Hosanna-Tabor and Culture Gap: A Case for Settling Church & Minister Employment Disputes through Religious Arbitration

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I. INTRODUCTION

On January 11, 2012 the Supreme Court affirmed the ministerial exception[1] which acts as an affirmative defense, effectively barring recovery for any act of discrimination committed by a religious organization against one of its employees charged with carrying out the organization's mission. The ruling bars nearly 1.7 million American citizens[2] from obtaining a legal remedy for discrimination by creating a broad exception to the antidiscrimination policy, which has dominated this country for the past forty years.[3] As a person of faith who previously served as an ordained minister,[4] I am both sympathetic to the Court's ruling which protects the autonomy and decision-making powers of religious organizations from government control and alarmed by the lack of legal recourse available to church employees. This note suggests religious arbitration as a potential middle path—a path which respects both the constitutional concerns underlying the ministerial

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[1] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). The ministerial exception acts as an affirmative defense barring recovery for any act of discrimination committed by a religious organization against one of its employees charged with carrying out the organization's mission.

[2] MICHAEL W. MCCONNELL, ET AL., RELIGION AND THE CONSTITUTION 333 (3d ed. 2011) (reporting that, in 2007 1, 691,102 Americans were employed by churches). The Hartford Institute for religion research reports that approximately 600,000 Americans are professional clergy. *Fast Facts*, THE HARTFORD INSTITUTE *available at* http://hirr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Jan. 26, 2013). The actual number of individuals covered by the ministerial exception is somewhere between these two figures depending upon how expansive the definition of functional ministers becomes. See section III, B, *infra*, for further discussion.

[3] Title VII of the Civil Rights Act, originally passed in 1964, prohibits employment discrimination based upon race, color, religion, sex, and national origin. 42 U.S.C § 2000e (2012).

[4] *See* note * *supra*.

exception and the higher ideals of our American system which strives toward equal treatment and access for all citizens under the law.

Religious arbitration is a superior alternative to the civil courts for resolving disputes between religious organizations and their employees since religious arbitration adheres to the constitutional concerns underlying the ministerial exception, while offering religious employees greater protection from discriminatory practices than is currently available through the civil courts. To support this thesis, Section II explains the constitutional concerns which restrict courts by tracing the justifications behind the ministerial exception, including the Court's rationale in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*.[5] Section III then turns to the practical difficulties that prohibit a civil court from extending justice to a religious employee who has been the victim of discrimination. Section IV highlights religious arbitration's ability to meet these twin problems by adhering to the constitutional principles underlying the ministerial exception while avoiding the practical limitations inherent in the civil courts. Section V briefly considers both the traditional objections leveled against a scheme of religious arbitration and potential responses.

II. THE MINISTERIAL EXCEPTION: HISTORICAL JUSTIFICATIONS AND PRESENT STATUS

In *Hosanna-Tabor* the Supreme Court affirmed the ministerial exception, which had been uniformly recognized by the Courts of Appeals.[6] The Fourth Circuit first articulated the idea of a ministerial exception in 1974,[7] and between that time and the Supreme Court's recent ruling, every circuit which addressed the issue upheld its existence.[8] Although the ministerial exception

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[5] *Hosanna-Tabor*, 132 S. Ct. at 706–16.

[6] *Id.* at 701–02.

[7] McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) ("We find that the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden . . . by the . . . First Amendment.").

[8] *Hosanna-Tabor*, 132 S. Ct. at 705 n. 1:

See Natal v. Christian and Missionary Alliance, 878 F. 2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F. 3d 198, 204–209 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F. 3d 294, 303–307 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F. 3d 795, 800–801 (4th Cir. 2000); *Combs v. Central Tex. Annual Conference*, 173 F. 3d 343, 345–50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F. 2d 360, 362–63 (8th Cir. 1991); *Werft v. Desert*

has been widely recognized, its justification has not been clearly understood. The Free Exercise Clause,[9] church autonomy,[10] and the civil courts' adjudicative disability[11] have all been cited as reasons underlying the ministerial exception with each rationale leading to a different scope of the ministerial exception's application. Each of these reasons is examined below before turning to the Court's rationale in *Hosanna-Tabor*.

A. *The Free Exercise Clause*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .[12]

Religious liberty has been valued in our nation's history and heritage since its founding,[13] forming both a basis for the call to revolution[14] and being an essential element in forming a new union.[15] Even though the founding generation was not as diverse in religious ideology as our country is today,[16] they laid a foundation of religious liberty and tolerance. The official acts of the Continental Congress include: a letter to Catholic Quebec promising full freedom to exercise the Catholic religion should Quebec join

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Southwest Annual Conference, 377 F. 3d 1099, 1100–1104 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F. 3d 648, 655–57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F. 3d 1299, 1301–1304 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F. 3d 455, 460–63 (D.C. Cir. 1996).

[9] Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F. 2d 1164, 1169 (4th Cir. 1985) (citing the Free Exercise Clause as protecting a religious organizations act of decision in "'quintessentially religious' matters").

[10] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1398 (1981).

[11] Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J. L. & PUBLIC POL. 119, 134–63 (2009).

[12] U.S. CONST. amend. I.

[13] DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774–1789 151–73 (2000).

[14] *Id.* at 39–40, 151 (noting that in 1775 the New York Provincial Congress issued a resolution saying that "neither the Parliament of Great Britain, nor any other earthly legislature or tribunal, ought or can of right interfere or interpose in anywise howsoever in the religious and ecclesiastical concerns of the colonies.").

[15] *Id.* at 152–73.

[16] *Id.* at 40. The founding generation had at least two distinct categories of belief: pietism and rationalism. There were also differing forms of religion within the colonies themselves, for instance Congregationalism dominated Connecticut while Georgia was dominated by Episcopalians and Rhode Island had religious liberty for all. *Id.* at 162.

the colonies in revolt against England,[17] the solicitation of desertion among German mercenaries hired by England by promising religious freedom,[18] a resolution recognizing conscientious objector status on the basis of minority religious views,[19] and the guarantees of religious freedom contained within both the Articles of Confederation and the Northwest Ordinance.[20] Perhaps the views of the founding generation are best illustrated by Benjamin Franklin's letter to Ezra Stiles in which, after espousing his own religious views, Franklin said:

> I confide that you will not expose me to criticism and censure by publishing any part of this communication to you. I have ever let others enjoy their religious sentiments, without reflecting on them for those that appeared to me unsupportable and even absurd. All sects here, and we have a great variety, have experienced my good will in assisting them with subscriptions for building their new places of worship; and, as I never opposed any of their doctrines, I hope to go out of the world in peace with them all.[21]

Religious liberty, thus defined as the acceptance of others whose religious beliefs diverge or are even opposed to our own, has been and continues to be an essential part of our national freedom that is guaranteed by the Free Exercise Clause.

The strong national heritage of religious free exercise forms one basis of support for the ministerial exception. Carole Rayburn[22] charged her church with both gender and race discrimination under Title VII when she was denied employment. The court ruled in favor of the church on a motion for summary judgment[23] based upon the underlying free exercise right.[24]

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[17] *Id.* at 156.

[18] *Id.* at 163–64. It is estimated that between 5,000–12,000 of the roughly 30,000 foreign mercenaries remained in the colonies after the war ended.

[19] DAVIS, *supra* note 13 at 165.

[20] *Id.* at 157–63, 168–72.

[21] Letter from Benjamin Franklin, President of Yale, to Ezra Stiles (March 9, 1790).

[22] *Rayburn*, 772 F.2d at 1165. Rayburn held a Masters of Divinity from Andrews University and a Ph.D. in psychology from Catholic University. *Id.*

[23] *Id.*

[24] *Id.* at 1167. The Court reasoned that "Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience so long as he does not violate the personal rights of others, is fundamental to our system." Sherbert v. Verner, 374 U.S. 398, 402–403 (1963). This basic freedom is guaranteed not only to individuals but also to churches in their collective capacities, which must have "'power to

Rayburn v. Gen. Conference of Seventh Day Adventist[25] did not mean that churches were above the law and completely immune from Title VII.[26] Rather under this line of reasoning a balancing test developed whereby the interests of the state were weighed against the burden placed upon the church.[27]

The free exercise rational relied upon by *Rayburn* court[28] was severely undercut by *Employment Division v. Smith*.[29] *Smith* replaced the balancing test with a rule that the Free Exercise Clause does not prohibit the application of neutral laws of general applicability.[30] Under the *Smith* standard, any governmental interest will justify even a severe burden on religious exercise so long as the law is not facially aimed at the religion[31] and is generally applicable to all citizens. *Smith* severely limited a church's religious freedom under the free exercise justification, but not absolutely.[32] Some courts limited *Smith's* reach to individuals only and held that the *Sherbert v. Verner*[33] line of cases still controlled where a religious institution's rights are concerned.[34] Others ignored *Smith* entirely relying instead upon Religious

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decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (citations omitted).

[25] *Rayburn*, 772 F.2d at 1165.

[26] *Id.* at 1171 (saying, "Of course, churches are not—and should not be—above the law.").

[27] DOUGLAS LAYCOCK & PATRICK J. SCHILTZ, EMPLOYMENT IN RELIGIOUS ORGANIZATIONS IN RELIGIOUS LIBERTY 393–94 (2011). Laycock and Schiltz identify this as the *Sherbert* line of cases, but note that under the balancing test churches usually lost.

[28] *Rayburn*, 772 F.2d at 1167.

[29] Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause did not exempt the use of peyote during a religious ceremony from a general regulation which banned all drug use by state employees).

[30] *Id.* at 879 (saying that, "[s]ubsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'").

[31] Church of the Lukumi Babalu Aye. v. City of Hialeah, 508 U.S. 520, 547 (1993) (invalidating a local ordinance which by its language was applicable to all citizens because the Court found that it was motivated by "animosity to religion and distrust of its practices").

[32] Lupu & Tuttle, *supra* note 11, at 130–31; *see also*, LAYCOCK & SCHILTZ, *supra* note 27, at 402–405. Possible limits include the idea of generally applicable when there is the existence of exceptions to the rule, internal church autonomy issues, hybrid rights.

[33] Sherbert v. Verner, 374 U.S. 398 (1963).

[34] *See, e.g.*, EEOC v. Catholic Univ., 83 F.3d 455, 461–63 (D.C. Cir. 1996).

Freedom Restoration Act.[35] While still other courts found room in the hybrid rights exception left open by the *Smith* majority.[36] Despite these exceptions, under *Smith* courts generally found that the governmental interest outweighed the burden placed upon religious organizations.[37]

B. *Church Autonomy over Internal Issues (Entanglement)*

Church autonomy is the second rationale, based upon the First Amendment, justifying the ministerial exception. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*,[38] the Supreme Court said that there exists "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, a power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[39] Under this rationale the government may not interfere with a religious organization's choice of minister without also impermissibly affecting areas of church governance, faith, and doctrine.[40]

The difficulty under the church autonomy justification is in defining who the ministerial exception applies to. Wide agreement exists that the ministerial exception applies to a religious organization's spiritual leader but beyond that point consensus breaks down. One extreme perspective argues that autonomy should apply to every aspect of church operations.[41] Essentially, the argument is that every decision is a spiritual decision which

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[35] Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 197 (Mich. App. 1995). The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, was passed by Congress in response to *Smith*, but subsequently was held to be unconstitutional as applied to the states. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[36] The hybrid rights exception is applicable when both the First Amendment's Free Exercise Clause and a second constitutional protection are implicated. *Catholic Univ.*, 83 F.3d at 467; *Employment Div.*, 494 U.S. at 881.

[37] LAYCOCK & SCHILTZ, *supra* note 27, at 393–94.

[38] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952) (involving a dispute between two factions of the Russian Orthodox Church, in which the New York legislature intervened by passing a law which granted the faction located in New York legal title to the disputed property).

[39] *Id.* at 116.

[40] Lupu & Tuttle, *supra* note 11, at 131–34; *See also* Laycock, *supra* note 10.

[41] Laycock, *supra* note 10, at 1398 (identifying the thesis of the article to be "that the churches' interest in autonomy extends to every aspect of church operations"). Laycock recently clarified his view saying that he embraces a case-by-case balancing approach. Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J. L. & PUBLIC POL 253, 266–68 (2009).

affects the faith and doctrine of the church. The decision about a teacher's salary, for example, is not simply a decision about the worth and value of the teacher, but reflects a spiritual value judgment about how to spend the religious organization's limited resources in a way that will best accomplish the overall mission.

What developed, however, was a ministerial exception that allowed churches to discriminate against their spiritual leaders categorically and against all other employees for religious reasons.[42] But left unresolved by this scheme was any consensus on who was a spiritual leader[43] and what ability the courts had to determine whether a religious organization's proffered reason for discrimination was valid or merely pretext.

C. *Civil Courts Adjudicative Disability*

A final justification is found by focusing upon the regulatory function of the government[44] and by viewing the religion clauses as jurisdictional rather than rights inducing.[45] Under this view the government has jurisdiction over secular and temporal issues, but has no authority over issues of spiritual and eternal import.[46] Legal support for this theory is found in the principle of government neutrality laid forth in context of property disputes[47] and tort cases.[48] The basic premise is that the government cannot take sides in a religious dispute, and can only decide any particular dispute between religious parties so long as no issues of faith or doctrine are implicated.[49]

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[42] JULIA STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 68 (2002).

[43] Coulee Catholic Sch. v. Lab. and Indus. Rev. Comm'n, 768 N.W.2d 868, 881 (Wis. 2009) ("In practice, the . . . test . . . has not yielded predictable results.").

[44] Lupu & Tuttle, *supra* note 9, at 120 ("The conceptual focus . . . is on the role of the state in its regulatory capacity rather than on the status of religious entities as the holders of unique rights."). The concept underlying this theory is that the state is only competent to decide issues that are secular and temporal and issues that are spiritual and eternal must be decided elsewhere.

[45] *Id.* at 120–21 ("the Religion Clauses are primarily jurisdictional, limiting the government to the secular and temporal, and foreclosing government from exercising authority over the spiritual domain.").

[46] *Id.*

[47] *Id.* at 134–36.

[48] *Id.* at 136–37.

[49] Jones v. Wolf, 443 U.S. 595, 603 (1979) (saying, "[t]he method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.").

D. *The Rationale Behind* Hosanna-Tabor

Hosanna-Tabor involved a small Lutheran church and school[50] and one of the school's teachers, Ms. Perich. Ms. Perich was a "called" teacher, which signifies that she completed eight theological courses at a Lutheran university, was endorsed by a local governing body, and passed an oral examination.[51] Hosanna-Tabor also employed "lay" teachers and the functions of both "lay" and "called" teachers were not significantly different.[52] The dispute arose during the sixth year of the employment relationship after Ms. Perich went on disability leave due to narcolepsy.[53] When Perich indicated that she would be medically cleared to return to work, the church asked her for a "peaceful release" whereby the church would pay a portion of her health insurance in exchange for her resignation.[54] Perich refused to resign and reported to work when medically cleared which spawned a confrontation during which Ms. Perich indicated that she was consulting an attorney.[55] Subsequently the church voted to terminate Ms. Perich for "insubordination and disruptive behavior" as well as for "threatening legal action."[56]

The Supreme Court unanimously held that the ministerial exception exists based upon the First Amendment,[57] and that Ms. Perich qualified as a minister under the exception because she had been given the title of minister and performed important religious functions for the church.[58] In affirming the existence of the ministerial exception, the Court gave credence to each of

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[50] The record before the Court shows that Hosanna-Tabor had 53 voting members present at its business meeting where it terminated Perich's employment. *See supra* note 2. While this number indicates that Hosanna-Tabor was larger than the average church, which according to The Hartford Institute for religion research is 75 weekly participants, Hosanna-Tabor was certainly not a large and sophisticated church. Note that in the authors experience churches usually have approximately twice the number of weekly participants as they do voting members.

[51] *Hosanna-Tabor*, 132 S. Ct. at 707. Ms. Perich's formal title was "Minister of Religion, Commissioned."

[52] *Id.* at 700.

[53] *Id.* at 700–702.

[54] *Id.* at 700.

[55] *Id.*

[56] *Id.*

[57] *Hosanna-Tabor*, 132 S. Ct. at 702.

[58] *Id.* at 707–708. Regarding Ms. Perich's title, the Court said that it was significant that the title had meaning as was illustrated by her educational requirements, the church's treatment of her, and Perich's own use of the title in claiming the IRS tax benefit reserved for ministers. *Id.*

the previously cited rationales. Supporting the free exercise argument, the Court said that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission."[59] Further, the Court distinguished *Employment Division v. Smith* saying that, "*Smith* involved government regulation of only outward physical acts."[60] The Court admitted that the ADA was a neutral law of general applicability, but found that it does not justify "government interference with an internal church decision that affects the faith and mission of the church itself."[61]

Church autonomy provided the most prominent basis for the Court's affirmation of the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*.[62] After citing *Kedroff* and other precedent[63] the Court validated the ministerial exception saying that it was necessary to prevent "interfere[nce] with the internal governance of the church, [which would] depriv[e] the church of control over the selection of those who will personify its beliefs."[64]

The unanimous Court flatly rejected the idea that church autonomy is similar to the freedom of expressive association[65] and instead anchored the concept in the First Amendment finding that autonomy is guaranteed by both

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[59] *Id.* at 706.

[60] *Id.* at 707.

[61] *Id.* The Courts reasoning seems to be similar to the reasoning of EEOC v. Catholic Univ., 83 F.3d 455, 461–63 (D.C. Cir. 1996), which limited *Smith* to individuals only. Although it could arguably fit into *Smith's* own hybrid rights exception.

[62] *Id.* at 706.

[63] *Id.* at 705 (2012) (citing Serbian Eastern Orthodox Diocese for United States & Canada v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); and Watson v. Jones, 13 Wall. 679 (1872)). The idea throughout this line of cases is that there exists "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*, 344 U.S. at 116.

[64] *Hosanna-Tabor*, 132 S. Ct. at 706.

[65] *Id.* at 14. The freedom of expressive association has been recognized as implicit in the First Amendment and protective of a group's ability to selectively associate with those who share their common views and to exclude others. *See* Boy Scouts of Am. & Monmouth Council v. Dale, 530 U.S. 640, 654 (2000) (holding that the Boy Scouts could lawfully exclude a homosexual scout leader because it contradicted their belief about the morality of homosexuality); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 580–81 (1995) (holding that private parade organizers could exclude the participation of groups who presence would communicate a message with which they disagreed).

the Free Exercise and Establishment Clauses.[66] According to the Court, the Free Exercise Clause "protects a religious group's right to shape its own faith and mission"[67] and the Establishment Clause "prohibits government involvement in ecclesiastical decisions."[68]

Implicit within the Court's reasoning is support for the theory of adjudicative disability. First, the Court tacitly supports the theory by relying upon the doctrine of neutrality, both when explaining why *Smith* did not apply to the ministerial exception[69] and when dismissing Perich's claim for monetary damages.[70] Here the Court said that "relief would depend upon a determination that Hosanna-Tabor was wrong . . . and it is precisely such a ruling that is barred by the ministerial exception."[71] Embedded within the Court's statement is a second idea supporting adjudicative disability: the idea that there are religious issues over which courts have no jurisdiction. Justice Alito's concurrence addressed the issue directly. While explaining why examining a religious organization's proffered reason for discharging a minister for pretext is forbidden, he reasoned that a pretext inquiry would require a "civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission."[72]

Thus, in affirming the existence of the ministerial exception the Court gave credence to each of the rationales previously cited: the Free Exercise Clause, a church's right to autonomy, and the courts' adjudicative disability. The apparent result is that after *Hosanna-Tabor*, the ministerial exception bars religious workers access to a legal remedy for discriminatory practices by their religious employers. This result is justified by the necessity of preserving a church's right to autonomy over its internal affairs and is an implicit recognition of the limited scope of a civil court's adjudicative power.

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[66] *Id.* at 702.

[67] *Id.* at 706.

[68] *Id.*

[69] *Id.* at 707 (citing Emp. Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990) for the proposition that that the government may not "lend its power to one or the other side in controversies over religious authority or dogma").

[70] *Hosanna-Tabor*, 132 S. Ct. at 709.

[71] *Id.*

[72] *Id.* at 715 (Alito, J., concurring).

III. PRACTICAL DIFFICULTIES: THE EXEMPTIONS SCOPE AND A CULTURE GAP

In *Hosanna-Tabor*, the Supreme Court announced a flawed and unwieldy standard for adjudicating disputes between religious organizations and their employees. The Supreme Court not only affirmed the ministerial exception, but unquestionably expanded its scope by making the ministerial exception an affirmative defense to discrimination charges,[73] by expanding its reach to apply to both titled and functional ministers,[74] and by banning a court's inquiry into pretext.[75] The Court outlined four factors to be considered in determining whether an employee is covered by the ministerial exception: (1) formal title given by the church, (2) the substance of the title, (3) the employee's own use of that title, and (4) the important religious functions of the employee's duties.[76] But these factors are clumsy and ill suited to navigate religious employment disputes. Inherent in religious disputes are considerations unique to a specific religious culture: considerations which a court can no longer ignore.[77] Instead, before deciding whether the ministerial exception denies the court jurisdiction to hear the matter, a civil court must look behind the religious actions of the church and its employees in order to examine their substance. This examination of the substance of religious actions, not only violates the principles underlying the ministerial

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[73] *Id.* at 710, n. 4.

[74] *Id.* at 706–709.

[75] *Id.* at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone.").

[76] *Hosanna-Tabor*, 132 S. Ct. at 708.

[77] The factors require a court to consider the actions of the religious actors: the church and the employee, but does not make the religious actors' actions determinative. Instead, the factors instruct a secular court to look behind the actions of the religious actors to determine their substance: what is the substance of the ministerial title and do the employee's duties have important religious functions. Under the scheme used by the Sixth Circuit, which the Court rejected, the civil court gave no consideration to the religious actor's actions and instead made a determination based upon objective factors. EEOC v. Hosanna-Tabor Church & Sch., 597 F.3d 769, 781(6th Cir. 2010) ("The governing primary duties analysis requires a court to objectively examine an employee's actual job function, not her title."). This scheme, although admittedly faulty, did not burden a civil court with the difficult task of peering into the substance and important, religious functions of ministers before determining whether the ministerial exception applied.

exception, but ultimately fails to provide any meaningful relief for victims of discrimination.

A. *Culture Gap*

Thus far the discussion has focused upon a court's jurisdictional authority over spiritual matters of doctrine and faith. But civil courts also encountered practical difficulties when adjudicating disputes within a different culture. American religions are not only diverse when compared with each other,[78] but as a whole, they represent a distinct and separate culture from secular America.[79] Religions are distinct in the way they reason and the demands they place on adherents. These distinctions present practical difficulties for a court charged with adjudicating disputes between religious actors.[80]

Religion concerns itself with spirituality. But it is not a spirituality that is separate and distinct from the physical world. Instead it is a spirituality that is intertwined with and even predictive of the events in the physical world.[81] By perceiving a link between the spiritual and the physical worlds, religion engages a cultural worldview that differs significantly from the one inhabited by the secular courts entrusted with adjudicating religious disputes.

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[78] There are at least thirty-three identifiable subcategories of Christianity within the United States. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: TABLE 75: SELF-DESCRIBED RELIGIOUS IDENTIFICATION OF ADULT POPULATION (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0075.pdf. Each of the identified subcategories had over 50,000 adults self-identifying as adherents.

[79] SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON 10–18 (2004).

[80] American religions, and the individual adherents within those religions, are diverse. There are, of course, religious moderates and religious extremists. The examples contained within this note fall on the more extreme end of the spectrum, in hopes of clearly elucidating the inherent distinctions between religious and secular America. *See id.* at 13.

[81] Spirituality in this sense is not separate from the physical world, but intrinsically intertwined in it. *James* 5:13–18 (saying that prayer will heal sickness and has in the past been the cause for drought); *Genesis* 6:5–7 (recounting that mankind's wickedness was the reason for the flood). This belief that the events in the physical world have a spiritual causation has voice within our contemporary society. *See The 700 Club* (CBN television broadcast Sept. 12, 2006) (during which Pat Robertson linked Hurricane Katrina's destruction of New Orleans to judicial tolerance of abortion). *See also The 700 Club* (CBN television broadcast Sept. 13, 2001) (suggesting that the terrorist attacks of September 11, 2001 were possibly linked to God's wrath due to abortion), *text available at* http://cultureoftruth.blogspot.com/2006/04/pat-robertson-terrorism-hurricane.html.

Religion makes claims to a higher power, an absolute truth, and consequently demands complete adherence in every aspect of life.[82] A devout fundamentalist Christian, for example, may believe that their faith requires not only attendance at periodic religious services, but also makes claims about their finances,[83] their choice of friends,[84] their response to adversity and authority,[85] their sexuality,[86] their family relationships,[87] and their political affiliation.[88] By contrast, many Americans, and many judges, view religion as an optional add-on:[89] something that is separate and distinct from the rest of life. The two worldviews are not compatible.[90] The attempt to separate what is religious from what is nonreligious is nonsensical to devout religious adherents, who view life as an integrated whole.[91] To a

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[82] KENT GREENAWALT, RELIGION AND THE CONSTITUTION VOL. ONE: FREE EXERCISE 394 (2008).

[83] *Leviticus* 27:30 (saying that a tenth of everything must be given to God); *Malachi* 3:7–12 (saying that the nation is cursed because people have neglected to give God his ten percent); *Mark* 10:17–23 (Jesus telling a wealthy man to sell his possessions in order to provide for the poor); 2 *Corinthians* 8:1–15 (instruction to share possessions with those in need so that there is equality).

[84] 2 *Corinthians* 6:14–17 (instructing believers to refrain from close ties with nonbelievers); 2 *Timothy* 3:1–5 (warning against association with people possessing certain characteristics).

[85] *Romans* 12:13–21 (instructing believers to repay evil with kindness); *Romans* 13:1–7 (saying that governmental authority is from God and must be submitted to); *Hebrews* 13:17 (instructing believers to obey those in authority).

[86] *Exodus* 20:14 (one of the commandments forbidding adultery); *Matthew* 5:27–32 (Jesus expands adultery to include lustful thoughts); 1 *Corinthians* 6:9–11 (prohibition on homosexual contact); 1 *Corinthians* 15–18 (prohibition on sexual immorality and the solicitation of prostitutes).

[87] *Ephesians* 5:22–24, 32–33 (instructions for the relationship between married spouses); *Ephesians* 6:1-4 and *Deuteronomy* 5:16 (instructions for the parent child relationship); 1 *Timothy* 5:3–8 (instructing believers to care for the needs of their parents and grandparents). Regarding the use of birth control, the Catholic Church cites *Genesis* 1:27–28 (commandment to be fruitful and multiply) and *Psalm* 127:3–5 (claiming that children are a blessing from God) among other biblical sources to support their stance opposed to contraception.

[88] The Pew Research Center tracks the political affiliation of various religious groups. For a recent survey results see *Trends in Party Identification of Religious Groups*, PEWFORUM.ORG, http://www.pewforum.org/politics-and-elections/trends-in-party-identification-of-religious-groups.aspx (last visited Feb. 26, 2012).

[89] Nicholas Wolterstorff, *Abraham Kuyper on the Limited Authority of Church and State*, 7 GEO. J.L & PUB. POL'Y 105, 117 (2009).

[90] *Id.*

[91] STRONKS, *supra* note 42, at 81.

religious adherent, every act and every decision is informed by spiritual considerations. There is simply no parallel in secular American life.[92]

As a result of this culture gap, dialogue between the church and the state breaks down. Religions derive truth from sacred texts and divine revelation—things outside of human reason.[93] Conversely, secular Americans find truth in reason and science.[94] The two are not always incompatible[95] and sometimes lead to the same conclusions. For instance, these two views coalesced around the move for independence[96] and occasionally do today around issues of social justice—but more often the dialogue is frustrated. The source of truth for religion is divine. It is dependent upon faith, which is defined as belief despite evidence to the contrary.[97] And no amount of reason can alter that view.[98]

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[92] A close example may be a committed environmentalist who, because of their views, makes decisions about work, family, finances, political affiliation, and free time. An obvious difference is the dimension of sexuality, but in other regards this is a close parallel. *See* Grainger PLC v. Nicholson, [2010] IRLR 4 (EAT) (2009) (In this United Kingdom employment dispute case the Court accepted the plaintiff's argument that his belief in climate change was akin to religious belief and as such a forbidden basis for discrimination).

[93] GREENAWALT, *supra* note 82, at 394.

[94] HARRIS, *supra* note 79, at 64–65.

[95] For an opposing view arguing that even moderate belief is incompatible with reason, *see id.* at 14–23.

[96] DAVIS, *supra* note 13, at 40–41, 54.

[97] *Hebrews* 11:1 ("Now faith is being sure of what we hope for and certain of what we do not see.") NIV (1996). *See also* HARRIS, *supra* note 79, at 64–66 (defining faith as being "entirely self-justifying", since it is belief without evidence).

[98] HARRIS, *supra* note 79, at 66

> This is the very same faith that will not stoop to reason when it has no *good* reasons to believe. If a little supportive evidence emerges, however, the faithful prove as attentive to data as the damned. This demonstrates that faith is nothing more than a willingness to await the evidence—be it the Day of Judgment or some other downpour of corroboration. It is the search for knowledge on the installment plan: believe now, live an untestable hypothesis until your dying day, and you will discover that you were right.
>
> But in any other sphere of life, a belief is a check that everyone insists upon cashing this side of the grave: the engineer says the bridge will hold; the doctor says the infection is resistant to penicillin—these people have defeasible reasons for their claims about the way the world is. The mullah, the priest, and the rabbi do not. Nothing could change about this world, or about the world of their experience, that would demonstrate the falsity of many of their core beliefs. This proves that these beliefs are not born out of any examination of the world. . . . They are, in [a] sense, "unfalsifiable."

The cultural gap presents a significant challenge for a justice system committed to safeguarding both the free exercise of religion and the rights of citizens to be free from discrimination. The difficulty is especially pronounced when the culture gap exists between the participants to a case and the fact-finder.[99] Thus far, the judicial system has been unable to implement a scheme which adequately protects both interests. The difficulty existed before *Hosanna-Tabor* was decided.[100] And unfortunately, the Supreme Court's recent decision failed to resolve the underlying difficulty.

Under the free exercise rational of the ministerial exception, courts were charged with the task of balancing the state's interest against the burden placed upon the church. But this was a balancing test which the churches usually lost.[101] The cultural gap that exists between many civil court judges and the reasoning and decision-making processes of churches is vast.[102] This results in an underestimation of the burden placed upon religion,[103] and by comparison, an overestimation of the government's interest.[104]

Under the pre-*Hosanna-Tabor* model, the fundamental question that a judicial fact-finder had to determine in assessing the burden placed upon the church was whether "the activity at issue [was] religious or secular?"[105] But as already discussed, this distinction does not exist for many religious people and their organizations, who instead, view life as an integrated whole. The complexity of the question denies easy and consistent standards for adjudication. From a church's perspective, the result is at best

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[99] Laycock, *supra* note 10, at 261.

[100] Coulee Catholic Sch. v. Lab. & Indus. Rev. Comm'n Dept. of Workforce Dev., 768 N.W. 2d 868, 881 (Wis. 2009).

[101] LAYCOCK &. SCHILTZ, *supra* note 27, at 393–401.

[102] STRONKS, *supra* note 42, at 71. This is not to say that judges have ill intensions toward churches or are even insensitive to their views. Rather the task of accurately determining the burden placed upon one's religion is simply too difficult for someone outside of that religious culture.

[103] LAYCOCK & SCHILTZ, *supra* note 27, at 394–400 (arguing that there is no such thing as a purely secular reason for church).

[104] *Id.* at 400–401.

[105] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F2d 1164, 1171 (4th Cir. 1985) (saying "Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, *where the decision does not involve the church's spiritual functions.*") (emphasis added). *See also* STRONKS, *supra* note 42, at 71 (identifying the task of distinguishing between a church's spiritual and non-spiritual functions as being "the crux of the matter."); LAYCOCK & SCHILTZ, *supra* note 27, at 396–97 (pointing out that even budgetary concerns have an element of spirituality for churches).

inconsistent.[106] At worst, a church may perceive a judicial system that promises to respect religion and then fails to appreciate the religious reasons when they are explained.[107] The inability to find any administrable standard was the primary reason that the ministerial exception shifted away from free exercise basis and toward the Establishment Clause.[108]

B. *Judicial Difficulty After* Hosanna-Tabor

The Court's four-factor approach to deciding whether the ministerial exception applies to a particular employment relationship failed to address the underlying adjudicative difficulty. Neither the formal title given by the church, the substance of the title, the employee's own use of that title, nor the important religious functions of the employee's duties, provide objective guidance by which courts will arrive at consistent judgments. Instead, courts will continue to struggle to determine whether an employee is sufficiently religious to justify the ministerial exception's bar against employment discrimination suits.

1. *Titled Minister*

The Court said that the existence of a ministerial title is a relevant factor, but not determinative of the issue.[109] It is unclear how much authority a civil court possesses to second guess a religious organization's characterization of its employee as ministerial. Under the principle of church autonomy, this appears to be forbidden since the question of who is a minister is itself a religious question[110] and *Hosanna-Tabor* has forbidden court inquiry into pretext.[111] Logically, it appears that if a church in good faith confers the title of minister on an employee, a civil court cannot support a finding that the employee is not a minister without interfering with the church's autonomy.

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[106] Coulee Catholic Sch., 768 N.W.2d at 881.

[107] GREENAWALT, *supra* note 77, at 380 (arguing it is inappropriate for secular officials to judge the sufficiency of religious reasons).

[108] Lupu & Tuttle, *supra* note 11, at 130–31.

[109] *Hosanna-Tabor*, 132 S. Ct. at 713.

[110] *Id.* at 710–11 (Thomas, J., concurring).

[111] *Id.* at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,'—is the church's alone.").

One possible explanation is that the majority of the Court[112] was concerned with the potential of bad faith action by a religious body.[113] By making ministerial title one of many factors, the Court has preserved, at least in theory, a civil court's ability to check illegitimate assertions of ministerial status made by a religious organization.[114]

Although this explanation has appeal, it may prove unworkable since it is based upon the assumption that a civil court is able to recognize bad faith. Justice Thomas highlights this issue saying, "attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable."[115] Given the diversity of our pluralistic society, it seems likely that some religious faith's sincere designation of minister will be misunderstood by civil courts and instead be interpreted as being akin to bad faith. This possibility raises establishment concerns that the government may recognize some traditional, established religion's methods for ordaining ministerial employees, but not afford the same recognition to the methods of less established religions. The degree to which this develops will only be discovered by time, but the potential problem is inherent in any scheme where the civil courts hold ultimate authority over a religious question.

A second possible explanation for the four-factor approach is suggested by the adjudicative disability rational. Under this rubric, a civil court is not looking for pretext or determining if the person is really a minister.[116] Rather, the issue is whether, in resolving an employee's claim, a civil court would be required to exercise authority over the church's religious message.[117] If resolving the issue does not require an assessment by the civil court of the "minister's" adequacy or qualifications to communicate the

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[112] Justice Thomas was not concerned about this possibility and would have deferred to the church's characterization as the determinative factor. *Id.* at 709 (Thomas, J., concurring).

[113] Under the factors analysis, a civil court could conclude that a church janitor is not a minister for purposes of the ministerial exception by finding that there was no substance behind the title and the functional duties were not religious. *Id.* at 708.

[114] This result is predicted by proponents of the adjudicative disability theory. Lupu & Tuttle, *supra* note 11, at 147–49. It is suggested that "the court has general jurisdiction to decide whether it has particular jurisdiction . . . in a dispute between congregations and their employees. The congregation's decision to label a position as 'ministerial' . . . will be relevant to the court's determination, but . . . should not preclude the court from making an independent judgment about the position at issue." *Id.* at 148.

[115] *Hosanna-Tabor*,132 S. Ct. at 710–11 (Thomas, J., concurring).

[116] Lupu & Tuttle, *supra* note 11, at 147–48.

[117] *Id.* at 149.

church's message, then the employee is not a "minister" for purposes of the ministerial exception.[118]

But if this was the Court's rationale, it is unclear why a civil court should give any weight at all to the church's own characterization of the employee. Questions about the church's message could be best assessed by looking at the function of the employee: whether they are responsible for teaching doctrine or giving spiritual guidance would seem determinative. However, this approach was used by the Sixth Circuit and expressly rejected by the Supreme Court in *Hosanna-Tabor*.[119] Therefore, a court must now consider the church's own characterization of its employees.

The Court's instruction to consider a church's characterization of their employee by reference to the ministerial title exists without a clear justification. As such, the exact scope of the ministerial exception is unclear. Despite this ambiguity it seems to apply to titled ministers, at least in traditional religions where that title is supported by courses in theological training.[120]

2. *Functional Ministers*

The final factor listed by the Court was consideration of the "important religious functions" of the employee.[121] This factor is similar, if not identical, to the functional minister approach that was used by the Sixth Circuit which

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[118] *Id.* at 148.

[119] *Hosanna-Tabor*, 132 S. Ct. at 708–09. The Court cited three errors by the Sixth Circuit: failure to consider an employee's title; placing too much weight on the fact that others, without a ministerial title, performed the same duties; relying on the amount of time spent on secular and religious duties, without considering the nature of the religious duties.

[120] The Court's second factor, "the substance reflected in that title," relies upon the existence of formal processes, such as theological training at the college or university level. *Id.* at 708. The third factor, the employee's own use of the title, seems most relevant to the idea of pretext. Suggesting that if the employee identified herself as having a position of ministerial importance then it is probable that the church's ministerial title was sincerely given. In *Hosanna-Tabor*, the Court cited Ms. Perich's act of accepting the Lutheran Church's formal call to religious service, her claim of the IRS tax benefit reserved for those who earn their income in the exercise of the ministry, and formal statements which she made to the Lutheran Synod indicating her desire to continue in the teaching ministry. *Id.* at 708. It is unclear whether any of these acts on their own would be sufficient for a court to determine that an employee has adequately identified themselves as a minister to enable the religious organization to successfully apply the ministerial exception.

[121] *Id.*

the Supreme Court reversed, saying that the court of appeals "placed too much emphasis on Perich's performance of secular duties."[122] Further, in what must have been an attempt to clarify the error in the Sixth Circuit's approach, the Court said that the amount of time an employee spends on both religious and secular activities is relevant, but not without consideration of the nature of those religious activities.[123] Again however, the Court failed to adequately define the scope of the ministerial exception or to clarify the underlying basis on which it is established.

Unanswered by the Court's instructions is the essential question: "who gets to determine what qualifies as 'important' and 'religious' under the 'important religious functions' analysis?"[124] If the determination is left to the church, as arguably it should be under the adjudicative disability rational, then there is virtually no protection left for religious employees. A church could potentially frame nearly everything as affecting its religious message.[125] For instance, a decision to sue could be said to affect the ability of a church to communicate its Christian message, since disputes should be handled internally, according to 1 *Corinthians*.[126] If believed, this rational would apply to all religious employees: both those who teach the church's message as well as those who do nothing more than administrative tasks, since involvement in legal proceedings would by their very nature undermine the church's message.

However, if the determination of what qualifies as "important" and "religious" is left to the civil courts, other, equally disturbing, problems develop. Designation of this determinative authority to the civil courts violates the principle of church autonomy which the Court espoused in

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[122] *Id.* at 708–709.

[123] *Id.* at 704. Perich spent only 45 minutes of each workday on religious activities.

[124] The Court appeared to be responding to the EEOC's argument that the ministerial exception should be reserved for employees whose duties are exclusively religious, by saying that it is sufficient if the employee performs at least some important religious functions. *Id.* at 710.

[125] Almost every employment position can be framed as affecting the religious message through the idea of expressive association. *See supra* note 65. A rational argument can be made that anyone who is held out to either the public or the faithful, as a representative of the religion, affects the church's religious message. Under such a scheme, the ministerial exception may apply to those who teach children, direct the choir, and secretaries and administrative assistants who deal with the public on the church's behalf.

[126] This is precisely the argument offered by Hosanna-Tabor which the Court never reached. EEOC v. Hosanna-Tabor Evangelical Lutheran Chuch & Sch., 597 F.3d 769, 781 (6th Cir. 2010). For the biblical reference supporting this belief *see 1 Corinthians* 6:1–11.

Hosanna-Tabor[127] and offends the simple logic of adjudicative disability which acknowledges the existence of spiritual questions over which the courts have no jurisdiction.[128] The determination of which religious functions are important is simply one which a civil court cannot adjudicate without looking into the doctrinal beliefs of the particular religion. The variety within religious traditions is too great for a civil court to announce any objective standard which would define "important religious function." For instance, the Salvation Army deems charitable efforts to be of central importance.[129] Many Protestant Christians, such as the Southern Baptists, place a special emphasis on proselytizing.[130] Judaism, by contrast, attempts to dissuade potential converts.[131] Wiccans value sex as pleasure and place a premium on being in tune with nature and consequently hold the environment to be of central importance.[132] The list does not include many of

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[127] *Hosanna-Tabor*, 132 S. Ct. at 706 (saying that the government may not "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs").

[128] *See supra,* note 44. The logical difficulty of the "important" question may be illustrated by asking a court to determine which of a college student's many relationships are important. The question itself, is offensive and the answer would be contingent upon the values, goals, and beliefs of the individual student. There is no way for a court to make that determination without superimposing some of its own values and beliefs on the student.

[129] The mission statement for the Salvation Army states that its "mission is to preach the gospel of Jesus Christ and to meet human needs in his name without discrimination." *About: Mission Statement,* THE SALVATION ARMY, http://www.salvationarmyusa.org/usn/www_usn_2.nsf/vw-local/About-us (last visited Mar. 29, 2012).

[130] One of the basic beliefs of the Southern Baptist Convention is a duty to Evangelism and Missions, which states:

> It is the duty and privilege of every follower of Christ and every church of the Lord Jesus Christ to make disciples of all nations . . . to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ.

Basic Beliefs, SOUTHERN BAPTIST CONVENTION, http://www.sbc.net/aboutus/basicbeliefs.asp (last visited Mar. 29, 2012).

[131] "In general, Jews do not try to convert non-Jews to Judaism. In fact, according to halakhah (Jewish Law), rabbis are supposed to make three vigorous attempts to dissuade a person who wants to convert to Judaism." JUDAISM 101, http://jewfaq.org/gentiles.htm (last visited Mar. 29, 2012).

[132] Beverlee Jill Carroll, *Wiccan Beliefs*, WORLD RELIGIONS PROFESSOR (2012), http://www.world-religions-professor.com/wiccanbeliefs.html.

the nation's largest religions,[133] but begins to illustrate the divergent views about what is important within the religious community.

A civil court's difficulty administering an "important, religious functions" standard is not only a function of the diverse religious climate within the country, but is inherent in the limits of the court's jurisdiction. The Southern Baptist Convention lists nineteen basic beliefs.[134] These are the things that the religion, itself, deems as being of central importance to the Southern Baptist faith. Should a reviewing court find that any employee who has religious functions relating to one of these nineteen basic beliefs is functionally a minister?[135] If so, how closely related to one of these beliefs does a function have to be in order to be deemed important?[136] If not, how is a court to decide which of these basic beliefs qualify as important to the religion?

The four-factor analysis advanced by the Supreme Court in *Hosanna-Tabor* fails to adequately account for the practical difficulties encountered by courts tasked with resolving employment disputes between religious organizations and their ministerial employees. Leaving the ultimate decision of which employees are classified as ministers in the hands of the civil court raises both constitutional and practical concerns. A diligent court must be alert to First Amendment concerns and aware of its own practical limitations in understanding the decisions and motives of the parties, before rendering a decision. Decisions, that are contingent upon a fact-finder's determination of what qualifies as an important religious function, are unlikely to be consistent. Therefore, religious organizations and their employees would be better served by avoiding the courts and taking their disputes before a religious arbitrator.

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[133] The largest religious groups in the United States by number of self-identified adult adherents are Christian, Jewish, Muslim, Buddhist, Unitarian, Hindu, Spiritualist, Wiccan, and Pagan. *U.S. Census Bureau, supra* note 78. According to the abstract each of the listed religions boasts over 340,000 adult adherents in the United States. Within the Christian religion, the abstract identifies 24 sub-categories which each boast over 340,000 adherents.

[134] *Basic Beliefs, supra* note 130. The list includes, among others, the following subjects: scripture, sacraments, education, finances (as a subset of Stewardship), charity (a subset of the Christian and the Social Order), and the family (defined as the uniting of one man and one woman). This is not an uncommon number. The Assemblies of God list sixteen fundamental truths.

[135] This accords with the Supreme Court's instruction that the "amount of time an employee spends on particular activities is relevant [when considered in light of] the nature of the religious functions." *Hosanna-Tabor*, 132 S.Ct. at 709.

[136] Ms. Perich's religious duties were limited to only forty-five minutes a day. *Id.* at 708.

IV. RELIGIOUS ARBITRATION

The need for religious organizations and their employees to have an alternative forum is readily apparent.[137] The absence of any alternative means for ministerial employees to assert their claims of unlawful discrimination against their religious employers unnecessarily undermines the important societal commitment to a society free from discrimination on the basis of race, gender, age, and disability.[138] Religious arbitration is an alternative forum which effectively addresses the twin concerns of (1) offering employees some protection from unlawful discrimination, and (2) respecting the First Amendment's concerns about the separation of church and state. As such, its use should be expanded and even Congressionally mandated.

Religious arbitration is well established in the United States.[139] As a part of the general scheme[140] under the Federal Arbitration Act,[141] and the

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[137] Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1283 (2011) (hereinafter *Multiculturalism*) (reciting the dangers of both the state intervening in religious disputes and in leaving religious entities isolated so that they can perpetuate human rights violations). Additionally, religious arbitration advantages both religious organizations and their ministerial employees: under religious arbitration ministerial employees, who are barred from advancing discrimination claims by the ministerial exception, have a forum in which their claim can be heard; religious organizations are benefited by religious arbitration by having the matter handled by someone who understands their doctrine and values.

[138] 42 U.S.C.A §12102 (2009), Title VII of the Civil Rights Act of 1964, etc.

[139] Christian and Jewish groups have established arbitration systems, while Islamic groups are actively working to establish their own systems. Michael C. Grossman, *Is This Arbitration: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 177–82 (2007); *Multiculturalism, supra* note 137, at 1247–52. Other groups have negotiated disputes based upon spiritual principles and, at least in theory, could develop their own religious arbitration system. *See* Grossman, *supra* note 139 at 177 n. 66 (listing Sikh, Puritans, Quakers, Mormons, Chinese Immigrants, and Navajos as groups which are developing their own religious dispute resolution processes at least on a cursory level). For a more detailed explanation of the history and procedures of faith-based arbitration *see* Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interactions with Secular Courts*, 75 FORDHAM L. REV. 427, 436–42 (2006).

[140] For a well-developed explanation of the strong federal policy favoring arbitration, which is outside the scope of this article *see* Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) and Grossman, *supra* note 139, at 169–98.

[141] 9 U.S.C. §§ 1–16 (2000).

Uniform Arbitration Act,[142] courts have routinely enforced the judgments of religious tribunals[143] with the requirement that they be entered into voluntarily.[144] But this voluntary requirement may seriously undermine religious arbitration's effectiveness as a tool to achieve a society free from discrimination. The voluntariness requirement acts as an opt-in process to the arbitration forum, which under most circumstances is completely appropriate, since there remains a default forum—the civil court system—for those who take no action. However, in the specific context of religious employment, and more narrowly in the context of the ministerial exception, there is no default forum. Effectively leaving those who fail to voluntarily opt-in to religious arbitration without any process by which they can assert claims of unlawful employment discrimination.

An accurate estimate of the number of employment contracts between religious organizations and their ministerial employees, which voluntarily contain an arbitration clause, may be impossible to ascertain.[145] Given the wide variety of the parties, which includes both mega, and small-churches, both of hierarchical and congregational structure, it seems probable that a significant number of parties lack the sophistication required to understand the legal ramifications of including, or failing to include, a mandatory arbitration clause. Regarding those which are sophisticated enough to understand the legal landscape, such understanding is likely one-sided, since it would be rare for a ministerial employee to recognize that they are unable

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[142] Unif. Arbitration Act (UAA) §§ 1–33, 7 U.L.A. 9–94 (2000).

[143] Prescott v. Northlake Christian Sch., Inc., 141 Fed.Appx. 263 (5th Cir. 2005) (upholding the arbitration award of a Christian arbitration committee which ruled in favor of an employee alleging discrimination on the part of a private Christian School employer); Abd Alla v. Mourssi, 680 N.W.2d. 569 (Minn. Ct. App. 2004) (confirming the arbitration award of an Islamic arbitration committee in a dispute over a restaurant partnership); Encore Prod., Inc. v. Promise Keepers, 53 F.Supp.2d 1101 (D. Colo. 1999) (holding that contract dispute was subject to arbitration by Christian Conciliation); Easterly v. Heritage Christian Sch., Inc., No. 1:08-CV-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. 2009) (holding that an employment dispute in which a teacher alleged age discrimination against her Christian school employer was subject to religious arbitration). *See also Multiculturalism*, *supra* note 137, at 1237 and 1244.

[144] *Multiculturalism*, *supra* note 137, at 1244.

[145] The Institute for Christian Conciliation (ICC), a division of Peacemaker Ministries—the largest U.S. Christian mediation and arbitration service—reports handling between 3 to 5 employment disputes between religious organizations and their ministers annually. ICC has no specific data on the prevalence of arbitration contracts used by religious organizations, as they assume that many religious organizations may simply incorporate the suggested wording, posted on ICC's website, into their employment contracts. Telephone Interview with Brit Gross, Case Administrator, ICC (March 22, 2012).

to assert potential discrimination claims in the secular court system. Even those employees who fully understand the system may lack sufficient bargaining power to assure the inclusion of an arbitration clause against an unwilling employer.[146]

To avoid this potential injustice and to advance anti-discrimination policy, Congress should require that employment contracts between religious organizations and their ministerial employees contain a mandatory arbitration clause. The benefit of Congressional action would be to guarantee that ministerial employees, who are barred by the ministerial exception from bringing employment discrimination claims in the secular court, have a means of pressing their claims. The alternative is simply unconscionable.[147] Potential Congressional action of this type, however, would not be free from controversy. Legislation to mandate religious arbitration within the limited context of employment contracts between religious organizations and their ministers would need to, at a minimum, overcome the traditional objections to religious arbitration which when broken into four broad categories include: (1) pre-dispute pressure to choose religious arbitration; (2) religious procedural rules; (3) conflicts between religious law and U.S. law; and (4) Establishment Clause concerns.[148]

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[146] Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010). This article explores the motivations that spur businesses to either include or to forego mandatory arbitration clauses in their contracts. It seems unlikely, however, that the same motivations are present among religious organizations which operate from a completely different set of priorities such as proselytization and the desire to be governed by religious law. For a discussion of the uniqueness of religious arbitration in its choice of law provisions *see Multiculturalism*, *supra* note 137, at 1245–47.

[147] Assuming for argument's sake that the allegations of Ms. Perich were accurate, *see* EEOC v. Hosanna-Tabor, 597 F.3d 769, 772–75 (6th Cir. 2010), and that Hosanna-Tabor was in fact trying to "reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution," *Id.* at 781. It would be unacceptable to categorically deny Ms. Perich any opportunity to have her claims judged on the merits.

[148] *See generally*, Nicholas Walter, Note, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 542-44 (2012).

V. OBJECTIONS TO CONGRESSIONALLY MANDATED RELIGIOUS ARBITRATION

Religious arbitration, although firmly established,[149] traditionally has been challenged.[150] A proposal that religious arbitration be mandatorily imposed by Congressional legislation is certain to be opposed by those who are uncomfortable with the voluntary version,[151] however many of the specific objections voiced against religious arbitration are inapplicable within the specific context of ministerial employees and the ministerial exception.

A. *Pre-dispute Pressure to Choose Religious Arbitration*

Pre-dispute pressure is concerned with ensuring the volitional nature of arbitration agreements, in order to guarantee that individuals are not coerced into surrendering the right to pursue claims within the court system.[152] But the argument has no force in the context of the ministerial exception under which ministerial employees have no access to the court system when asserting a discrimination claim. Thus, the primary concern is not that ministerial employees will be coerced into giving up their rights under U.S. law, because, in this limited context, they have already been stripped of those rights. Rather, the concern becomes reversed so that ministerial employees may be coerced into foregoing religious arbitration and thereby, stripped entirely of all legal protection.[153]

However, it is possible that requiring religious arbitration for ministerial employees may lead to an overbroad application. Religious organizations faced with a requirement of using arbitration in a limited context may be inclined to begin voluntarily using it for all of their employees. In such a scenario, all claims between religious organizations and their employees may become subject to arbitration. Claims that are presently fit for adjudication in the civil courts, such as property or contract disputes, would potentially be removed to a religious arbitrator, in which case, concerns about the voluntary nature of religious arbitration agreements regain their force. Therefore,

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[149] *See generally, Basic Beliefs, supra* note 134.

[150] Walter, *supra* note 148.

[151] *Id.* at 550–54 (opposing the idea that any religious arbitration decision be binding and enforceable by civil courts).

[152] Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281 (2002) (saying that parties are abusing arbitration by depriving others of their right to pursue claims within the court system).

[153] *Id.*

careful Congressional drafting would be necessary to alleviate these potential dangers.

B. *Religious Procedural Rules*

Religious procedural rules are concerned with the procedures that discriminate by limiting the testimony of women or conflict other mandated statutory procedural laws.[154] While limitations on women are unquestionably unacceptable and even abhorrent to many in our society, they are unlikely to be offensive to the actual parties engaged in religious arbitration proceedings.[155] A religious organization and the individuals whom it selects to be their ministers necessarily have a high level of agreement about doctrinal issues, such as the status of women. The doctrinal belief itself acts as a guard against discrimination since it is unlikely that, either a religious organization subscribing to a belief in the subservience of women would hire a female minister, or that a woman would agree to work as a minister for such an organization.[156] Indeed, agreement of belief functions as consent that the parties will have disputes resolved by an agreed-upon belief system.[157] Under a Congressional mandate requiring religious arbitration for ministerial employees, the agreement to submit to religious arbitration would not technically be voluntary, but the shared belief system and lack of an alternative forum, nullify concerns that one party is being disadvantaged, coerced, or discriminated against.[158]

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[154] *See* Walter, *supra* note 148, at 542–47.

[155] Eugene Volokh, *Orthodox Jewish Arbitrations, Islamic Arbitrations, and Discrimination Against Witnesses based upon Sex or Religion*, THE VOLOKH CONSPIRACY, (Oct. 21, 2010, 6:05 PM), http://volokh.com/2010/10/21/orthodox-jewish-arbitrations-and-discrimination-against-witnesses-based-on-sex-or-religion/ (highlighting a "consent-of-the-parties argument").

[156] *But see* Walter, *supra* note 148, at 549–52 (discussing the dilemma which accompanies a situation in which one party to the dispute has changed their religious belief). Although such a situation is certainly possible, it is less likely in a situation where the parties have been committed enough to a belief structure to become a ministerial employee. It would require a severe change of belief for such a person to suffer discrimination based upon a belief that they previously subscribed too.

[157] *Multiculturalism*, *supra* note 139, at 1253 ("the purpose of arbitration is 'to ensure that . . . agreements . . . are enforced . . . according to the intentions of the parties").

[158] The potential for discrimination is much greater in other contexts outside of the ministerial employment relationship. For an example in the context of a partnership dissolution decided by Jewish arbitration, *see* Betz v. Pankow, 16 Cal. App. 4th 931 (1st App. Dist 1993).

C. *Conflicts Between Religious Law and U.S. Law*

Conflicts between religious law and U.S. law occur when religious law violates public policy. Decisions that contravene established public policy can often arouse intense emotional reactions from the public.[159] In Canada a dispute over Islamic arbitration's handling of family law matters lead Premier Dalton McGuinty to proclaim, "There will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[160] Similarly in 2010, 70 percent of voters in Oklahoma approved a constitutional amendment that prohibits Oklahoma courts from considering international or sharia law while exercising their judicial authority.[161] Strong public reactions against perceived violations of public policy are understandable, but misguided. In the U.S., religious arbitration is firmly established,[162] and even in Canada, which has prohibited courts from enforcing religious arbitration decisions, it is unclear if the ban has had any impact on how women are treated in Islamic households.[163]

Public outcry against religious arbitration has, thus far, been confined to "Islamophobia" as there has not been an equivalent public reaction to the more well-established Jewish or Christian versions of religious arbitration.[164] While there is a general concern that "granting increased autonomy to religious communities [may] threaten individual liberties,"[165] it would be an

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[159] Covering the sharia law debate in Canada, Rosie Dimmano reported that "there was a legitimate fear that fundamentalist practices as codified in sharia law—even more worrisomely, as interpreted by individual imams—would leave women vulnerable to judgments founded on religious texts that clash with Canadian law and values." Rosie Dimano, *Sharia Solution a Fair One, and Not Racist*, TORONTO STAR, Sept. 16, 2005, *available at* http://www.thestar.com/.

[160] Harvey Simmons, *One Law for All Ontarians*, TORONTO STAR, Sept. 14, 2010, *available at* http://www.thestar.com/opinion/editorialopinion/article/860513--one-law-for-all-ontarians.

[161] *Oklahoma "Sharia Law Amendment", State Question 755 #2010#*, BALLOTPEDIA (July 7, 2012, 12:55 PM), http://ballotpedia.org/wiki/index.php/Oklahoma_%22Sharia_Law_Amendment%22,_State_Question_755_(2010). The law has been held unconstitutional by the Tenth Circuit Court of Appeals. *See* Huma Khan, *Oklahoma's Ban on Sharia Law Struck Down by Federal Appeals Court*, ABC NEWS (Jan. 11, 2012), http://abcnews.go.com/blogs/politics/2012/01/oklahomans-ban-on-sharia-law-struck-down-by-federal-appeals-court/.

[162] Walter, *supra* note 148, at 516–27.

[163] Simmons, *supra* note 160.

[164] *Id.*

[165] *Multiculturalism*, supra note 137, at 1304.

overreaction to limit religious arbitration categorically.[166] When the discussion is confined to the narrow scope of ministerial employment, religious arbitration is unlikely to attract public dissent. Instead, in this context, it is likely to be seen as fostering both the freedom of religion and the freedom of contract.

Additionally within the narrow context of the ministerial exception, there is no actual conflict between religious law used in arbitration proceedings and U.S. law. The result necessarily flows from the fact that under the ministerial exception, U.S. law has determined that it has nothing to say on matters involving religious doctrine and the employment relationships between a religious organization and its ministerial employees. With the lack of any substantive conflict of law and the prevalence of well-established, accepted religions presently engaging in religious arbitration, the risk of a public outcry seems to be only a minimal obstacle to a Congress that was motivated to pass legislation requiring mandatory arbitration clauses in employment contracts between religious organizations and their ministers.

D. *Establishment Clause Concerns*

Courts have consistently held that the enforcement of religious arbitration awards by secular courts poses no Establishment Clause concerns.[167] Mandatory arbitration agreements have been consistently upheld as well.[168] Additionally, the Supreme Court has held that Congress has the authority to except certain classes of claims from arbitration altogether.[169] Yet the issue may take on a different character should Congress pass legislation specifically mandating the use of arbitration in the context of ministerial employees. The practical difference is hard to distinguish. Since ministerial employees do not have access to the courts, a Congressional mandate would not harm them. The concern arises that Congress would be mandating that religious organizations must use arbitration. A law specifically targeted at religion, in this way, may give rise to stronger Establishment Clause concerns. But a more likely result is that the law would be characterized as existing within the regulatory authority of the state, akin to the requirement that religious organizations become

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[166] *Id.* at 1305.

[167] *See* Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 4 n. 11 (2005).

[168] Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1642 (2005).

[169] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991).

incorporated in order to enjoy special tax status.[170] Viewed this way, Congressional action would not raise any Establishment Clause concerns.

VI. CONCLUSION

The ministerial exception, which is necessitated by a commitment to keeping the spheres of church and the state separate, creates a sector within which victims of illegal discrimination have no viable forum where they can assert their claims. The law should not be required to choose between these important societal values: (1) the freedom of religion, and (2) the ability to ensure that everyone is free from discriminatory practices. Religious arbitration is a well-established practice that is able to successfully navigate the intersection of these two values. However, the requirement that religious arbitration be entered into voluntarily hinders its effectiveness as a tool for remedying discrimination. Thus, Congress should pass legislation mandating the use of religious arbitration for all disputes that fall under the coverage of the ministerial exception.

Potential legislation, if written narrowly, would avoid the traditional objections to religious arbitration's use and provide meaningful relief for those covered by the ministerial exception. Under the ministerial exception, the civil courts have concluded that they cannot adjudicate claims between a religious organization and their ministers. Absent an alternative forum, the fear that someone is being defrauded or coerced into agreeing to a religious arbitration forum loses all force. Additionally, the fact that the parties, both the religious organization and the ministerial employee, share the same religious culture make it advantageous for their dispute to be decided by someone who is either a member of or at least understanding of their religious culture. By mandating the use of religious arbitration for disputes rejected by the civil courts based upon the ministerial exception, Congress could simultaneously safeguard two important societal values: the freedom of religion and a commitment to be free from discrimination.

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[170] 26 U.S.C. §501(c)3 (2010).