarchical church represented the anti-slavery group. The Watson Court upheld the power of the church courts to determine their own religious beliefs:

[T]he rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Yet, there was much in the Watson opinion suggesting that the Hosanna-Tabor Court was incorrect when impliedly attributing to Watson an absolute rule of deference. To see why, it is helpful to appreciate that 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;”

(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;” and

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73 See id. at 690-91.
74 Id. at 727.
75 See Hosanna-Tabor, 132 S. Ct. at 704 (discussing Watson’s rule of giving “religious organizations an independence from secular control or manipulation” (citing Kedroff, 344 U.S. at 116)).
76 Watson, 80 U.S. at 722.
77 Id.
(3) a property dispute where the local religious congregation is “but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals.”

With respect to the first kind of case, the 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. The Court offered an example to illustrate what it had in mind. 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.” 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.” Admittedly, the task in such a case might be “delicate” and “difficult.” Nonetheless, “when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down,” 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.”

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

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78 Id.
79 Id. at 723.
80 Id.
81 Id. at 724.
82 Id.
83 Id.
84 Id.
carry the property so confided to them to the support of new and conflicting doctrine.” 85 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. 86

Suppose that the terms of a legal instrument are not involved and that there is a dispute within an independent church. The Watson Court suggested that the right to use the property at issue should be “determined by the ordinary principles which govern voluntary associations.” 87 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.” 88

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. 89 It was in the context of discussing a schism within a hierarchical church that the Watson Court declared that the “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” 90 The Court cautioned against depriving

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85 Id. at 723.
86 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.”).
87 Id. at 725.
88 Id.
89 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.”).
90 Id. at 728.
religious “bodies of the right of construing their own church laws,”91 and resisted permitting civil courts to decide “ecclesiastical questions.”92

While the Watson Court was clearly suggesting deference with respect to a determination of doctrinal questions,93 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.94

A variation of the hypothesized case involving an independent church discussed in Watson was at issue before the Court in Bouldin v. Alexander.95 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

91 Id.
92 Id. at 734.
93 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”).
94 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.”).
95 82 U.S. 131 (1872).
at a non-regularly scheduled set of meetings. The Court held that the minority’s actions were 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 was countenancing 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.

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

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96 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 excinded, was not the action of the church, and that it was wholly inoperative”).

97 Id.

98 Id.

99 See id. at 136 (“Mr. Bouldin and party, being greatly in the minority”). See also Richard Albert, Religion in the New Republic, 67 La. L. Rev. 1, 52 (2006) (“But the Court’s deference was tempered by the interest of advancing the broader principle of majoritarian democracy, which, in Bouldin v. Alexander, the Court determined had to trump the competing interest of allowing a church congregation to govern itself.”).

100 280 U.S. 1 (1929).
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.

101 Id. at 16.
102 Id.
103 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.”).
104 Id. at 11 (“The chaplaincy was founded in 1820, under the will of Dona Petronila de Guzman.”).
105 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.”).
106 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.”).
107 Id. at 17.
108 See supra notes 79-84 and accompanying test.
The Hosanna-Tabor Court did not discuss either Bouldin or Gonzalez. Bouldin offered a very different picture of the jurisprudence, because the Court’s decision either resulted in a change in church leadership or at least clarified who in fact was entitled to lead the church. Gonzalez undercut the Hosanna-Tabor reading of the jurisprudence in a different way. For example, Gonzalez seems to differ from Watson with respect to how wills should be construed, which emphasizes that Watson is hardly as deferential as suggested by the Hosanna-Tabor Court. Further, by construing the terms of the will as accepting that religious doctrine might change over time, Gonzalez leaves open what should have been done had it been obvious that no changes in doctrine would be countenanced.

Professor Lund reads Gonzalez to suggest that individuals qualifying as ministers for purposes of the exception should not even be awarded compensation if they have wrongly been fired by religious entities. He notes, “Consider Gonzalez, the case about the fourteen-year-old boy who wanted to become a Catholic chaplain with the right to the money in the chaplaincy's endowment. It would have made no sense to deny him the position of chaplain but still give him the money in the endowment. The Court thought this point obvious.”¹⁰⁹ But the Court thought this point obvious, precisely because denial of the position was viewed as consistent with the will.¹¹⁰ Suppose, however, that the Court had construed the will differently. In that event, a separate question would have been whether the Church’s refusal to use the funds in the way dictated by the will would require that the funds establishing the chaplaincy should revert to the

¹¹⁰ See Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 19 (1929) (“Since Raul is not entitled to be appointed chaplain, he is not entitled to a living from the income of the chaplaincy.”). Lund himself notes that this passage where the Court makes clear that it believes no wrong has occurred. See Lund, supra note 109, at 72 n.163.
testator’s heirs.\textsuperscript{111} If so, such a holding would suggest that when the Church acts “wrongly” by not following the terms of the will, the question is not whether there should be a remedy but merely which remedy is appropriate.

Rather than discuss those cases, the Hosanna-Tabor Court instead jumped from Watson to Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,\textsuperscript{112} a case in which the doctrine of deference was amplified. 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,\textsuperscript{113} and the United States Supreme Court reversed.\textsuperscript{114} The Court read Watson v. Jones\textsuperscript{115} 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.”\textsuperscript{116} The Kedroff Court concluded 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.”\textsuperscript{117}

\textsuperscript{111} Cf. Williamson v. Grizzard, 387 S.W.2d 807, 810 (Tenn.1965) (“Our interpretation of the grantors’ intent is that they wished the church to use the land so long as it had a use for it, and then desired thereafter that their heirs receive the benefit therefrom. It appears from the bill that the described land may have served its usefulness to the church, and we conclude that the heirs should receive the land in accordance with the clear, intent and wish of the grantors, provided, of course, the church fails to use the land for the purposes specified in the deed.”)

\textsuperscript{112} 344 U.S. 94 (1952).

\textsuperscript{113} 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.”).

\textsuperscript{114} See id. at 121.

\textsuperscript{115} 60 U.S. 679 (1871).

\textsuperscript{116} Kedroff, 344 U.S. at 116.

\textsuperscript{117} Id.
Kedroff seems to offer robust protections for religious entities, since it made 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 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

118 Id. at 120.
119 Id.
120 Id. at 120-21
121 Id. at 116.
123 See id. at 442.
124 Id. at 443-44.
125 See id. at 444.
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 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.”

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126 Id. at 445-46.
127 Id. at 449.
128 Id.
129 Id.
130 Id.
131 Id. at 452 (Harlan, J., concurring) (citing Watson, 80 U.S. at 722-24).
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 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

133 See supra note 107 and accompanying text.
135 See id. at 697-98.
136 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”).
137 Id.
138 See id. at 725.
139 Id. at 708.
140 Id. at 709.
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.

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 minority had the right to the exclusive possession and use of the

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141 Id. at 718

142 Gonzalez, 280 U.S. at 16.

143 Milivojevich, 426 U.S. at 713. See also Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) (“religious bodies may make apparently arbitrary decisions affecting the employment status of their clergy members and be free from civil review having done so”) (citing Milivojevich, 426 U.S. at 713).

144 Milivojevich 426 U.S. at 713.

145 Ct. Hutchison v. Thomas, 789 F.2d 392, 395 (6th Cir. 1986) (“Assuming, without deciding, that review is allowed for fraud or collusion, it is still only allowed for fraud or collusion of the most serious nature undermining the very authority of the decision-making body.”).


147 See id. at 597.

148 Id. at 598 (“164 of them, including the pastor, voted to separate from the PCUS. Ninety-four members opposed the resolution.”).
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

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149 Id. at 598-99 (“Representatives of the minority faction … brought this class action in state court, seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the Vineville church property as a member congregation of the PCUS.”).
150 Id. at 599 (“Georgia's approach to church property litigation has evolved in response to Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).”)
151 Jones, 443 U.S. at 599.
152 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.”).
153 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.”).
154 Id. at 605.
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.”\textsuperscript{155}

The existing jurisprudence prior to \textit{Hosanna-Tabor} was hardly as deferential as was implied by the \textit{Hosanna-Tabor} Court. While the federal courts are not to decide ecclesiastical matters, they are permitted to use neutral principles of law to resolve church disputes. Indeed, where improper means have been used, courts have been permitted to issue rulings that would result in a change in church leadership. While there is a rule of deference, that deference is qualitatively different from what the \textit{Hosanna-Tabor} Court implied was contained in the relevant jurisprudence.

\textbf{B. Religion Cases Where Ownership of Real Property Was Not at Issue}

There are different ways to read the \textit{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.\textsuperscript{156} However, it might be thought that the neutral principles approach should not be used outside of the context of a property dispute\textsuperscript{157} and that the Court’s frequent trumpeting of the importance of deference suggests that the state should refrain from injecting itself into church matters whenever

\textsuperscript{155} \textit{Kedroff}, 344 U.S. at 116.

\textsuperscript{156} 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.”).

\textsuperscript{157} See Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (suggesting that the neutral principles doctrine should only be used in property disputes).
possible. 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 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.” Rights guaranteed by the Religion Clauses might thereby be violated, not only by the Board’s conclusions, but also by “the very process of inquiry leading to findings and conclusions.” One possible way to read the Court 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.”

158 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.”).
160 Id. at 502.
161 Id.
162 Id. at 504-05.
163 Id. at 507.
164 Id. at 502.
In his dissent, Justice Brennan argued that the National Labor Relations Act did include church-operated schools. 165 While admitting that “the resolution of the constitutional question is not without difficulty,” 166 he suggested that it was “irresponsible to avoid [that difficulty] by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent.” 167 Justice Brennan suggested that the constitutional questions should have been addressed, although he expressly refrained from discussing how he would have resolved the constitutional issue. 168

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. 169 Or, the Court might merely have been suggesting that it will not address the implicated constitutional issues where Congress has not made its intentions sufficiently clear. 170 Some of the subsequent case law suggests that the stumbling block was the absence of clear congressional intent 171 rather than a required hands-off policy.

Ohio Civil Rights Commission v. Dayton Christian Schools, Incorporated 172 is helpful to consider when trying to sort out some of the related issues. At issue was the firing of a teacher,

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165 Id. at 518 (Brennan, J., dissenting) (“the NLRA includes within its coverage lay teachers employed by church-operated schools”).
166 Id. (Brennan, J., dissenting).
167 Id. (Brennan, J., dissenting).
168 See id. (Brennan, J., dissenting) (“I do not now do so [discuss the constitutional issue] only because the Court does not.”)
170 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.”).
171 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).
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.”\(^{173}\) She consulted an attorney, who threatened litigation under federal and state sex discrimination laws if the school did not change its nonrenewal decision.\(^{174}\)

Hoskinson was then suspended immediately, because she had challenged the nonrenewal decision in a “manner inconsistent with the internal dispute resolution doctrine.”\(^{175}\) 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,’”\(^{176}\) which at its core stood for the proposition that “one Christian should not take another Christian into courts of the State.”\(^{177}\) By threatening litigation rather than making use of internal appeal procedures,\(^{178}\) Hoskinson was deemed to have violated her statement of faith.\(^{179}\)

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,\(^{180}\) and stated that the “sole reason for her termination was her violation of the internal dispute resolution doctrine.”\(^{181}\) In response, Hoskinson filed a complaint with the Ohio Civil Rights Commission,\(^{182}\) alleging that the nonrenewal constituted illegal sex discrimination.\(^{183}\) The

\(^{173}\) Id. at 623.
\(^{174}\) Id.
\(^{175}\) Id.
\(^{176}\) Id. at 622-23.
\(^{177}\) Id. at 623.
\(^{178}\) Id. ("Instead of appealing this decision internally, Hoskinson contacted an attorney.").
\(^{179}\) Cf. id. ("She subscribed to the Statement of Faith and expressly agreed to resolve disputes internally through the Biblical chain of command.").
\(^{180}\) See id.
\(^{181}\) Id.
\(^{182}\) Id.
\(^{183}\) Id. at 623-624.
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.\textsuperscript{184}

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.”\textsuperscript{185} The United States Supreme Court did not address the substance of the response, expressing confidence that there would be an “adequate opportunity”\textsuperscript{186} 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,”\textsuperscript{187} 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 the ascribed religious-based reason was in fact the reason for the discharge.”\textsuperscript{188} 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.”\textsuperscript{189}

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.

\textsuperscript{184} Id. at 624.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 628.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 632 (Stevens, J., concurring in the judgment).
Nonetheless, civil authorities were not to be entirely excluded from deciding whether the firing or nonrenewal was lawful. Ironically, Hosanna-Tabor does not even cite to Dayton Christian Schools, even though it also involved dismissal of a schoolteacher who had threatened to take legal action to vindicate her rights.\footnote{See Corbin, supra note 7, at 104 n.58 (noting the striking parallels between Dayton Christian Schools and Hosanna-Tabor).}

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,\footnote{471 U.S. 290 (1985).} where the Court addressed whether the Fair Labor Standards Act (FLSA) was applicable to employees of a religious foundation engaged in commercial activities.\footnote{See id. at 291-92.} 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.”\footnote{Id. at 292.} While the associates did not receive salaries, they were provided food, clothing and shelter among other benefits.\footnote{Id.} 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 ‘[e]nterprise engaged in commerce or in the production of goods for commerce.’ Second, the associates must be ‘employees’ within the meaning of the Act.”\footnote{Id. at 295 (citing 29 U.S.C. § 203(s)).} The Court held that both prongs were met in this case,\footnote{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.”).} and that applying the Act to the Foundation's commercial activities was “fully consistent with the requirements of the First
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 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.

197 Id.
199 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.”).
200 See id. at 340.
201 See id. at 336.
202 Id. at 337.
203 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.”).
204 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 (D. Utah 1984)).
205 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.”).
206 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”).
Jimmy Swaggart Ministries v. Board of Equalization of California\textsuperscript{207} illustrates the point. At issue was whether California’s generally applicable\textsuperscript{208} sales and use tax could be applied to the “distribution of religious materials by a religious organization”\textsuperscript{209} without offending constitutional guarantees. The Court upheld the application of the tax\textsuperscript{210} because there was no evidence that the state was targeting religion\textsuperscript{211} and no reason to think that the tax would in some way compromise sincerely held religious beliefs.\textsuperscript{212} Indeed, there was no claim that the payment of taxes violated religious beliefs,\textsuperscript{213} although such a belief would likely have proven unavailing in any event.\textsuperscript{214}

A case often thought to establish that religious actors are not immune from neutral, generally applicable laws\textsuperscript{215} is Employment Division v. Smith,\textsuperscript{216} 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.\textsuperscript{217} The Smith Court explained that the “free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine

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\item \textsuperscript{207} 493 U.S. 378 (1990).
\item \textsuperscript{208} 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”).
\item \textsuperscript{209} Id. at 380.
\item \textsuperscript{210} 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.”).
\item \textsuperscript{211} Id. at 390 (“There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.”).
\item \textsuperscript{212} Id. at 391 (“There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs.”).
\item \textsuperscript{213} Id. (“appellant's religious beliefs do not forbid payment of the sales and use tax”).
\item \textsuperscript{214} 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”).
\item \textsuperscript{215} See Cynthia Koploy, Note, Free Exorcise 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.”).
\item \textsuperscript{216} 494 U.S. 872 (1990).
\item \textsuperscript{217} Id. at 874.
\end{itemize}
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.

Indeed, there was no claim in Hosanna-Tabor that Perich had somehow misrepresented doctrine in her classroom or that having her in the classroom would, in itself, somehow communicate to students something contrary to faith. Hosanna-Tabor might be contrasted with Dayton Christian Schools in the following respect. By teaching, Linda Hoskinson would be violating the “religious doctrine that mothers should stay home with their preschool age children,” whereas there was no analogous doctrine that Perich would be violating by teaching. To the extent that Perich was somehow violating doctrine by threatening to use the courts to vindicate her rights, that was also true in Dayton Christian Schools. If Dayton Christian Schools did not provide a basis to prevent that teacher from seeking vindication in the courts, then Hosanna-Tabor should not have as well, at least insofar as the concern involved the possible undermining of church doctrine.

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218 Id. at 877.
219 See id.
220 Id.
221 See Dayton Christian Schools, 477 U.S. at 623.
222 Cf. Hosanna-Tabor, 136 S. Ct. at 700 (discussing “the damage she [Perich] had done to her “working relationship” with the school by “threatening to take legal action.”).
223 See Dayton Christian Schools, 477 U.S. at 623 (“Teachers are expected to present any grievance they may have to their immediate supervisor, and to acquiesce in the final authority of the board, rather than to pursue a remedy in civil court.”)
The Smith 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 conjunction with other constitutional protections.” The Smith Court further noted that prior cases in which exemptions had been granted for religious reasons lent themselves to individualized assessment. 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.”

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 be permissible if in

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224 Smith, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment)).
225 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.”).
226 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)).
227 Id. at 890.
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 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

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228 Hosanna-Tabor, 136 S. Ct. at 706 (“The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.”).
229 460 F.2d 553 (5th Cir. 1972).
230 Id. at 554.
231 See id. at 555 (“she alleged that she had received less salary and fewer benefits than that accorded similarly situated male officers”).
requirements on the basis of religion,\textsuperscript{232} there was no similar exemption with respect to discrimination on the basis of race, sex, or national origin.\textsuperscript{233}

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,\textsuperscript{234} the court concluded that an investigation and review of the relevant practices would put the state in the position of intruding upon “matters of church administration and government,”\textsuperscript{235} which were of singular importance. The “relationship between an organized church and its ministers is its lifeblood.”\textsuperscript{236} Because the “minister is the chief instrument by which the church seeks to fulfill its purpose,”\textsuperscript{237} the court cautioned that matters involving the minister-church relationship are of “prime ecclesiastical concern.”\textsuperscript{238} Noting that applying Title VII provisions in the minister-church employment setting might violate First Amendment guarantees, the Fifth Circuit concluded that

\textsuperscript{232} 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.”); Lund, supra note 109, 23-24 (“Organizations founded on shared religious principles cannot really exist unless they actually share religious principles. Nothing, therefore, is more at the heart of a religious organization's freedom than the right to choose its staff on a religious basis.”).

\textsuperscript{233} 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.”).

\textsuperscript{234} McClure, 460 F.2d at 559-60.

\textsuperscript{235} Id. at 560.

\textsuperscript{236} Id. at 558. Cf. 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 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.”)

\textsuperscript{237} McClure, 460 F.2d at 559.

\textsuperscript{238} Id.
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 principles of law could not order the hiring or retention of a minister 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.

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

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239 Id. at 560-61.
240 Kedroff, 344 U.S. at 116.
241 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.”)
242 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).
an unwanted spiritual leader on a church.” 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.” Vindicated claims of discrimination might yield damages rather than a ministerial post.

B. Development of the Ministerial Exception

Courts in the circuits have followed the 5th 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 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.

245 Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008).
246 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 243, 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.”).
247 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.”)
248 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.
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.”

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*. The school had three distinct categories of employees: faculty, administrative staff, and support staff. The court found that the faculty were ministers for Title VII purposes, in part because most had been ordained, in part because

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249 626 F.2d 477 (5th Cir. 1980).

250 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.”).

251 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”).

252 Christopher Lund notes that “churches might agree with the broad abstract ideal of nondiscrimination, but not with the precise details of anti-discrimination laws.” See Lund, supra note 109, p. 48. 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.

253 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 compelling their modification, imposing injunctive restraints upon the College's freedom to make employment decisions, and awarding monetary relief to those persons aggrieved by the prohibited acts.”).

254 Id.

255 651 F.2d 277 (5th Cir. 1981).

256 Id. at 283.
they were supposed to model the ministerial role for the students,\textsuperscript{257} and in part because they were teaching doctrine to the students.\textsuperscript{258}

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 5\textsuperscript{th} 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,\textsuperscript{259} because they were not “engaged in activities traditionally considered ecclesiastical or religious”\textsuperscript{260} 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,”\textsuperscript{261} but did not include those administrators whose functions related “exclusively to the Seminary’s finance, maintenance, and other non-academic departments,”\textsuperscript{262} even if they were considered ministers by the Seminary.\textsuperscript{263} Needless to say, this will involve the courts in some very difficult line-drawing,\textsuperscript{264} both because ministers might only have secular duties and because lay individuals might be given religious duties.\textsuperscript{265}

\begin{footnotes}
\textsuperscript{257} Id. at 283-84.
\textsuperscript{258} Id. at 284.
\textsuperscript{259} Id. at 284.
\textsuperscript{260} Id. at 284-85.
\textsuperscript{261} Id. at 285.
\textsuperscript{262} Cf. Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 362 (8\textsuperscript{th} 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.”).
\textsuperscript{263} See DeMarco v. Holy Cross High School, 4 F.3d 166, 168 (2\textsuperscript{nd} Cir. 1993) (“Although a layperson, DeMarco had certain religious duties, including leading his students in prayers and taking them to Mass.”).
\end{footnotes}
One issue is whether an individual alleging discrimination comes within the ministerial exception.266 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.267 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.268 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.269

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.270 In Rayburn v. General Conference of Seventh-Day Adventists,271 the 4th Circuit addressed a claim of race and sex

266 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.”).
267 See id. at 172 (“Given that the religious duties that DeMarco allegedly failed to carry out are easily isolated and defined, we are confident that the able district judge will be able to focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties.”).
268 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.”).
269 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 only after the allegation of discrimination.”) (citing Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396, 404 (1st Cir.1990)).
270 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”).
271 772 F.2d 1164 (4th Cir. 1985).
discrimination brought by Carole Rayburn, who was an “associate in pastoral care.”\textsuperscript{272} While the Seventh Day Adventist Church does not permit women to be ordained,\textsuperscript{273} 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.”\textsuperscript{274}

Rayburn applied for two different positions within the Church and was awarded neither.\textsuperscript{275} 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.”\textsuperscript{276}

The 4\textsuperscript{th} 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\textsuperscript{277} and refusing to “impose upon a statute a limiting construction where to do so would strain congressional intent.”\textsuperscript{278} The court instead concluded that Title VII “applies to the employment decision in this case,”\textsuperscript{279} 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

\begin{footnotes}
\item 272 \textit{Id.} at 1165.
\item 273 \textit{Id.}
\item 274 \textit{Id.}
\item 275 \textit{Id.}
\item 276 \textit{Id.} See also \textit{id.} at 1165 (“Rayburn did submit some evidence to support her claims of sexual and racial discrimination.”).
\item 277 \textit{See supra} note 239 and accompanying text.
\item 278 Rayburn, 772 F.2d at 1167.
\item 279 \textit{Id.}
\end{footnotes}
Yet, the 4th 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.”

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.” Instead, the court said that it simply had to “decline examination of the Seventh-day Adventist Church's decision here.”

As the United States Supreme Court suggested the year after Rayburn was decided, 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.

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

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280 Id. at 1167-68 (citing Kedroff, 344 U.S. at 116).
281 Kedroff, 344 U.S. at 116.
282 Rayburn, 772 F.2d at 1169.
283 Id. at 1170.
284 See supra notes 172-90 and accompanying text (discussing Dayton Christian Schools).
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.\footnote{See id. at 1356 (citing 29 U.S.C. §§ 621,623 and Md. Ann. Code Art. 49B, § 16).} Because the Church allegedly opposed age discrimination,\footnote{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.’”)} the plaintiff claimed that there should be no bar to his suit. He sought monetary damages and an injunction against future discrimination.\footnote{See id. at 1356.} The court held that his suit was barred by the Free Exercise Clause.\footnote{Id.}

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.\footnote{Id.} While the court stated that it was unwilling “to interpret the antidiscrimination provision of the Book of Discipline”\footnote{Minker, 894 F.2d at 1358.} because doing so would require the court “to interpret or enforce matters of essential religious dogma,”\footnote{Id.} it nonetheless pointed to a passage suggesting that the Church’s commitment to nondiscrimination was not as robust as the plaintiff seemed to think.\footnote{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”).} That said, however, the court suggested that an issue that could be addressed was whether “the district 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.”\footnote{Id. at 1359.} The court reasoned that because money damages alone would suffice,\footnote{See id. at 1359.} there was “no potential for

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  \item \footnote{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.’”)} See id. at 1356.
  \item \footnote{Id.} Id.
  \item \footnote{See infra note 293 and accompanying text.} See infra note 293 and accompanying text.
  \item \footnote{Minker, 894 F.2d at 1358.} Minker, 894 F.2d at 1358.
  \item \footnote{Id.} Id.
  \item \footnote{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”).} 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”).
  \item \footnote{Id. at 1359.} Id. at 1359.
  \item \footnote{See id. at 1359.} See id. at 1359.
\end{itemize}
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
equivalent of the task of a minister,” and concluded that the Free Exercise Clause precluded
review.

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296 Id.
297 See McClure, 460 F.2d 569-60 (discussing Watson, Gonzalez and Kedroff); Rayburn, 772 F.2d 1167-68
(discussing among cases Kedroff and Milivojevich).
298 83 F.3d 455 (D.C. Cir. 1996).
299 Id. at 457.
300 Id. at 459.
301 Id.
302 Id.
303 Id. at 460.
304 Id. (citing E.E.O.C. v. Catholic University of America, 856 F.Supp. 1, 10 (1994)).
305 Id. (citing E.E.O.C. v. Catholic University of America, 856 F.Supp. 1, 11 (1994)).
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.’

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

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306 See id. at 461 (citing Rayburn, 772 F.2d at 1169).
307 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).
308 CUA, 83 F.3d at 461-62.
309 Id. at 462 (citing Smith, 494 U.S. at 879) (emphasis in CUA opinion).
310 Id. (emphasis in original).
311 Id. (citing Smith, 494 U.S. at 885).
read Smith to apply to religious institutions as well. 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. 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.”

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.” Even so, that would not imply that the protections under the ministerial exception have to be as broad as they are commonly construed.

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

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312 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.”).
313 See CUA, 83 F.3d at 462.
314 Id. at 462-63 (citing McClure, 460 F.2d at 560).
315 Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 946-47 (9th Cir. 1999).
316 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.”).
which the victim had been fired,\textsuperscript{317} other remedies might be available,\textsuperscript{318} and could be imposed without intruding on religious practice.\textsuperscript{319}

Or, someone hoping to become a priest might be subjected to sexual harassment.\textsuperscript{320} Assuming that such harassment was not religiously condoned,\textsuperscript{321} 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. \textbf{Gellington v. Christian Methodist Episcopal Church, Incorporated}\textsuperscript{322} involved the following scenario: Veronica Little, a minister, alleged that her immediate supervisor had made sexual advances toward her on more than one occasion.\textsuperscript{323} She reported this to Lee Gellington, a minister with whom she worked.\textsuperscript{324} He helped Little prepare a complaint to the church elders.\textsuperscript{325} Shortly thereafter, he was reassigned to a different church 800 miles away at a substantially reduced salary.\textsuperscript{326} Reasoning that the

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\textsuperscript{317} 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.”).
\textsuperscript{318} Id. at 721 (noting that the plaintiff “does not seek reinstatement but only monetary damages”).
\textsuperscript{319} 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)

Thus to the extent Elvig’s sexual harassment and retaliation claims implicate the Church’s ministerial employment decisions, those claims are foreclosed. Nonetheless, Elvig has stated narrower and thus viable sexual harassment and retaliation claims that do not implicate protected employment decisions. Elvig’s sexual harassment claim can succeed if she proves that she suffered a hostile work environment and if the Defendants do not prove that Elvig unreasonably failed to take advantage of available measures to prevent and correct that hostile environment.;


\textsuperscript{320} 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.”).
\textsuperscript{321} 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.”).
\textsuperscript{322} 203 F.3d 1299 (11th Cir. 2000).
\textsuperscript{323} See id. at 1301.
\textsuperscript{324} See id.
\textsuperscript{325} Id.
\textsuperscript{326} Id.
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 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

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327 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).
328 Cf. Lund, supra note 109, p. 40 (“But giving front pay in lieu of reinstatement does not really fix the core problem. It still gives the government control over the church’s clergy, just in a different way: Appoint this minister or pay a fine.”)
329 See Mississippi College, 626 F.2d at 488 (“the government has a compelling interest in eradicating discrimination in all forms”)
330 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.”).
church is thus almost certain to be far greater than the effect of sexual harassment suits by ministers.\textsuperscript{331}

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,\textsuperscript{332} someone who is in charge of the music for the ministry,\textsuperscript{333} and someone who acts as a press secretary.\textsuperscript{334} But the very breadth of the exception undermines the argument that the ministerial exception protects the “lifeblood”\textsuperscript{335} of the church. Indeed, the McClure court emphasized that the “minister is the chief instrument by which the church seeks to fulfill its purpose,”\textsuperscript{336} and it is utterly implausible to describe all of these kinds of positions as equally essential.\textsuperscript{337}

\textsuperscript{331} Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring in the order denying rehearing en banc)
\textsuperscript{332} Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299, 301 (4th Cir. 2004) (“From 1992 until 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).)
\textsuperscript{333} 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.
\textsuperscript{334} See Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003).
\textsuperscript{335} McClure, 460 F.2d at 558.
\textsuperscript{336} Id. at 559. See also Kaufmann v. Sheehan, 707 F.2d 355, 359 (8th Cir. 1983) (“[T] 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.”)
\textsuperscript{337} 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.” Id.
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. For example, the Smith Court warned against having a “system in which each conscience is a law unto itself,” and an analogous warning should be heeded insofar as the Constitution is interpreted to immunize the actions of religious institutions that are admittedly in violation of that very institution’s doctrine.

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

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338 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.”).
339 Smith, 494 U.S. at 890.
341 See Watson, 80 U.S. at 724.
342 See id.
343 375 F.3d 951 (9th Cir. 2004).
formal complaint to her Church against the pastor of her Church.\textsuperscript{346} She claimed that the Church took no action to “stop the harassment or alleviate the hostile working environment.”\textsuperscript{347} 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{348} 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{349}

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{350} However, some of the other damages based on the harassing conduct itself or by the retaliatory harassment would be compensable.\textsuperscript{351}

Before \textit{Hosanna-Tabor}, it was not clear that damages for an unlawful firing were 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.\textsuperscript{352} As the \textit{7th} Circuit has suggested, the ministerial exception could be interpreted as “a rule of interpretation, not a

\textsuperscript{344} \textit{Id.} at 953.
\textsuperscript{345} \textit{Id.}
\textsuperscript{346} \textit{Id.} at 953-54.
\textsuperscript{347} \textit{Id.} at 954.
\textsuperscript{348} \textit{Id.}
\textsuperscript{349} \textit{Id.}
\textsuperscript{350} \textit{Id.} at 966.
\textsuperscript{351} \textit{Id.}
\textsuperscript{352} \textit{See infra} notes 381-83 and accompanying text (discussing \textit{Hosanna Tabor}’s preclusion of a remedy for a wrongful firing of a minister)
constitutional rule,” and such a rule of interpretation might be made more nuanced than the current courts have been willing to admit.

The circuits are in general agreement that there is a ministerial exception of some sort, which is unsurprising given the existing jurisprudence. Basically, the United States Supreme Court has made clear in numerous decisions that civil courts should not be deciding ecclesiastical matters. However, recognition that there is some sort of ministerial exception is only the beginning—the difficult issues involves figuring out when it is triggered and what kind of protection it affords.

C. The Hosanna-Tabor Court’s Muddying of the Constitutional Waters

The Hosanna-Tabor Court implied that the basic issue before the Court was straightforward. The Court announced, “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” Allegedly, the Court was not simply offering its own view of what the Religion Clauses protect, but was representing what the Court has said for the past 150 years. “Our decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”

Yet, such a view does not represent the jurisprudence unless it is suitably qualified. For example, several decisions suggested that the conferred immunity was contingent on the process

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353 Schleicher, 518 F.3d at 475.
354 For a discussion of how the Hosanna-Tabor Court has treated this approach, see infra note 381 and accompanying text.
355 See Hosanna-Tabor, 132 S. Ct. at 707 (“there is a ministerial exception grounded in the Religion Clauses of the First Amendment”).
356 Id. at 707.
357 See id. at 709 n.4 (“the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).
358 Id. at 702.
359 Watson v. Jones, the first cases discussed by the Court, see Hosanna Tabor, 132 S. Ct. at 704, was decided in 1872.
360 Id. at 704.
having been proper. Thus, deference is required “to the decisions of the proper church tribunals on matters purely ecclesiastical,” absent fraud or collusion. By the same token, 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 the conditions under which proof of fraud or collusion permits 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.

Ironically, the Hosanna-Tabor Court noted the Kedroff qualification requiring that “no improper methods of choice are proven” and, further, cited Milivojevich in its discussion. However, the Hosanna-Tabor Court failed to note that the Milivojevich Court clarified the Gonzalez exception regarding “fraud, collusion, or arbitrariness” to prevent the civil courts from determining arbitrariness, at least “in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations.” The difficulty pointed to here is that the process by which the congregation came to rescind Perich’s call might be understood to have been improper, depending on what the congregation was told about Perich’s availability for work or how Perich’s threat to “assert her legal rights” was described. For example, the 6th Circuit and the Supreme Court described what she had said differently, and one might well have inferred different things about Perich

361 Gonzalez, 280 U.S. at 16.
362 Id.
363 Kedroff, 344 U.S. at 116.
364 See Hosanna-Tabor, 132 S. Ct. at 704 (citing Kedroff, 344 U.S. at 116).
365 Id. at 705.
366 Gonzales, 280 U.S. at 16.
367 Milivojevich, 426 U.S. at 713.
368 See supra note 368 and accompanying text (discussing whether the administrators had told the congregation that Perich would be ready to return to work the next month).
369 See Hosanna-Tabor, 132 S. Ct. at 700.
depending upon the description offered. The 6th Circuit suggested that Perich had talked about 
bringing suit if no compromise could be reached, which might be thought to mean that she did 
not really want to go to court and was instead hoping to resolve the dispute amicably if at all 
possible. The Supreme Court’s description—“she had spoken with an attorney and intended to 
assert her legal rights”—might suggest someone who was litigious. Was the congregation 
misled about what Perich had said or done? That is unclear. Even if the congregation had been 
misled, would that constitute the improper methods in hiring/firing to which the Court referred in 
prior decisions? That, too, is unclear. But the Hosanna-Tabor Court’s referring to a qualification 
of the ministerial exception existing in the past jurisprudence but then failing to apply or even 
discuss that qualification will mean that courts attempting to apply the relevant jurisprudence 
will not know whether the Hosanna-Tabor Court has reaffirmed or instead overruled the 
existence of this limitation on the ministerial exception.

The Hosanna-Tabor Court distinguished Smith by noting that “Smith involved government 
regulation of only outward physical acts. The present case, in contrast, concerns government 
interference with an internal church decision that affects the faith and mission of the church 
itself.” But such a distinction is unpersuasive for two distinct reasons. Many “acts’ might 
simply be described in physical terms, but it would at best be surprising for them to simply be 
viewed in that way. For example, many would suggest that something important would be 
missed by describing circumcision or the receipt of the sacrament in purely physical terms.

370 See Hosanna-Tabor, 597 F.3d at 774.
372 Id. at 707.
373 Fredric J. Bold, Jr, Comment, Vows to Collide: The Burgeoning Conflict between Religious Institutions and 
Same-Sex Marriage Antidiscrimination Laws, 158 U. Pa. L. Rev. 179, 189 (2009) (“according to the Catholic 
Church, sacraments are divine in origin and are the primary means by which believers receive spiritual nourishment 
from God through the Church”). Alison Davidian, Beyond the Locker Room: Changing Narratives on Early Surgery
Second, the question at hand was whether the decision to fire Perich implicated the faith and
mission of the church. If what she asserted was true and her firing was for reasons having
nothing to do with doctrine, then the faith and mission of the religious institution was simply not
at risk.

One of the difficulties presented in Perich’s case was in figuring out whether she was a
minister for purposes of the ministerial exception. 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 undercut the plausibility of its claim that she should
trigger the ministerial exception. The Hosanna-Tabor Court disagreed, holding that she was a
minister for purposes of the exception after adopting a very fact-specific approach. “In light of
these considerations—the formal title given Perich by the Church, the substance reflected in that
title, her own use of that title, and the important religious functions she performed for the
Church—we conclude that Perich was a minister covered by the ministerial exception.”

By listing all of these factors without assigning weights to them, the Court is almost
guaranteeing that cases involving relevantly similar plaintiffs will be decided differently in the
future. Suppose, for example, that Perich had not made use of the minister classification for tax
purposes. Would that have been enough to change the result? Justices Alito and Kagan

for Intersex Children, 26 Wis. J.L. Gender & Soc’y 1, 13 (2011) (noting that “male circumcision [is] a practice that
is grounded in cultural as well as religious justifications”).

374 Southwestern Baptist Theological Seminary, 651 F.2d at 284.
375 See Hosanna-Tabor, 597 F.3d at 779.
376 Hosanna-Tabor, 132 S. Ct. at 708.
377 See id.
suggested that courts should focus on the function performed by the plaintiff. That is fair enough. But when a court is considering the functions performed by the plaintiff, the court should consider whether individuals without particular training or, perhaps, who are not even members of the denomination are also asked to perform the functions at issue. If so, that should weigh against a finding that the ministerial exception had been triggered.

One difficulty presented by the Hosanna-Tabor Court’s approach is that the courts will now be deeply immersed in fact-intensive examinations to determine whether an individual challenging church employment practices is indeed a minister for purposes of the exception. Not only does this almost guarantee inconsistent results, but it also involves the courts in analyses that themselves may implicate Establishment Clause concerns.

An additional difficulty is that the Court has announced that no damages may be awarded to someone alleging discrimination if that person falls within the exception. The Court explained:

Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.

Such relief would depend on a determination that Hosanna–Tabor was wrong to

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378 See id. at 711 (Alito, J., concurring). Justice Kagan signed onto the concurrence. See id.
379 See supra notes 20-21 and accompanying text (noting both that lay teachers performed the same duties as Perich and that one did not even have to be Lutheran to be asked to perform those functions).
380 Cf. Corbin, supra note 7, at 98 (“trying to discern whether or not Perich is a minister creates more Establishment Clause problems than simply resolving her retaliation claim”). Justice Thomas would remove this problem by deferring to the religious organization’s determination of who counted as a minister. See Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring) (“in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister”).
have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception.\textsuperscript{381}

First, as a minor, practical point, precluding any and all damages for someone alleging improper employment practices might induce courts in their fact-intensive decision-making to find that the plaintiff did not qualify as a minister for purposes of the exception, at least in a close case where the facts were sympathetic. Second, this position cannot be supported by the prior jurisprudence, where the Court had suggested that a religious institution guilty of fraud or who had otherwise used improper methods might be subject to oversight by the civil courts. Here, the Hosanna-Tabor Court is suggesting immunity, at least with respect to a finding that a firing was improper. The Court justified its position by explaining that “the purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful.”\textsuperscript{382} But this is simply wrong. Were that the purpose behind the exception, previous Court would never have worried about fraud, collusion or other improper methods—they instead would simply have conferred the kind of immunity from civil oversight that the Jones Court expressly rejected in the context of religious property disputes.\textsuperscript{383}

The Hosanna-Tabor Court offered the consolation: “We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”\textsuperscript{384} Needless to say, a breach of contract suit might well implicate analogous issues, since the possibility of such a suit might affect the ways that religious institutions would deal with their ministerial employees. If the Court fears that tort

\textsuperscript{381} Hosanna-Tabor, 132 S. Ct. at 709.
\textsuperscript{382} Id.
\textsuperscript{383} See supra note 154 and accompanying text.
\textsuperscript{384} Hosanna-Tabor, 132 S. Ct. at 710.
liability for employment discrimination would impinge too greatly on the religious institution’s
discretion, then it might have similar fears with respect to other kinds of remedies that might influence decision-making.

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. Hosanna-Tabor clearly overstated the deference traditionally accorded to religious institutions by the Constitution. 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.  

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.

The Hosanna-Tabor Court had the opportunity to clarify the jurisprudence. It did so, but only in that it ended speculation about whether the Court would find that the Constitution recognizes the ministerial exception. Courts will still have to do intensive fact-based examinations of the circumstances, which will likely result in very different holdings under relevantly similar circumstances. Some courts will read Hosanna-Tabor narrowly as only applying to certain employment actions, although other courts will read it as providing a broad-based immunity for religious institutions, lack of grounding for such a broad-based immunity in the past jurisprudence notwithstanding.

There is a longstanding recognition that the civil courts should not make doctrinal determinations and in that sense there is a clear constitutional basis for recognizing a ministerial exception. But the Court has long recognized that religious institutions, like all institutions, can make decisions in improper ways and can do things that cannot be countenanced by the law. The Smith Court’s warning that the Court must avoid creating “a constitutional anomaly” by affording individuals too much license is even more applicable in this context.

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385 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 significance of an employee's job duties.”).

386 Smith, 494 U.S. at 886.
Ironically, in Smith, there was nothing in the record indicating that the religious use of peyote had harmed anyone.\textsuperscript{387} In contrast, in many of the cases in which the ministerial exception is asserted, there is evidence that individuals have been subjected to discriminatory treatment in violation of “generally applicable laws,”\textsuperscript{388} where there has been no risk to the religious institution’s faith or mission. The recognition of the ministerial exception covering a broad range of positions, even when there is no showing of a risk of doctrinal harm, is to create a glaring anomaly in the law. That this has been claimed to be in accord with the exiting jurisprudence is to make both the law and judging itself anomalous. Hosanna-Tabor represents both a holding and a mode of decisionmaking that will likely end up harming religious institutions, society, and the law, itself.

\textsuperscript{387} Id. at 911-12 (Blackmun, J., dissenting) (“The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.”).

\textsuperscript{388} Id. at 886.