CASE NOTE

What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission

Katherine Hinkle†

In January 2012, the United States Supreme Court handed down a decision in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission ("EEOC") that confirmed the existence of the "ministerial exception" previously established in every circuit court. In applying the exception, the Court radically undermined the Sixth’s Circuit’s firmly established “primary duties” test for determining who should qualify as a “minister” in applying the exception. The Court attacked the core factors used in the “primary duties” test yet refused to set down any new guidelines. The Court's unwillingness to clarify the definition of a minister has created confusion that will likely lead religious employers to claim ministerial exceptions for a broader class of employees than in previous employment-related lawsuits. This case fails to resolve the existing split in the circuit courts regarding how to determine who is a minister, and the broad parameters used by the Court have exacerbated the problem.

This Note first discusses the history of the ministerial exception, its relationship to the First Amendment, and its development over time, including an analysis of Hosanna-Tabor’s holding and its new definition of minister. This Note next analyzes the impact of the Court’s failure to set out a clear test for determining who is a minister. Finally, the Note explores the potentially problematic outcomes of future employment law cases based on the new, loose factors the Court described.

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INTRODUCTION

Federal courts have declined to exercise jurisdiction over the internal affairs of religious organizations based on First Amendment principles for
more than a century.\footnote{Raymond F. Gregory, Encountering Religion in the Workplace: The Legal Rights and Responsibilities of Workers and Employers 141 (2011); see Watson v. Jones, 80 U.S. 679 (1872) (recognizing the possibility of excessive government entanglement in religion if the judiciary intervenes in internal church governance matters). The relationship between church and state has been contentious in American thought and governance since the country’s very inception. American thinkers have struggled with issues of religious freedom and government intervention since before the establishment of the Constitution. For example, in Virginia, Thomas Jefferson and Patrick Henry clashed over a tax to support Christian ministers in 1777. Bruce T. Murray, Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective 11 (2008). Henry advocated for state-funded religious support as a compromise between those who supported a single, Anglican state church and those who wanted complete separation of church and state. Id. Thomas Jefferson, on the other hand, sought the complete dissociation of religion from public government. Id. In the end, Jefferson’s view won and he drafted the Virginia Statute for Religious Freedom, which was adopted by the Virginia Assembly in 1786. Id. Part 2 of the statute read:

[T]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Id. This important statute went on to be a major influence in the drafting and ratification of the First Amendment. Id.} Beginning with Watson v. Jones in 1871, the Supreme Court recognized that, based on the Free Exercise Clause of the First Amendment, civil courts have no jurisdiction over purely religious matters that are governed by an ecclesiastical body.\footnote{Watson, 80 U.S. at 727. The Free Exercise Clause is the second of the two religion clauses contained in the First Amendment. The religion clauses state: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend I. Based on the conflicts over established, government-sanctioned churches in the colonies, this clause reflects the decision to eschew a single, or government-preferred church. Barry Adamson, Freedom of Religion, the First Amendment, and the Supreme Court: How the Court Flunked History 15 (2008).} The Court in 1952 expanded this holding in Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, applying this prohibition to the appointment of religious leaders.\footnote{Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952). This decision reflects the Court’s tendency to reject the “separation of church and state” understanding of the First Amendment in favor of the “Theological School.” See Joshua D. Dunlap, Note, When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception, 82 NOTRE DAME L. REV. 2005, 2020 (2007). The Theological School understands the First Amendment’s religion clauses as a limit on government interference with the rights of religious organizations. Id. The Theological School understands the establishment clause of the First Amendment to function as a barrier between church and state that prohibits the government from interfering with the functioning of religious organizations. Id.} Finally, in 1972 the Fifth Circuit clearly established what courts refer to today as the “ministerial exception” in McClure v. Salvation Army.\footnote{McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); Caroline Mala Corbin, Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 FORDHAM L. REV. 1965, 1973 (2007) (stating that McClure v. Salvation Army created the ministerial exception}
the Civil Rights Act of 1964 does not apply to ministers employed by religious institutions. The Fifth Circuit proclaimed that the minister is the primary means through which a church conveys its religious teachings, and judicial interference with the hiring and firing of this employee violates the Free Exercise Clause of the First Amendment. Thus, the Fifth Circuit created a ministerial exception to labor and employment laws that bars courts from intruding upon the employment decisions of religious employers regarding ministers.

By creating this ministerial exception in McClure, the Fifth Circuit expanded upon an existing concept in part 702 of Title VII of the Civil Rights Act of 1964. Part 702 of the Act explicitly exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. Taken together with the Supreme Court's decisions in Watson and Kedroff, this provision carves out an exemption for religious organizations. However, Congress left to the judiciary the challenging task of determining how exactly these exceptions should apply to religious organizations.

In employment law disputes, courts have struggled to determine to whom this ministerial exception should be applied. Generally, courts have held that Title VII does not apply to the employment relationship between a religious employer and its minister. However, this simple statement is fraught with difficulties. In the lower courts, there is a great deal of

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when the Fifth Circuit held that subjecting a church to Title VII would violate the religion clauses of the First Amendment); see infra Part I.C.

5. McClure, 460 F.2d at 560. See infra Part I.C. These definitions have been interpreted to mean much more than just Christian ministers or Christian churches. Corbin, Above the Law, supra note 4. "Minister" encompasses any religious leader and even non-ordained employees who serve in religious institutions with a religious function. See infra Part I.A. Additionally, the religious institution in question does not have to be Christian and does not have to be a place of worship. See McClure, 460 F.2d at 560.

6. McClure, 460 F.2d at 560; see infra Part I.C.

7. 42 U.S.C. § 2000e-1 (2012). This part lays out a variety of exemptions for the law, but the relevant portion states:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-1(a).

8. GREGORY, supra note 1, at 142. Initially, part 702 of Title VII only applied to religious institutions to the extent that they discriminated against employees involved in religious activities. However, Congress later expanded the exemption to include all activities of religious organizations, instead of only religious activities. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255. See infra Part I.A.

9. See infra Part I.

10. See Corbin, Above the Law, supra note 4, at 1968 ("In sum, when it comes to the church-minister relationship, religious organizations are effectively above the law.").
confusion regarding who should be considered a minister.\textsuperscript{11} Whether a person could be considered a minister for the purposes of the exception is a question of law.\textsuperscript{12} Therefore the courts must interpret the confusing case law regarding this point every time a suit of this nature comes before them. In order to perform this analysis, courts engage in an in-depth, case-by-case analysis of the individual’s role in the employer’s organization.\textsuperscript{13} As a result of this highly subjective analysis, cases that are factually similar have come out very differently because of a court’s interpretation of the individual’s role in a religious group.\textsuperscript{14} The only clear test which has been applied is the “primary duties” test, in which the courts will apply the ministerial exception only if the employee’s primary duties consist of “teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”\textsuperscript{15}

To confuse matters more, the Supreme Court’s 2012 decision in \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC} confirmed the existence of this ministerial exception but complicated the determination of who qualifies as a minister.\textsuperscript{16} The recognition of the ministerial exception itself is not surprising, considering every circuit and twelve state supreme courts have recognized the concept.\textsuperscript{17} However, in addressing this issue the court did not set clear guidelines to help the lower
courts determine who should be considered a minister. The Court indicated some factors that it considered persuasive in its own analysis, but found those factors were unique to the instant case. This Note will argue that the Court's decision has left the lower courts with no guidance in an area that is extremely divided. By overturning the Sixth Circuit's decision, the Court's holding only served to weaken the primary duties test and to add even more confusion to the issue of who will be considered a minister for the purpose of applying the ministerial exception.

Part I of this Note will discuss the history of the ministerial exception and its development over time. Part II will discuss the holding of Hosanna-Tabor and explain the arguments from the majority opinion and two concurring opinions, focusing on the different definitions of minister. Part III will analyze the strengths and weaknesses of the case and discuss how the holding and dicta create more confusion in the lower courts regarding the definition of minister. Finally, Part IV will discuss the impact of the Court's failure to set out a clear test for determining who is a minister on the area of employment law.

I. LEGAL BACKGROUND

To understand how the definition of minister has developed, it is first necessary to track the development of the ministerial exception doctrine as a whole. Accordingly, this Part will begin with a discussion of one of the two types of ministerial exceptions: the statutory ministerial exception codified in Title VII of the Civil Rights Act of 1964. Second, this Part will discuss the constitutional ministerial exception, which is based on the First Amendment and has been developed over time through several key Supreme Court cases. Next, this Part will analyze the creation of the current form of the ministerial exception through McClure v. Salvation Army. Then, this Part will explore the Supreme Court decision Employment Division v. Smith and its impact on interpretations of the

18. Hosanna-Tabor, 132 S. Ct. at 694; Laycock, supra note 17, at 859.
20. See infra Part III (examining the weaknesses in the Court's definition of "minister" and explaining how this weak definition has not solved any of the previous problems inherent in the lower courts' decisions).
21. See infra Part IV (discussing the decision's impact on future labor and employment law cases).
22. See infra Part I.A (discussing the statutory ministerial exception).
23. See infra Part I.B.1-2 (analyzing the first amendment roots of the ministerial exception and its development through Supreme Court cases on church autonomy).
24. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); see infra Part I.C (discussing the creation of the modern ministerial exception).
ministerial exception. Finally, this Part will discuss the application of the ministerial exception in the lower courts through the primary duties test, focusing on courts' struggles to determine who qualifies as a "minister" for the purposes of the exception.

A. The Statutory Ministerial Exception

With the Civil Rights Act of 1964, Congress attempted to bar discrimination in a multitude of settings but made exemptions for religious employers. Title VII of the Civil Rights Act makes it unlawful for an employer to discriminate against an individual on the basis of race, color, religion, sex, or national origin when hiring or discharging an employee. However, within this generally applicable statute, Congress included an important exception for religious institutions: part 702 allows religious employers to discriminate on the basis of religion in hiring practices.


26. See infra Part I.E (describing the creation and application of the primary duties test).

27. Title VII of the Civil Rights Act provides:

   It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


28. 42 U.S.C. § 2000e-1(a) (2012) (stating that Title VII shall not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"). Although part 702 was initially applied only to religious activities, it later came to include any activity by a religious organization. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255; see Lauren P. Heller, Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom, 81 ST. JOHN'S L. REV. 663, 664 n.2 (2007) (explaining that the congressional record shows that the debate in the legislature demonstrates that Congress purposefully chose to limit the exception to discrimination on the basis of religion); Janet S. Belcode-Shalin, Ministerial Exception and Title VII Claims: Case Law Grid Analysis, 2 NEV. L.J. 86, 90-91 (2002). This change led groups to challenge the exception under the Establishment clause. Because part 702 treated religious and non-religious organizations differently with respect to non-religious activities, challengers claimed that the exception unreasonably favored religious institutions. See William P Marshall & Douglas C. Blomgren, Regulating Religious Organizations Under the Establishment Clause, 47 OHIO ST. L.J. 293, 324-26 (1986). Despite these concerns, the Supreme Court upheld the constitutionality of part 702 in Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, which found that part 702 is rationally related to alleviating significant government interference with the ability of religious organizations to define and carry out their religious missions. See 483 U.S. 327, 339 (1987).
Under this narrow exception, ministers do not have a cause of action against religious employers for religious discrimination but do have a cause of action for discrimination on the basis of race, sex, or national origin.\textsuperscript{29} This statutory exception demonstrates Congressional intent to exclude religious organizations from certain employment laws.\textsuperscript{30}

\textbf{B. The Constitutional Ministerial Exception}

The constitutional ministerial exception is much broader than the statutory exception and has been applied in a wider variety of situations. Based on First Amendment’s Free Exercise and Establishment Clauses, courts have limited their jurisdiction over matters of church management and personnel in order to avoid excessive entanglement.\textsuperscript{31} Courts have relied on both Religion Clauses\textsuperscript{32} and a general principle of church autonomy as support for the ministerial exception.\textsuperscript{33} Judicial interpretation of these principals has culminated in the development of the current ministerial exception as described in \textit{McClure}. After the \textit{McClure} decision, courts interpreted its holding in different, jumbled ways based on a variety of fact patterns.

\begin{itemize}
  \item \textsuperscript{29} Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin.").
  \item \textsuperscript{30} Part 702 is also particularly noteworthy as an exemption because the Title VII’s definition of an employer includes religious organizations. It states: 
  \begin{itemize}
    \item (b) The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in part 2102 of title 5) or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under part 501(c) of title 26.
  \end{itemize}
  \textsuperscript{42} U.S.C. § 2000e(b); see also \textit{McClure} v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (interpreting the definition to include religious organizations). Therefore part 702 is a noteworthy exception to a law that is generally intended to apply to religious organizations.
  \item \textsuperscript{31} See, e.g., Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992) (holding that jurisdiction over the employment action would excessively inhibit religious liberty); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) (holding that ministerial exception must be applied to pastor to prevent excessive government entanglement with religion); see also infra Part I.B.1.
  \item \textsuperscript{32} For a discussion of the Free Exercise and Establishment Clauses, see infra Part I.B.1.
  \item \textsuperscript{33} Molly A. Gerratt, \textit{Closing a Loophole: Headley v. Church of Scientology International as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes}, 85 S. CAL. L. REV. 141, 157 (2011); Note, \textit{The Ministerial Exception to Title VII}, supra note 15, at 1779; see infra Part I.B.2.
\end{itemize}
1. The Ministerial Exception’s First Amendment Roots

The constitutional ministerial exception is derived from both the Free Exercise Clause and the Establishment Clause of the First Amendment. The Free Exercise Clause guarantees the right to “freely exercise” one’s religion without government interference. Under a Free Exercise justification for the ministerial exception, a court must weigh the state’s interest in enforcing anti-discrimination laws against the church’s interest in an unburdened selection of its leaders. According to the Supreme Court’s decision Sherbert v. Verner, courts were to apply strict scrutiny to cases involving sincerely held religious beliefs that were substantially burdened by government action. As a result, courts usually sided with religious


35. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. CONST. amend. 1. From its decision in Palko v. Connecticut in 1937 until Employment Division v. Smith in 1990, the Supreme Court had consistently held up Free Exercise as one of the most protected and sacred of all constitutional rights. In Palko v. Connecticut, the Court found that free exercise of religion was “implicit in the concept of ordered liberty,” and that “neither liberty nor justice would exist if they were sacrificed.” 302 U.S. 319, 324-25, 326 (1937). The Court supported this assertion in West Virginia Bd. of Educ. v. Barnette, in which it invalidated the state’s mandatory flag saluting policy in favor of a Jehovah’s Witness’s right to free exercise. 319 U.S. 624, 642 (1943). In Barnette, Justice Jackson famously wrote, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” Id. This affirmation laid the groundwork for the court’s adoption of the compelling state interest test in Sherbert v. Verner, 374 U.S. 398 (1963). See Vincent Martin Bonventre, The Fall of Free Exercise: From “No Law” to Compelling Interest to Any Law Otherwise Valid, 70 ALA. L. REV. 1988, 1409-10 (2007).

36. Gerratt, supra note 33, at 157. Generally, this test will ask a court to strike a balance between religious and governmental interests. Only “[g]overnmental interests of the highest importance and those not otherwise served” are enough to compensate for a denial of religious liberty. Brown v. Dade Christian Sch., Inc. 556 F.2d 310, 321 (5th Cir. 1977) (en banc) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Therefore, to overcome a Free Exercise defense, the government must show that there is a compelling state interest and that the chosen method is the least restrictive means of achieving that purpose. Bruce Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 COLUM. L. REV. 1514, 1519 (1979).

37. Sherbert, 374 U.S. at 403. In Sherbert, the Court overruled the denial of unemployment compensation benefits to a Seventh Day Adventist whose refusal to work on Saturday, her religion’s Sabbath, had been deemed “without good cause.” Id. Because of this ruling, she was deemed ineligible for the state’s compensation law. Id. According to the Court, the state’s position forced an unacceptable choice between obeying religious precepts and receiving benefits that would otherwise be granted. Id. at 404. Drawing upon the Court’s precedents that had focused on the especially rigorous protection to be afforded to First Amendment rights, the Justices made clear that only a “compelling state interest”—that is, “only the gravest abuses, endangering paramount interest[s]”—could justify even an incidental infringement on free exercise. Id. at 406. According to the Court, the state’s alleged interest in preventing fraudulent religious claims did not meet the test. Id. Sherbert v. Verner is credited with establishing the concept that the free exercise of religion can be breached by both discriminatory legislation and purely secular legislation that imposes unintended burdens upon the free exercise of religion. Alfred G. Killilea, Privileging Conscientious Dissent: Another Look at Sherbert v. Verner, 16
institutions, finding that these institutions’ right to exercise their religion in the selection of ministerial employees was more compelling than the government’s interest in protecting employees. Therefore, free exercise generally won out over employment laws.

The Establishment Clause also supports the ministerial exception. This clause prevents the government from becoming excessively entangled in religious exercise. There are two types of entanglement: procedural and substantive. Procedural entanglement occurs when there is prolonged state interaction with a religious entity. This concept supports the ministerial exception because, regardless of the nature of the claim, a protracted lawsuit that involves the government and a religious entity could lead to procedural entanglement.

Substantive entanglement prohibits the government from endorsing or controlling religious doctrine. As the Supreme Court determined in Lemon v. Kurtzman, because substantive entanglement violates the Establishment Clause, the government’s ability to interfere with church autonomy is severely restricted. Based on this concept, government

J. CHURCH & ST. 197, 198 (1974). Therefore, even secular laws governing employment that impinge upon a church’s right to exercise its religion are unconstitutional under Sherbert.

40. The primary purpose of the Establishment Clause is government neutrality regarding religion. David Felsen, Comment, Developments in Approaches to Establishment Clause Analysis: Consistency for the Future, 38 AM. U. L. REV. 395, 399 (1989). However, over time the Supreme Court has changed its interpretation of the proper means to achieve this goal. First, the Court followed a “strict separation” policy that protected the “wall of separation” between church and state that Thomas Jefferson had initially proposed. Id. at 400 (quoting Thomas Jefferson, Replies to Public Addresses, in THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb ed., 1904)). However, over time the increasingly complex nature of American society made it impossible for strict separation to continue and the Court became more flexible in its attitude towards the interplay of church and state. Id. at 404-05. Culminating in its decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court began allowing government accommodation of religion without violation of the Establishment Clause. Id. at 407. Earlier, in School District v. Schempp, the Court had created a new Establishment Clause test that weakened the “wall of separation” and created a “purpose and effect” test. Id.; 374 U.S. 203, 222 (1963). The Court found that there was no violation of the Establishment Clause without a religious purpose or effect. Felsen, supra note 40, at 407. In Lemon v. Kurtzman, the Court built on its decisions in Schempp and Walz v. Tax Commission, 397 U.S. 664 (1970), to develop the “Lemon Test.” 403 U.S. at 612-13. Generally, Lemon reflects a judicial trend of flexibility towards the Establishment Clause and a more fluid relationship between church and state that recognizes the inevitable interactions between the two in society. Felsen, supra note 40, at 408-09.
41. Corbin, Above the Law, supra note 4, at 1979; Gerratt, supra note 333, at 164.
42. Corbin, Above the Law, supra note 4, at 1979; Gerratt, supra note 33, at 164.
43. Corbin, Above the Law, supra note 4, at 1979; see NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502-04 (1979) (finding that the NLRB could not exercise jurisdiction over lay teachers in a parochial school because it would involve extensive monitoring and cooperation between a government entity and a religious organization).
44. Corbin, Above the Law, supra note 4, at 1980; Gerratt, supra note 333, at 164.
45. Lemon v. Kurtzman, 403 U.S. 602, 612-14 (1971). The Lemon Test requires that a statute have a “secular legislative purpose,” have a principal effect that “neither advances nor inhibits religion,”
involvement in the selection of ministerial employees would violate the Establishment Clause. In the process of determining why an employee was discharged, a court may need to evaluate a religious employer's judgment regarding its employees. As the court in *Rayburn* stated, "It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of 'God's appointed.'" By limiting suits between ministers and religious employers, the ministerial exception serves to prevent the government from excessive entanglement prohibited by the Establishment Clause.

2. **Supreme Court Jurisprudence Recognizes Church Autonomy**

Along with the basic constitutional justifications for the ministerial exception, there are several key Supreme Court cases that also support a religious institution's right to be free from certain types of government interference. In *Watson v. Jones*, the Supreme Court expanded religious liberty beyond the First Amendment and developed the concept of church autonomy. In *Watson*, the Court first articulated the concept that church leadership should be free to decide matters of organization and governance without government intervention. The case involved a fight over the property of the Walnut Street Presbyterian Church in Louisville, and "must not foster an excessive government entanglement with religion." *Id.* at 612. Under *Lemon*, excessive entanglement has been interpreted to mean that a court should analyze the relationship between church and state that results from the application of a statute to the religious group. *Id.* at 615. When the government's action puts it in a position to choose between competing religious viewpoints, it has become excessively entangled and has therefore violated the Establishment Clause. *Petruska v. Gannon Univ.*, 462 F. 3d 294, 311 (3d Cir. 2006); see Note, The Ministerial Exception to Title VII, *supra* note 15, at 1783-84.

46. Or, even worse, a court may be forced to evaluate the religious justification for the employment action under religious law. For example, in *Rweyemamu v. Cote*, a priest claimed that he was fired because he was African American. 520 F.3d 198, 200 (2d Cir. 2008). The priest asserted that the bishop had misapplied canon law, and appealed to the church hierarchy. *Id.* After the church hierarchy denied his claim and sided with the bishop, he filed a claim under Title VII. *Id.* For the court to determine whether the priest was terminated for a legitimate reason or a discriminatory reason, it would have had to evaluate the bishop's interpretation of canon law. By choosing between the religious interpretation of the priest and the bishop, the court would have become excessively entangled in religion in violation of the Establishment Clause. *Id.* at 208-09.

47. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985). The Court in *Hosanna-Tabor* similarly found the judgment of the church to be religiously based, because according the Lutheran theology, the respondent had received a "call" to teach from God himself, and the court therefore could not interfere with the church's determination that God had revoked the call. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).


Kentucky. As a result of the Civil War, the church split into two factions. The majority anti-slavery group had support from the General Assembly of the Presbyterian Church. However, the pro-slavery side held power in the church and legal title to the church's property. As a result of this disagreement, both sides went to court to demand exclusive use of the property.

The Supreme Court held that whenever the question before the Court involves discipline, faith, or ecclesiastical rule, and the matter has been decided by the church's highest court, legal tribunals should accept the church decision as final and binding upon the matter. The Court reasoned that religious tribunals know their own laws best, and civil courts should defer to their judgments on matters of faith. The Court framed the issue as

50. Watson, 80 U.S. at 684. The Walnut Street Presbyterian Church was not the only property that the Presbyterian factions fought over. WILLIAM E. ELLIS, A HISTORY OF EASTERN KENTUCKY UNIVERSITY: THE SCHOOL OF OPPORTUNITY 2 (2005). In Kentucky alone, the Northern and Southern Presbyterians also battled over control of Centre College and the Danville Seminary. Id. When the ruling in Watson v. Jones dashed the Southern faction's hopes of controlling these properties, they set their sights on political control over major Presbyterian universities, and were able to seize control of Kentucky's Central University. Id. Therefore, Watson v. Jones had large repercussions throughout both the religious and academic communities in Kentucky, impacting the landscape of education in the state as well as legal battles over church property. Id.

51. Watson, 80 U.S. at 684; ELLIS, supra note 50, at 2.

52. Watson, 80 U.S. at 691. The problem of slavery had deeply divided the Presbyterian Church, even before the Civil War. During the War, the Church authorities had supported the Northern cause. Judicial Intervention in Church Property Disputes, supra note 49, at 1113. After the War, the General Assembly of the Church issued an order that those who had supported the South in the conflict, or those that believed that slavery was a "divine institution" would be required to publicly recant their views and repent before being welcomed into the Church once again. Id. at 1114. The rule particularly applied to those seeking positions of leadership within the Church. Id.

53. Watson, 80 U.S. at 683; Judicial Intervention in Church Property Disputes, supra note 49, at 1114.

54. Watson, 80 U.S. at 685; ELLIS, supra note 50, at 2.

55. The Presbyterian Church has religious courts that are charged with adjudicating matters relating to religious law. The current Presbyterian Church has a Permanent Judicial Commission that has the power "to decide controversies brought before it and to give advice and instruction in cases submitted to it..." PC(USA) Structure and Governing Bodies, PRESBYTERIAN CHURCH (USA) (2012), http://www.pcusa.org/resource/pcusa-structure-and-governing-bodies/.

56. Watson, 80 U.S. at 727. In choosing this path to decide the case, the Court rejected the English concept of the Implied Trust Rule. Honorable John E. Fennelly, A Church Divided: Watson v. Jones, 9 ST. THOMAS L. REV. 319, 320 (1997). English courts were allowed to analyze issues of church doctrine when a group held a building under an implied agreement that they would only hold the building so long as they abided by certain religious tenets. DALLIN H. OAKS, TRUST DOCTRINES IN CHURCH CONTROVERSIES 33, 37-38 (1984). The minority in Watson urged the Court to apply the rule because the majority had departed from the original, pro-slavery doctrines under which the church had been created. Watson, 80 U.S. at 725. However, the Court declined to apply the rule and instead focused on freedom of association and issues of judicial competence. Id. Therefore, not only is this a key case for a proponent of the ministerial exception, but it is also a valuable precedent for issues of church governance generally.

57. Watson, 80 U.S. at 729. Although Watson is used repeatedly as a foundational case in the Ministerial exception, it is important to note that the court purposefully sidestepped the First Amendment issues to reach the decision on free association grounds. Previously, religious property
one of implied consent: when one chooses to join a church, one agrees to submit to the will of the governing body of the church on religious matters.\textsuperscript{58} Instead of substituting its own secular judgment, the Court chose to defer to religious authorities in this matter because it was related to the organization and control of their church, even though it was also related to property issues.\textsuperscript{59} With this holding, \textit{Watson v. Jones} set an important precedent of deference to religious authorities in matters of church governance.\textsuperscript{60}

In a later decision in \textit{Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America}, the Supreme Court strongly supported their holding in \textit{Watson} and reinforced the line they had drawn between church and state.\textsuperscript{61} Much like \textit{Watson}, in \textit{Kedroff}, the Court was called on to decide which faction of the Russian Orthodox Church could use and occupy a church in New York City. The conflict stemmed from a New York act that brought the New York Russian Orthodox churches into a sect that was autonomous from the Most Sacred Governing Synod in Moscow and the Patriarch of Moscow.\textsuperscript{62} The legislature was concerned about the Communist party’s influence on the church centered in Moscow and therefore chose to support the American splinter faction of the Orthodox

\begin{footnotes}
\item[58.] Lund, supra note 49; Mark E. Chopko & Marissa Parker, Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor, 10 FIRST AMEND. L. REV. 233, 259 (2012) ("[W]here people of faith have bound themselves together into a religious community and have established an internal procedure for the resolution of important questions, it would be a ‘vain consent’ to allow the unsuccessful party from an internal church process to re-litigate the questions in the civil courts.").
\item[59.] Gerratt, supra note 33, at 159.
\item[60.] See id. ("Beginning with \textit{Watson v. Jones}, the Court announced a ‘hands-off’ approach to intra-church disputes."). Although the approach is generally “hands-off,” that does not mean the Court will abstain. In cases where multiple factions claim to be “the church,” courts must determine who actually represents the governing body’s principles in order to decide to whom it should defer. See Bouldin v. Alexander, 82 U.S. 131 (1872); Lund, supra note 49, at 17.
\item[61.] Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Chopko & Parker, supra note 58, at 262.
\item[62.] \textit{Kedroff}, 344 U.S. at 116.
\end{footnotes}
Church. The two factions of the church then sought a determination as to who properly controlled the church property in New York City.

The Court held that the New York law violated principles of free exercise and determined that the power to control the property rested in the hands of the Orthodox Church Authority in Moscow. In coming to this conclusion, the Court relied heavily on its previous decision in Watson. Although they conceded that Watson was decided on narrow grounds, not founded on prohibitions against state interference with the free exercise of religion, the Court used the decision as a valuable statement in favor of church autonomy. The Kedroff court reasoned that Watson "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church governance as well as those of faith and doctrine." From this principle, the Court further reasoned that free exercise of religion included freedom to select clergy.

Most importantly for our understanding of the ministerial exception, the Court clearly stated that when a civil body displaces one church administrator with another, it improperly takes control of strictly ecclesiastical matters in violation of First Amendment principles. Thus, the Kedroff decision gave churches a

63. Id. at 105-06.
64. Id. at 107. Before Kedroff, courts had been wary of becoming involved in church property disputes based on general notions of separation of church and state, but had never articulated particular Free Exercise or Establishment Clause justifications for their reasoning. See Judicial Intervention in Church Property Disputes, supra note 49, at 1113. In fact, Watson only came to the federal courts as a diversity matter. Id. at 1114. The dispute in Watson was not considered to raise any federal questions. Id. at 1114 n.8. In Kedroff, the Court continued the move towards using First Amendment principals to settle church property disputes began in Watson and “injected the First Amendment issues of Free Exercise and Establishment into every case involving a dispute over church property.” Id. at 1123.
65. Kedroff, 344 U.S. at 115; Lund, supra note 49, at 14 (pointing out that the Watson court did not base its holding on constitutional principles, because it was decided by principles of federal common law, but still explained the holding in terms of constitutional values).
66. Kedroff, 344 U.S. at 116. The Court decided against evaluating the evidence to decide the factual issue of who actually controlled the Church and sidestepped the issue entirely by assuming the Russian Church had control without probing further. Had the Court looked into this issue and decided that the American church actually had rightful control of the property, the issue surrounding the New York statute would have been moot and the Court would have been unable to hand down this ringing affirmation of Church autonomy. Judicial Intervention in Church Property Disputes, supra note 49, at 1126. This choice to ignore evidence that the American church may have had legitimate control suggests that the Court may have wanted to invalidate the statute on First Amendment grounds, regardless of whether the Church was rightly controlled by the Russian faction or not.
68. Id. at 119. On remand, the lower courts did not seem to understand the Court’s holding as having such a clear message. The New York Court of Appeals returned to the foundational principles of Watson and used the Implied Trust Rule. See supra note 56 (describing the Implied Trust Rule). It found that a court could replace trustees who could not carry out the purposes of the trust, in this case the proper worship according to Russian Orthodox tenets. Judicial Intervention in Church Property Disputes, supra note 49, at 1127. The appellate court found that the Moscow patriarch could not uphold his duties under the implied trust because he did not enjoy sufficient freedom from the communist government. Id. at 1128. The Russian Church was therefore an unfit trustee. Id. Finally, in a nod to the
clear, constitutional right to decide matters of church governance, including the selection of clergy, for themselves.

The Supreme Court later affirmed the holding in Kedroff and upheld the right of a church to choose its religious leaders in Serbian Eastern Orthodox Diocese v. Milivojevich.69 Milivojevich had been the presiding bishop for the North American Church when he was removed by the Mother Church and replaced by another bishop.70 Milivojevich declared his removal invalid and brought suit. The Illinois Supreme Court held that the removal process was procedurally invalid under the Mother Church’s own regulations and invalidated the reorganization of the diocese.71 The United States Supreme Court overturned the state court’s opinion and held that the state court’s inquiry into the religious doctrine of the Mother Church was impermissible under the First and Fourteenth Amendments.72 The Court reasoned that the same principles established regarding church property in Watson and Kedroff also apply to disputes over church administration.73 The Court confirmed that principles of church autonomy also allow a church to discipline and select its clergy without interference from civil courts.74

Taken together, Watson, Kedroff, and Serbian Eastern Orthodox Diocese all show the Supreme Court’s understanding that religious institutions have the right to exercise independent judgment in the
management of their own affairs, including over property and religious leaders. Watson strongly stands for the proposition that civil authorities should not substitute their judgment for that of a religious authority on church governance matters. Kedroff and Serbian speak specifically to a church's right to choose its own clergy. Based on these principles, these cases form the backbone of the ministerial exception.

C. The Current Ministerial Exception: McClure v. Salvation Army

The ministerial exception was first officially recognized in the Fifth Circuit case McClure v. Salvation Army in 1972. Previously, courts interpreted part 702 of Title VII narrowly and limited its application to religious discrimination. However, this left courts with a pressing challenge: how should courts respond when a minister sues a religious employer for discrimination based on non-religious criteria? Using concepts from the both the constitutional and statutory exceptions, the Fifth Circuit addressed the application of Title VII to claims by ministers and church employees against religious employers, thus expanding part 702.

75. See also Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) (holding that the Catholic Church had the right to determine who could be a chaplain, and, in the absence of fraud, collusion, or arbitrariness, the Court will accept decisions of church authorities on purely ecclesiastical matters as conclusive, even if they affect civil rights).

76. Lund, supra note 49, at 19. Kedroff vastly expanded the holding in Watson by applying constitutional principles that were vaguely outlined in the decision and giving them a clear First Amendment foundation. See discussion supra note 64.

77. Lund, supra note 49, at 19. Lund asserts that Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929), should also be considered one of the foundational cases of the ministerial exception. See id. He argues that Kedroff and Watson lay the foundation for church independence in the area of property, and Gonzalez and Serbian Diocese demonstrate that those rights can trump even valid, neutral laws of general applicability. Id.

78. 460 F.2d 553 (5th Cir. 1972). Dunlap, supra note 3, at 2008. After McClure, the Fifth Circuit immediately went on to support its holding and affirm the creation of a ministerial exception in Simpson v. Wells Lamont Corporation, 494 F.2d 490 (5th Cir. 1974). In Simpson, the Fifth Circuit held that courts did not have jurisdiction over a civil rights suit brought by a minister against church officials and parishioners. Id. at 491. The minister claimed that he had been fired due to his views on racial integration and the color of his wife's skin. Id. The Fifth Circuit, citing McClure, held that "who will preach from the pulpit of a church, and who will occupy the church parsonage" is a purely ecclesiastical matter. Id. at 492. The Fifth Circuit also cited the Supreme Court's holding in Kedroff that history reflects a "spirit of freedom for religious organizations, an independence from secular control or manipulation." Id. at 493 (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

79. Coon, supra note 34, at 499-500. In Amos, the Supreme Court found that the exemptions for religious organizations in part 702 did not violate the establishment clause by favoring religion. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337-38 (1987); see discussion supra note 28. However, even though the Supreme Court had held that the exemption applied to both religious and non-religious activities of religious employers, lower courts began to set clear limits on the extent that churches could be protected from employment discrimination claims. Coon, supra note 34, at 496. These cases established that the exemption in part 702 did not allow employers to discriminate based on non-religious factors like race or gender. Id.

80. Coon, supra note 34, at 499-500.
In *McClure*, a woman did not prevail when she filed a civil action against her employer after she was terminated for complaining about discriminatory payment practices against women. Mrs. McClure, who worked in a variety of positions as a commissioned officer in the Salvation Army, claimed that she received less salary and fewer benefits than similarly situated male employees. She alleged that after complaining to her supervisor and to the EEOC about these practices she was discharged. The district court found that the Salvation Army was a church and Mrs. McClure was a minister. Accordingly, the district court dismissed the case for lack of jurisdiction, stating that Title VII did not apply to the employment relationship between a church and its minister.

The Fifth Circuit affirmed this decision and held that the application of Title VII to a church and its minister would result in an encroachment by the government on a religious organization’s free exercise rights under the First Amendment. Initially, the court analyzed the facts under part 702 of Title VII but found that this did not exempt the Salvation Army’s hiring practices. The court continued its analysis to inquire whether the application of Title VII in this instance would violate the First Amendment. In its analysis on this point, the court focused on the Supreme Court’s repeated recognition of the wall of separation between

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81. McClure, 460 F.2d at 555.
82. Id. The district court noted that the department in which Mrs. McClure worked employed a large number of people, although they did not describe how that might affect Mrs. McClure’s claim. McClure v. Salvation Army, 323 F. Supp. 1100, 1104 (N.D. Ga. 1971). Mrs. McClure worked in the Southern Territory, where there were 1300 officers. Id. at 1101.
83. McClure, 460 F.2d at 555.
84. McClure, 323 F. Supp. at 1106. The district court describes the Salvation Army as “a family center for the dissemination of the Gospel, for the development of Christian life, and for the outreach in the particular community in which it is located.” Id. at 1102. The court further found:

[The Salvation Army] is similar to any other church. It has a senior segment, a youth segment or Christian education department, and many other things that other churches have including a structure for leadership training, and emergency training for disasters. The commanding officer of a corps acts as the ‘pastor’ of the corps, but both the corps commander and every other officer of the Army stationed in the locality perform the function of preaching to the congregation.

Id. at 1101.
85. McClure, 460 F.2d at 555. The district court noted that, in tackling this issue, “[t]he Supreme Court has given little guidance. Indeed, the Court appears to have avoided the problem with studied frequency in recent years.” McClure, 323 F. Supp. at 1105.
86. McClure, 460 F.2d at 560.
87. Id. at 558. In accepting the narrow view of part 702, the *McClure* court looked to the legislative history of the act and the text of part 702. Id. The court first found that the House and Senate had compromised on part 702 and specifically chose to adopt a watered-down version of the act. Id. Instead of granting a sweeping exception to religious employers, as the House had wanted, they adopted the Senate’s version that exempted only religious activities. Id. (analyzing 110 CONG. REC. 12818 (1976)). Additionally, analyzing the amendment’s language, the court found that part 702 was originally intended only to apply to religious discrimination. See Coon, supra note 34, at 500.
88. McClure, 460 F.2d at 558.
church and state. Focusing on the Supreme Court’s holding in Watson, the Fifth Circuit reasoned that matters of church governance and administration are “beyond the purview of civil authorities.” The court further reasoned that the relationship between a church and its minister is the foundation of church governance, and that therefore the relationship should fall within the prohibitions against government involvement outlined in Watson. The court concluded that investigating the employment relationship between a minister and a religious employer would require a court to delve so deeply into the administration of the church that it would certainly violate the Free Exercise and Establishment Clauses. Thus, with this holding, the McClure court established the constitutional ministerial exception. By basing the exception outside of the statutory provision, the

89. *Id.* The concept of the “wall of separation” is one of the oldest principles in First Amendment jurisprudence and is as controversial as it is established. Thomas Jefferson first used the phrase “wall of separation” to describe the relationship between church and state in his letter to the Danbury Baptist Association in 1802. James Hutson, “A Wall of Separation” FBI Helps Restore Jefferson’s Obliterated Draft, 57 LIBR. OF CONGRESS INFO. BULL. (June 1998), http://www.loc.gov/loc/lcib/9806/danbury.html. Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Jefferson’s Letter to the Danbury Baptists, LIBR. OF CONGRESS INFO. BULL. (June 1998), http://www.loc.gov/loc/lcib/9806/danpost.html. The letter was published in a Massachusetts newspaper that year, and then largely forgotten. *Id.* However, the concept reemerged in 1878 when the Supreme Court declared in Reynolds v. United States “that it may be accepted almost as an authoritative declaration of the scope and effect of the [first] amendment.” 98 U.S. 145, 164 (1878). The phrase later fell out of favor as an arbitrary and unhelpful metaphor and was criticized by Justices Stewart and Rehnquist. Hutson, supra note 89. Historical evidence has supported opponents of this metaphor, showing that Jefferson did not mean the letter to be a dispassionate, academic pronouncement of his views of a proper government. *Id.* Instead, it was a carefully crafted political letter, meant to gratify public opinion, “being seasoned to the Southern taste only.” *Id.* Therefore, because of its recent fall from grace, it is particularly interesting that the Fifth Circuit chose to revive this metaphor in its discussion of the ministerial exception.

90. McClure, 460 F.2d at 559.

91. *Id.* (“The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”); see Coon, supra note 34, at 501.

92. Coon, supra note 34, at 502 (noting that the McClure court was concerned that investigating and reviewing church employment decisions could produce a coercive effect on the church which would be the very opposite of the separation envisioned by the First Amendment).

93. Coon, supra note 34, at 503. See Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (citing McClure as support for the proposition that applying Title VII to an employment relationship between church and minister gives rise to serious constitutional questions).
McClure court acknowledged that there are constitutional reasons for preventing government intrusion in the selection of ministers.

D. The Ministerial Exception Survives Smith

Despite a strong trend supporting religious freedom in both the Supreme Court and lower courts, in 1990 the Supreme Court handed down a decision that seemingly destroyed the ministerial exception. In Employment Division v. Smith, two Native American men were terminated from their jobs after testing positive on a drug test. The men were discharged from their jobs after using peyote in a religious ceremony of the Native American Church, of which both were members. When the men subsequently applied for unemployment benefits, they were deemed ineligible because they had been discharged for work-related misconduct as a result of their positive drug tests. The men then sued, claiming that the policy infringed on their free exercise right to partake in religious rites.


96. Smith, 494 U.S. at 874. The ingestion of peyote was a hallmark of even the early Native American Church, which was established in what is now Oklahoma in the 1880s. Daniel C. Swan, Native American Church, OKLA. HIST. SOC’Y ENCYCLOPEDIA OF OKLA. HIST. & CULTURE (2007), http://digital.library.okstate.edu/encyclopedia/entries/N/N/A015.html. Generally, the Native American Church is a diverse body that incorporates a variety of religious practices of the many unique tribes that comprise it. Id. Currently, the Native American Church supports its members in a variety of legal battles to protect the religious use of peyote as part of the Church’s religious sacrament. Id. Additionally, it was not clear whether the religious use of Peyote was actually illegal in Oregon. Initially when the Supreme Court took the case, the Court sent the issue back to the Oregon Supreme Court for them to decide whether the use of peyote was illegal under the laws of Oregon. Smith, 494 U.S. at 875. On remand, the Oregon Supreme Court held that the religiously inspired use of peyote fell within the prohibition of the Oregon statute, which “makes no exception for the sacramental use” of the drug. Id. However, the court did find that the Free Exercise clause, under Sherbert v. Verner, required the payment of benefits. Id.

97. Smith, 494 U.S. at 875 The individuals were denied employment benefits under an Oregon statute which provided:

An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter or the equivalent law of another state or Canada or as defined in ORS 657.030(2) or as an employee of the federal government, for which remuneration is received that equals or exceeds four times the individual’s weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the director finds that the individual: (a) Has been discharged for misconduct connected with work.
The men argued that, under the analysis required by *Sherbert v. Verner*, the prohibition on benefits for drug users burdened their free exercise without a compelling state interest.\(^9\) The Court disagreed and held that an individual's religious beliefs do not necessarily excuse him from complying with otherwise valid, general and neutral laws.\(^9\) According to the Court, a compelling interest analysis under *Sherbert* is not required in cases where there is a generally applicable prohibition on socially harmful conduct.\(^10\) The Court even went so far as to say that any society that applied the compelling interest across the board to any law that could infringe on private religious matters would be “courting anarchy.”\(^10\) The Court explained that applying a compelling interest test to every law would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws . . ..”\(^10\) Therefore, the Court seemed to indicate that when a law is of general applicability, courts do not have to balance a compelling government interest against a burden on free exercise. Because Title VII and other employment discrimination laws are neutral laws of general applicability, with this holding, the Court cleared the way for the destruction of the ministerial exception.\(^10\) Without the burden of the *Sherbert* test, discrimination by religious employers would be subject to the same penalties as discrimination by secular employers.

However, despite this strong holding, the lower courts determined that the ministerial exception still existed by identifying two distinct free

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\(^9\) *Smith*, 494 U.S. at 876-78. For a discussion of the *Sherbert* test, see *supra* notes 35-37 and accompanying text.

\(^9\) *Smith*, 494 U.S. at 885. For an explanation of this holding, see Gerratt, *supra* note 33, at 161.

\(^10\) *Feldman*, supra note 94, at 1797. Although the First Amendment prevents the government from intruding on religious belief, it does not affect government regulation of an individual's conduct, even when that conduct is motivated entirely by sincerely held religious beliefs. *Id.* Some have argued that this distinction marks a shift towards neoconservative ideology in Free Exercise jurisprudence. See *id.* at 1792. Feldman argues that *Smith* marks the last gasp of the dying traditional conservatism and heralds a neoconservative approach that attacks pluralism and upholds constitutional originalism. *Id.* at 1794.

\(^10\) *Smith*, 494 U.S. at 888.

\(^10\) *Id.* at 888-89.

\(^10\) Joanne C. Brant, “Our Shield Belongs to the Lord”: Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L.Q. 275, 308-09 (1994) (arguing that Title VII and other employment discrimination laws are neutral laws of general applicability because they “are not specifically directed at religious practice and do not prohibit conduct only when it is engaged in for religious reasons”).
exercise rights: a right to personal free exercise and a right to institutional free exercise.104 Lower courts have focused heavily on the Court’s note that “the government may not lend its power to one or the other side in controversies over religious authority or dogma.”105 This line has led some to believe that the Court was trying to preserve the line of reasoning established in Watson and Kedroff regarding internal church governance.106 By drawing a line between personal free exercise claims and the institutional autonomy protected in previous Supreme Court cases, lower courts have kept the ministerial exception alive.

E. Confused Lower Court Holdings Regarding the Ministerial Exception

Despite the confusion that Smith created, lower courts have continued to regularly uphold the existence of a ministerial exception.107 However, while they agree that there should be an exception, lower courts have great difficulty trying to determine who should be a “minister” for the purposes of the exception.108 Soon after the McClure court created the ministerial

104. Gerratt, supra note 33, at 162; see EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461-63 (D.C. Cir. 1996) (finding that Smith touches only on the individual right to free exercise and leaves the institutional right untouched). In EEOC v. Catholic University of America, a nun sued the university for alleged gender discrimination in violation of Title VII after she was denied tenure in her position as a professor of Canon Law. 83 F.3d at 459. In analyzing the nun’s claims, the court applied both the Free Exercise Clause and the Establishment Clause. Id. at 460. The court laid out the reasoning of the Ministerial Exception, but then went on to ask, “Did the ministerial exception survive Smith?” Id. at 461. The court found that although Smith prevented an individual from asserting a free exercise defense to valid, neutral laws of general applicability, it did not apply to churches. Id. In its analysis, the court wrote:

First, the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in Smith and in the cases cited by the Court in support of its holding. The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission. Moreover, the ministerial exception does not present the dangers warned of in Smith. Protecting 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.” Id. at 462 (quoting Reynolds v. United States, 98 U.S. 14 (1879)); see also Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 348-49 (5th Cir. 1999) (emphasizing that Smith relates to individual free exercise and “the Supreme Court has shown a particular reluctance to interfere with a church’s selection of its own clergy”).


106. Laycock, supra note 17, at 854; McConnell, The Problem, supra note 105, at 3-4.

107. See EEOC v. Catholic Univ. of Am, 83 F.3d at 461-63 (upholding the ministerial exception after Smith). For further discussion of this issue, see supra note 104.

108. Edward G. Phillips, Ministerial Exception Meets Its Match: Primary Duties of Secular Employees, 46 TENN. B. J. 32, 34 (Oct. 2010) (“Several courts have commented on the lack of uniformity in this area.”). One of the most challenging areas to apply the Ministerial Exception to is cases of teachers in religious schools. Unlike priests, who have clearly designated spiritual functions, teachers often perform both spiritual and secular functions intertwined throughout the day. Mathues,
exception, eight circuits followed its lead and adopted the concept.\textsuperscript{109} Now, all twelve geographic circuits and twelve state supreme courts have recognized the exception.\textsuperscript{110} However, despite the overwhelming acceptance of the ministerial exception, lower courts are deeply divided and confused regarding how to apply the exception. While the courts agree that this term encompasses more than just ordained clergy, there are great inconsistencies in the application of the term minister to religious employees.\textsuperscript{111}

The clearest test for determining who is a minister was established by the Fourth Circuit in \textit{Rayburn v. Seventh-day Adventists}.\textsuperscript{112} In \textit{Rayburn}, a female member of the Seventh-day Adventist church brought race and sex discrimination claims against the church after it hired a different candidate for the position of associate in pastoral care.\textsuperscript{113} The Court held that the employment decisions of the church could not be subject to Title VII scrutiny because it would give rise to excessive entanglement and prohibit free exercise.\textsuperscript{114}

To reach this decision, the court had to determine if the individual qualified as a minister for the purpose of applying the exception. The court reasoned that “if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy.”\textsuperscript{115} Thus, the court looked to the plaintiff’s function

\textit{supra} note 11. For example, the Catholic Archdiocese of Chicago states that, “Catholic schools focus on the values of faith, hope, love, and community. We talk openly about values and spend time each day giving children an opportunity to learn, share, and understand the consequences of good and bad behaviors. We believe in Jesus Christ and we have a feeling of grace that comes from our beliefs.” \textit{Values: What Do You Want Your Child to Value?}, ARCHDIOCESE CHICAGO CATHOLIC SCHS. (2012), http://schools.archchicago.org/Values/. Does this imply that all teachers who work in these schools, even those who are not Catholic, are responsible for spreading the Catholic faith? This poses a challenging question for any court that is confronted with this issue, and, as a result, courts are deeply divided. See also Mathues, \textit{supra} note 11, at 117–119.


110. Laycock, \textit{supra} note 17, at 846.

111. \textit{id.} at 848.

112. 772 F.2d 1164 (4th Cir. 1985).

113. \textit{id.} at 1165. Carole Rayburn held a Master of Divinity degree from the church’s theological seminary and a Ph.D. in psychology from Catholic University. \textit{id.} In 1979, she applied to the Potomac Conference, the church’s administrative body, for an Associate in Pastoral Care internship. \textit{id.} She also applied for a vacancy on the pastoral staff of the Sligo Church. \textit{id.} An Associate in Pastoral Care may hold the position of an associate pastor in the church, but may not receive the formal title of minister because, according to church teachings, only men may be ordained. \textit{id.} However, despite this requirement, the position at the Sligo church still allowed the Associate in Pastoral Care to teach Bible classes, preach during services, and counsel the singles group and other religious support groups. \textit{id.}

114. \textit{Rayburn}, 772 F.2d at 1169-70.

115. \textit{id.} at 1169 (quoting Bagni, \textit{supra} note 36, at 1545). In his article, Bagni develops an interesting formula for examining the conflicts between church and state. He uses the image of a core
within the organization: if her position was sufficiently spiritual, then judicial involvement would violate the First Amendment.\(^\text{116}\) The Rayburn court found that, because the plaintiff was responsible for leading the congregation in Bible study, advising the Sabbath School, and working as a counselor for the church, she should be considered a minister.\(^\text{117}\) With this analysis, the Rayburn court created the primary duties test. Since Rayburn, nearly all circuits have adopted this analysis.\(^\text{118}\)

Although most circuits apply the primary duties test, each court has applied the test in a different way. The result has been a confused and unpredictable application of the ministerial exception. Cases that are factually similar often came out very differently based on a court’s interpretation of what “primary duties” actually means. The cases below are excellent examples of the confusion in this area.

In Redhead v. Conference of Seventh-day Adventists and Clapper v. Conference of Seventh-day Adventists, two courts issued diametrically opposed rulings in cases with strikingly similar fact patterns. In Clapper, a teacher in a Seventh-day Adventist school was fired due to budgetary constraints and complaints from parents.\(^\text{119}\) In his position, Clapper was responsible for teaching elementary school, as well as leading the students in prayer, conducting ten minutes of worship daily, and teaching Bible ideas with less central ideas emanating from that center. Bagni, supra note 36, at 1539. The foundational idea of the relationships between church and state is the concept that religious freedom and independence of religion and government are the “alpha and omega of democracy and freedom.” Id. To preserve these ideals, the government “must refrain from regulating those activities and relationships within a church that can be termed purely spiritual or integral facets of the actual practice of religion.” Id. The purely spiritual activities are the core of the church, and emanating from that core are relationships and activities with increasingly secular natures. Id. If an employee can be considered clergy, then the relationship between the church and that employee falls within the central relationship and should be insulated from regulation by the state. Id. at 1154.

\(^{116}\) Coon, supra note 34, at 504. Once again, the Supreme Court’s decisions in Sherbert, Kedroff and Serbian Orthodox Diocese play a large role in the court’s reasoning. Rayburn, 772 F.2d at 1167-68. The court found that “[t]he right to choose ministers without government restriction underlies the well-being of a religious community, for perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.” Id. at 1167-68 (citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

\(^{117}\) Rayburn, 772 F.2d at 1168.

\(^{118}\) Note, The Ministerial Exception to Title VII, supra note 15, at 1778; see, e.g., Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (finding that a church’s secular press secretary was a minister); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 804-5 (4th Cir. 2000) (finding the church’s music director was a minister).

study. The court concluded that the primary duties of the plaintiff consisted of teaching and spreading the faith because the church’s goal in operating the school was to carry out its sectarian purpose. Instead of focusing on the time spent on each activity each day, the court chose to interpret the plaintiff’s primary duties in a broad way, analyzing the school’s overall purpose.

Redhead stands in stark contrast to the court’s holding in Clapper. In Redhead, the plaintiff was fired from her position in an Adventist school after the school learned that she was pregnant. In her position, she was responsible for teaching one hour of Bible study each day and attending worship services with her students; otherwise, she taught purely secular subjects. The school required that she observe the precepts of the Seventh-day Adventist church in order to teach at the school. The court held that because the plaintiff’s teaching duties were primarily secular, she did not qualify as a minister. Applying Rayburn’s primary duties analysis, the

121. Id. at *7. The court’s decision fits very closely with Professor Bagni’s understanding of a ministerial employee in his article Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations. Bagni, supra note 36, at 1542. Bagni argues that the secular education provided by religious schools is “inextricably intertwined” with the religious mission of the school. Id. He suggests that if a brief analysis of the school’s mission shows that the school teaches its secular subjects in a religious context, then the employees charged with teaching should be considered ministerial employees. Id. at 1543.

122. Clapper, 1998 WL 904528, at *7. This concept is one of the most difficult aspects of applying the “primary duties” test. Should courts perform a quantitative analysis or a qualitative analysis to determine what, exactly, the teacher’s primary duties are? The language of the primary duties test comes from Professor Bagni’s article, so it is instructive to analyze his understanding of the test. See Bagni, supra note 36. Bagni asserts that the Supreme Court has routinely found that secular education provided by religious schools is “inextricably intertwined” with the schools’ “religious mission [and] is the only reason for [their] existence.” Id. at 1143 (citing Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)). A school that is deeply connected to a church may therefore not be regulated in the employment relationships with its clergy because that relationship falls within the protected center of the free exercise of religion. Id. at 1544. When determining whether a teacher is a member of the clergy, Bagni suggests that it is appropriate for a court to examine the school’s charter, policy statements, or the course’s syllabus to determine if the materials have a religious orientation. Id. at 1546. Bagni suggests looking to the quality of what the teacher is teaching, and not the quantity of religious instruction given every day. See id. Bagni suggests that even secular subjects taught in a religious school may be permeated by a religious theme or message, making it difficult to perform a quantitative analysis to ascertain the teacher’s primary duties. Id.

124. Id. at 216. In Clapper, the teacher was also required to observe the teachings of the Church, which, in contrast to Redhead, the Clapper court found to be an important factor in determining that the teacher was a minister. Clapper, 1998 WL 904528, at *7.
125. Redhead, 440 F. Supp. 2d at 221. In Redhead, the court looked to both the quantity and quality of religious activities the teacher performed each day. See id. at 221-222. However, the court found the quantity of the duties to be dispositive. Id. The Redhead court mentions that in Clapper, the plaintiff integrated religious teachings into everyday subjects, whereas Ms. Redhead did not. Id. at 221. The Redhead court suggests that without evidence of this permeation of religion into everyday secular subjects, the most important factor is the amount of time spent each day on religious activities. Id. The Redhead court did not find one hour of religious instruction each day sufficient to declare the teacher a
court found that the plaintiff’s one hour of Bible study a day was insufficient to conclude that she was a minister. Instead, the court chose to focus on the fact that the majority of her day involved teaching secular academic subjects.

There is no better comparison demonstrating the confusion regarding the primary duties test than Clapper and Redhead. Despite their similarities, the court in Redhead distinguished the case from Clapper by focusing on the Clapper plaintiff’s obligations to pay tithes and to conduct ten minutes of worship each day. Apparently the Redhead court found those extra ten minutes to be dispositive, thus ruling that the Redhead plaintiff was not a minister. A small difference in the way the facts were presented and ten additional minutes of religious study each day made the difference between summary judgment and the plaintiff’s case moving forward. Although both cases involved Adventists schools, presumably with the same overarching mission, because of the complexities of the ministerial exception, the courts produced two very different holdings. These two cases are excellent examples of the confusion in the lower courts regarding the application of the ministerial exception.

II.
CASE BACKGROUND

This Part explores how the ministerial exception was applied in the 2012 Supreme Court case Hosanna-Tabor Evangelical Church and School v. EEOC. After briefly outlining the facts of the case, this Part will

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126. Redhead, 440 F. Supp. 2d at 221.
127. Id. The court in Redhead also found Clapper distinguishable because thirty percent of the plaintiff’s salary came from Church Tithes. Id. (citing Clapper, 1998 WL 904528, at *3). It is unclear from the facts presented in Redhead whether the teacher in that case paid tithes or had her salary partially funded by tithes. See id. However, the Redhead court’s analysis suggests that if a school wanted to ensure that the ministerial exception would be applied to any cases against it, the school could plead facts similar to those in Clapper, describing a strong link between the religious congregation and the school, both spiritually and financially. See id.; Clapper, 1998 WL 904528, at *3. It seems that the plaintiff in Redhead was able to survive the ministerial exception simply because the school did not plead adequate facts to show that the teacher was closely connected to the religious mission of the school. See Redhead, 440 F. Supp. 2d at 221.
128. Redhead, 440 F. Supp. 2d at 221.
129. For additional discussion of the confusion regarding the application of the ministerial exception to teachers and a list of additional cases, see Mathues, supra note 11.
discuss the procedural history, with a focus on the very different holdings in the district and appellate courts. Then, this Part will delve into the court's majority and concurring opinions.

A. Facts of the Case Suggest Cheryl Perich had a Ministerial Role Within the School

In Hosanna-Tabor, the Supreme Court held that because teacher Cheryl Perich was a minister, the ministerial exception barred her employment discrimination suit against her employer.\(^\text{131}\) Hosanna-Tabor Evangelical Lutheran Church and School is an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod.\(^\text{132}\) The school employed "called" and "contract" teachers.\(^\text{133}\) Called teachers were regarded as having been called to their vocation by God.\(^\text{134}\) To be

\(^{131}\) Hosanna-Tabor, 132 S. Ct. at 710.

\(^{132}\) Brief for Respondent Cheryl Perich at 3, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553). The Lutheran Church-Missouri Synod was founded in 1847 and has over 2.6 million members. Mary Todd, Authority Vested: A Story of Identity and Change in the Lutheran Church-Missouri Synod 1 (2000). The Lutheran Church-Missouri Synod differs from the larger body of Lutherans, the Evangelical Lutheran Church in America (ELCA). Id. The Missouri Synod is much smaller than the ELCA and is considered far more politically and socially conservative than the ELCA. Id. For example, the ELCA allows the ordination of women, while the Missouri Synod believes in a very literal interpretation of scripture that does not allow women to hold authority over men. Id. at 2. This information is particularly interesting, since Hosanna-Tabor supposedly held Perich out as a minister, even though according to the Missouri Synod women do not have the authority to teach the gospel to men. Hosanna-Tabor, 132 S. Ct. at 700.\(^\text{132}\)

\(^{133}\) Brief for Respondent Cheryl Perich, supra note 132, at 4. Although Hosanna-Tabor clearly had a religious affiliation, it was not religious to the exclusion of all non-Lutherans. For example, enrollment in the school was open to the general public, not just the members of the Lutheran community. Id. Of the students enrolled in Lutheran schools, roughly fifty-one percent of the students are either religiously unaffiliated or non-Lutherans. Id. Therefore, despite the Lutheran affiliation of the school, more than half of its population was non-Lutheran. Id.

\(^{134}\) Hosanna-Tabor, 132 S. Ct. 694, 695. The concept of a "call" is an important tradition within Lutheranism. The Augsburg Confession of 1530 states that "no one should publicly teach in the church or administer the Sacraments unless he be regularly called." The Augsburg Confession, art. XIV (1530), available at http://www.lcms.org/page.aspx?pid=414. The Lutheran Church-Missouri Synod bases its understanding of a "called" teacher on the concept of a "divinely established ministerium." In its Amicus brief, the Church wrote:

Like many Christian denominations, the Synod fervently believes in a divinely established ministerium in which individual ministers are first called by God and then ordained by the church to do God's work. The biblical basis for a divinely established ministerium goes back to Jesus selecting his disciples, impressing them into service, and conferring on St. Peter the keys to the kingdom. In this view, ministers are not chosen by human beings. Rather, they are chosen by God; human beings merely recognize that certain individuals have already been selected for the ministry by God. The Synod's Commission on Theology and Church Relations puts it this way: "It is God who calls an individual to serve the ministry of the Word within the office . . . But the call also has a human dimension in that God entrusts the task of calling to human beings . . . Although the divine character of the call is primary, the human activity by which the divine call is issued is not without importance.
considered called, teachers at Hosanna-Tabor needed to satisfy religious, character, and educational standards. Academic requirements required completing a “colloquy” program at a Lutheran college, which includes studying theology. Once a candidate completed those requirements, she was listed as eligible for a call. To receive a call, a candidate was selected by a local church congregation. After prayerful consideration of the candidate’s spiritual qualities, the congregation would extend a call to a candidate via a majority vote. The congregation then welcomed the candidate into his or her role and gave the individual the title of “Minister of Religion, Commissioned.”

Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner at 2, Hosanna-Tabor, 132 S. Ct. 694 (No. 10-553).


137. Brief for Petitioner, supra note 135, at 5-6. In its Amicus brief, the Lutheran Church-Missouri Synod also outlined the requirements for a commissioned minister in great detail, stating:

The path toward becoming a commissioned minister is a demanding one. One must be a member of a Synod congregation, have a bachelor’s degree, and possess the professional and spiritual qualities expected of commissioned ministers. Potential candidates include those who are declared qualified by one of the Synod’s ten colleges or universities upon graduation as well as those who apply to a Colloquy program at a Synod college or university, and if accepted, engage there in a course of theological study usually involving eight classes and an internship. In the latter candidate must also successfully petition for an endorsement from the Synod district where he or she lives, submitting academic transcripts, letters of recommendation, an autobiographical personal statement, and written answers to various ministry-related questions. If studies are completed successfully and an endorsement is obtained from the relevant Synod district, the candidate must then pass a final oral examination, at which point he or she stands ready to receive a call.

Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, supra note 134, at 7. There was no disagreement in the case regarding the lengthy process that Perich undertook in order to become a “called” teacher, and the fact that she undertook this difficult journey to receive a title that the Church believes is very spiritual may have been one of the deciding factors in the case. Hosanna-Tabor, 132 S. Ct at 707 ("Perich’s title of a minister reflected a significant degree of religious training followed by a formal process of commissioning."). The court goes on to quote the above passage of the Lutheran Church-Missouri Synod’s brief in describing the difficulty and importance of the process of calling. Id.


139. Id. In its Amicus brief, the Lutheran Church-Missouri Synod focuses on the religious importance of a congregation selecting a commissioned minister for work within a school as a means of stressing the connection between teachers and the religious mission of the Church. Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, supra note 134, at 8. The Church points out that the most common "call" received by ministers from congregations is to serve as teachers. Id.

140. Brief for Petitioner, supra note 135, at 6. This title is not the same as ordination. Only ordained ministers have the power to preach and administer the sacraments. Brief for Respondent Cheryl Perich, supra note 132, at 4-5. Ordained ministers, or "the pastoral office," must be men, and are the primary spiritual leaders of the Church. Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, supra note 134, at 4-5. Commissioned ministers may be men or women and are assistants to the "pastoral office" that allow the primary Minister to focus on his spiritual duties. Id.
only used if called teachers are unavailable.\textsuperscript{141} School boards employed contract teachers for one-year, renewable terms.\textsuperscript{142}

Respondent Cheryl Perich was initially employed as a contract teacher at Hosanna-Tabor in 1999, and after completing her colloquy, she was commissioned as a called teacher.\textsuperscript{143} While at Hosanna-Tabor, Perich taught kindergarten and fourth grade.\textsuperscript{144} She was responsible for teaching math, language arts, social studies, science, gym, art, and music.\textsuperscript{145} When teaching these subjects she used no religious books and used the same music book that was used in the local public school.\textsuperscript{146} Perich also taught a religion class four days a week, led the students in prayer each day, and attended weekly school-wide chapel services.\textsuperscript{147} Perich led the chapel service twice a year.\textsuperscript{148} Hosanna-Tabor did not require those teaching religion classes or leading chapel service to be called or even Lutheran.\textsuperscript{149}

In June 2004, Perich became ill and was diagnosed with narcolepsy.\textsuperscript{150} She was allowed to take a leave of absence for the 2004-2005 school

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\textsuperscript{4-6.} The Lutheran Church-Missouri Synod's amicus brief places the roots of the commissioned minister squarely in the Bible, arguing that the role that Perich filled was directly sanctioned by the Book of Acts 6:1-6, in which seven disciples ("commissioned ministers") are appointed to do various tasks to free up the twelve apostles ("ordained ministers") to do spiritual work. \textit{id.} \textsuperscript{141.} Brief for Petitioner, \textit{supra} note 135, at 4. Generally, all lay teachers were required to be Christian, but in 2002 the school employed one teacher who was not Christian. \textit{id.} Moreover, despite the importance put on teachers being "called," the lay teachers were still allowed to teach religion classes. Brief for Respondent Cheryl Perich, \textit{supra} note 132, at 7. In fact, the teacher who occupied Perich's position prior to her arrival was neither Lutheran nor called. \textit{id.} \textsuperscript{142.} Brief for Respondent Cheryl Perich, \textit{supra} note 132, at 4. During the 2004-05 school year, two-thirds of the teachers in Lutheran schools were "non-rostered," which means that they were ineligible to be called, and therefore would always be lay teachers. \textit{id.} at 5. Additionally, in Lutheran schools in general, twenty-one percent of teachers were unaffiliated with any Lutheran congregation. \textit{id.} \textsuperscript{143.} \textit{Hosanna-Tabor,} 132 S. Ct. at 700. \textsuperscript{144.} \textit{id.} The school includes students from kindergarten to grade eight. Brief for Respondent Cheryl Perich, \textit{supra} note 132, at 3. \textsuperscript{145.} \textit{Hosanna-Tabor,} 132 S. Ct. at 700. \textsuperscript{146.} Brief for Respondent Cheryl Perich, \textit{supra} note 132, at 7. The fact that Perich used no religious material in class, yet still led students in prayer regularly and attended chapel services makes it difficult to apply precedent to the facts of this case. Like in \textit{Clapper,} Perich regularly prayed with students. \textit{See Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998).} However, like in \textit{Redhead,} there was very little integration of religious material into the classroom. \textit{Redhead,} 440 F. Supp. 2d at 214. \textsuperscript{147.} \textit{Hosanna-Tabor,} 132 S. Ct. at 700. Although these may seem like dispositive factors that clearly demonstrate that Perich held a ministerial position, the Sixth Circuit found the time she spent teaching religion and leading prayer to be relatively unimportant because teachers who taught religion or led chapel service were not required to be Lutheran or even called. EEOC \textit{v. Hosanna-Tabor Evangelical Lutheran Church & Sch.,} 597 F.3d 769, 779 (6th Cir. 2010). \textsuperscript{148.} \textit{Hosanna-Tabor,} 132 S. Ct. at 700. The duty of leading chapel service rotated among all the teachers. \textit{Hosanna-Tabor,} 597 F.3d at 779. \textsuperscript{149.} Brief for Respondent Cheryl Perich, \textit{supra} note 132, at 7; see also \textit{Hosanna-Tabor,} 597 F.3d at 779. \textsuperscript{150.} \textit{Hosanna-Tabor,} 132 S. Ct. at 700. It seems that much of this controversy may stem from Hosanna-Tabor's unfamiliarity with Perich's condition. In Perich's brief, she repeatedly describes her
In January of 2005, Perich informed the school principal, Stacey Hoeft, that her doctor had cleared her to return to work the following month. When the school board convened to discuss Perich’s situation, they decided to seek Perich’s resignation and a “peaceful release” from her call. Perich refused to resign and reported to work after her leave had expired, despite Hoeft’s assertion that the school no longer had a position for her. After Perich’s return to work, Hoeft informed her that she would likely be fired, and Perich responded that she had spoken with an attorney and intended to assert her legal rights. Following a school board meeting that evening, the board chairman sent Perich a letter stating that because of her threat to file a lawsuit the congregation would consider whether to rescind her call. The congregation later chose to rescind her call, citing her “insubordination,” “disruptive behavior,” and damaged relationship with the school based on her threat to sue.

employer’s skepticism at her quick recovery from her illness. Brief for Respondent Cheryl Perich, supra note 132, at 9-12. Members of the congregation questioned her doctor’s judgment, some even stating that they knew better than the doctor. Id. at 11 (quoting a congregation member as stating, “I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won’t have symptoms.”). However, despite their concerns, none of the board members asked for additional information or clarification from Perich’s physician. Id.

152. Hosanna-Tabor, 132 S. Ct. at 700.
154. Id. at 10. When they considered Perich’s situation, the school board and congregation decided that if Perich requested a “peaceful release from her call” the congregation would pay a portion of Perich’s medical insurance premiums. Id. Essentially, the congregation demanded that Perich resign, or risk having to either lose her health insurance, or pay the premium entirely on her own.
155. Brief for Respondent Cheryl Perich, supra note 132, at 11. When Perich understood that Hosanna-Tabor would be seeking her resignation, she asked to meet with the entire school board so that she could be given an opportunity to demonstrate that she was able to return to work. Id. at 10-11. Even after she presented a note from her doctor clearing her to return to work, the school board still refused to accept that she was capable of performing her job. Id.
156. Hosanna-Tabor, 132 S. Ct. at 700.
157. Id.; Brief for Respondent Cheryl Perich, supra note 132, at 12.
158. Hosanna-Tabor, 132 S. Ct. at 700. According to the Lutheran Church-Missouri Synod’s Amicus Brief, the decision to rescind a “call” is a difficult one for a congregation and is not the same as “firing” and individual. Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, supra note 134, at 12. The Church gives a strong religious justification for a congregation’s decision, stating:

[C]ongregations are not to fire ministers arbitrarily. Indeed, within Lutheran theology, congregations do not fire ministers at all. Just as ministers are called by God rather than human beings, so too calls end when God dictates rather than when human beings dictate. Of course, human beings enter into the process—they are to discern when God has deposed a minister, just as they are to discern when God calls a minister. But ultimately God is the decision maker on when a minister’s call begins and when it ends. Perhaps Martin Chemnitz, an early Lutheran theologian,
As a result of her termination, Perich filed a charge with the EEOC, alleging that her termination had been in violation of the Americans with Disabilities Act (ADA). The EEOC brought suit against Hosanna-Tabor and Perich intervened in the litigation. They sought Perich’s reinstatement, along with back pay, compensatory and punitive damages, attorney’s fees, and injunctive relief. Hosanna-Tabor asserted that the suit was barred by the ministerial exception and filed for summary judgment.

Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, supra note 134, at 12 (citing MARTIN CHEMNITZ, MINISTRY, WORD, AND SACRAMENTS: AN ENCHRIDION 37 (1593) (English trans. 1981)).

159. 42 U.S.C. §§ 12101 et seq. (1990) (prohibiting discrimination against a qualified individual on the basis of a disability and prohibiting employers from retaliating against an individual who has opposed any unlawful practice under the statute); Hosanna-Tabor, 132 S. Ct. at 701. The ministerial exception was made applicable to the ADA in Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

160. Hosanna-Tabor, 132 S. Ct. at 701. The Equal Employment Opportunity Commission is charged with “enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.” Overview, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2012), http://www.eeoc.gov/eeoc/index.cfm. The EEOC has several roles. First it has the authority “to investigate charges of discrimination against employers who are covered by the law.” Id. Second, within its investigation, it will “fairly and accurately assess the allegations in the charge and then make a finding.” Id. Finally, “[i]f we find that discrimination has occurred, we will try to settle the charge. If we aren’t successful, we have the authority to file a lawsuit to protect the rights of individuals and the interests of the public.” Id.

161. Hosanna-Tabor, 132 S. Ct. at 701. Most importantly the complaint asked the court to “award Perich the amount of her losses, including but not limited to her lost earnings and benefits and to reinstate Perich to the position from which she was terminated with pay and benefits equal to that which she would have attained had she not been terminated or providing Perich with appropriate front pay in lieu of reinstatement.” Complaint at 6–7, Hosanna-Tabor, 132 S. Ct. 694 (No. 10-553). The forced reinstatement of Perich is the relief which most clearly threatened church autonomy, because it would require the Church to take back a “minister” who they previously said they did not want teaching and spreading their faith. See Lund, supra note 49, at 38 (discussing the “reinstatement problem”). Such a reinstatement would likely violate the holding in Kedroff See Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

162. Hosanna-Tabor, 132 S. Ct. at 701. Hosanna-Tabor’s motion for summary judgment asserts, “Based upon the doctrine of “ministerial exception” both Plaintiffs’ claims alleged under the ADA for retaliation against the Defendant Hosanna Tabor Lutheran Church are barred and must be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or in the alternative failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).” Defendant Hosanna-Tabor Lutheran Church and School’s Motion for Summary Judgment at 17, Hosanna-Tabor, 132 S. Ct. 694 (No. 10-553).
B. Lower Court Holdings are Diametrically Opposed

Although both the district court in the Eastern District of Michigan and the Sixth Circuit identified the primary issue in this case as whether Perich was a minister for the purposes of the ministerial exception and both courts applied the primary duties test, they came to very different conclusions.\(^{163}\) The district court began its analysis by acknowledging that courts are sharply divided on what positions fit the criteria established in the primary duties test.\(^{164}\) After recognizing the challenges inherent in this kind of analysis, the district court analyzed the holdings in a variety of factually similar cases. The court initially focused on Redhead and Guinan v. Roman Catholic Archdiocese of Indianapolis as support for the proposition that when teachers teach primarily secular subjects the ministerial exception does not apply.\(^{165}\) However, the court primarily focused on the holding in Clapper. The court found that Perich’s situation most closely resembled the plaintiff in Clapper, in which a teacher was deemed a minister because he led the students in prayer, conducted ten minutes of worship daily, and taught Bible study in addition to his academic responsibilities, and therefore was most persuaded by that court’s reasoning.\(^{166}\) As a result, the district

\(^{163}\) EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 776 (6th Cir. 2010) (finding that the district court’s conclusion that Perich was a ministerial employee is a legal conclusion subject to de novo review); EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008) (finding that “the primary issue is whether Perich served as a ministerial employee”). The Sixth Circuit also distinguished between the district court’s factual findings in support of its decisions and its legal conclusions. Hosanna-Tabor, 597 F.3d at 776. The Sixth Circuit found that the factual findings “must be accepted unless clearly erroneous” whereas the legal conclusions could be reviewed de novo, therefore allowing the Sixth Circuit to more easily reach the question of Perich’s status. Id.

\(^{164}\) Hosanna-Tabor, 582 F. Supp. 2d at 888 (noting that there are “courts on both sides of the issue when it comes to elementary school teachers in religious schools”). The court also noted that “judicial evaluations of the role of employees—from parochial school teachers to church organists—has not created any discernibly consistent pattern.” Id. (quoting Note, The Ministerial Exception to Title VII, supra note 15, at 1787-88). One imagines that the discussion regarding the current case law on the ministerial exception and teachers by G. David Mathues would have been particularly helpful to the court. See Mathues, supra note 11.

\(^{165}\) In Guinan v. Roman Catholic Archdiocese of Indianapolis, the district court for the southern district of Indiana found that a teacher who sued her Catholic school employer for age discrimination was not a minister for the purpose of the ministerial exception. 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998). In Guinan, the teacher in question was a catechist charged with teaching both secular subjects and religion classes. Id. at 852. However, despite her religious role, the court found that “it cannot be fairly said that she functioned as a minister or a member of the clergy” because “the vast majority of Guinan’s duties involved her teaching secular courses, such as math or science.” Id. Much like the court in Redhead, the Guinan court chose to look to the quantity of time spent on religious activities, as opposed to the qualities of the activities that she did participate in. See Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d. 211 (E.D.N.Y. 2006). For a discussion of Redhead, see supra Part I.E.

\(^{166}\) Hosanna-Tabor, 582 F. Supp. 2d at 891. The court focused on the fact that the school in Clapper required every teacher to adhere to the beliefs of the Seventh-day Adventist Church and found that requirement analogous to the practices of Hosanna-Tabor. Id. at 889 (citing Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *2 (4th Cir. Dec. 29, 1998)).
court held that Perich was a ministerial employee.\textsuperscript{167} In reaching this conclusion, the district court found that Hosanna-Tabor’s distinction between contract and called teachers meant that the school valued called teachers as ministerial.\textsuperscript{168} This distinction, it held, meant that Perich was essentially directly overseen by the Lutheran Church and therefore must be considered a minister.\textsuperscript{169} The court trusted Hosanna-Tabor’s characterization of its own employee and therefore found that she must be deemed a minister.\textsuperscript{170}

Applying the same test, the Sixth Circuit found that Perich was not a minister.\textsuperscript{171} When applying the primary duties test, the appellate court focused on the fact that Perich’s duties were the same as when she was a lay teacher.\textsuperscript{172} Despite receiving the “call,” her daily responsibilities were exactly the same as a contract teacher. Unlike the district court, the Sixth Circuit chose to follow the “overwhelming majority” of courts that have

\textsuperscript{167} Hosanna-Tabor, 582 F. Supp. 2d at 892. The court found that “it seems prudent in this case to trust Hosanna-Tabor’s characterization of its own employee in the months and years preceding the events that led to litigation. Because Hosanna-Tabor considered Perich a ‘commissioned minister’ and the facts surrounding Perich’s employment in a religious school with a sectarian mission support this characterization, the Court concludes that Perich was a ministerial employee.” \textit{Id.} at 891. For further discussion of \textit{Clapper}, see supra Part I.E.

\textsuperscript{168} Hosanna-Tabor, 582 F. Supp. 2d at 891. This assertion by the district court was later supported by the Lutheran Church-Synod’s Amicus Brief to the Supreme Court, in which the Church described the religious role of the teacher as a minister in great detail. Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, \textit{supra} note 134, at 4-5.

\textsuperscript{169} Hosanna-Tabor, 582 F. Supp. 2d at 891. The Lutheran Church-Missouri Synod goes a step further in its later brief to the Supreme Court and asserts that the teachers at Hosanna-Tabor were overseen by God himself in their call, not just the temporal authority of the Lutheran Church. Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, \textit{supra} note 134, at 4-5.

\textsuperscript{170} Hosanna-Tabor, 582 F. Supp. 2d at 891. The court found that unless Hosanna-Tabor used the title of minister as “mere subterfuge,” their designations should be supported. \textit{Id.} at 890; see Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) (finding that if an employer arbitrarily titled all employees as “ministers” to avoid litigation, the court would not respect the church’s designation).

\textsuperscript{171} EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 781 (6th Cir. 2010). Both the Sixth Circuit and the district court used the primary duties test from \textit{Rayburn} that was taken from Professor’s Bagni’s article, \textit{Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations}. See \textit{Rayburn} v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (citing Bagni, \textit{supra} note 36). The courts both found that the ministerial exception will apply when “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.” \textit{Hosanna-Tabor}, 597 F.3d at 778 (citing Bagni, \textit{supra} note 36); \textit{Hosanna-Tabor}, 582 F. Supp. 2d at 887 (citing \textit{Rayburn}, 772 F.2d at 1169).

\textsuperscript{172} \textit{Hosanna-Tabor}, 597 F.3d at 779.
held that teachers in parochial schools are not ministers. The court reasoned that when teachers are classified as ministerial employees, they generally teach primarily religious subjects or have a central role in the pastoral mission of the school. Perich's religious activities took up a total of forty-five minutes of the seven-hour school day. Based on this analysis, the court found that Perich's primary duties were not spreading the faith, church governance, or supervision of a religious order. The court cautioned that the primary duties analysis requires a court to objectively examine an employee's actual job function rather than giving too much weight to the employee's job title, as the district court had done. Just as the comparison between Clapper and Redhead demonstrated, Hosanna-Tabor's district and appellate court decisions are excellent examples of the confusion in the courts regarding the proper application of the ministerial exception.

173. Id. at 778. The court cites the following cases as examples of this "overwhelming majority:" Dole v. Shenandoah Baptist Church, 889 F.2d 1389, 1392 (4th Cir. 1990) (holding that teachers at a religious school who integrated biblical material into traditional academic subjects are not ministerial employees); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a church-owned school are not ministerial employees); Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006).

174. Hosanna-Tabor, 597 F.3d at 779; see, e.g., EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463-65 (D.C. Cir. 1996) (holding that a nun whose primary duty was teaching canonical law at a Catholic University was a minister).

175. Hosanna-Tabor, 597 F.3d at 779. The analysis the court performs here is very similar to that performed in both Redhead and Guinan, in which the courts looked to the quantity of the religious functions the plaintiff performed, regardless of any overarching sectarian purpose in the school. See Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1996).

176. Hosanna-Tabor, 597 F.3d at 780 (quoting Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007)). Despite relying primarily on Redhead, the court does note that the Clapper court cautions against focusing solely on the quantity as opposed to the quality of the religious functions performed. Id. at 781; see Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998).

177. Hosanna-Tabor, 597 F.3d at 781. The Sixth Circuit cautioned that always accepting a church's designation of who is a minister would be problematic for the exception. The court reasoned: [A] finding that Perich is a "ministerial employee would compel the conclusion that all teachers at the school—called, contract, Lutheran, non-Lutheran—are similarly excluded from coverage under the ADA and other federal fair employment laws. However the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception.

Id. For a discussion of the original statutory roots of the ministerial exception to which this passage refers, see supra Part I.A.
C. The Supreme Court Finds that Cheryl Perich is a Minister

When the Supreme Court accepted this case, commentators hoped that it would resolve the tremendous confusion in the lower courts. Much of Hosanna-Tabor's Petition for Certiorari focused on the division in the circuits regarding how the courts should determine who qualifies as a minister. However, the decision did little to clarify this area of confusion. Although it confirmed the existence of the ministerial exception, it did not develop a new test or affirm reasoning used by any lower court in determining who falls under the exception. First, this Part will discuss the arguments that each party made to the Court, focusing particularly on those made by the petitioner because the Court strongly supported Hosanna-Tabor's arguments. Then, this Part will analyze the majority and concurring opinions, highlighting the Court's response to each party's arguments and analyzing the factors they suggest using to determine whether an individual is a minister.

1. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School's Arguments

Hosanna-Tabor's arguments focused on the unquestioned existence of the ministerial exception and the strong support in Supreme Court jurisprudence for religious liberty and church autonomy. The petitioner justified the existence of the exception with constitutional arguments based on the Free Exercise Clause, Establishment Clause, and freedom of association. The petitioner then turned to Perich's claims to show how her employment activities placed her squarely within the bounds of the ministerial exception. Hosanna-Tabor began its argument by defending the existence of the ministerial exception in the lower courts, justifying its

178. Petition for Writ of Certiorari at 10, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553); see generally Mathues, supra note 11, at 116 (“The ministerial exception continues to provoke debate in both the courts and the academy. Going forward, this disagreement is most likely to focus on the definition of “minister” because while the ministerial exception’s existence appears settled, its scope is not.”).

179. Petition for Writ of Certiorari, supra note 178, at 9-25. More specifically, the Petition listed its primary reason for granting the Writ as the divide over the application of the primary duties test, saying, “Federal circuits are in sharp and acknowledged conflict over what legal standard controls the boundaries of the ministerial exception, and specifically over the ‘primary duties’ test used by the Sixth Circuit here.” Id. at 10.

180. Brief for Petitioner, supra note 135, at 15 (“A minister cannot sue to force a church to accept or retain him as a minister. This Court and the lower courts have enforced this principle with striking unanimity, and neither respondent has questioned it at any stage of litigation.”).

181. Id. at 19-41. For a discussion of how these constitutional provisions apply to the ministerial exception, see supra Part I.B. See also Corbin, Above the Law, supra note 4, at 1977-81 (describing the First Amendment justifications for the ministerial exception clause, particularly within the Free Exercise and Establishment clauses).

182. Brief for Petitioner, supra note 135, at 19-41.
existence with the Supreme Court cases *Kedroff* and *Jones v. Wolf*.\(^\text{183}\) According to Hosanna-Tabor, these cases also support the Free Exercise Clause justification for the exception.\(^\text{184}\) Hosanna-Tabor asserted that *Kedroff* and *Serbian Diocese* stand for the proposition that a church has the right to select its own clergy, because churches have a free exercise right to choose those who will embody their religious message.\(^\text{185}\) Hosanna-Tabor also relied on the *Smith* decision as support for protection of institutional free exercise in controversies over religious authorities.\(^\text{186}\)

Next, Hosanna-Tabor asserted that the Establishment Clause limits the courts' ability to appoint ministers or resolve religious questions.\(^\text{187}\) Because the presumptive remedy in a Title VII suit is reinstatement, Hosanna-Tabor argued that this would be akin to government appointment of ministers, which is barred by the Establishment Clause.\(^\text{188}\) Additionally, Hosanna-Tabor argued that the Establishment Clause also bars the

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183. *Id.* at 16-18 (stating that lower courts have unanimously agreed that courts may not hear discrimination claims by employees who carry out religious functions). In *Jones v. Wolf*, the Court found that courts are not competent to "resolve a religious controversy." *Jones v. Wolf*, 443 U.S. 595, 604 (1979). *Jones v. Wolf* was another church property case similar to *Watson*, in which there was a schism in the church and two competing factions who sought to control the property. *Id.; see Watson v. Jones*, 80 U.S. 679 (1872). The Court found that when adjudicating a church property dispute, a court is allowed to use neutral principles of law, such as consideration of deeds or state statutes governing property laws. *Jones*, 443 U.S. at 601-02. However, a court may not delve into matters of religious doctrine or practice in order to determine which factions should control the property. *Id.* at 602.

184. Brief for Petitioner, *supra* note 135, at 19. In its brief, Hosanna-Tabor writes:

In *Kedroff*, this Court grounded the church's right to select its own clergy principally in the Free Exercise Clause. . . . In *Serbian*, the Court held that requiring the church to reinstate a bishop would violate the First Amendment—thus invoking both the Free Exercise Clause and Establishment Clause. In light of these cases, the courts of appeals have uniformly recognized that the ministerial exception is an essential part of the free exercise of religion.

*Id.*

185. Brief for Petitioner, *supra* note 135, at 19. In *Kedroff*, the Court found, basing its decision on the holding in *Watson*, that there was 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." *Kedroff* v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952). The court continued, "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religions against state interference." *Id.*

186. Brief for Petitioner, *supra* note 135, at 23. The Petitioner argued, as many others have, that the *Smith* statement—"the government may not lend its power to one or the other side in controversies over religious authority or dogma"—means that courts should not be involved in disputes over who should occupy positions of authority. *See supra* Part 1.D; McConnell, *The Problem*, *supra* note 105.


188. Brief for Petitioner, *supra* note 135, at 28. Hosanna-Tabor bases this argument in a historical analysis of the Establishment clause. The petitioner pointed out that the government appointment of ministers in the Congregationalist Churches of Massachusetts was one of the principle sources of religious unrest in that early history state, leading to its prohibition in the state's constitution, and influencing the Establishment Clause. *Id.* (citing JACOB C. MEYER, CHURCH AND STATE IN MASSACHUSETTS FROM 1740 TO 1833, 211-220 (1968 ed.)).
government from becoming entangled in religious disputes through the resolution of employment disputes between ministers and churches.\textsuperscript{189} Inquiry into the nature of the minister's employment, or investigations into any reason given by a church for that employee's termination, would necessarily involve entanglement with purely religious questions and would therefore be barred.\textsuperscript{190}

Hosanna-Tabor concluded its justification for the existence of the ministerial exception by arguing that freedom of religious and expressive association also limits judicial interference in the selection of ministers.\textsuperscript{191} Hosanna-Tabor argued that, through freedom of religious association, churches have the right to associate with those they choose in pursuit of a religious end and therefore have the right to choose their own clergy.\textsuperscript{192} Additionally, Hosanna-Tabor contended that freedom of expressive association gives a church the right to control the church's message by selecting its choice of leaders and representatives.\textsuperscript{193} It argued that forcing the church to accept unwanted ministers would impinge upon the church's right to advocate for their particular religious viewpoint.\textsuperscript{194} Therefore, based on these three constitutional principles, Hosanna-Tabor urged the Court to accept the ministerial exception.

Next, Hosanna-Tabor set out to prove that Perich's duties were inherently religious and important to the mission of the church. The school contended that, because of her "call" and the time she devoted to prayer and

\begin{itemize}
\item \textsuperscript{189} Brief for Petitioner, \textit{supra} note 135, at 29. See \textit{supra} Part I.B (discussing the concept of entanglement within the Establishment Clause).
\item \textsuperscript{190} Brief for Petitioner, \textit{supra} note 135, at 31; Corbin, \textit{Above the Law}, \textit{supra} note 4, at 1979 (noting that many cases and commentators cite the Establishment Clause as a justification for applying the ministerial exception because of its prohibition on excessive entanglement).
\item \textsuperscript{191} Brief for Petitioner, \textit{supra} note 135, at 32. Freedom of expressive association protects the right of an organization to "express those views, and only those views that it intends to express." Boy Scouts \textit{v}. Dale, 530 U.S. 640, 648 (2000). In \textit{Boy Scouts \textit{v}. Dale}, a scoutmaster's membership in the Boy Scouts was revoked after it was discovered that he was gay. \textit{Id.} at 640. The scoutmaster then filed a complaint against the Boy Scouts alleging that the discriminatory treatment was in violation of New Jersey law. \textit{Id.} The Court found that because the Boy Scouts explicitly advocated against homosexuality, the inclusion of the gay scoutmaster would unconstitutionally affect the Scouts' ability to advocate their chosen viewpoint. \textit{Id.} at 656.
\item \textsuperscript{192} Brief for Petitioner, \textit{supra} note 135, at 33. Hosanna-Tabor also relies on \textit{Christian Legal Society \textit{v}. Martinez}, 130 S. Ct. 2971, 2985 (2010), to support the proposition that membership decisions are protected by the First Amendment in certain circumstances. \textit{Id.} In \textit{Christian Legal Society}, the Court found that "[i]nsisting that an organization embrace unwelcome members "directly and immediately affects associational rights." \textit{Christian Legal Society}, 130 S. Ct. at 2985 (citing \textit{Roberts \textit{v}. U.S. Jaycees}, 468 U.S. 609, 622 (1984)).
\item \textsuperscript{193} Brief for Petitioner, \textit{supra} note 135, at 33; Note, \textit{The Ministerial Exception to Title VII}, \textit{supra} note 15, at 1784-86.
\item \textsuperscript{194} Brief for Petitioner, \textit{supra} note 135, at 33. For more in-depth discussions of free association rights, see \textit{Roberts}, 468 U.S. at 622, where the Court held that there is an explicit right to associate with others to pursue political and religious ends in the First Amendment, and \textit{Eu \textit{v}. San Francisco County Democratic Central Committee}, 489 U.S. 214, 229 (1989), agreeing that freedom of expressive association includes a political party's right to elect its leaders based on certain criteria.
\end{itemize}
religious instruction each day, Perich’s mission within the school was primarily religious.195 Hosanna-Tabor attacked the Sixth Circuit’s quantitative analysis, arguing that “counting minutes on the clock” does not provide evidence for the true significance of the teacher’s religious duties.196 The school argued that although she taught the same secular subjects as a lay teacher, Perich’s religious duties could still constitute her most important function.197 Finally, Hosanna-Tabor asserted that Perich’s responsibility to serve as a Christian role model to the students meant that her job was primarily religious, even when she was teaching secular subjects.198 Therefore, Hosanna-Tabor urged the court to disregard the

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195. Brief for Petitioner, supra note 135, at 37. Hosanna-Tabor asserted:

Perich’s first responsibility, as explained in the document extending her call, was to teach faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church. To fulfill this responsibility, she taught religion to her students four days a week and took them to chapel on the fifth day; she led them in devotional exercises every day; she led them in prayer three times a day. In turn with the other teachers, she planned and led worship services at the all-school chapel. For those services she chose liturgies, hymns, and Scripture readings and composed and delivered a message based on the scripture selections.

Id. at 37-38. Hosanna-Tabor focused on the nature of the functions she performed, and subtly urged the Court not to add up the minutes of the day as the Sixth Circuit had done. Id.

196. Brief for Petitioner, supra note 135, at 38. Hosanna-Tabor made an argument similar to the court’s holding in Clapper. See Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998). Hosanna-Tabor asserts that Perich’s first responsibility, regardless of the number of religious tasks she performed each day, was to teach the word of God. Brief for Petitioner, supra note 135, at 37. Similarly, the court in Clapper found that, regardless of the fact that only one of the thirteen responsibilities of teachers listed in the Education Code was religious, “the Education Code of the Chesapeake Conference makes abundantly clear in several provisions that the primary purpose of Seventh-day Adventist elementary education is the redemption of each student’s soul through his or her belief and faithful adherence to Seventh-day Adventist beliefs, i.e., propagation of the Seventh-day Adventist faith.” Clapper, 1998 WL 904528, at *7.

197. Brief for Petitioner, supra note 135, at 37. Hosanna-Tabor urges the Court to adopt an understanding of religious schools similar to that supported by Professor Bagni in his article Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations. Bagni, supra note 36, at 1542. By arguing that, regardless of the daily tasks Perich performed, she was still forwarding the school’s religious mission by being a Christian role model daily, Hosanna-Tabor is stressing that the religious purpose of the school is present in every activity, no matter how seemingly secular it is. Brief for Petitioner, supra note 135, at 37. Bagni argues that even if the content of an academic course is primarily secular, if the mission statement of the school or the course’s syllabus is decidedly religious, there should be no state-involvement in employment decisions due to free exercise and entanglement concerns. Bagni, supra note 36, at 1546.

198. Brief for Petitioner, supra note 135, at 37. Hosanna-Tabor also relied on testimony from Perich that she considered it important to share the Gospel message with students in every class and even with parents. Id. In her employment application, Perich stated:

Educational Ministry is special not just because of the devotional time and the religion class, but because the teacher can bring God into every subject taught in the classroom. Students also feel free to bring up topics that mention God or Religion during all times of the day. This is very important for them to be able to do as they are growing in their faith. During English class a year ago, I found out through reading a rough draft that [a student] understood that good people went to heaven. I showed her several scripture passages that tell that we get to heaven through faith in what Jesus has done for us. She wrote the passages in her notebook and underlined
Sixth Circuit’s primary duties analysis and look to the underlying importance of Perich’s religious functions to the school’s ministry.

2. Respondents Cheryl Perich and the EEOC’s Arguments

Respondents Cheryl Perich and the EEOC both denied that the Free Exercise and Establishment Clauses barred Perich’s claims. Additionally, both the EEOC and Perich argued that the Court’s decision in Smith supported their action. Most importantly, according to Perich, Hosanna-Tabor wrongly assumed the existence of a ministerial exception, and therefore neither Perich nor the EEOC devoted any significant space to convincing the court that Perich was not a minister. Because of the similarities of the two parties’ arguments, this Part will only examine Perich’s arguments.

Perich first focused on a compelling interest analysis under Sherbert. She argued that the federal government has a compelling interest in combating employment discrimination to ensure equal access to opportunities in society. Accordingly, Perich claimed the need to protect them in her Bible, then changed her rough draft. She told other students about her new discovery at recess.

Id. at 43-44. It seems hard to deny, after looking at Perich’s own understanding of her role in the school, that she was involved in teaching and spreading the faith.


200. Brief for Respondent Cheryl Perich, supra note 132, at 42-46 (asserting that the Free Exercise Clause “poses no bar to the application of a valid and neutral law of general applicability on the ground that the law incidentally burdens religious practice”); Brief for Federal Respondent, supra note 199, at 21-30 (arguing that “[i]n Employment Division v. Smith, [the] Court rejected the proposition that the Free Exercise Clause requires the government to make exceptions to neutral laws of general applicability that have the incidental effect of burdening religious practice,” and pointing out that the Court rejected the Sherbert balancing test).

201. Brief for Respondent Cheryl Perich, supra note 132, at 51-53; Brief for Federal Respondent, supra note 199, at 21-30. In her brief, Perich only briefly addresses the issue of whether she is a minister by arguing that the Church’s “designation of Perich as a ‘called’ teacher or ‘commissioned minister’ [do not] create an Establishment Clause problem where one otherwise would not exist. ‘While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such designation does not control their extra-religious legal status.’” Brief for Respondent Cheryl Perich, supra note 132, at 52 (citing Dole v. Shenandoah Baptist Church, 889 F.2d 1389, 1396 n.13 (4th Cir. 1990)).


203. Brief for Respondent Cheryl Perich, supra note 132, at 22-24. In Sherbert, the Court developed a balancing test which required that the state demonstrate a compelling interest if it enacted a regulation that burdened free exercise. 374 U.S. at 403. In this argument, Perich seems to be covering her bases by applying both the Sherbert test and the Smith test to show the Court that no matter which test it applies, the interest in upholding employment laws will always win. However, most scholars assumed that when the Court finally dealt with a ministerial exception case, the major decision would be which form of the primary duties test to apply. See Mathues, supra note 11, at 118 (“The question now becomes whether Guinan and Redhead, or Stanley and Clapper, applied the ministerial exception
employees from discrimination outweighs any potential First Amendment concerns.204

Next, Perich presented a variety of arguments based on the reasoning in Smith as to why her claims under the ADA did not violate the First Amendment. Perich asserted that the First Amendment does not prevent the application of neutral, generally applicable laws to religious associations and that therefore the anti-retaliation provision of the ADA is constitutional.205 Perich also argued that the application of the ADA to her claims would not violate the Free Exercise and Establishment Clauses of the First Amendment under the reasoning in Smith.206 Additionally, because Perich only asserted that she was wrongfully terminated from her teaching responsibilities for asserting her right to sue, a court would not have to engage in an analysis of Lutheran doctrine regarding dispute resolution.207 Rather, the Court would only need to determine whether her
discharge violated the ADA's retaliation provision, because the ADA is a neutral law of general applicability that does not "give way to religious conviction, no matter how sincere or important." 208

Finally, Perich argued that the application of the ADA would not violate the Establishment Clause because its application does not amount to the appointment of clergy and presents no entanglement problems. 209 Perich dismissed Hosanna-Tabor's historical argument regarding the state appointment of ministers by pointing out that the application of a neutral law is not analogous to the state selection of ministers. 210 Perich also asserted that there are no issues of excessive entanglement because the case does not require an inquiry into whether the reasons for Perich's dismissal were mere pretext. 211 Hosanna-Tabor admitted that it fired Perich because she threatened a lawsuit, and therefore the court would not have to determine whether the firing was truly motivated by religious belief and engage in an analysis of church doctrine. 212 Therefore, Perich contended that there were no First Amendment issues which would make the application of the ADA in her situation unconstitutional.

208. Brief for Respondent Cheryl Perich, supra note 132 (citing Emp't Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990)); see Feldman, supra note 94, at 1793 (describing how the Smith decision has repudiated the strict scrutiny analysis for free exercise cases, allowing the government to "punish religiously motivated conduct pursuant to a generally applicable law without satisfying the strict scrutiny standard"); supra Part I.D.

209. Brief for Respondent Cheryl Perich, supra note 132, at 51; see supra notes 40, 45, and accompanying text (discussing the Lemon test as a standard for determining whether the Establishment Clause has been violated by excessive entanglement with religion).

210. Brief for Respondent Cheryl Perich, supra note 132, at 50-51. Perich asserts:

The historical evil Hosanna-Tabor describes was the state's power literally to appoint the clergy and to choose who would lead a particular congregation. A court's application of a neutral law to the question of whether the church employee, like a school teacher, suffered an adverse employment action for discriminatory reasons hardly amounts to "government appointment of ministers," any more than the ordinary application of Title VII amounts to "government appointment" of every employee of every covered employer in the nation. Id. See Corbin, Above the Law, supra note 4, at 206 ("[W]here the ministerial exception to disappear, the prototypical situation regularly invoked by commentators and courts alike—that of the secular court making spiritual evaluations beyond its jurisdictional sphere and competence—would rarely, if ever, occur under Title VII doctrine.").

211. Brief for Respondent Cheryl Perich, supra note 132, at 53; Corbin, supra note 4, at 2010.

212. Brief for Respondent Cheryl Perich, supra note 132, at 54. Generally, most discrimination claims are put forth under the McDonnell Douglas test, which requires a deep evaluation of the employer's motives for the adverse employment action. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To establish a claim of discrimination without direct evidence, a plaintiff must first make out a prima facie case of discrimination. Id. To establish a prima facie case of disability discrimination, a plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) she is qualified to perform the essential functions of the job she sought with or without reasonable accommodation; (3) she suffered from an adverse employment action because of her disability; (4) the circumstances surrounding the employment action indicate it is more likely than not that her disability was the reason for it. Lawson v. CSX Transp., Inc., 245 F.3d 916, 922 (7th Cir. 2001).
3. The Supreme Court’s Majority Opinion

When issuing its opinion, the Supreme Court relied almost entirely on the arguments presented by Hosanna-Tabor and quickly dismissed those made by Perich and the EEOC. Much like the petitioner’s brief, the Court’s opinion relied heavily on Watson, Kedroff, and historical arguments in favor of the ministerial exception. Most importantly, the Court agreed with Hosanna-Tabor that there is a ministerial exception as created by the lower courts. First, the Court used its prior holdings to justify the existence of the exception. Second, the Court addressed the arguments made by Perich and the EEOC. Third, the Court determined whether Perich is a minister and is therefore subject to the ministerial exception.

The Court began its decision with a history of the religion clauses of the First Amendment. Much like Hosanna-Tabor’s brief, the Court grounded its understanding of the First Amendment in the religious history of America and used that history to support the argument that the First Amendment protects religious organizations in a manner distinct from secular organizations. The Court uses historical precedent and scholarship to argue that religious organizations are entitled to special protections under the First Amendment that go beyond the general right of association.

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213. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706-07 (2012). In just a few paragraphs, the Court dispatches with every argument in the briefs presented by Perich and the EEOC. Id. Most importantly, the Court disagrees with Perich that churches could be protected by a freedom of association right, without applying the Religion Clauses. Id. at 706. The Court reasons that religious organizations are given special protections by the First Amendment, finding:

The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and Perich’s view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.

214. Brief for Petitioner, supra note 135, at 17-18 (“Every court to consider the question has recognized the ministerial exception—including ten state supreme courts and all twelve federal circuits with jurisdiction over such cases.”); Hosanna-Tabor, 132 S. Ct. at 705 (“We agree that there is such a ministerial exception.”).

215. Hosanna-Tabor, 132 S. Ct. at 705; Laycock, supra note 17, at 852.

216. Hosanna-Tabor, 132 S. Ct. at 706; Brief for Respondent Cheryl Perich, supra note 132, at 31; Brief for Federal Respondent, supra note 199.

217. Hosanna-Tabor, 132 S. Ct. at 707; Laycock, supra note 17, at 859.

Amendment is meant to serve as a buttress against government interference with religious liberty.220 Stretching its reasoning all the way back to the Magna Carta, the Court suggested that American religious liberty was developed in response to harsh English control over religious officials and arbitrary appointment of ministers.221 As a result of this oppression, Puritans came to America for the freedom to elect their own ministers.222 Later, colonists threw off the shackles of the English church after it insisted on government control of religious officials.223 Against this backdrop, the First Amendment was adopted to prevent the clashes between church and government that plagued early American history.224

220. Reliance on historical arguments has become an increasingly important tool in Supreme Court jurisprudence on the First Amendment. Erwin Chemerinsky, History, Tradition, the Supreme Court, and the First Amendment, 44 HASTINGS L.J. 901, 902 (1993). Professor Chemerinsky argues that, beginning with the Dred Scott decision, the Court has used history and tradition as the foundation for its holdings in a variety of areas. Id.; see generally CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969) (describing a variety of examples of historical reasoning in First Amendment decisions). Recently, however, the Court has begun to invoke history and tradition more for First Amendment issues. Chemerinsky, supra note 220, at 903. Between 1990 and 1991, 83 majority opinions invoked tradition, as compared with 216 uses during the previous decade. Id. Professor Chemerinsky gives two reasons for this increase. First, he argues that the Court uses history as a means to make its decision-making appear to be derived from external truths, rather than personal opinion. Id. at 908. As a reaction to the liberal bias of the Warren Court, today’s more conservative justices are motivated by a powerful desire for judicial constraints. Id. at 909. Second, historical analysis is a reaction to the widespread repudiation of Originalism, the view that the Constitution’s meaning is limited to what is expressly stated in the text or obviously intended in the wording. Id. Applying the principles of Originalism is so problematic for the Court that it has turned to historical analysis as a way to root its decisions in the Constitution without using a method of analysis that has been explicitly repudiated by earlier Court decisions. Id. at 910; see United States v. Classic, 313 U.S. 299, 316 (1941) (denying the importance of Originalism by stating that “in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is [a new subject matter] with which the framers were not familiar”).

221. Hosanna-Tabor, 132 S. Ct. at 702. Almost all Supreme Court cases that touch on the First Amendment will base their initial reasoning in arguments from history, particularly when the Court is concerned that a doctrine has stayed from the “fundamental values” of the constitutional provision in which it is based. Michael W. McConnell, Reflections on Hosanna-Tabor, 35 HARV. J.L. & PUB. POL’Y 821, 827 (2012).

222. Hosanna-Tabor, 132 S. Ct. at 702. The Puritans enacted the Massachusetts Body of Liberties through the General Court of the Commonwealth of Massachusetts Bay in 1641, which guarantees the members of the Puritan congregations the right to meet and select their own ministers. The Massachusetts Body of Liberties, 1641, WINTHROP SOCIETY (2012), http://www.winthropociety.com/liberties.php. Article 95, part four of the document states that “[e]very Church hath free liberty of admission, recommendation, dismissal, and expulsion, or disposal of their officers, and members, upon due cause, with free exercise of the discipline and censures of Christ according to the rules of his word.” Id.


224. Hosanna-Tabor, 132 S. Ct. at 703. The Court’s explanation of Early American religious history is, at best, overly narrow. Scholars have argued that early Americans were wary of all institutional power, including ecclesiastical authority. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 180 (2003). Americans were not willing to trade the tyranny of England for the tyranny of church rule by giving religion excessive freedom, and therefore the founders
Based on the history of the First Amendment and the prior holdings in *Jones* and *Kedroff*, the Court held that the courts of appeals were correct in identifying and applying a ministerial exception. The Court reasoned that its holdings in *Jones* and *Kedroff* support the proposition that religious organizations should be independent from secular control and government intervention. Again, the Court’s decision mimicked the structure and logic of *Hosanna-Tabor*’s brief. First, the Court affirmed that *Watson* supports a Church’s right to decide issues of governance independent of state interference. Second, the Court found that the *Kedroff* court recognized the “freedom to select the clergy where no improper methods of choice are proven.” Based on these two principles, the Court held that

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225. *Hosanna-Tabor*, 132 S. Ct. at 706. The Court also roots its understanding of the ministerial exception in the writings of James Madison, who found that the “scrupulous policy of the Constitution in guarding against a political interference with religious affairs prevented the government from rendering an opinion of the selection of ecclesiastical individuals.” *Id.* at 703 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806) in 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63 (1909)); see Dunlap, *supra* note 3, at 2021-23 (discussing the importance of the writings of James Madison in the history of the relationship between religion and government).

226. *Hosanna-Tabor*, 132 S. Ct. at 704. The Court quotes the usually cited passages in *Kedroff* and *Serbian* that clearly demonstrate the Court’s deference to hierarchical religious organizations. *Id.* (citing *Serbian* E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976); *Kedroff* v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952). Almost every court that deals with the ministerial exception includes this part from *Kedroff* in its analysis: *Watson* radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religions against state interference. *Kedroff*, 344 U.S. at 116.

227. Compare *Hosanna-Tabor*, 132 S. Ct. at 704-05 (discussing the importance of the *Watson*, *Kedroff*, and *Serbian* decisions), with Brief for Petitioner, *supra* note 135, at 19-26 (discussing how *Kedroff* and *Serbian* demonstrate that the free exercise clause establishes a church’s right to select its own clergy).


229. *Hosanna-Tabor*, 132 S. Ct. at 704-05 (citing *Kedroff*, 344 U.S. at 116). This quote poses a difficult problem, because the question then becomes, what constitutes an “improper method” of choosing a minister? The notes in *Kedroff* give only a broad suggestion to solve this problem. The Court quotes *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-17 (1929), in support of its assertion:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations. *Kedroff*, 344 U.S. at 116 n.23. This suggests that “fraud, collusion, or arbitrariness” constitute the “improper methods” in *Kedroff*, but no other decision has addressed the matter. See *id.* at 116.
applying employment laws such as Title VII to religious employees impinges upon more than just a church’s employment decisions it improperly infringes upon the church’s free exercise rights.230

Next, the Court turned to Perich and EEOC’s argument that the right to free association is enough to protect churches while still allowing church employees to be protected by Title VII and the ADA.231 The Court called Perich’s argument that secular and religious schools have the same free association rights “untenable,” because the existence alone of the religion clauses of the First Amendment is enough to justify treating religious organizations differently and supports the position that a religious organization has different rights to select its members than a secular organization.232

Finally, the Court addressed Perich and EEOC’s contention that the decision in Smith precludes the recognition of a ministerial exception.233 The Court found that the ADA’s retaliation provision was a valid, neutral law but dispatched this argument by simply saying, “A church’s selection of its ministers is unlike an individual’s ingestion of peyote.”234 The Court did not explicitly state how the two situations are distinguishable but suggested that the difference stems from the fact that Perich’s claim relates to an internal church decision that affected the mission of the church itself.235 Therefore, in just a few pages, the Court dismissed every argument that Perich and the EEOC made in support of their case.


231. Hosanna-Tabor, 132 S. Ct. at 706; Brief for Respondent Cheryl Perich, supra note 132, at 31; Brief for Federal Respondent, supra note 199. See supra Part II.C.2.

232. Hosanna-Tabor, 132 S. Ct. at 706; Laycock, supra note 17, at 861 (describing the Court’s rejection of Perich’s arguments).

233. Hosanna-Tabor, 132 S. Ct. at 706; Brief for Respondent Cheryl Perich, supra note 132, at 42-43. The Court found that the “contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.” Hosanna-Tabor, 132 S. Ct. at 706. The Supreme Court’s holding regarding Smith supports what the lower courts had been doing since Smith was handed down, so it is not particularly surprising that the Court found that the ministerial exception had survived Smith. See Combs v. Central Texas Annual Conference of United Methodist Church, 173 F.3d 343, 348-49 (emphasizing that Smith relates to individual free exercise and “the Supreme Court has shown a particular reluctance to interfere with a church’s selection of its own clergy”); McConnell, The Problem, supra note 105 (arguing that Smith reaffirmed a church’s autonomy regarding internal governance with the phrase “religious authority”).

234. Hosanna-Tabor, 132 S. Ct. at 706. The Court contrasted Perich’s case with Smith, stating that “Smith involved government regulation of only outward physical acts,” id., whereas “[t]he present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself.” Id.

235. Hosanna-Tabor, 132 S. Ct. at 706. Several scholars, most notably Professor Leslie C. Griffin, have questioned the Court’s reasoning regarding its choice to distinguish Perich’s case from Smith. Professor Griffin writes:

This is a strange argument in the context of the ministerial exception. In terms of religious freedom, the ingestion of peyote is a profound religious ritual with long American history predating the Constitution. In sharp contrast, the ministerial
In the next part of the decision, the Court turned to the question of whether the ministerial exception applies to Perich’s case. First, the Court agreed with the lower courts that the exception is not limited to ordained clergy. Then, most importantly, the Court declined to adopt any particular method of determining who is subject to the exception. Instead of relying on the reasoning of a lower court or developing its own analytical tool, the Court simply stated, “It is enough for us to conclude, in our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”

The Court focused on Perich’s title, much like the district court did, finding that the call distinguished her as a religious figure as opposed to the lay teachers. Because the congregation selected called teachers, the Court found Perich did have a role in conveying the church’s message and mission. Additionally, the Court noted that Perich also held herself out to be covered by the exception involves cases where employees allege disability discrimination, retaliation, pregnancy discrimination, sexual harassment, hostile work environment, unequal pay, race discrimination, gender discrimination, and other civil rights violations. The Court asserts that it rightly distinguishes between the “outward physical acts” of Smith and the “internal church decisions that affect the faith and mission of the church itself” in Hosanna-Tabor. That distinction cannot hold water. What could “affect the faith and mission of the church itself” more than punishing individuals like Smith for participation in a religious ritual? And what “internal church decision that affects the faith and mission of the church itself” is involved in the firing of a disabled employee in a church that does not preach disabilities discrimination?

Leslie C. Griffin, The Sins of Hosanna-Tabor, 88 Ind. L.J 981, 993 (2013). Griffin goes on to argue that the Court’s distinction “collapses” when it becomes clear that it applies to a situation in Perich’s claim that does not even involve a religious dispute between the parties. Id. at 993-94.

Hosanna-Tabor, 132 S. Ct. at 707. Because the primary duties test is the most common test in the courts of appeal, it seemed likely that the Court would choose to apply it, even if it went with a more conservative approach applied in Clapper. See Note, The Ministerial Exception to Title VII, supra note 15, at 1778. However, the Court decided to forego choosing any particular test. Hosanna-Tabor, 132 S. Ct. at 707.

Hosanna-Tabor, 132 S. Ct. at 707; Laycock, supra note 17, at 848; Griffin, supra note 235, at 1009 (“All the justices were concerned that ‘minister’ be interpreted broadly enough to include non-Christian clergy of whatever title, as well as denominations that lack official clergy.”).

Hosanna-Tabor, 132 S. Ct. at 707; Griffin, supra note 235, at 1009 (finding that the justices “provided minimal guidance for future cases . . .” but rather “emphasized the facts that Hosanna-Tabor considered Perich to be a minister as well as that Perich accepted the formal call to religious service and claimed a minister’s housing allowance on her tax returns”).

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

Id. The Court agreed with the district court’s holding that the title suggests that Hosanna-Tabor valued called teachers as ministers. See EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 891 (E.D. Mich. 2008) (“That Hosanna-Tabor distinguishes between ‘lay’ and ‘called’ teachers by awarding the commissioned minister title suggests that the school values the latter employees as ministerial even if some courts would not.”). The Supreme Court found that “Hosanna-Tabor held out Perich as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a ‘diploma of vocation’ according her the title ‘Minister of Religion, Commissioned.’” Hosanna-Tabor, 132 S. Ct. at 707.

Hosanna-Tabor, 132 S. Ct. at 707; Griffin, supra note 235, at 1009.
community as a minister by claiming a housing allowance for ministers on her taxes.\footnote{242} Therefore, the Court concluded that she was a minister.

After concluding that she was a minister, the Court went on to address the reasons that the Sixth Circuit decision was incorrect.\footnote{243} The Court found three errors in the Sixth Circuit's decision.\footnote{244} First, the Court reasoned that the appellate court did not give enough weight to Perich's title.\footnote{245} The Court explained that, by ignoring Perich's title, the Sixth Circuit wrongly ignored the training and appointment process that a called teacher went through.\footnote{246} Second, the Court held that the Sixth Circuit gave too much weight to the fact that lay and called teachers performed the same functions.\footnote{247} The Court reasoned that the fact that secular teachers had the same duties as religious teachers should not be dispositive.\footnote{248}

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\footnote{242} Hosanna-Tabor, 132 S. Ct. at 708. The Court's choice to look at the financial benefit the plaintiff received as a result of her involvement with the church is analogous to the Clapper court's choice to look at the percent of the plaintiff's salary that was paid from the church's tithes. See Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998). In Clapper, the plaintiff urged the court to find that he was not a minister because only thirty percent of his salary came from the church. \textit{Id}. However, the court chose to use that fact to support its holding that he was a minister. \textit{Id}. The Court found that the financial benefit he received because of his relationship with the church demonstrated that his employment was related to the spiritual functioning of the church and therefore should be protected by the ministerial exception. \textit{Id}.

\footnote{243} Hosanna-Tabor, 132 S. Ct. at 708.

\footnote{244} \textit{Id}. These three errors further confuse the issue of who should be designated a minister, because they neither provide a new method of defining a minister nor rely on any previous test. See Griffin, supra note 235, at 1016 ("The test of who qualifies as a minister is vague enough that courts will continue to engage in theological discussion to resolve the controversy.").

\footnote{245} Hosanna-Tabor, 132 S. Ct. at 709. The Court agreed with the holding in the district court that Perich's title was a key point in determining that she was a minister. See Hosanna-Tabor, 582 F. Supp. 2d. at 891. Both courts agreed that a title in itself does not make an individual a minister, but is an important factor in determining what that person's true role within the organization was. See \textit{id}; Hosanna-Tabor, 132 S. Ct. at 709.

\footnote{246} Hosanna-Tabor, 132 S. Ct. at 709. Again, the Supreme Court's reasoning mimicked that of the district court in finding that Perich's title was important because it was a sign of her religious commitment and the religious training she received. See \textit{id}; Hosanna-Tabor, 582 F. Supp. 2d. at 891. Both the Supreme Court and district court went into great detail in their analyses of why the title of commissioned minister was important. The district court found that, "[o]n the whole, the commissioned minister certificate in this case represents a give-and-take relationship overseen by the Lutheran Church-Missouri Synod. In exchange for completing additional classes in Lutheran theology and obtaining the approval of a voting congregation, teachers are awarded the various employment benefits of being "called."" Hosanna-Tabor, 582 F. Supp. 2d. at 891. The Supreme Court found that Perich's title "reflected a significant degree of religious training followed by a formal process of commissioning." Hosanna-Tabor, 132 S. Ct. at 707. The Court stressed that "[i]t took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach." \textit{Id}.

\footnote{247} Hosanna-Tabor, 132 S. Ct. at 709. This analysis by the Supreme Court is, perhaps, their least instructive in the entire decision. In admonishing the Sixth Circuit, the Court reasons:

\textit{We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But, though relevant, it cannot be dispositive that others not formally recognized by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.}
Third, the Court criticized the Sixth Circuit decision for placing too much emphasis on Perich’s secular duties. Because even ordained clergy can have secular duties, the Court found that it was wrong to find that Perich was not a minister based on the daily time spent on secular tasks. The Court found that determining whether or not an employee is a minister cannot be “resolved by a stopwatch.” However, in a confusing turn, the Court still found that “the amount of time an employee spends on particular activities is relevant,” thereby making unclear whether they were

Id.

248. *Hosanna-Tabor*, 132 S. Ct. at 709. It is not clear whether the fact that lay and called teachers performed the same duties was dispositive in the Sixth Circuit’s decision. The Sixth Circuit court primarily relied on the fact that Perich spent most of her day teaching secular subjects. See EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 781 (6th Cir. 2010). The Sixth Circuit held that “it is clear from the record that Perich’s primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran Church relied on Perich as the primary means to indoctrinate its faithful into its theology.” *Id.* The Sixth Circuit relied on a variety of factors in coming to its decision, not just the fact that Perich performed the same duties as a lay teacher as she did as a called teacher. *Id.*

249. *Hosanna-Tabor*, 132 S. Ct. at 709. With this admonition, the Court essentially invalidates the primary duties analysis that focuses on quantitative analysis that was used in cases like Redhead. See *id.*; Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (finding that a teacher was not a minister when she taught only one hour of Bible study each day and attended religious ceremonies with students once per year).


251. *Hosanna-Tabor*, 132 S. Ct. at 709. The Court found:

It is true that her religious duties consumed only 45 minutes of each workday, and that the rest of her day was devoted to teaching secular subjects. The EEOC regards this as conclusive, contending that any ministerial exception “should be limited to those employees who perform exclusively religious functions.” We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation’s finances, supervising purely secular personnel, and overseeing the upkeep of facilities. Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions as largely determinative. *Id.* (quoting Brief for Federal Respondent, *supra* note 199, at 51). Again, here the Court uses language very similar to that in *Hosanna-Tabor’s* brief when applying the “stop-watch” metaphor. *Id.;* see Brief for Petitioner, *supra* note 135, at 38. In its discussion on why it believed the Sixth Circuit was wrong, and why Perich should be considered a minister, *Hosanna-Tabor* reasoned that “the Sixth Circuit counted minutes on the clock.” Brief for Petitioner, *supra* note 135, at 38. Additionally, the brief stated, “The clock-driven approach also disregards far more probative evidence of Perich’s importance to the Church.” *Id.*

252. *Hosanna-Tabor*, 132 S. Ct. at 709. When suggesting the problems of the “stop-watch” approach to the Court in its brief, *Hosanna-Tabor* relies on *Clapper* to suggest that there should be both qualitative and quantitative analyses. Brief for Petitioner, *supra* note 135, at 38 (citing *Clapper* v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7* (4th Cir. Dec. 29, 1998)). If the Court accepted that the “stop-watch” analysis was flawed, as suggested by *Hosanna-Tabor*, it is possible that the Court was also persuaded by *Clapper*’s use of both qualitative and
accepting or rejecting a primary duties analysis.\textsuperscript{253} After rejecting much of the Sixth Circuit’s analysis, the Court concluded that all of the factors the appellate court considered were still valid but should not be considered in isolation without recognizing the nature of the religious functions performed.\textsuperscript{254} Ultimately, the Court clearly recognized the ministerial exception but gave no real guidance as to its application to individuals who are not ordained members of the clergy.\textsuperscript{255}

4. Justice Thomas’s Concurrence

In his concurrence, Justice Thomas argued for a deferential definition of “minister” and took the majority’s support of church autonomy even further.\textsuperscript{256} Thomas argued that the religion clauses of the First Amendment require deference to a church’s good-faith understanding of who qualifies as a minister.\textsuperscript{257} If a court could second-guess a church’s determination of who qualifies as a minister, Thomas reasoned, then a religious organization’s right to choose its ministers would be hollow.\textsuperscript{258} Without giving deference to a religious organization’s own understanding of who is

\textsuperscript{253} It seems likely that the Court was suggesting that it favors the more moderate primary duties analysis put forth in Clapper over the Redhead line of cases, which employed a strict analysis of quantitative factors. See Clapper, 1998 WL 904528, at *7-8; Redhead, 440 F. Supp. 2d at 221.

\textsuperscript{254} Compare Hosanna-Tabor, 132 S. Ct. at 708-09 (describing title, time spent on religious functions, and comparison of the position with secular employees as factors to consider in deciding whether Perich was a minister), with EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780-81 (6th Cir. 2010) (considering the importance of Perich’s title, time spent on religious functions, and comparing her with other secular employees).

\textsuperscript{255} Hosanna-Tabor, 132 S. Ct. at 708-09; Griffin, supra note 235, at 1010 (“With Hosanna-Tabor limited to its facts, the trial courts will still struggle with an eminently theological question of church ministry.”).

\textsuperscript{256} Griffin, supra note 235, at 1009.

\textsuperscript{257} Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring). It is clear from his dissent that Justice Thomas accepted Hosanna-Tabor’s reasoning that the Church is entitled to deference on questions of who is or is not a minister. See Brief for Petitioner, supra note 135, at 48-50. Hosanna-Tabor relied on precedent in freedom of association cases that established that courts should give deference to an association’s understanding of what would impair its expression. Id. (citing Boy Scouts v. Dale, 530 U.S. 640, 653 (2000)). In its brief, Hosanna-Tabor wrote:

The Court need not investigate the issues of Lutheran theology raised by Perich’s attempts to deny the religious significance of her duties, her call, and her status as a commissioned minister. Neither should it resolve all those theological issues against the Church by simply ignoring them. Rather, it should defer to the religious authorities that both sides acknowledged because the dispute arose.

Id.

\textsuperscript{258} Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring). Justice Thomas also suggests that if courts could overturn a church’s determination of who qualifies as a minister, then religious groups might feel compelled to change their own definition of a minister based on judicial holdings in order to avoid liability. Id. Justice Thomas considered the possibility that a Church would change any hint of its theology in order to fit a court’s holding to be an egregious violation of the First Amendment. Id.
a minister, courts risk becoming embroiled in a question that is essentially religious in nature. Therefore, Justice Thomas would have based his determination of Perich’s status totally on Hosanna-Tabor’s understanding of her role as a called teacher.

5. Justice Alito’s and Justice Kagan’s Concurrence

In their concurrence, Justices Alito and Kagan revised the primary duties test by advocating for a definition of minister that is flexible enough to include a variety of religions and that focuses on the function performed by employees of religious institutions. Alito and Kagan proposed that the ministerial exception should apply to “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.” They reasoned that a ministerial exception should be tailored to protect the freedom of religious groups to engage in their most essential religious functions, such as worship and communicating the faith, and therefore should focus on employees who are essential to these key functions. Based on this set of factors, Alito and Kagan found that Perich should be identified as a minister
because she played an important role in carrying out the church’s mission and spreading its message.  

III. ANALYSIS

The Court’s decision created significant problems by undermining the primary duties test and by failing to address the First Amendment issues inherent in applying the ministerial exception. First, this Part will focus on the Court’s apparent destruction of the primary duties test. Second, this Part will describe how the Court’s decision did nothing to address the issues of excessive entanglement with religion that identifying ministers creates. Third, this Part will propose an alternative way of applying the ministerial exception that avoids these problems.

A. The Court’s Decision Seriously Undermines the Primary Duties Test and Fails to Provide Adequate Guidance to Lower Courts

The Court’s decision in Hosanna-Tabor did nothing to solve tremendous confusion in the lower courts regarding the definition of a minister for the purposes of applying the ministerial exception. The decision recognized a concept that every federal appellate court had already accepted yet ignored the problem that was most clearly outlined in Hosanna-Tabor’s Petition for Certiorari. Supporters of the ministerial exception viewed this decision as a decisive victory for religious liberty, yet it is not clear whether anything will change in the lower courts. Because the Court declined to outline a clear test for identifying a minister, the lower courts are still without sufficient guidance.


265. Griffin, supra note 235, at 1009 (describing the confusion the decision is likely to cause and stating that “[f]ollowing these definitions, it is possible that some past ministerial exception cases were wrongly dismissed and that some limited future victories await plaintiffs in similar circumstances,” but that “the Court’s new test may cover some employees, especially teachers, who were previously allowed to sue”).

266. Laycock, supra note 17, at 846; Mathues, supra note 11.

267. Petition for Writ of Certiorari, supra note 178.

268. Laycock, supra note 17, at 862 (“For now, we have a ringing and unanimous reaffirmation of the liberty of religious organizations to control their own message and select their own messengers.”); Chopko & Parker, supra note 58, at 299 (“[D]espite its vigorous pronouncement of First Amendment rights for some classes of claims and claimants, the consequences for churches of unraveling and clarifying the reach of Hosanna-Tabor could be substantial.”).

269. Griffin, supra note 235, at 1009.
In its Petition for Certiorari, Hosanna-Tabor argued that the primary reason for granting certiorari was the "sharp and acknowledged conflict over what legal standard controls the boundaries of the ministerial exception."270 The Petition particularly focused on the confusion regarding teachers in parochial schools.271 With this in mind, many expected the Court to tackle this question272 and thus were surprised when the Court declined to delineate a test for identifying a minister.273 However, despite the Court’s assertion that it was not identifying a test, the decision did call into question the validity of the most widely applied test, the primary duties test.274 The Supreme Court’s decision created more confusion by implying that the primary duties test is invalid.

In its analysis of the errors the Sixth Circuit made, the Court does not explicitly say that the primary duties test is invalid, but its discussion attacks many of the important facets of that test. First, the Supreme Court seemed to invalidate the core of the primary duties test: looking at the

270. Petition for Writ of Certiorari, supra note 178, at 10-11. Hosanna-Tabor’s petition stated: [T]welve federal circuits have recognized the “ministerial exception.” The ministerial exception bars lawsuits that interfere in the relationship between a religious organization and employees who perform religious functions—most obviously, lawsuits seeking to compel a religious organization to reinstate such an employee or seeking to impose monetary liability for the selection of such employees. . . . Based on this principle, every circuit has agreed that the ministerial exception bars most lawsuits between a religious organization and its leaders. Every circuit has also agreed that the ministerial exception extends beyond formally designated “ministers” to include other employees who play an important religious role in the organization. And all eleven circuits to consider the question have agreed that the ministerial exception survives this Court’s holding in Employment Division v. Smith . . . . But the agreement ends there. Federal circuits are in sharp and acknowledged conflict over what legal standard controls the boundaries of the ministerial exception, and specifically over the “primary duties” test used by the Sixth Circuit here. The conflict has produced directly conflicting results in factually indistinguishable cases, and is widely recognized and firmly entrenched. This case presents an ideal vehicle for resolving the split and providing guidance on an important constitutional question.

Id. Hosanna-Tabor’s Petition bases its entire reason for granting certiorari on the confusion regarding the definition of a minister. See id.

271. Petition for Writ of Certiorari, supra note 178, at 10-11. The confusion over the application of the exception to teachers in parochial schools is particularly well documented. See generally Mathues, supra note 11.

272. See Caroline Mala Corbin, The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. Colloquy 96, 106-08 (2011) (speculating that the Court’s decision will need to clearly address the question of why Perich is or is not a minister); Brad Turner, Its My Church and I Can Retaliate if I Want to: Hosanna-Tabor and the Future of the Ministerial Exception, 7 DUKE J. CONST. L. & PUB. POL’y 21, 34 (2011) (theorizing that the Court will uphold the primary duties test and further clarify its application to Perich’s situation).

273. Griffin, supra note 235, at 1006, 1009 (arguing that after the Court’s decision, the issue of identifying a minister remains “problematic” and the Justices provided “minimal guidance for future cases”).

274. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) (applying a hybrid analysis of both quantitative and qualitative factors different than a traditional primary duties analysis); see also Petition for Writ of Certiorari, supra note 178, at 11 (stating that the primary duties test is applied by the Third, Fourth, Sixth, and D.C. Circuits).
actual functions of the position rather than the title of the position given by the employer.\textsuperscript{275} Bound by the primary duties analysis, the Sixth Circuit found that "the title of commissioned minister does not transform the primary duties of these called teachers from secular in nature to religious in nature."\textsuperscript{276} In the primary duties analysis, a court is encouraged to look past a church's designation and objectively identify the individual's actual function.\textsuperscript{277} However, the Supreme Court held that the Sixth Circuit was wrong to focus on Perich's actual duties.\textsuperscript{278} Specifically, the Court criticized the Sixth Circuit's analysis for failing to see "any relevance" in Perich's title of Commissioned Minister.\textsuperscript{279} Accordingly, the Court found her title to be an important factor in determining that she was a minister.\textsuperscript{280} Therefore, the Supreme Court called into question one of the hallmarks of the primary duties test: looking beyond a church's designation to the actual duties performed by the employee.\textsuperscript{281}

Second, the Supreme Court also seemed to invalidate the primary duties test's focus on the nature of secular duties of the position by criticizing the Sixth Circuit's decision to compare Perich's work to that of secular teachers. The Court reasoned that the Sixth Circuit was wrong to focus on the fact that lay teachers and called teachers performed the same

\textsuperscript{275} Hosanna-Tabor, 132 S. Ct. at 709. Cases applying the primary duties analysis look beyond the title of the individual in question and analyze the actual tasks performed. Without this strategy, it would be unlikely that courts would find teachers or administrative staff who, unlike Perich, have no religious title to be ministers. \textit{See} Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (finding that a church's secular press secretary was a minister); Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (finding that a teacher, without special religious title or commission, was a minister).

\textsuperscript{276} EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780-81 (6th Cir. 2010).

\textsuperscript{277} Id; \textit{see also} EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 285 (5th Cir. 1981) (holding that employees who were considered ministers by the seminary are not ministers for the purposes of the exception).

\textsuperscript{278} Hosanna-Tabor, 132 S. Ct. at 709. This focus on the title of the employee is particularly problematic for the Court because it would invalidate a line of cases that deemed Catholic women ministers for purposes of the exception. If title were a key part of the exception, then it would be nearly impossible for women to ever be "ministers" in Catholic organizations. \textit{See} Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) (holding non-ordained female chaplain is a minister); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003) (holding female Catholic communications director is a minister); Pardue v. Center City Consortium Sch. of the Archdiocese of Washington, Inc., 875 A.2d 669 (D.C. 2005) (holding a female school principal was a minister).

\textsuperscript{279} Hosanna-Tabor, 132 S. Ct. at 709. This may be an overstatement of the Sixth Circuit's analysis. The court did analyze the importance of Perich's title but found that the court's analysis was bound by the primary duties test that required them to look past the title to her actual daily tasks and "primary functions" within the school. Hosanna-Tabor, 597 F.3d at 781.

\textsuperscript{280} Hosanna-Tabor, 132 S. Ct. at 709. The Supreme Court seems to agree with the district court's understanding of the importance of Perich's title. \textit{See} EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 891 (E.D. Mich. 2008).

\textsuperscript{281} Note, \textit{The Ministerial Exception to Title VII}, supra note 15, at 1779 ("Courts applying the primary duties test scrutinize an employee's job duties and assess the spiritual significance of those duties in relation to the church's religious mission.").
duties and to place an emphasis on the amount of time that Perich spent on her secular duties. In applying the primary duties analysis, the Sixth Circuit used the similarities between the duties of called and lay teachers to demonstrate that Perich’s duties were not religious in nature. However, the Court held that the Sixth Circuit was wrong to compare the two positions, even though it admitted that the information was “relevant.” Problematically, one of the most important features of the primary duties test is a judicial analysis of the nature of the activities performed, and therefore it is difficult to imagine how a court could perform this analysis without comparing Perich’s duties to those of other employees or religious personnel.

The Court also found the Sixth Circuit’s quantitative analysis of Perich’s duties invalid. The Court reasoned that the Sixth Circuit placed too much emphasis on Perich’s performance of secular duties. However, it would be very challenging for a court to perform a primary duties analysis without a significant quantitative analysis of whether the performance of secular duties outweighed the performance of religious

282. Hosanna-Tabor, 132 S. Ct. at 709; see discussion supra notes 247, 248.

283. Hosanna-Tabor, 597 F.3d at 781. The Supreme Court states that the Sixth Circuit found the comparison between called and lay teachers “dispositive,” Hosanna-Tabor, 132 S. Ct at 708, but the Sixth Circuit’s opinion weighs a variety of factors and only mentions the comparison briefly among other considerations. See Hosanna-Tabor, 597 F.3d at 781. The Sixth Circuit, applying the primary duties test, found that the fact that called and lay teachers performed identical functions to be important along with the fact that the church did not rely on Perich as the primary means of spreading its faith. Hosanna-Tabor, 597 F.3d at 781.

284. Hosanna-Tabor, 132 S. Ct. at 709. This statement is particularly baffling, because the Court does not further clarify why it is relevant. The decision merely finds, “But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.” Id. This factor was clearly relevant, yet not dispositive, in the Sixth Circuit’s decision, and therefore it is unclear why the Court chooses to draw a distinction between its position and the lower court’s position on this point. See id.; Hosanna-Tabor, 597 F.3d at 781.

285. Note, The Ministerial Exception to Title VII, supra note 15, at 1779. For examples of courts applying this type of analysis on teachers, see Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528 (4th Cir. Dec. 29, 1998) (finding that a teacher was a minister because he led students in prayer). See also Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990) (finding that teachers who integrated biblical material into secular subjects should still be considered lay teachers for the purposes of the ministerial exception); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a church-operated school do not function as ministerial employees); Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (finding that teacher was not a minister because she taught only one hour of religious material daily); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (finding that even though a teacher was a catechist, the teacher’s main responsibility was teaching secular subjects). Each case applies the test slightly differently, but each analyzes the individual’s function and duties within the religious organization.


287. Id.
duties in the employee’s day.\textsuperscript{288} It is possible that the Court is suggesting lower courts perform a \textit{Clapper} type analysis that looks primarily to the qualitative characteristics of the school and analyzes how the teacher fits within the religious mission of the school.\textsuperscript{289} However, based on other aspects of the Court’s analysis, it remains unclear how the Court would have preferred the appellate court to determine the nature of Perich’s activities.

Furthermore, the Court’s unwillingness to adopt a “rigid” formula for identifying a minister may also suggest it does not support the primary duties test.\textsuperscript{290} Cases rejecting the test have often referred to it as “too rigid,” or “arbitrary,” which may imply that the Court is siding with those decisions in its choice not to accept the test.\textsuperscript{291} Therefore, whether the reference was purposeful or not, the Court has clearly decided to avoid applying the primary duties test.

\textbf{B. The Court’s Decision May Lead to Excessive Entanglement With Religion}

Although the potential confusion the Court’s decision may create is in itself a serious issue,\textsuperscript{292} the lack of guidance could create even more significant constitutional problems. The Court’s failure to resolve the confusion over the definition of minister may lead to an increase in excessive entanglement with religion in violation of the Establishment Clause by courts attempting to apply the Supreme Court’s reasoning.\textsuperscript{293} In

\textsuperscript{288} Even when a court performs a substantial qualitative analysis of the employee’s duties, the court still must look to the amount of time spent on particular duties. In \textit{Clapper}, the court applied a mixed analysis that looked to both the amount of time spent on the activities and how those activities related to the overall religious mission of the school. \textit{See Clapper}, 1998 WL 904528, at \textsuperscript{*7}. Even though the court in \textit{Clapper} found that the most important factor in considering whether the teacher was a minister was the type of work he did, they still noted that he spent daily time in worship and Bible study with his students. \textit{Id.} Most importantly, the court implied that the reason he was a minister was because every minute he spent with his students was religious because he was charged with being a Christian role model to his students and was asked by the school to integrate religion into every facet of his day. \textit{Id.} Therefore, even a court professing to apply a qualitative primary duties analysis still fell back on a quantitative analysis.

\textsuperscript{289} \textit{See Clapper}, 1998 WL 904528, at \textsuperscript{*7}. This type of analysis would allow courts to keep the primary duties analysis alive, while still staying away from the “stop-watch” type analysis the Court found too narrow \textit{Hosanna-Tabor}, 132 S. Ct. at 709.

\textsuperscript{290} \textit{Hosanna-Tabor}, 132 S. Ct. at 707 (noting that the court is hesitant to adopt a “rigid” formula).

\textsuperscript{291} \textit{See Alcazar v. Corp. of the Catholic Archbishop}, 598 F.3d 668, 675 (9th Cir. 2010) (calling the primary duties test “arbitrary”); \textit{Rweyemamu v. Cote}, 520 F.3d 198, 208 (2d Cir. 2008) (criticizing the primary duties test as “too rigid”).

\textsuperscript{292} \textit{See Petition for Writ of Certiorari}, \textit{supra} note 178, at 10-11; \textit{Griffin, supra} note 235, at 1006, 1009 (arguing that after the Court’s decision, the issue of identifying a minister remains “problematic” and the Justices provided “minimal guidance for future cases”).

\textsuperscript{293} For a discussion of relationships between the Establishment Clause and the ministerial exception see \textit{supra} Part II.B.1.
place of the primary duties test, the Court has left the lower courts with a piecemeal, case-by-case analysis of a plaintiff’s role in a religious organization.\textsuperscript{294} To follow the Court’s precedent, lower courts will have to perform the same sort of analysis that the \textit{Hosanna-Tabor} Court performed by delving deeply into issues of Lutheran theology and the role of teachers in that theology; such analyses risk serious entanglement with religion.\textsuperscript{295} Accordingly, this decision will not improve any of the issues of excessive entanglement that have plagued the lower courts.\textsuperscript{296} Without providing new guidance, courts must still delve into religious beliefs and doctrine and make a judgment as to whether the employee plays an important role in worship or spreading the faith.\textsuperscript{297} The Court’s decision seems to encourage this type of analysis with its holding that a qualitative analysis of the employee’s duties is necessary to discern the “nature of the religious function performed.”\textsuperscript{298} Therefore, the Court’s means of identifying a

\textsuperscript{294} See Petition for Writ of Certiorari, \textit{supra} note 178, at 12 (stating that circuits that have not accepted the primary duties test perform a case-by-case analysis); Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1244 (10th Cir. 2010) (applying the exception to a director of religious formation for a Catholic diocese); Scharon v. St. Luke’s Episcopal Presbyterian Hosp., 929 F.2d 360, 362-63 (8th Cir. 1991) (finding that the court would “consider these situations on a case-by-case basis”); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) (applying the exception to a pastor of a church).

\textsuperscript{295} Corbin, \textit{Above the Law}, \textit{supra} note 4, at 2009 (pointing out that many courts and commentators believe that adjudicating cases between churches and ministers creates significant substantive entanglement). See Bagni, \textit{supra} note 36 (describing possible ways to avoid entanglement while still protecting employees of religious organizations). In its analysis of Perich’s importance to Hosanna-Tabor’s spiritual mission, the Court had to delve deeply into issues of Lutheran theology and the role of teachers in that theology. Lyle Denniston, \textit{Argument Recap: Blurry Line Between Church and State}, SCOTUSBLOG (Oct. 5, 2011, 3:41 PM), http://www.scotusblog.com/2011/10/argument-recap-blurry-line-between-church-and-state/. This is particularly obvious in the amount of theology presented to the Court in the Amicus briefs. The Lutheran Church-Missouri Synod submitted an Amicus brief that was almost entirely theological justifications for Perich’s role as a minister. See Brief of the Lutheran Church-Missouri Synod as Amicus Curiae in Support of Petitioner, \textit{supra} note 134, at 7. In the Court’s decision, several significant paragraphs were devoted to the importance and meaning of the title of “commissioned” minister within the Church, largely supported by the religious information the Lutheran Church provided in its Amicus brief. See \textit{Hosanna-Tabor}, 132 S. Ct. at 707-08.

\textsuperscript{296} See Corbin, \textit{Above the Law}, \textit{supra} note 4, at 2026 (arguing that when applying the ministerial exception, courts are directly deciding questions of religious doctrine).

\textsuperscript{297} See id. Under the current analysis, courts have had to decide issues ranging from the role of music in religious life to the religious significance of daily prayer in schools. See Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006) (holding that it was improper for a court to involve itself in determining whether music was a valuable part of religious worship); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 804-05 (4th Cir. 2000) (finding the church’s music director was a minister).

\textsuperscript{298} \textit{Hosanna-Tabor}, 132 S. Ct. at 709. Applying the type of qualitative analysis suggested by the Court is even more problematic for issues of entanglement because, in order to determine the importance of the individual’s position, a court must first gain an understanding of the religious organization’s beliefs so that it can determine how the plaintiff fits within that scheme. For example, in \textit{Clapper}, the court looked deeply into the school’s teachings on the role of teachers in spreading the faith. See Clapper v. Chesapeake Conference of Seventh-day Adventists, No. 97-22648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998).
minister does nothing to address one of the key problems with the current analysis.

C. Religious Motivation Requirement as an Alternative Means of Applying the Ministerial Exception

In order to solve both the lack of guidance and the excessive entanglement problems, the Court could have adopted a "religious motivation" requirement. In two cases, the Ninth Circuit allowed sexual harassment cases to survive the ministerial exception when the defendant's alleged violation of an employment law was not primarily religiously motivated. This allowed the Ninth Circuit to respect the foundation of the ministerial exception while still protecting employees.

In Hosanna-Tabor, Perich was terminated because her actions violated the church’s requirement for internal dispute resolution, directly touching on matters of religious doctrine. However, in many cases, the reason for the employer’s behavior is not religious at all. Bollard v. California

299. See Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004) (finding that ordained minister could state a claim for sexual harassment because her harassment claims did not implicate issues of minister selection or church doctrine); Bollard v. Cal. Province of the Soc’y of Jesus, 196 F.3d 940 (9th Cir. 1999) (finding that application of Title VII to seminary did not trigger ministerial exception because there was no significant impact of the claim on defendant’s religious beliefs).

300. The court in Bollard still acknowledged both the Free Exercise and Establishment Clause justifications for the exception. Renee M. Williams, The Ministerial Exception and Disability Discrimination Claims, 2011 U. CHI. LEGAL F. 423, 433 (2011). Williams suggests that the Bollard court examined the plaintiff’s claims under both the Free Exercise and the Establishment Clause, yet decided that neither prevented the court from hearing the plaintiff’s sexual harassment claim:

The Bollard court examined the claim by pursuing two lines of analysis: a Free Exercise Clause rationale and an Establishment Clause rationale. With regard to the Free Exercise Clause, the court noted that certain religious interests are so strong that “no compelling state interest justifies government intrusion into the ecclesiastical sphere.” The court recognized that the “ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions.” Despite this recognition by the court, the Ninth Circuit found that, because the priest alleged sexual harassment in Bollard, any Free Exercise rationale for assertion of the ministerial exception was missing.

Id. (citing Bollard, 196 F.3d at 946). The Bollard court found that a general concern for free exercise or church autonomy could not justify applying the ministerial exception when there was no religious justification for the employment action. Bollard, 196 F.3d at 946

301. Hosanna-Tabor, 132 S. Ct. at 709; see supra Part II.C.1 (discussing Hosanna-Tabor justifications for firing Perich). Hosanna-Tabor asserted that it fired Perich because she failed to comply with the Church’s established policy of internal dispute resolution, and, by doing so, she broke trust with the Church authorities. Hosanna-Tabor, 132 S. Ct. at 700.

302. For example, in McClure, the Salvation Army provided no religious justification as to why it decided to pay female workers less than male workers. See McClure v. Salvation Army, 460 F.2d 553, 555-56 (5th Cir. 1972). Additionally, in Rayburn, the church never provided a faith-based reason for why it chose not to hire the plaintiff. See Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F. 2d 1164, 1166 (4th Cir. 1985). The church in Rayburn never denied that it chose not to hire the plaintiff because of her involvement with civil rights groups. See id. Furthermore, in DeMarco v. Holy
Province of the Society of Jesus is an excellent example of such a scenario. In this case, church superiors repeatedly sent Bollard, a novice Jesuit, pornographic materials and subjected him to unwelcome sexual advances. The Ninth Circuit held that Bollard’s suit was not barred by the ministerial exception because there was “no danger that, by allowing this suit to proceed, [the court] will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine.” The court reasoned that where the motivation for the action is purely secular, there are no potential violations of the Free Exercise or Establishment Clauses. The court relied on an analysis under the balancing test in Sherbert v. Verner to demonstrate that where the church provides no protected religious reason for its actions, the state interest in preventing harassment may trump the rights of the religious body. Additionally, the court reasoned that there was no Establishment Clause justification for applying the ministerial exception because nothing in the presentation or defense of the claims would require the court to examine religious doctrine, particularly because the Jesuits firmly deny that the alleged actions had any religious justification. The court clearly

Cross High School, the school never gave a religious justification for choosing to fire the plaintiff. See DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170 (2d Cir. 1993). All the evidence in DeMarco suggests that the school chose not to retain the plaintiff because of her age, not because of any religious concerns. See id.

303. See Bollard, 196 F.3d at 940.

304. Id. at 944. Bollard suffered this harassment between 1995 and 1996 and reported the harassment to his superiors within the Jesuit order. Id. However, his reports prompted no action by his superiors. Id. Bollard alleged that the harassment was so severe that he was forced to leave the order in 1996 before he was able to take his vows to become a priest. Id.

305. Bollard, 196 F.3d at 947. The court found:

The Free Exercise Clause rationale for protecting a church’s personnel decisions concerning its ministers is the necessity of allowing a church to choose its representatives using whatever criteria it deems relevant. That rationale does not apply here, for the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy. Because there is no protected choice rationale at issue, we intrude no further on church autonomy 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.

Id. at 947-48. The court then goes on to cite several cases in which parishioners have brought successful claims for sexual harassment against the church. Id. at 948; see Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 10 F. Supp. 2d 138 (D. Conn. 1998); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993).

306. Bollard, 196 F.3d at 947-48; see Gerratt, supra note 33, at 174 (arguing that where the church gives no religious reason for the action, the state’s interest in protecting employees wins in the Sherbert balancing test).


308. Bollard, 196 F.3d at 949-50. In cases where there is a religious justification for the hiring decision, courts often have to analyze religious beliefs, plunging themselves deeply into entangling issues of the proper application of religious doctrine. See, e.g., EEOC v. Roman Catholic Diocese of
recognized all of the important constitutional underpinnings of the ministerial exception but affirmed that when those justifications are not present, the state has a compelling interest in protecting citizens from harassment and discrimination.  

A narrow ministerial exception that looked only to the religious nature of the employment decision might alleviate the problems of entanglement and confusion in the lower courts. First, a religious motivation requirement would prevent courts from delving into the complex issue of who is or is not a minister. Such a requirement would only ask if the employment decision was motivated by a sincerely held religious belief. This would satisfy conservatives like Justice Thomas, who, in his concurrence to Hosanna-Tabor, argued that the ministerial exception would not actually protect a church’s First Amendment rights if courts did not accept the church’s designation of who is or is not a minister. Courts could accept a religious institution’s good-faith explanation of its reasons and only inquire as to the reason’s veracity in cases of blatantly misleading explanations. This would prevent courts from becoming entangled in

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309. Bollard, 196 F.3d at 948. Without a religious justification for the firing, the court found: Nothing in the character of this defense will require a jury to evaluate religious doctrine or the “reasonableness” of the religious practices followed within the Jesuit order. Instead, the jury must make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the Jesuits to prevent or correct it. The limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide ranging intrusion into sensitive religious matters.  

310. Gerratt, supra note 33, at 174; see Coon, supra note 34, at 489-91 (discussing the debate over constitutional justifications behind the ministerial exception).  

311. In conducting this type of analysis, a court could look to the religious justification for firing the individual, regardless of whether that person was a minister or not. For example, in DeMarco, the teacher was allegedly fired because of his age, even though the church never said that his age in any way related to his ability to teach or spread the faith, and there was no church position against teachers attaining a certain age. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 169 (2d Cir. 1993). This is distinguishable from Perich’s situation, in which the church clearly claimed that it had a religious justification for firing her. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012). The Sherbert balancing test allows a court to balance a compelling state interest with a religious organization’s interest in its ability to freely exercise its religion. Sherbert, 374 U.S. at 403. However, when the right to freely exercise religion is not at issue, because the church provides no religious justification for its action, it would be difficult for the church to argue that judicial involvement in their hiring and firing process impinged on their right to choose ministers freely according to the tenets of their faith. Gerratt, supra note 33, at 174.  

312. Gerratt, supra note 33, at 174.  

313. See Hosanna-Tabor, 132 S. Ct. at 710 (Thomas, J., concurring); supra Part II.C.4.  

314. For example, if an employer demonstrated a pattern of discrimination against African Americans, yet said it was because each individual was morally unfit to serve the religious organization, a court might have cause to investigate the organization’s justification further. Courts frequently perform this type of pretext analysis under the McDonnell Douglas test. See McDonnell Douglas Corp.
matters of religious doctrine. A religious motivation test would also give courts a clear test to apply consistently. Unlike the vague, multi-factor test to identify a minister outlined by the Court in Hosanna-Tabor, this test would only ask courts to identify whether the defendant religious organization had produced a religious justification for the employment action. If a court was satisfied that there was a religious justification, then the ministerial exception would bar the court from hearing the case.315 Accordingly, a religious justification test would resolve many of the issues that the Hosanna-Tabor decision has not.

As a result of Hosanna-Tabor, lower courts are in no better position to decide cases under the ministerial exception.316 Many of the factors in the primary duties test have been invalidated by the Court’s decision, leaving courts will little guidance on how to apply the ministerial exception.317 Additionally, the manner in which lower courts could apply the exception also creates some serious entanglement problems.318 The best way to escape these problems is to abandon the current formula for the ministerial exception entirely and create a test which would respect First Amendment rights while still giving employees who have been unfairly treated their day in court.

IV. FUTURE IMPACT

In Hosanna-Tabor the Supreme Court quickly dismissed what they referred to as the EEOC and Perich’s “parade of horribles” argument that the ministerial exception will unreasonably protect religious employers from employment discrimination suits.319 The Court reasoned that the exception has existed in the lower courts for many years without creating an

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315. The ministerial exception could be applied exactly as it was in Hosanna-Tabor or any equally deferential ministerial exception case once a court was satisfied that there was a religious justification for the hiring decision. See Hosanna-Tabor, 132 S. Ct. at 706; Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006) (demonstrating deference to a religious institution’s understanding of its own doctrine).

316. Griffin, supra note 235, at 1009; see supra Part III.A (discussing how the Court’s decision has not helped clear up the confusion in the lower courts).

317. See supra Part III.A (analyzing the how the Court’s repudiation of the Sixth Circuit’s reasoning has called into question the main features of the primary duties test).

318. See supra Part III.B (describing how the Court’s decision has not solved any of the previous issues with excessive entanglement with religion); see also Lund, supra note 49, at 53-54 (discussing the constitutional problems inherent in excessive inquiry into religious doctrine).

unfair barrier against employment suits. However, the Court failed to recognize the power that its affirmation of the exception may have on lower courts and on employers. This Part will first explore the change in priorities that Hosanna-Tabor represents and will analyze what this change could mean for employees of religious institutions who are now more vulnerable to discrimination. Next, this Part will discuss the impact that Hosanna-Tabor could have on the application of labor and employment laws to religious institutions.

A. Hosanna-Tabor Represents a Shift in Judicial Priorities

The Court’s ruling in Hosanna-Tabor represents a drastic shift in the prioritization of the value of anti-discrimination laws. Federal legislation and constitutional amendments have demonstrated our nation’s profound commitment to preventing and punishing discrimination in myriad situations. Extending from the Equal Protection Clause of the Fourteenth Amendment to the Genetic Information Nondiscrimination Act of 2008, Congress and the states have guaranteed protections against discrimination in a variety of circumstances. Although the Court recognized that anti-discrimination laws are important, it clearly held that an interest in religious freedom always outweighs an interest in preventing discrimination. Therefore, more than a century of national commitment to expanding anti-discrimination laws has been trumped by the Court’s decision in this case.

320. Id. The ministerial exception was first officially recognized in McClure in 1972, but church autonomy has been protected by the Court since the Watson decision in 1872. See McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Watson v. Jones, 80 U.S. 679 (1871).

321. Professor Corbin, for instance, suggests that the ministerial exception will force employees to choose between their religious calling and their civil rights. Corbin, The Irony of Hosanna-Tabor, supra note 272, at 108.


324. See Hosanna-Tabor Evengelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012) (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs and carry out their mission . . . . The church must be free to choose who will guide it on its way.”); Leslie C. Griffin, Reconsidering Free Exercise: Hosanna-Tabor v. EEOC, AM. CONSTITUTION SOC’Y BLOG (Jan. 13, 2012), http://www.acslaw.org/acsblog/reconsidering-free-exercise-hosanna-tabor-v-eeoc (“[R]eligious freedom trumps the antidiscrimination laws even when no religious dispute is at stake.”).

325. The Court’s decision has been described as a “sweeping deference to churches.” Editorial: The Ministerial Exception, N.Y. TIMES, Jan. 13, 2012, at A22.
B. The Shift in Priorities Favors Religious Institutions and May Lead to Increased Discrimination Against Employees

Not only does the Court's opinion favor religious institutions over anti-discrimination laws, the confusion it creates also benefits religious institutions.\(^{326}\) Courts were always unclear about how to apply the ministerial exception. Before *Hosanna-Tabor*, if courts struggled with applying the ministerial exception, they were still free to side with victims of discrimination.\(^{327}\) But after *Hosanna-Tabor*, courts will likely feel more pressure to side with religious employers in order to follow Supreme Court precedent.\(^{328}\) Therefore, the Court's holding has paved the way for the religious employer to win far more frequently than a plaintiff could hope to.\(^{329}\)

Based on this understanding, religious organizations and employers have lauded the decision.\(^{330}\) The way in which religious employers reacted to this decision may be indicative that religious institutions view this broad affirmation of religious liberty as a carte blanche to ignore employment laws when it comes to those they perceive to be ministerial employees. Religious groups have called the decision "a rebuke to the government," and "the greatest Supreme Court religious liberty decision in decades."\(^{331}\)

Recognizing this trend, many scholars soon began cautioning churches that

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326. By choosing not to apply a kind of balancing test, such as the *Sherbert* test, the Court is implying that there is essentially no valid, neutral law or compelling interest that would trump a religious institution's right to free exercise. *See Hosanna-Tabor*, 132 S. Ct. at 706-07 (dismissing respondent's arguments for a balancing test); *cf* Emp't Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872, 886 (1990) (finding that when the government has a compelling interest in preventing socially harmful behavior, it can outweigh the individual's right to free exercise).

327. *See DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (finding that age discrimination in the Employment Act does apply to religious institutions and it is proper for a district court to make inquiries of fact to determine whether the teacher was fired for religious or age-discriminatory reasons); Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d. 211, 221 (E.D.N.Y. 2006) (holding that ministerial exception did not foreclose teacher's pregnancy discrimination claims); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (finding that the ministerial exception did not apply because the teacher's functions were not primarily religious).

328. *See Griffin*, supra note 235, at 1010 ("If the ministerial definition is unclear, [courts] will undoubtedly do what they have done in the past: avoid any possible entanglement with religion. The best way to avoid entanglement is to dismiss a case. The ministerial rule always favors employers.").

329. *See id.*

330. Groups ranging from the Orthodox Union to the Beckett Fund for Religious Liberty applauded the decision. John H. Cushman, Jr., *Religious Groups Greet Ruling With Satisfaction*, N.Y. TIMES (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/us/hosanna-tabor-ruling-welcomed-by-religious-groups.html?_r=4&. The deputy director of the Beckett Fund's national litigation stated, "The message of today's opinion is clear: The government can't tell a church who should be teaching its religious message. This is a huge victory for religious freedom and a rebuke to the government, which was trying to regulate how churches select their ministers." *Id.*

331. Cushman, supra note 330.
Hosanna-Tabor does not remove an employer’s ethical right to treat individuals fairly. After the dust settled on the celebrations, scholars began to express concern that the holding would lead to rampant discrimination and urged churches not to abuse the right they had just been granted. Some called the consequences of this decision on basic civil liberties “alarming.” Scholars generally agree that this decision has created a class of people to which employment laws do not apply, and, most shockingly, that the class is ill-defined and fluid. Professor Caroline Mala Corbin wrote:

People who wish to serve their God should not have to choose between their calling and their civil rights. Yet, the ministerial exception essentially strips ministers of protection against discrimination based on race, sex, age, and as here, disability, and leaves them outside the shelter of the Family Medical Leave Act, Fair Labor Standards Act, and Equal Pay Act, and a host of other protective employment laws.

332. In an article written before the decision was handed down, Professor Horowitz of the University of Alabama Law School cautioned religious institutions and scholars to look beyond their side’s victory or defeat and consider the ramifications for those employees who are embroiled in these controversies, writing:

[Those who favor the ministerial exception] have a scholarly and moral obligation to think about what happens next, after the Court has (hopefully) reaffirmed the doctrine and its constitutionality. We need to do so from a perspective that acknowledges the dangers as well as the value of church autonomy: that treats churches as imperfect institutions, not saintly ones, and asks what sorts of non-legal levers—from internal debate within the church to external public criticism—might encourage churches to exercise their authority sensitively and appropriately.


333. Cushman, supra note 330 (quoting one professor’s reaction: “The freedom to make certain employment decisions without government interference leaves intact the moral obligation to act honorably, to treat employees honestly, and to make religious decisions based upon true religious belief.”). Most interestingly, even those who strongly advocated for Hosanna-Tabor cautioned churches against seeing this as a right to freely discriminate. Don Byrd, of the Baptist Joint Committee for Religious Liberty (a group that filed an amicus brief for the petitioner), cautioned before the decision even came down:

Support for a broad definition of the ministerial exception should not imply support for a broad license to discriminate with impunity. It merely stands for the proposition that sound judgment in such cases can only fall under the responsibility of the religious institution itself, as it is not proper for our courts.


334. Chopko & Parker, supra note 58, at 302.

335. See Griffin, supra note 235, at 1016 (arguing that the ministerial exception always unfairly favors employers at the peril of religious employees); Corbin, The Irony of Hosanna-Tabor, supra note 272, at 108-09.

336. See supra Part III (analyzing the likely effects of Hosanna-Tabor).

337. Corbin, The Irony of Hosanna-Tabor, supra note 272, at 108-09.
Because it is not clear who belongs in this class of individuals the Court has placed outside the protection of our most basic labor laws, religious employers may discriminate more frequently with diminished fear of legal consequences.\textsuperscript{338}

In the wake of Hosanna-Tabor, it was immediately clear that religious institutions felt that their right to select their employees, even through discriminatory means, was affirmed in this case.\textsuperscript{339} Churches understand that the Court chose to place the rights of religious institutions to select their ministers above the government’s compelling interest in protecting employees from discrimination.\textsuperscript{340} Based on this, it is possible that this ringing affirmation of church independence and power will have a significant impact on the treatment of employees and their ability to successfully litigate discrimination claims against their employers.

\textbf{CONCLUSION}

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC is a historic Supreme Court decision that affirms a church’s right to select individuals who are responsible for spreading its message without government interference. However, by refusing to address a key area of debate the Court’s decision accomplished very little. The Court did nothing to clear up the most pressing issue: how to define a minister for the purpose of applying the exception. Instead, the Court chose to list a number of factors in its decision to declare that the respondent was a minister that all

\textsuperscript{338} The cases that have been decided since Hosanna-Tabor suggest that courts are slightly more willing to find that an individual is a minister for the purposes of the exception, but too few decisions have been issued to identify a clear trend. In Herzog v. St. Peter Lutheran Church, a called teacher, who followed a career path very similar to Perich’s, sued her employer for discrimination. Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668, 669-70 (N.D. Ill. 2012). In applying the Court’s decision in Hosanna-Tabor, the first thing the district court noted was that “[i]n Hosanna-Tabor the Supreme Court declined to ‘adopt a rigid formula for deciding when an employee qualifies as a minister.’” Id. at 673 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012)). However, despite recognizing this challenge, the district court still found that the plaintiff’s case was so similar to Perich’s situation that it could properly find that this teacher was a minister. Id. at 674. The district court held that the plaintiff could not survive summary judgment. Id. The Supreme Judicial Court of Massachusetts also struggled to apply the holding of Hosanna-Tabor, but ultimately found that a part-time teacher in a Jewish school was a minister. Temple Emanuel of Newton v. Mass. Comm’n Against Discrimination, 463 Mass. 472, 473 (2012). The court found that the teacher was not a rabbi and that the record was silent as to her religious training. Id. at 486-87. Nevertheless, the court held that Hosanna-Tabor required that she be deemed a minister simply because she taught some religious subjects at a religious school. Id. Taken together, these cases suggest that courts may be forced to either closely analogize to the facts of Hosanna-Tabor when possible, or follow the permissive trend that Hosanna-Tabor started and give all religious employers the benefit of the doubt.

\textsuperscript{339} See Laycock, supra note 17; Cushman, supra note 330.

\textsuperscript{340} See Hosanna-Tabor, 132 S. Ct at 710.
but invalidated the only widely applied test to identify ministers. Thus, the lower courts are left with even less guidance in this complicated area than they had previously. It is unclear how this confusion will play out in the months and years to come, but the strong affirmation of religious liberty has certainly energized religious groups. Only time will tell if this decision will, as the Court predicted, serve to protect the free exercise of religion, or, as respondents Perich and the EEOC predicted, leave employees of religious organizations with no protection against blatant discrimination by employers.