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ABSTRACT

The Ministerial Exception (ME) is a legal doctrine providing that antidiscrimination employment laws do not apply to the relationship between religious institutions and their ministers. Such a notion appears in various democracies, as it aims to confront a shared problem: the attempt to solve the clash between antidiscrimination employment laws and religious autonomy. Liberal democracies strive to protect employees from discrimination, as well as to accommodate freedom of religion, which cannot be fulfilled without the existence of religious organizations. While being able to choose their staff is at the heart of the existence of religious institutions, the fulfillment of such freedom often discriminates against workers on the basis of religion, gender, sexual identity, and so forth.

For many years, the legal outcome of the ME led to quite similar results with distinct shared principles across different countries. However, the latest judgment of Our Lady of Guadalupe School v. Morrissey-Berru *combined with the judgment of* Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission *has created an American version of the ME that shifts the balance of antidiscrimination labor laws and religious autonomy to bluntly favor religious autonomy. This article suggests that such a shift and new distance from the universal conception of the ME may be the result of an unfinished picture in American law—American ME doctrine needs to be completed in a manner that will connect the missing piece between* Our Lady of Guadalupe *and* Hosanna-Tabor *to create a well-balanced model of American ME.*

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I. INTRODUCTION

In July 2020, the Supreme Court of the United States decided one of the most important cases in employment law in recent years—*Our Lady of Guadalupe School v. Morrissey-Berru*.[1] In *Our Lady of Guadalupe*, the Supreme Court decided by a 7–2 majority to interpret the "Ministerial Exception" (ME) broadly, expanding its applicability to teachers that are not titled ministers, in line with an assessment of "their core responsibilities as teachers of religion."[2]

The ME precludes the application of antidiscrimination laws "to claims concerning the employment relationship between a religious institution and its ministers."[3] This notion appears in various democracies, many of which differ in their constitutional models and their church-state relations.[4] It would appear that the ME attempts to confront a shared problem; one of protection against discrimination versus freedom of religion. A democracy strives to protect employees from discrimination, to protect the individual, but also, in a wider sense, to alter social conditions and promote an egalitarian society.[5] At the same time, democracies wish to accommodate freedom of religion,

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1. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
2. *Id.* at 2066.
3. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 188 (2012).
4. See analysis in Section II.
5. *See* Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 939 (2014) ("Discrimination law is different from other areas of the law ... The law was designed to do more than just resolve inevitable disputes; the law was intended to alter social conditions...").

which cannot be fulfilled without the existence of religious organizations, as "religious communities traditionally and universally exist in the form of organised structures."[6] Being able to choose their staff on a religious basis is at the heart of the existence of religious institutions.[7] However, the fulfillment of such freedom often discriminates against workers on the basis of religion, gender, sexual identity, and so forth. Such a clash between freedom of religion and employment antidiscrimination laws seems unavoidable in liberal democracies and poses a major challenge to courts worldwide.

Being a shared problem of distinct hermeneutic universal characteristics, while legal systems and tools differ, states often reach quite similar outcomes with regard to the application of the ME. This Article examines the applicability of the ME in three legal contexts: US courts, Israeli courts, and the European Court of Human Rights. While for many years, the legal outcome of the ME led to quite similar results across these three court systems with distinct shared principles, the latest US judgment of *Our Lady of Guadalupe*, combined with the judgment of *Hosanna-Tabor*, has created an American version of the ME that shifts the balance of antidiscrimination labor laws and religious autonomy to bluntly favor religious autonomy. It implies that religious institutions do not need to provide a religious reason for their discriminatory decisions,[8] and that the ME applies to the entire sector of teachers in religious institutions.[9] This shift of balance created by the combined outcome of *Hosanna-Tabor* and *Our Lady of Guadalupe* removes the United States from the universal understanding of the ME. This article suggests that such a shift in balance and removal from the universal conception of the ME undermines antidiscrimination employment laws excessively. This does not mean that between *Our Lady of Guadalupe* and *Hosanna-Tabor* should be overturned, but rather that the unbalanced result of the two decisions calls for a third ruling that will moderate their combined result. American ME doctrine must be completed in a manner that bridges the gap between *Our Lady of Guadalupe* and *Hosanna-Tabor* to create a well-balanced model of the American ME. This can be done by setting two different subversions of the ME: one that applies to discriminatory decisions against employees of religious functions (such as teachers) that require

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6. Fernandez Martinez v Spain, App No. 56030/07, Eur. Ct. H.R., ¶ 126 (June 12, 2014).

7. *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 23 (2011) ("We begin with a fact that might strike readers as all too obvious. Organizations founded on shared religious principles cannot really exist unless they actually share religious principles. Nothing, therefore, is more at the heart of a religious organization's freedom than the right to choose its staff on a religious basis. Without that right, religious organizations would lose their distinctive character almost immediately.").

8. *See Hosanna-Tabor*, 565 U.S. at 193.

9. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2067 (2020).

religious considerations for the decision, and another that applies to discriminatory decisions against religious leaders and does not require religious considerations for the decision.

This Article proceeds as follows. Part I describes the settings of the ME and the clash between antidiscrimination employment laws and religious autonomy in liberal democracies. Part II analyzes ME doctrine in the United States, Israel, and Europe and introduces church-state relation models and the main judgments and legislation that shaped such ME models. Part III offers a new perspective on the deviation of American ME post-*Our Lady of Guadalupe* from the universal understanding of the ME and suggests a method of settling such deviation in future case law. This settling is not suggested because of a requirement that US law should comply with universal ME principles, but rather because strong deviation from accepted models of the ME might call for an examination of the current model and the balance it strikes.

II. THE SETTINGS FOR THE MINISTERIAL EXCEPTION

The ME is the crux of the clash between freedom of religion and antidiscrimination employment laws. Before diving into the comparative analysis of the ME and the scope of its applicability, the driving forces behind it must be understood.

A. *Freedom of Religion*

The relationship between the state and the church (or synagogue, mosque, and so on)[10] is at the center of much academic discussion. In the past, religion and the state were deeply intertwined. The earliest recording of the relationship between state and religion is of Sumerian origin (not surprisingly, as they invented writing) and describes the singular identity of the state and religion:

> In [the Sumerian Kingdom], state and religion were entwined. The state was an absolute monarchy with religion for an ideology. The king was god's representative on earth, and immediately beneath him were the priests. The capability to read and write was confined to the priests and some scribes, and they ran the state with the help of a fairly large bureaucracy. The role of the masses was to serve god, which in effect meant serving the king.[11]

The Sumerian example is important, as the Sumerians, who are also attributed with inveting "the state" (alongside writing and the sailboat), managed to maintain their state for a remarkably long time

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10. The term state and church will be used throughout this article to describe state and religion relations, regardless of the religion in question.

11. Dennis C. Mueller, *The State and Religion*, 71 REV. SOC. ECON., Mar. 2013, at 2.

of between eight hundred and one thousand five hundred years.[12] Such longevity is attributed to the harmonization between Sumerians' belief system and the social and political structure they maintained.[13]

The Sumerians, while remarkable, were one of many ancient cultures that unified state and religion. The major break of such a pattern took place with ancient Athens and the birth of the democratic state.[14] Decisions were made by the Assembly of Citizens, and leaders were chosen on the basis of their skills and merits.[15] Mueller explains that there was no ideology behind such separation, but rather, common sense: "This separation arose not because the Athenians had made a conscious decision to separate the two sets of institutions, but rather because of their reverence for reason. The Greeks were simply too rational to let superstition influence their choices in the public domain."[16]

In modern thought, the theoretical linkage between separation of state and church dominates the discussion. Huntington claims that the separation of church and state is a distinct feature of Western civilization.[17] However, in practice, liberal democracies do not always maintain such clear separation, as "[d]emocratic states in the West subsidize religious organizations and religious schools, allow or even sometimes compel religious instruction in public, supposedly secular schools, and enact laws, which advance religious agendas."[18] Admittedly, different states have different relationships between religion and state, which, as will be shown later, influence their discussion over the applicability of the ME. On one side of the scale sit countries such as the United States, whose constitution calls for a separation of state and church,[19] and on the other side, countries such as Israel, which identifies as a Jewish state,[20] anchoring Judaism as

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12. *See id.* at 2–3.

13. *See id*; GEORGES ROUX, ANCIENT IRAQ 90 (3rd ed., Penguin Books 1980) ("[T]he religious ideas promoted by the Sumerians played an extraordinary part in the public and private life of the Mesopotamians, modeling their institutions, colouring their works of art and literature, pervading every form of activity. . . In no other antique society did religion occupy such a prominent position."); such citation was linked to the Sumerians' prosperity and longevity in S. E. FINER, THE HISTORY OF GOVERNMENT 115 (1997).

14. *See* Mueller, *supra* note 11, at 3.

15. *See id.*

16. *Id.*

17. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS 70 (1996).

18. Mueller, *supra* note 11, at 1–2.

19. U.S. CONST. amend. I.

20. Basic Law: Israel – The Nation State of the Jewish People ("INSJP"), Art 1. (Isr.). ("1. (a) The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established. (b) The State of Israel is the nation state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination. (c) The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People.").

part of its constitutional mechanism.[21] While "Israel's government involvement in religion is low for the Middle East/North Africa (MENA) region [it is] relatively high on a global scale" and definitely among democracies.[22] An additional model worth noting is that of European states. European states have different models for state and church relations, in which "[t]he position and meaning attributed to religion . . . may differ, but, in general, constitutional discourse no longer has a religious basis."[23] Models of state involvement in religion range widely, with some including complete separation and even hostility toward religion (France) and others including state-established churches (the UK) and church tax collection by the states (Germany).[24] However, the European Court of Human Rights provides some insight regarding the shared principles uniting such different models and especially so with regard to the balance between freedom of religion and other rights.[25]

Freedom of religion is a shared principle of liberal democracies that has "always been recognized by liberal regimes as a fundamental right, a right intended to enable believers to carry out their religious practices without interference."[26] Freedom of religion appears prominently in the constitutions of many Western nations, "ascribing powers, privileges, and rights to religious persons while subordinating others, including the state, to these powers."[27] Alongside domestic recognition of freedom of religion, it is also recognized in the international sphere, as multiple international and regional treaties include provisions protecting freedom of religion.[28]

The term "freedom of religion" was used for the first time in Western civilization by Tertullian (born AD 150–160) in response to Roman allegations that Christians do not follow Roman worship practices:

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21. *See generally* SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL 70–72, 309–18 (2007) (describing the constitutional relationship between religion and state in Israel).

22. Gábor Halmai, *Varieties of State–Church Relations and Religious Freedom Through Three Case Studies,* 2017 MICH. ST. L. REV. 175, 181 (2017).

23. Aernout J. Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks,* 10 INT'L J. CONST. L. 153, 153 (2012).

24. *See generally id.* Church Taxes a voluntary tax collected by the state from members of religious groups to provide financial support of religious institutions.

25. *See infra* Chapter II.C.

26. Gidon Sapir & Daniel Statman, *Why Freedom of Religion Does Not include Freedom from Religion,* 24 L. & PHIL. 467, 467 (2005).

27. Avihay Dorfman, *Freedom of Religion,* 21 CAN. J. L. & JURIS. 279, 279 (2008).

28. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 18 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 18 (Dec. 16 1966); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conference of American States, art. 3, (May 2, 1948); Organization of American States, American Convention on Human Rights, art. 12, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 8, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (Oct. 21, 1986).

> Let one man worship God, another Jupiter. Let one lift up hands of supplication to the heavens, another to the altar of Fides. Let one count the clouds as he prays, another the panels on the ceiling. Let one consecrate himself to God, another to a goat . . . See that you do not end up fostering irreligion by taking away freedom of religion [libertas religionis] and forbid free choice with respect to divine matters, so that I am not allowed to worship what I wish, but am forced to worship what I do not wish. Not even a human being would like to be honored unwillingly.[29]

However, Augustine is described as "the first author with immediate persisting influence" over the notion of freedom of religion.[30] Augustine argued that religion cannot be forced: "One can enter a church unwillingly, one can approach the altar unwillingly, one can accept the sacrament unwillingly, but one cannot believe but willingly."[31] Augustine considered political order to have a mediating role in creating peace, thus enabling believers to follow the commands of God.[32] However, this did not lead Augustine to the conclusion that force should not be used by authorities to enforce religion.[33] Thomas Aquinas formulated a doctrine of religious tolerance based on utility--religious tolerance is preferable if it leads to less evil than intolerance.[34] As an example of this logic, he argued that Jews should be tolerated since they provide living evidence of Christianity's superiority.[35]

Even thinkers such as Martin Luther and John Calvin, who started as "rebellious heretics of the Roman Catholic Church [who] pled for toleration of heretics and a measure of religious freedom," later "became as authoritarian and resistant to the concept of religious freedom as Rome."[36] Despite such a shift of doctrine, one may quote Luther's earlier ideas, which famously asserted that "belief or unbelief is a matter of every one's conscience, and since this is no lessening of the secular power, the latter should be content and attend to its own

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29. ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM 11 (2019).

30. Matthias Mahlmann., *Freedom and Faith - Foundations of Freedom of Religion*, 30 CARDOZO L. REV. 2473, 2476 (2009).

31. *Id.* at 2476-77, *citing and translating* Augustinus, *In Joannis Evangelium Tractatus* CXXIV, *in* 35 JACQUES-PAUL MIGNE, PATROLOGIAE CURSUS COMPLETUS, SERIES LATINA, 1379, 1607 (Migne 1845) ("Intrare quisquam ecclesiam potest nolens, accedere ad altare potest nolens, accipere Sacramentum potest nolens: credere non potest nisi volens.").

32. *See* Mahlmann, *supra* note 30, at 2477; Augustinus, *De Civitate Dei*, *in* 40 CORPUS SCIPTORUM ECCLESIASTICORUM LATINORUM, SANCTI AURELI AUGUSTINI OPERA Pars I, Pars II, XIX, 13, 17, 26 (Tempsky 1899 & 1900).

33. *See* Mahlmann, *supra* note 30 at 2477 ("This mediating role of the political orders does not, however-given the arguments for legitimate force in matters of belief-lead him [Augustine] to the prohibition of force in religious matters by public authorities").

34. THOMAS AQUINAS, 15 SUMMA THEOLOGICA Part. II-II, Questions 10-11 (Kerle, Styria 1950).

35. *See id.*

36. *Religion and Freedom*, 8 J. CHURCH & STATE 5, 10 (1966).

affairs and permit men to believe one thing or another . . . and constrain no one by force."[37] This is in blunt contrast to Luther's later writing supporting corporal punishment for heretics.[38]

Unlike previous thinkers, Baruch Spinoza took this notion a step forward, and translated religious tolerance—which would later be developed into the modern conception of freedom of religion—into a framework of a right that cannot be ceded even with consent:

> However, we have shown already . . . that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do. For this reason government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions should actuate men in their worship of God. All these questions fall within a man's natural right, which he cannot abdicate even with consent.[39]

While in classical times, the notion of freedom of religion usually meant the state would (sometimes) tolerate the religious beliefs of minorities or heretics, in modern times, with the rise of secularism, the concept is often the opposite. In liberal democracies, the notion of protecting minorities' religious rights is highly relevant, but also relevant is the accommodation of religion in general (including the majority's religious rights—an aspect that was taken for granted throughout history, as states often endorsed a specific religion).

When examining justifications for freedom of religion in liberal democracies, some theories have been suggested. Gidon Sapir and Daniel Statman argue that, in liberal thought, freedom of religion "cannot be anchored in the assumed truth of religious propositions," but rather, "related to the kind of considerations accessible to a liberal framework."[40] They enumerate four justifications for freedom of religion in liberal democracies: According to the first, in the long run, violation of this freedom has a negative moral effect on society. According to the second, it also has a negative effect on the average level of happiness. The third kind of justification posits that a violation of this freedom constitutes a severe blow to the conscience and to the integrity of the religious individual. And, finally, according to the fourth justification, such a violation weakens the religious culture. Nevertheless, "[t]he distinction between these different justifications is not always obvious and some overlap exists."[41]

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37. Martin Luther, *Secular Authority: To What Extent It Should Be Obeyed, in* MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 385 (John Dillenberger ed., 1961).

38. *See* HENRY KAMEN, L'EVEIL DE LA TOLERANCE 41 (Jeanine Carlander trans., 1967).

39. BENEDICT DE SPINOZA, THEOLOGICO-POLITICAL TREATISE 257 (1951) (1670).

40. Sapir & Statman, *supra* note 26, at 470.

41. *See id.*

Avihay Dorfman argues that a justification of freedom of religion must demonstrate that religion is special: "asserting that religion is important does not suffice" as "[a] case must be made to the effect that religion is important in ways that are different from those important activities and commitments that do not count as religion."[42] According to Dorfman, the distinctiveness of religion is that its "toolkit" differs from that associated with the democratic process; religion-based arguments fall short of the democratic accessibility standard since the religious argument is grounded in the inexplicable.[43] Therefore, he explains, "freedom of religion is grounded in the ideal of political self-determination–Freedom of religion assures that the Spirituals, despite their exclusion from the democratic process, can conceive of themselves as living under a self-given law."[44]

Indeed, it is disputed among the proponents of freedom of religion whether freedom of religion should be understood to stand independently or as a branch of broader human rights; while some argue that it is a distinct right that should be protected based on its own unique merits,[45] others consider it to fall under freedom of conscience[46] or under the right to culture.[47]

The protection of freedom through laws and legal doctrines is growing as "legal and political efforts to enable religious practice through the accommodation of religiously motivated dissent is now widespread around the world. Laws protecting religious freedom proliferate."[48] However, it is debated whether freedom of religion should be understood as "prohibiting the state from discriminating against religion, so that neutral, generally applicable, laws are legitimate" or whether it should "be construed broadly to require the state to exempt religion from neutral-on-its-face laws that interfere with the observances of religion."[49] While it is widely agreed that some exemptions are in order, the extent of such exemptions, the issue at the heart of this article, is debated, and this will be discussed later at length.

B. *Antidiscrimination Employment Law*

This Article will take up a comparative analysis of domestic antidiscrimination laws and their relationship to freedom of religion–

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42. Dorfman, *supra* note 27, at 282.
43. *See id.* at 312–14, 318.
44. *Id.* at 300.
45. *See id.*
46. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65–71 (1996).
47. *See* Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 625–41 (1999).
48. WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM xix (2018).
49. Sapir, *supra* note 47, at 623.

–a relationship giving rise to the ME. But before undertaking that analysis, this subpart first traces the universal rationales behind modern antidiscrimination employment laws. The field of antidiscrimination is young, given that "most anti-discrimination laws are relatively new."[50] While some constitutions include longstanding rights to equality, "it is arguably only since World War II that these constitutional rights have been interpreted in a broad way so as to recognize that all citizens have certain rights to non-discrimination."[51] Clearly, this statement may be challenged as overly optimistic, as not *all* citizens are indeed protected by laws against discrimination in all liberal democracies; many minority groups are still fighting for equal rights.[52]

The value of equality is generally viewed as driving antidiscrimination law as "[c]onceptually, discrimination is tied to inequality. It is impossible to discriminate against someone unless there is some dimension in which the discriminator treats the discriminatee worse than those against whom she does not discriminate."[53]

However, antidiscrimination law can also be considered related to the value of freedom. According to Sophia Moreau, "[t]he interest that is injured by discrimination is our interest in a set of . . . deliberative freedoms: that is, freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender."[54]

Discrimination law itself is difficult to define and identify since antidiscrimination provisions may be found in various sources and used in different contexts:

> [Discrimination law] is found in constitutional Bills of Rights as well as in statutes. It applies to certain sectors (employment and health) but not others (romantic relationships). It uses a complex set of tools (direct and indirect discrimination, harassment, reasonable adjustments, affirmative action, positive duties, etc.), but it is not immediately obvious how these tools are interrelated—sometimes they even seem to be in conflict with each other. To make matters worse, unlike contract, crime, or trusts, discrimination is not uniquely—perhaps not even primarily—a legal concept. . . . it is used very widely in moral, political, and popular discourses, and there is often a significant variance between its use by laypersons and by law.[55]

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50. DEBORAH HELLMAN & SOPHIA MOREAU, PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 1 (2013).

51. *Id.*

52. Transgender fight to equality makes a good example for a group still fighting for legal recognition as protected group against discrimination in many liberal democracies.

53. Kasper Lippert-Rasmussen, *Discrimination and Equality*, *in* ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 569 (Andrei Marmor ed., 2012).

54. Sophia Moreau, *What is Discrimination?*, 38 PHIL. & PUB. AFFAIRS 143, 147 (2010).

55. TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 23 (2015).

While the idea of equal opportunity in the workplace may sound trivial today, it was at one time a revolutionary advancement, described as "[o]ne of the epic legal developments of the twentieth century."[56] In the field of labor and employment law, antidiscrimination plays a role within the employment law justification framework. Labor is not a commodity,[57] and this calls for the protection of and respect for employees' equality, dignity, and freedom. Indeed, the International Labor Organization Declaration of Philadelphia, adopted in 1944, arguably the most important international labor and employment law instrument, provides that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[58]

From a more capitalistic approach, employment discrimination has been described as inefficient. Mark Kelman, in his important article *Market Discrimination and Groups*, explained that market actors "are duty-bound to treat those putative plaintiffs with whom they deal . . . no worse than they treat others who are equivalent sources of money. . . . A worker is essentially just her embodied net marginal product."[59] In other words, capitalism expects that employers would focus on workers' productivity and would not be distracted by discriminatory considerations.[60]

By their nature, employment antidiscrimination laws tend to be general; they usually prohibit specific forms of discrimination in the context of employment relations based on race, sex, religion, and age.[61] Employment antidiscrimination laws often confront quite unusual settings, as employment discrimination may at times not be deliberate or conscious, and laws do not generally "address conscious and unconscious decision-making processes . . . the area of employment discrimination in which many cultural beliefs and stereotypes exist."[62]

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56. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 61 (2000).

57. ILO Declaration of Philadelphia, *Declaration Concerning the Aims and Purposes of the International Labour Organisation*, art. I.

58. *Id.* at art. II(a).

59. Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834 (2001).

60. Noah D. Zatz, *Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 156, 160 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2018) ("In short, the law commands that employers be good capitalists, focused on worker productivity and their own bottom line, not distracted by social categorisation, hierarchy, and extrinsic motives.").

61. Yuval Feldman & Tami Kricheli-Katz, *The Human Mind and Human Rights: A Call for an Integrative Study of the Mechanisms Generating Employment Discrimination Across Different Social Categories*, 9 L. & ETHICS HUM. RTS. 43, 46 (2015).

62. *Id.* at 45.

Whether employers discriminate consciously or not, employers are not likely to openly discriminate, and thus second-generation employment discrimination tends to take more elusive forms. Smoking guns—the sign on the door that "Irish need not apply" or the rejection explained by the comment that "this is no job for a woman"—are largely things of the past. Many employers now have formal policies prohibiting race and sex discrimination and procedures to enforce those policies. Nevertheless, "Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much-continued inequality."[63]

However, the case of religious organizations, to which the ME applies, is somewhat different. It is one of the few areas in which discrimination is open. A religious organization does not attempt to argue that it fired a teacher because she performed poorly rather than because of her religious beliefs/sexual orientation/marital status; it rather argues that it is exempt from discrimination laws and is thus allowed to fire her on such grounds.

Antidiscrimination employment laws are intended to protect workers from discrimination as well as to set social conditions to denunciate discrimination.[64] Thus, exempting a group from the reach of antidiscrimination law is problematic on two different levels. First, allowing an exemption from employment antidiscrimination law leaves a large group of workers vulnerable to discrimination. Second, there is a normative message here that suggests that the norm against employment discrimination is weak and may be overlooked.

Aware of such a problematic clash between freedom of religion and antidiscrimination employment laws, liberal democracies have struggled with setting boundaries for the ME and determining its scope.

III. DIFFERENT MODELS OF INAPPLICABILITY OF ANTIDISCRIMINATION LAWS TO RELIGIOUS INSTITUTIONS

Different countries have different employment laws and state-church relations. Different legal systems produce—here again stating the obvious—different legal mechanisms and legal results. However, in the case of the ME, as will be shown below, countries with differing legal frameworks tend to obtain similar results. Even in cases where differences can be detected in the scope of the ME, results can still be perceived as in-line with those of other countries—that is not to say that the ME functions identically everywhere, but rather, that strong similarities may be found. That was correct, at least, until the United States took a sharp turn from what is universally accepted.

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63. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

64. *See* Selmi, *supra* note 5, at 939.

A. *The United States*

To understand the US ME, one first needs to examine the First Amendment of the Constitution, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[65] The first half of the First Amendment is known as the Establishment Clause and the second as the Free Exercise Clause.[66] Thomas Jefferson famously described their effect as "building a wall of separation between church and State."[67] While the Establishment Clause "denies the government the right to practice religion," the Free Exercise Clause "gives people the right to practice their religion."[68] Indeed, the First Amendment is treated as containing "a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom."[69]

The notion of church autonomy, which is now understood to flow from freedom of religion, was first set in *Watson v. Jones*.[70] The Supreme Court, while not relying on the First Amendment, has nevertheless provided for church freedom for managing its internal affairs without court intervention.[71] The Court clarified that church autonomy is justified by the notion of implied consent, which assumes that people under a religious organization chose to join willingly and thus accepted the ways of the church; interfering in a church's internal affairs undermines such free choice:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the

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65. U.S. Const. amend. I.

66. Lund, *supra* note 7, at 11.

67. Thomas Jefferson, Letter to the Danbury Baptists (1802), *in* FROM MANY, ONE: READINGS IN AMERICAN POLITICAL AND SOCIAL THOUGHT 344, 345 (Richard C. Sinopoli ed., 1997).

68. Lund, *supra* note 7, at 12.

69. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991).

70. Watson v. Jones, 80 U.S. 679, 733 (1871) (dealing with a fight over property of the Walnut Street Presbyterian Church in Louisville).

71. *Id.* ("But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.").

> total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[72]

The notion of church autonomy presented in *Watson* has come to constitute the right of the church to choose its own clergy. This right was articulated in *Gonzalez v. Roman Catholic Archbishop of Manila*, where the Supreme Court provided that the Catholic Church has the right to choose its chaplains, regardless of possible violations of the law of trusts.[73]

However, the constitutional framework for church autonomy was not evident until *Kedroff v. St. Nicholas Cathedral*; there, the Court held that a New York statute allowing congregations to split from the Russian Orthodox Church while keeping their property violated the First Amendment.[74] Thus, church autonomy has become a constitutional matter anchored in the First Amendment, granting religious organizations a constitutional right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[75]

The principle of church autonomy, which started in the context of property disputes, would later be used for setting the ME in the context of employment law. The ME was not developed by the Supreme Court, but in various increments in the lower courts. *McClure v. Salvation Army*, which may be described as the birth of the ME, dealt with Billie McClure, a Salvation Army minister. McClure claimed that "she had received less salary and fewer benefits than that accorded similarly situated male officers, also that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices."[76] While Title VII prohibits employment discrimination based on race, color, religion, sex and national origin, Section 702 of Title VII exempts from its applicability employers of "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 religious activities."[77] However, such an exemption was thus far understood to exempt religious organizations from discrimination based on religious grounds only, and not from discrimination against employees because of their race, color, sex, or

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72. *Id.* at 728–29.

73. 280 U.S. 1, 16 (1929); *see also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976) (providing that the Church has a right to choose its bishops, despite possible violation of the laws of contract, property, and agency).

74. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 119 (1952).

75. *Id.* at 116.

76. McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir. 1972).

77. 42 U.S.C. § 2000e-1.

national origin.[78] However, the Court interpreted the exemption widely, explaining that

> the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.[79]

In a much-cited paragraph, the Court concluded that the relationship between a religious organization and its clergy is an internal spiritual matter of the organization that should not be interfered with by external sources:

> The relationship between an organized church and its ministers is its lifeblood. 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. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[80]

McClure set the tone for what followed: over the ensuing years and absent a Supreme Court discussion, "courts all over the country adopted this basic conception of the ministerial exception—churches had a constitutional right to hire and fire the people performing significant religious duties for them, the employment discrimination laws notwithstanding."[81] Federal appellate circuits, as well as state courts, adopted the ME with regard to various discrimination claims, many of which concerned race and sex discrimination.[82]

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78. McClure, 460 F.2d at 558 ("The language and the legislative history of Sec. 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.").

79. *Id.* at 560.

80. *Id.* at 559–60.

81. Lund, *supra* note 7 at 21.

82. *Id.*; *see also* Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 227 (6th Cir. 2007); Petruska v. Gannon Univ., 462 F.3d 294, 307–08 (3d Cir. 2006); Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 955 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656–57 (10th Cir. 2002); EEOC v. Roman Cath. Diocese of Raleigh, N.C., 213 F.3d 795, 800 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303 (11th Cir. 2000); Combs v. Cent. Tex. Ann. Conf. of United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362–63 (8th Cir. 1991); Natal v. Christian & Missionary All., 878 F.2d 1575, 1578 (1st Cir. 1989); *see, e.g.*, Gunn v. Mariners Church, Inc., 84 Cal. Rptr. 3d 1, 6–8 (Ct. App. 2008); Rweyemamu v. Comm'n on Hum. Rts. & Opportunities, 911 A.2d 319, 331 (Conn. App. Ct. 2006); Pardue

Caroline Mala Corbin identifies that two main points arise from such lower court judgments.[83] First, since the selection of clergy is a crucial internal matter for a church, it is a "constitutional imperative"[84] that the church is protected by church autonomy, as "[a]ny attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights."[85] Second, such autonomy is absolute regarding the employment of ministers, as "[r]eligious institutions are not only free to select whomever they wish, but they need not justify their employment decisions,"[86] and "it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions."[87]

In the landmark case of *Hosanna-Tabor,* the ME was finally brought in front of the Supreme Court.[88] The main question for academia was whether the ME would be cancelled by the Supreme Court.

In *Hosanna-Tabor*, the Supreme Court was required to determine whether the employment of Cheryl Perich, an elementary school teacher at Hosanna-Tabor Evangelical Lutheran Church and School, had been wrongfully terminated, in violation of the Americans with Disabilities Act (ADA) and the Michigan Persons with Disabilities Civil Rights Act (MPDCRA).[89] Perich had been diagnosed with narcolepsy, and the U.S. Equal Employment Opportunity Commission (EEOC) claimed that Perich's employment had been terminated in retaliation for threatening to file a discrimination lawsuit.[90]

The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability[91] and from retaliating "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual

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v. Ctr. City Consortium Schs. of Archdiocese of Wash., Inc., 875 A.2d 669, 675 (D.C. 2005); Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm'n, 768 N.W.2d 868, 892 (Wis. 2009).

83. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1973–74 (2007).

84. Pardue, 875 A.2d at 673.

85. *Id.* at 673 (quoting United Methodist Church, Balt. Ann. Conf. v. White, 571 A.2d 790, 794 (D.C. 1990)); *see also* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999) ("A church's selection of its own clergy is ... [a] core matter of ecclesiastical self-governance with which the state may not constitutionally interfere. A church must retain unfettered freedom in its choice of ministers . . .").

86. Corbin, *supra* note 83, at 1975.

87. Bollard, 196 F.3d at 946.

88. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 173 (2012).

89. *Id.* at 172–73; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101; Michigan Persons with Disabilities Civil Rights Act (MPDCRA), Mich. Comp. Laws § 37.1602(a) (1979).

90. *Hosanna-Tabor*, 565 U.S. at 700–02.

91. ADA §12112(a).

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."[92] The MPDCRA forbids retaliation "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."[93]

The defense, invoking the ME, argued that "the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers."[94] The church claimed that Perich was a minister who was fired for a religious reason, as "her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[95]

As the question of the ME had not yet been reviewed by the Supreme Court, the Court first affirmed that the ME existed and that it was a valid principle in American law:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[96]

After establishing the status of the ME, the Court went on to consider whether the ME was applicable to the facts of the case, that is, whether Perich was a minister. Perich was a kindergarten teacher who held a "diploma of vocation," according her the title "Minister of Religion," and who performed both religious and secular duties within the church.[97]

The Court accepted that the ME "is not limited to the head of a religious congregation."[98] The Court further explained that it refused to adopt "a rigid formula for deciding when an employee qualifies as a minister,"[99] but rather, adopts a four-component test:

> In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important

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92. ADA §12203(a).
93. MPDCRA § 602(a).
94. *Hossana-Tabor*, 565 U.S. at 180.
95. *Id.*
96. *Id.* at 188–89.
97. *Id.* at 177, 191–93.
98. *Id.* at 190.
99. *Id.*

> religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.[100]

Therefore, an evaluation of an employee's formal title, the substance reflected in the title, her use of the title, and the religious functions performed for the employer are to be used to determine whether an employee of a religious organization is a minister for the purpose of the ME. The Court further explained that with regard to the last component of religious functions, the fact that an employee performs mixed activities of religious and secular functions does not preclude her from having a religious function.[101]

The Court went on to clarify that the ME does not apply solely to discrimination claims on religious grounds but to all discrimination claims, as its purpose is to maintain church autonomy:

> 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.[102]

Such broad construction of the ME led the Court to decide that the church was protected under the ME, disqualifying Perich's suit.[103] With that, the Supreme Court established that the ME exists and that it bars employment discrimination suits brought on behalf of ministers.[104] While the Court acknowledged "[t]he interest of society in the enforcement of employment discrimination statutes," it has practically determined that such an interest is trumped by "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[105]

In July 2020, the Supreme Court decided the case of *Our Lady of Guadalupe School v. Morrissey-Berru*,[106] the most important ME case since *Hosanna-Tabor. Our Lady of Guadalupe*, which was decided together with *St. James School v. Biel*,[107] required the Court, once again, "to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious

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100. *Id.* at 192.

101. *Id.* at 193 ("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 that 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." (citation omitted)).

102. *Id.* at 194 (citation omitted).

103. *Id.* at 196.

104. *Id.*

105. *Id.* at 196.

106. Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

107. St. James School v. Biel, 911 F. 3d 603 (2018).

schools who are entrusted with the responsibility of instructing their students in the faith."[108]

The case concerned employment discrimination claims by two elementary school teachers at Catholic schools. Unlike Perich in *Hosanna-Tabor*, "these teachers were not given the title of 'minister' and [had] less religious training than Perich."[109] Morrissey-Berru argued that she had been demoted and her contract with the school not renewed so that the school could replace her with a younger teacher, in violation of the Age Discrimination in Employment Act of 1967.[110] The Ninth Circuit maintained that while Morrissey-Berru had "significant religious responsibilities," "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework."[111] It further maintained that, unlike Perich, Morrissey-Berru was not titled "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister."[112] Therefore, despite having religious responsibilities, the Ninth Circuit held that she was not a minister, and thus, the school was not protected under the ME.[113]

The second case concerned the late Kristen Biel, a "lay teacher" at St. James School, a Catholic primary school in Los Angeles.[114] Biel claimed that she was discharged due to her request for a leave of absence to undergo breast cancer treatment.[115] The Ninth Circuit, in this case too, provided that Biel was not a minister since "Biel, by contrast, has none of Perich's credentials, training, or ministerial background."[116]

The Supreme Court reversed both decisions, holding that under the ME "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[117] The Court established that the ME is crucial in maintaining church autonomy: "Without that power [church autonomy], a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters."[118]

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108. *Our Lady of Guadalupe*, 140 S. Ct. at 2055.
109. *Id.*
110. *Id.* at 2058; Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967), *amended by* 29 U.S.C. § 621.
111. Our Lady of Guadalupe School v. Morrissey-Berru, 769 Fed. App'x 460, 461 (9th Cir. 2019).
112. *Id.*
113. *Id.*
114. St. James School v. Biel, 911 F. 3d 603 (2018).
115. *Id.* at 605.
116. *Id.* at 608.
117. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).
118. *Id.*

After reaffirming the importance of the ME, the Court continued, in a rather dramatic determination, to alter the quadruple test set in *Hosanna-Tabor*. It established that the "recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases."[119] The Court argued the title "minister" is not sufficient to justify the ME, and its lacking does not disqualify the application of the ME.[120] It reasoned that "since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement."[121] The emphasis was heavily, if not solely, put on the functional component of the test:

> What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.[122]

The Court argued that performing religious duties is sufficient to be recognized as a minister for the purpose of the ME, as "[e]ducating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught."[123] While downplaying the importance of the title requirement, the Court stressed that "Morrissey-Berru and Biel had titles. They were Catholic elementary school *teachers*, which meant that they were their students' primary teachers of religion."[124]

The Court maintained that its decision in *Hosanna-Tabor* had been misunderstood by the Ninth Circuit, treating the four components as a rigid formula of checklist items.[125]

This author asserts that such explanation of a misunderstanding of *Hosanna-Tabor* by the Ninth Circuit is quite unreasonable and, perhaps, designated to portray the decision in *Our Lady of Guadalupe* as less dramatic than it actually is. *Hosanna-Tabor* does not contain any clue that the functional component is the only decisive one. Moreover, the approach that the functional component *should* be the decisive one was at the heart of Justice Alito's concurring opinion in *Hosanna-Tabor* (who also gave the opinion of the Court in *Our Lady of Guadalupe*).[126]

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119. *Id.* at 2063.
120. *Id.* at 2063–64.
121. *Id.* at 2064.
122. *Id.*
123. *Id.* at 2066.
124. *Id.* at 2067.
125. *Id.* at 2066–67.
126. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 198 (2012) (Altio, J., concurring) ("Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.").

Our Lady of Guadalupe sets a very broad interpretation of the ME—far broader than that in *Hosanna-Tabor*. The functional component, one of four, has become the only substantial component. Moreover, the functional component itself is understood quite broadly; while in *Hosanna-Tabor*, it was understood that the mixed nature of secular and religious duties is enough to maintain a religious function,[127] in *Our Lady of Guadalupe*, it seems that any teacher in a religious school would qualify as a minister. This does not sit well with the Court's reasoning. While it is true that there are many religions in the United States and not all use the term "minister," this case deals with a religion that has such a title. The Court did not try to truly ascertain whether Biel and Morrissey-Berru were "ministers without a title" but rather determined that all teachers are ministers for the purpose of the ME. If the concern is that other religions do not use the term minister, the Court could attempt to understand the functions of a minister and their parallel titles and functions in other religions. The Court in *Our Lady of Guadalupe* did not merely clarify its intentions in *Hosanna-Tabor*, but rather, it established a broad understanding of the ME, which applies to all teachers in religious institutions. This is not to argue that *Our Lady of Guadalupe* is a bad decision but rather to point out that it had changed the understanding of the ME's application from its construction in *Hosanna-Tabor*.

B. *Israel*

Israel's state–religion relations are very far removed from those in the United States. Israel's version of a constitution—its Basic Laws—identify Israel as a Jewish state. A recent controversial Basic Law, titled "Israel–The Nation-State of the Jewish People" (INSJP), provides that The Land of Israel is the historical homeland of the Jewish people and the nation-state of the Jewish people, in which the Jewish populace "realizes its natural, cultural, religious and historical right to self-determination."[128] The law sets out that the right of self-determination in Israel is "unique to the Jewish People"; that is, in comparison to that of other groups in Israel.[129]

However, the notion of Israel as a Jewish state arose much earlier, and it is rooted in Israel's Declaration of Independence. The 1948 Declaration of Independence establishes Israel as a Jewish state and sets the right to equality irrespective of religion, race, or sex.[130] The Declaration specifically refers to the Arab inhabitants of Israel, and

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127. *Id.* at 193–94.

128. Basic Law: Israel–The Nation State of the Jewish People ("INSJP"), Art. 1(a)-(b) (Isr.).

129. *Id.* at art. 1(c).

130. For an English translation of the Declaration of Independence of Israel, see ISRAELI DECLARATION OF INDEPENDENCE (1948), http://ecf.org.il/media_items/848 [https://perma.cc/7MPQ-KLPY] (archived Oct. 3, 2021).

encourages them to participate in the "building of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions."[131]

The values of Israel as a Jewish and democratic state are mentioned in three Basic Laws[132]—the balance of such values is one of the most debated topics in Israeli society.[133] Indeed, while some fractions of Israeli society would have been interested in a far more religious state, in which religious law (Halacha) controls the public domain, others wish to create full separation of state and synagogue.[134]

Israel's historical approach to the balance between the demands of religious and secular camps is referred to as the "status quo" model. It is traditionally depicted as a decision not to decide—"that is, on preserving an existing status quo that acknowledges the priority of religious demands in some areas in a way that reflects a social-political compromise rather than a principled decision-making."[135] The status quo reflects compromises that were crystallized in the early days of Israel based on agreements reached between Jewish leaders at that time, mainly a letter that the Jewish Agency—which was controlled by the secular Labor Party—sent in 1947 to the international organization of Agudat Israel, the hegemonic movement within the ultra-Orthodox Jewish public.[136] Inter alia, the letter included an understanding that Israel would allow for an autonomic public religious education system alongside the secular education system.[137]

Such an understanding was later reflected in Israel's State Education Law of 1953 (SEL), which establishes separate religious and secular education systems, enables parents to choose a public

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131. *Id.*; *see* Michal Tamir, *The Declaration of Independence as a Transitional Constitution: The Case of Israel*, 8 MIDDLE EAST L. & GOVERNANCE 57, 82 (2016) ("[T]he [Israeli] Supreme Court has relied in several cases on the Jewish character of the state as defined in the Declaration of Independence in order to affirm collective Arab minority rights and to reinforce equality of Arab citizens.").

132. Basic Law: Freedom of Occupation, Art. 2 (Isr.) (an official English translation of the Basic Law is available at https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm); Basic Law: Human Dignity and Liberty, Art. 1 (Isr.) (an official English translation of the Basic Law is available at https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm); Basic Law: The Knesset, Art. 7(a)(1) (Isr.) (an official English translation of the Basic Law is available at https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm).

133. For the social debate see in length: ALEXANDER YAKOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS 97–123 (Ruth Morris & Ruchie Avital trans., Routledge 2009).

134. *Id.*

135. Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2495 (2009).

136. *The Status Quo Letter from David Ben-Gurion to the Leaders of Agudat Israel*, TEXTOLOGIA, https://www.textologia.net/?p=33379 [https://perma.cc/GV5G-CX9T] (archived Oct. 29, 2021) (copy of the original letter in Hebrew).

137. *Id.*

education system compatible with their own preferences.[138] Additionally, in the Unique Cultural Educational Institutions Law of 2008, allowing Haredi Jews and other groups possessing unique cultural characteristics to establish their own educational institutions with state funding.[139]

Article 18 of SEL sets out that "[t]he Council for Religious State Education may, on religious grounds only, disqualify a person for appointment or further service as a principal, inspector or teacher at a religious State-educational institution."[140] Israel's Equal Employment Opportunities Law, which protects employees from different forms of discrimination, provides in Article 2(c) that "[d]ifferential treatment necessitated by the character or nature of the assignment or post shall not be regarded as discrimination."[141]

The status of religious organizations is significantly different in Israel than in the United States. In Israel, all education institutions, including independent ones, are considered hybrid public/private entities and are thus subject to "normative duality"; that is, both legal schemes of private law, as well as special standards derived from the scheme of constitutional and administrative law, are applicable thereto.[142] Therefore, religious organizations are supported and funded by the state but are also required to comply with the strict legal demands posed by Israeli administrative law.

In the case of *Yaffa Rosenbaum v. Ministry of Education*, Rosenbaum, a kindergarten teacher in a religious daycare affiliated with the state religious education system, claimed that she had been wrongfully dismissed due to her husband's secular views and her refusal to send her own children to an ultra-Orthodox school—despite being ultra-orthodox herself.[143] While it was not disputed that Rosenbaum's work performance was impeccable, the Council for Religious State Education (the Council) argued that a person who did not manage to keep her own family on a religious path would similarly "fail" at such a task with her students.[144] The court held that while Article 18 of SEL allows the Council to disqualify a teacher from religious considerations, such religious considerations should be examined with reference to the teacher herself and not her family members.[145] The court acknowledged that in the field of education, a

138. State Education Law, 5713–1953.

139. Unique Cultural Educational Institutions Law (2008) (Isr.).

140. State Education Law § 18.

141. Art. 2(c), Employment (Equal Opportunities) Law, 5748–1988, (1988), (Isr.).

142. *See* CivA (N.L.C Labor Appeal Jer.) 1123/01 All Israel Are Friends High School Tel-Aviv Jaffa v. Zoizner, XX 438, 466 ¶ 44 (2001) (Isr.); CivA (N.L.C. Labor Appeal Jer.) 109/08 Independent Talmudic Education Center v. Ovadia Ben Nun, XX 1, 10 ¶ 18 (2008) (Isr.).

143. CivC (Reg'l Lab. Ct. Nz) 1693/98 Rosenbaum v. State of Israel, Ministry of Educ., XX ¶ 9-14 (1999) (Isr.).

144. *See id.* ¶ 40(d).

145. *Id.* ¶ 47–49.

person's "ways of life" may have implications for her work skills; however, the relevant ways of life are of the educator alone and not her family.[146] The court further explained that the considerations should be reasonable[147] and provided that, while it could be suggested that a high school teacher should set an example with regard to whom one should marry, such consideration is irrelevant to a kindergarten teacher teaching young children.[148] The court did not shy away from entering into religious justifications itself, noting that expecting Rosenbaum to part from her husband rather than accept their differences was opposed to the spirit of Judaism, which enshrines the value of marriage and domestic harmony.[149]

In the case of *Plonit v. Almonit*, the court was required to determine whether termination of employment of a teacher in an Ulpana (girls-only Jewish high school) while she was pregnant was lawful.[150] The defendant claimed the plaintiff's decision to conceive a child outside of wedlock set a bad example for her students.[151] The plaintiff, a religious woman in her early forties, whose attempts to find a partner and marry did not succeed, turned to *in vitro fertilization* treatment to conceive a child as a single mother on the advice of rabbis.[152] The Employment of Women Law prohibits the termination of employment of pregnant employees, save under a permit from the Minister of Labour and Social Affairs.[153] Such a permit was not granted in the case at hand.

The court was required to determine whether the Ulpana's decision was protected under Article 18 of SEL and Article 2(c) of the Equal Employment Opportunities Law and, thus, exempt from the application of the Employment of Women Law. The court opened its decision with a quote from the Bible: "And when Rachel saw that she bore Jacob no children, Rachel envied her sister; and she said unto Jacob: 'Give me children, or else I die.'"[154]

The court acknowledged that the Council has wide discretion in the employment and dismissal of employees, as part of which it must consider different religious considerations:

> [The Council] must take into account binding and accepted Halachic considerations in the general religious public, accepted religious tradition, social norms and innovations of Halacha, in accordance with the population of students and parents of a particular religious institution according to its nature and

146. *Id.* ¶ 52.
147. *See id.*
148. *See id.* ¶ 50 (demonstrating that the court understands that content worlds and values are age-related and thus, dismissible actions of teachers are interpreted accordingly), ¶ 53.
149. *See id.* ¶ 58.
150. *See* CivC (Reg'l Lab. Ct. TA) 12137/09 Plonit v. Almonit, XX ¶ 1 (2013) (Isr.).
151. *Id.* ¶ 115.
152. *Id.*. ¶ 112–15.
153. *See* Art. 9A., Employment of Women Law, 5714–1954, (1954), (Isr.).
154. Plonit v. Almonit ¶ 1 (quoting *Genesis* 30:1 (King James)).

> ' lifestyle. Indeed, in our opinion, there are cases in which it is not possible to accept a teacher's continued employment in a religious school, when her lifestyle, beliefs and/or dress code are inconsistent with what is required and with the religious lifestyle and practice in the same sector in which she works.[155]

However, the court established that the Council should have also considered the plaintiff's rights, "such as her right to parenthood, her right to continue her employment as a teacher in her sector and her being a religious and believing person, who chose to exercise her right to parenthood later in life."[156] The court set out that the exemptions of Article 2(c) of the Equal Employment Opportunities Law should be interpreted in a restrictive manner, but also with reference to Article 18 of SEL, to take into account the independence of the religious sector.[157] The court did not elaborate on the application of the seemingly contradictive interpretational requirements it established. The court further explained that while religious autonomy is a central value that must be respected, it may be limited in order to fulfill social goals.[158] The court set out that the defendant should have sought the counsel of rabbis and other authorities in an attempt to find a proper solution to her delicate situation, which reflects a shared problem of many women in the religious sector.[159] In light of such factors, the court ruled in favor of the plaintiff.

Guy Mundlak points out that labor law in Israel "encapsulates much of the tension between secular and religious Jews in Israel" and "displays the problem of pluralistic societies in accommodating non-pluralistic groups within them."[160] Mundlak suggests that the Israeli solution "resists strong separation, favors religious closure, and counts on secular tolerance, contributing to the imbalanced status quo between religious and secular Jews."[161] However, such a suggestion may be challenged. In comparison with the United States, it seems that religious institutions actually have less autonomy in Israel. However, in Israel, such institutions are largely state funded, if not directly affiliated with the state religious education system. In the United States, the ME applies to private institutions only.

An important aspect of Israeli ME that will be discussed again later is that of the ME's application in the context of different types of discrimination. While in the United States, the ME applies to all types of discrimination as it enshrines religious institutions' freedom to decide, Israel has, in practical terms, set such freedom as the religious

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155. *Id.* ¶ 109–10.
156. *Id.* ¶ 112.
157. *See id.* ¶ 101–02.
158. *Id.* ¶ 107.
159. *Id.* ¶ 116.
160. Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 30 COMP. LAB. L. & POL'Y J. 213, 230 (2009).
161. *Id.*

institutions' freedom to decide on religious grounds.[162] One should note, however, that that does not mean that the ME is limited to *discrimination on religious grounds*, but rather, that the ME would apply to all sorts of discrimination types, if the considerations behind the discriminatory decision were religious. To make this difference clearer, discrimination against a protected sector would be tolerated in religious institutions *as long as it serves a religious purpose or has religious reasoning*; discrimination against a protected sector that does not serve a religious purpose would not be tolerated. For example, if a religious institution terminated a worker's employment because of her age and cannot show that it did so in line with a religious consideration, such an institution would not be protected under the ME.

C. *European Court of Human Rights*

In 1950, the Member States of the Council of Europe adopted the European Convention on Human Rights (the Convention),[163] which established "a single, permanent system of control and protection of human rights."[164] The European Court of Human Rights (ECtHR), often referred to as "the Strasbourg Court," was founded by the force of the Convention and holds the authority to interpret the Convention and to hear applications regarding violation of the Convention's provisions by member states.[165] Many scholars argue that the Convention and the ECtHR play the role of a constitution and a constitutional court for Europe.[166] Forty-seven states are party to the Convention; they are naturally diverse in their legal systems, labor law perceptions, and state-church relations. For example, while France has complete separation of religion and state, and arguably, even hostility toward religion, Germany collects taxes to support religious institutions.[167]

Despite such diversity, over the years, the ECtHR has formed a solid legal body with regard to the ME and its scope. This is especially interesting for the purpose of this research, as it shows how different judicial systems may still have much in common when the ME is

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162. *See* State Education Law § 18 (Isr.).

163. Claudia Morini, *Secularism and Freedom of Religion: The Approach of the European Court of Human* Rights, 43 ISR. L. REV. 611, 611 (2010). European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

164. *Id.*

165. EUR. CT. HUM. RTS. REVISED RULES OF CT. (2021), http://www.echr.coe.intlNR/rdonlyres/DIEB31A8-4194-436E-987E-65AC8864BE4F/0/RulesofCourt.pdf [https://perma.cc/LR3Y-TC56] (archived Oct. 3, 2021).

166. *See generally* STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 317 (2006).

167. *See* Nieuwenhuis, *supra* note 23, at 168–69.

concerned. Freedom of religion is protected under Article 9 of the Convention:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[168]

Where the ME is concerned, Article 9 should be read together with Article 11 of the Convention, protecting associative life against wrongful state interference.[169] Therefore, "the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary state intervention."[170]

In September 2010, the ECtHR simultaneously released important decisions in two cases (*Obst* and *Schüth*) concerning the ME.[171] These cases both included applicants who were employees of church institutions and were dismissed because of extramarital relations.[172] The applicants in both cases argued that their dismissals were in violation of Article 8 of the Convention, which sets out that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[173] In both cases, the ECtHR examined the balance between the opposing rights of freedom of religion and church autonomy versus right to privacy. The ECtHR reached two different conclusions in these two cases. In *Obst*, the chamber found that the effect of the dismissal on Obst's personal life would be minimal because Obst was still relatively young and should be able to find alternative employment, and therefore, the decision to authorize Obst's dismissal was correct.[174] Schüth, on the other hand, had a very specific qualification as an organist, and the ECtHR considered that he would struggle to reintegrate into the labor market.[175] The chamber in *Schüth* established that the balance between church autonomy and Schüth's rights was improperly conducted, as the German tribunals

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168. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 2889 U.N.T.S. 222.

169. Hasan & Chaush v. Bulgaria, App. No. 30985/96, XX Eur. Ct. H.R. ¶ 62 (2000).

170. Hasan & Chaush v. Bulgaria, App. No. 30985/96, XX Eur. Ct. H.R. ¶ 62 (2000).

171. *See* Obst v. Germany, App. No. 425/03, XX Eur. Ct. H.R. 1, 3 ¶ 6–23 (2010); Schüth v. Germany, App. No. 1620/03, XX Eur. Ct. H.R. 1 (2010).

172. *See* Obst v. Germany, App. No. 425/03, XX Eur. Ct. H.R. 1, 3 ¶ 6–23 (2010); Schüth v. Germany, App. No. 1620/03, XX Eur. Ct. H.R. ¶ I.A. (2010).

173. 2889 U.N.T.S. 222, *supra* note 168, art. 8.

174. Obst, App. No. 425/03 at 22 ¶ 48.

175. Schüth, App. No. 1620/03 at 25–26 ¶ 73.

had given excessive weight to church autonomy over the right to privacy:

> The [German] employment tribunals did not sufficiently explain the reasons why, according to the findings of the Employment Appeal Tribunal, the interests of the Church far outweighed those of the applicant, and that they failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention.[176]

At first, it was unclear whether the ad hoc balancing of rights under the proportionality test was a conscious choice by the ECtHR or was chosen "merely because the domestic courts in those cases had themselves approached the issue in that way."[177] However, according to Ian Leigh, the ECtHR's decision in *Eweida and Others v. UK* "dispelled this doubt and confirmed that proportional balancing is indeed now the preferred method of disposing of religious clash of rights cases at least in an employment context."[178] However, the author of this paper considers that the case of *Eweida* differs from *Schüth* and *Obst*, as discrimination against a religious worker in a non-religious workplace is not the same as the ME cases in which religious autonomy plays a major role.

Be that as it may, this formulation did not last for long, as the ECtHR arguably abandoned this formula balancing the collective dimension of freedom of religion and church autonomy against individual human rights in the 2014 case of *Fernández Martínez v. Spain*.[179] *Fernández Martínez* has been described as "one of the important cases decided in recent years by the [ECtHR] about religious autonomy."[180] In this case, Fernández Martínez, a Catholic priest ordained in 1961, after twenty-three years of service, had applied to the Vatican for dispensation from the obligation of celibacy.[181] As Fernández Martínez did not receive any answer with regard to his request, within a year of the request, he married in a civil ceremony

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176. *Id.* at 26 ¶ 74.

177. Ian Leigh, *Reversibility, Proportionality, and Conflicting Rights*, *in* WHEN HUMAN RIGHTS CLASH AT THE EUROPEAN COURT OF HUMAN RIGHTS: CONFLICT OR HARMONY? 218, 221 (Stijn Smet & Eva Brems eds., 2017).

178. *Id.*; *see* Eweida and Others v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10, XX Eur, Ct. H.R. 1, 32 ¶ 83 (2013) ("Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.").

179. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. (2014).

180. Javier Martínez-Torrón, *Fernández Martínez v. Spain: An Unclear Intersection of Rights*, *in* WHEN HUMAN RIGHTS CLASH AT THE EUROPEAN COURT OF HUMAN RIGHTS: CONFLICT OR HARMONY? 192, 192 (Stijn Smet & Eva Brems eds., 2017).

181. Fernández Martínez, ¶ I.A. 11–12.

and, over time, had five children with his wife.[182] From October 1991 onwards, already married with children, Fernández Martínez was employed as a teacher of Catholic religion and ethics in a state-run secondary school under a renewable one-year contract.[183] Five years after his appointment, a local newspaper printed an article about the Movement for Optional Celibacy of Priests (MOCEOP), mentioning Fernández Martínez by name and including his photo. The article triggered a mass approval of old dispensation from celibacy requests, which included that of Fernández Martínez submitted 13 years prior.[184] The decree specifically noted that Fernández Martínez could no longer serve as a Catholic religion teacher, unless the bishop decided otherwise, and with the condition that he was not involved in a scandal ("*remoto scandalo*").[185] As a result of the decree and its content, Fernández Martínez's annual state contract was not renewed.[186]

Following these events, Fernández Martínez turned to the judicial itinerary in Spain, which ended with an adverse judgment by the Spanish Constitutional Court.[187] The court determined that Fernández Martínez's personal and family privacy had not been violated and that he had not been discriminated against because of his marital status, and reasoned that he was the one who chose to make his private life public by agreeing to an interview and allowing his family photo to be published in the newspaper.[188] The removal of his permit to teach religion was justified as it was triggered by a scandal––a term that needs to be evaluated from a religious perspective.[189] The court found that Fernández Martínez's rights could be limited due to the church's religious autonomy and parents' rights with regards to the religious education of their children.[190] The court further established that the constitutional principle of neutrality, anchored in the Spanish Constitution, obliges it to respect the judgments of ecclesiastical authorities on the qualification of religion teachers.[191] While the court has the power to ensure that the dismissal was indeed on religious

182. *Id.*
183. *Id.* ¶ I.A. 13.
184. *Id.* ¶ I.A 14–15.
185. *Id.*
186. *Id.* ¶ I.A. 18–19.
187. S.T.C., 4 June 2007 (No. 128) (Spain), http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6095 [https://perma.cc/CB25-C5L7] (archived July 27, 2018).
188. *Id.*; Martínez-Torrón *supra* note 180, at 193–94.
189. S.T.C., 4 June 2007 (No. 128) para. 6 (Spain).
190. *Id.*; CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311 art. 27(3) Dec. 29, 1978 (Spain).
191. S.T.C., 4 June 2007 (No. 128) para 12; C.E., B.O.E. n. 311 art. 16(3) Dec. 29, 1978 (Spain).

grounds, as it was convinced was the case here, it would not intervene in ecclesiastical decisions.[192]

The case was reviewed by the ECtHR's Chamber in 2012,[193] which ruled against Fernández Martínez, and then again in 2014 by the ECtHR's Grand Chamber. In the 2012 chamber decision, the court seems to have abandoned the balancing formula in favor of a European ME in the model of *Hosanna-Tabor*. The court set out that since Fernández Martínez's contract did not include strictly religious considerations, religious liberty and neutrality impede it from examining the necessity and proportionality of the decision.[194] The chamber distinguished the case from *Schüth* and *Obst* mainly by categorization of position—lay versus called. Fernández Martínez was a "secularised priest" and thus required a higher level of loyalty.[195]

However, the grand chamber's decision somewhat diluted the possibility of *Hosanna-Tabor* mirroring the European ME, given the split decision of 9–8.[196] The grand chamber did not set a functional test as in *Hosanna-Tabor* but also did not engage in proper balancing of rights as in *Schüth* and *Obst*. Rather, it determined whether non-renewal was in accordance with the law, for a legitimate aim, and whether it was necessary in a democratic society.[197] The two criteria were quickly checked, and the latter then more thoroughly analyzed. The grand chamber focused on the following factors: Fernández Martínez's status, his contribution to the publicity of his status as a married priest and membership of MOCEOP, remarks he made in such regard, the state's responsibility as an employer, the severity of the sanctions posed (non-renewal of the employment contract), and the review process by domestic Spanish courts.[198] One may note that the grand chamber took a rather one-sided perspective on the parties' knowledge of Fernández Martínez's status. The grand chamber noted

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192. S.T.C., 4 June 2007 (No. 128) para. 12 ("A este Tribunal como poder público del Estado únicamente le compete constatar en razón de aquel deber de neutralidad, a los efectos del presente recurso de amparo, la naturaleza estrictamente religiosa de las razones en las que la autoridad religiosa ha fundado en este caso la no propuesta del demandante de amparo como profesor de religión y moral católicas [...]").

193. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. 167 (2014).

194. *Id.* ¶ 84 (" [à] l'instar des arguments du Tribunal constitutionnel [...] la Cour considère que les circonstances qui ont motivé le non-renouvellement du contrat du requérant en l'espèce sont de nature strictement religieuse. Elle est d'avis que les exigences des principes de liberté religieuse et de neutralité l'empêchent d'aller plus loin dans l'examen relatif à la nécessité et à la proportionnalité de la décision de non-renouvellement [...]").

195. *Id.* ¶ 86.

196. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. 167 (2014).

197. *Id.* at E.

198. *Id.*; *see also* Sylvie Langlaude Done, *Religious Organisations, Internal Autonomy and Other Religious Rights before the European Court of Human Rights and the OSCE*, 34 NETH. Q. HUM. RTS. 8, 17 (2016).

that Fernández Martínez should have known that his status would be problematic for the church as he was aware of the church rules and "should therefore have expected that the voluntary publicity of his membership of MOCEOP would not be devoid of consequences for his contract."[199]

However, no similar weight was given to the fact that he was hired to the position already married with children—a fact that was known to the church. A counterclaim would be that it was not the applicant's status that was problematic, but rather, the scandal it caused following the media report. Therefore, it could be assumed that the issue of prior knowledge was relevant for both parties.

The grand chamber further found that church autonomy had not been abused as the considerations for the non-renewal of Fernández Martínez's contract were strictly religious:

> As to the Church's autonomy, it does not appear, in the light of the review exercised by the national courts, that it was improperly invoked in the present case, that is to say that the Bishop's decision not to propose the renewal of the applicant's contract cannot be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of the Catholic Church's autonomy.[200]

The grand chamber in *Fernández Martínez* backed away from the American ME version adopted by the Chamber, but still arguably presented a softened version of a European ME. As Pamela Slotte argued, while religious organizations are not completely exempt from antidiscrimination labor laws, exemption can be found for employees performing religious tasks:

> When it comes to matters of employment, it seems that religious associations or organizations with a faith-based ethos that function as employers . . . cannot deviate from generally applicable law, including from labor law and non-discrimination law, to an extent that would disregard the fundamental rights of the employees. [However] deviation from generally applicable norms may be acceptable practice when it comes to employees performing religious tasks.[201]

This indeed echoes the American ME, in a softened version. The functional test, which is the main requirement in the American ME, is valid in Europe too. However, when such religious function is detected, it does not grant the religious institution a hermetic shield from antidiscrimination laws, but rather, leads to a balancing of rights. Other than the functional test, the second requirement is that the discriminating decision must be due to religious considerations. This

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199. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. para. 145 (2014).

200. *Id.* at para. 150.

201. Pamela Slotte, *The Ministerial Exception: Theological and Legal Perspectives from Finland and Europe, in* RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 39, 49 (Brett G. Scharffs, Asher Maoz, & Ashley Isaacson Woolley eds., 2019).

aspect of the European ME resembles the Israeli model. Foreign considerations that are not religious, leading to a discriminating decision, would not be protected from the applicability of employment antidiscrimination laws.

IV. THE UNBALANCED COMBINED OUTCOME OF *HOSANNA-TABOR* AND *OUR LADY OF GUADALUPE*

A. *The ME as a Hermeneutical Universal Issue*

In modern times, religious organizations fulfill important public functions as they provide services to the public, such as education, health care, job training, and prison and drug rehabilitation.[202]

As the presence of religious organizations is notable in all fields of life, the paradox of tolerance has become an issue preoccupying democracies throughout the globe. The paradox of tolerance provides that "any kind of tolerance has to have some limits, and that any concept of tolerance in consequence appears to become intolerant at some stage."[203] More simply put, it is a problem of what is the right limit of religious freedom. Mahlmann suggests that this problem is not unique nor understandable only from the viewpoint of a specific legal system, as it relates to a universal question.[204] He refers to the paradox of tolerance as of a hermeneutical universalist nature:

Mahlmann's view implies a methodological vote for a point of view that could be called hermeneutical universalism. It implies that legal regimes of various forms are not hermetic entities only understandable from the perspective of a participant, but they are concrete answers to quite universal questions. Therefore, Mahlmann concludes, universal perspectives should not be forgotten when attempting to construe a proper response to the paradox of tolerance.[205]

Kant, for example, considered the entire enterprise of religion as universal, as there may be many kinds of faiths but one religion of humanity as the temple of God.[206] This research does not adopt such a view—it recognizes the diversity in religions and in models of state and church. Rather, it suggests that the accommodation of religious institutions and their clashes with employment antidiscrimination law have some shared universal principles. It further argues that it should therefore be possible to collate such principles in order that different legal systems are able to grow and learn from global experience.

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202. Corbin, *supra* note 83, at 1968.
203. Mahlmann, *supra* note 30, at 2475.
204. *Id.*
205. *Id.*
206. Immanuel Kant, DIE RELIGION INNERHALB DER GRENZEN DER BLOSSEN VERNUNFT (1793), *reprinted in* 6 AKADEMIE AISGABE 184, 198 (Koniglich-Preussische Akademie der Wissenschaften ed., 1902).

Surely, each legal system would confer with such principles, in accordance with its own unique characteristics and limitations.

Until recently, one could have claimed that the shared experience of American courts, Israeli courts, and the ECtHR (which has jurisdiction over forty-seven countries)[207] has created a rather harmonic situation, in which each legal system by its own means has reached quite similar practical results, whereby religious leaders and other workers with religious functions are covered under the ME. However, the combined outcome of *Hosanna-Tabor* and *Our Lady of Guadalupe* created a balance between employment rights and church autonomy that favors church autonomy in a manner that deviates greatly from the balance achieved by Israeli courts and the ECtHR. This is not to suggest the US ME must conform with other legal systems, but rather, that such striking deviation might imply that the outcome achieved by the combination of *Hosanna-Tabor* and *Our Lady of Guadalupe* should be examined. It is possible that the Court in *Our Lady of Guadalupe* did not correctly estimate its implications when put together with *Hosanna-Tabor* and that some adjustments could be considered.

Before fully outlining the deviation from the previously accepted balance between employment rights and church autonomy caused by *Hosanna-Tabor* and *Our Lady of Guadalupe*, the remaining discussion will describe the shared principles of the ME formulation concluded by US courts, Israeli courts, and the ECtHR.

1. Correlation between the Level of State Involvement and the Scope of the ME

When comparing case law of the three courts, it becomes evident that the more independent the religious organization is perceived as, the more broadly the ME applies. In the United States, the ME applies to private organizations only, as the state cannot own or fund religious organizations according to the First Amendment.[208] One may note that the American version of the ME leaves religious organizations with the highest amount of religious autonomy. In Israel, religious organizations are often state organizations, or at the very least, state funded. Even in the rare situation of a private non-state-funded institution, because of the rule of normative duality, such an organization would be perceived as serving a public purpose.[209] While the interpretation of *who* is exempt from antidiscrimination employment laws is unnecessary in Israel, as the law explicitly

207. Together: "the three Courts."

208. U.S. CONST. amend. I.

209. Civ. A., National Labor Court (DC Jer.) 1123/01 All Israel Are Friends High School Tel-Aviv Jaffa v. Zoizner (2001) (Isr.), para. 44; Civ. A., National Labor Court (DC Jer.) 109/08 Independent Talmudic Education Center v. Ovadia Ben Nun (2008) (Isr.), para.18.

provides such information, the actual applicability of the ME in Israel is more limited than in the United States, as exemptions are interpreted in a restrictive manner.[210] The ECtHR, which has dealt with ME cases relating to a variety of institutional independence levels, has provided that the amount of state involvement is indeed a relevant factor in determining the limits of religious autonomy (even if not affecting ministers' duty of loyalty).[211] The ECtHR chose to distinguish *Fernández Martínez* from *Schüth* and *Obst* by noting that, unlike the latter two, in which "the applicants were employed by their respective Churches, the applicant in the present case, like all religious-education teachers in Spain, was employed and remunerated by the State."[212]

Indeed, the notion that autonomy goes hand in hand with independence from state ownership or funding is at the very core of American state and church separation.[213] As such separation is blurred or cancelled, religious autonomy is consequently impaired. While the comparison of the three courts does not provide concrete indication of the exact doctrinal implication of the changing spectrum of state involvement, it can be inferred that a wider applicability of the ME goes together with lack of state involvement, whereas state-controlled religious institutions would be subject to a limited version of the ME. It will be interesting to assess whether future case law uncovers the differences between state-funded institutions and state-owned institutions in terms of ME application.

2. Title and Function

Recent ME case law has downplayed the requirement of title and placed its emphasis on that of religion function, up until the point that the discussion has made a 360-degree turn to discuss title again—but in terms of the teacher title rather than the minister title.

The discussion of title and function is most relevant in American and European case law, as Israeli law already defines teachers as covered under the ME.[214] In the United States, *Our Lady of Guadalupe* changed the ME formula to place its emphasis on function rather than title, additionally implying that all teachers are ministers for ME

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210. *See* CivC (Reg'l Lab. Ct. TA) 12137/09 Plonit v. Almonit, XX ¶ 101–02 (2013) (Isr.).

211. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. para. 142 (2014).

212. *Id.*

213. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1232 (2004) ("[I]f the state funds churches, the autonomy of churches is threatened, [...]. Indeed, the primary purpose underlying the Establishment Clause and Free Exercise Clause of the First Amendment is the preservation of autonomy-of the state, of religious institutions, and of individuals.").

214. State Education Law, 5713–1953, art. 18.

purposes,[215] thus equalizing the scope of the ME to that provided in Israeli law. The European situation appears to have been influenced by American ME. *Hosanna-Tabor* has been described as an influencing factor on the *Fernández Martínez* decision of the ECtHR Grand Chamber, which noted that a religion teacher has a "crucial function requiring special allegiance."[216] The three courts' overwhelming acceptance of teachers as covered under the ME has ironically reinstated the importance of title—not the title of minister, but rather, the title of teacher. Teachers are generally considered covered under the ME, and their religious function serves as a measure to consider how strongly the ME would apply. For example, the ECtHR would give more weight to religious autonomy in the case of teachers who teach religion classes, in line with an increased duty of loyalty.[217] Israeli courts suggest that the ME is to be interpreted narrowly when it comes to teachers of younger children, as their function in setting an example of proper religious behavior is weaker.[218] In the United States, post-*Our Lady of Guadalupe*, religious function is assumed to be an integral part of the teaching profession in religious organizations, as teachers are "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."[219] This is not to say that that function does not matter for the American ME, as *Our Lady of Guadalupe* mostly focuses on the requirement of religious function. The emphasis on function may prove to be of more significance in future suits concerning other professions; however, in the case of teachers, religious function appears to be assumed.

Therefore, it seems acceptable that teachers and congregation leaders are covered under the ME, rather than only ministers. Religious function is likely to play a key element in suits resembling that of *Schüth*, who was a church organist rather than a teacher.[220] In any event, it may be concluded that teachers have been acknowledged as covered under the ME. Whether such inclusion leads to complete exclusion of employment antidiscrimination laws or not depends on the

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215. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2067 (2020).

216. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. para. 134 (2014); *see* Francesca M. Genova, *Labor in Faith: A Comparative Analysis of Hosanna-Tabor v. EEOC Through the European Court of Human Rights' Religious Employer Jurisprudence*, 90 NOTRE DAME L. REV., 419, 449 (2014), for an argument regarding the influence of *Hossana Tabor* over the European Court of Human Rights ("This opinion may have influenced the ECtHR Grand Chamber in Fernández Martínez, as the Chamber's case stressed that Fernández Martínez was a 'secularised priest,' thus driving the distinction, whereas the Grand Chamber noted a religion teacher has a "crucial function requiring special allegiance.").

217. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. para. 135 (2014).

218. CivC (Reg'l Lab. Ct. Nz) 1693/98 Rosenbaum v. State of Israel, Ministry of Educ., XX ¶ 50, 53 (1999) (Isr.).

219. *Our Lady of Guadalupe*, 140 S. Ct. at 2066.

220. Schüth v. Germany, App. No. 1620/03, XX Eur. Ct. H.R. ¶ 7 (2010).

legal system at hand. However, nowadays, a claim that the ME applies to ministers only is not likely to be heard.

B. *The United States' Parting Paths from the Universal Understanding of ME*

In Israel, Article 18 of the SEL sets out that the ME applies for decisions determined by "religious grounds only."[221] While the court has interpreted the term "religious grounds" to include a variety of factors, it is clear that a decision discriminating on non-religious considerations would not be protected under the ME.[222] In *Fernández Martínez*, the grand chamber noted that the balancing of rights is to take place only after it has been determined that the considerations behind the decision (non-renewal of contract, in this case) were "strictly religious."[223] Both legal systems agree that the ME means that religious organizations may discriminate against employees as long as the reasons for the discrimination are of a religious nature.

In the United States, the situation is vastly different. Prior to *Hosanna-Tabor*, lower courts have been divided according to whether the ME covers discrimination in light of religious considerations only.[224] Some have taken it as a matter of fact that the ME applies to discrimination based on religious considerations only.[225] It has been suggested that an approach based on fear of the court reviewing whether a religious organization discriminated because of religious considerations is exaggerated, since "[s]o long as the court accepts the religious belief or doctrine at face value, no First Amendment issue arises."[226] Further, it has been implied that discrimination grounds

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221. State Education Law, 5713–1953, art. 18.

222. *See* CivC (Reg'l Lab. Ct. TA) 12137/09 Plonit v. Almonit, XX ¶ 109–10 (2013) (Isr.).

223. *See* Fernández Martínez v. Spain, App. No. 56030/07, XX Eur. Ct. H.R. para. 149 (2014).

224. See for example: Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008) (noting that courts "may pretermit any 'plausibility inquiry [because such an inquiry] could give rise to constitutional problems where, as in the case at bar, a defendant proffers a religious purpose for a challenged employment action'" (quoting DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993)); Little, 929 F.2d at 948 (citing and quoting from EEOC v. Miss. Coll., 626 F.2d 477, 484 (5th Cir. 1980)); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also* Jamie Darin Prenkert, *Liberty, Divesity, Academic Freedom, and Survival: Preferential Hiring among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 25 (2004), for further analysis.

225. Lund, *supra*_note 7, at 56: ("Under it, courts are supposed to dismiss ministerial claims without any inquiry into the facts once the church offers a religious reason for firing the minister. In that rare case when a church offers a nonreligious reason for the firing, the claims can proceed. ").

226. Prenkert, *supra* note 224, at 25.

such as race would not be tolerated by courts, even if religious reasoning were provided.[227]

Hosanna-Tabor has rebutted such speculation, providing that when the ME applies, the employer does not have to provide a religious reason for the dismissal:

> 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.[228]

While such an overwhelmingly wide understanding of the ME was applicable only to religious leaders until recently, the combination of *Hosanna-Tabor* and *Our Lady of Guadalupe* together has practically set out that all teachers in religious institutions are not protected under antidiscrimination laws at all. The outcome of *Hosanna-Tabor* may be defended as balanced since it implied that few people were completely exempt from antidiscrimination employment laws; however, after *Our Lady of Guadalupe*, which expanded the ME to apply to all teachers in religious institutions, a great population of workers now remains unprotected. This result was noted by dissenting Justice Sotomayor, who noted that such an approach "strips thousands of schoolteachers of their legal protections."[229] Further, the assumption that workers chose to be exempted from antidiscrimination law and put under the discretion of the church makes more sense with regard to religious leaders than to schoolteachers, who more likely chose their position for livelihood reasons just as much as for religious purposes. Justice Sotomayor refers to this issue when arguing that *Hosanna-Tabor* provided the means to separate "leaders who 'personify' a church's 'beliefs' or who 'minister to the faithful' from individuals who may simply relay religious tenets."[230]

It can be added to Justice Sotomayor's observation that such an outcome is harmful not only to the unprotected schoolteacher but also to the wider public. As the norm against employment discrimination serves a greater public interest, which exceeds the personal interest of the employee,[231] leaving all religious schoolteachers vulnerable to discrimination weakens the norm against discrimination. A religious institution that terminates the employment of its workers because of disability, race, age, or other discriminatory grounds, without having

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227. *Id.* at 26: ("[If] a religious institution of higher education were fired for involvement in an interracial relationship, the public policy of eradicating race discrimination may outweigh any respect for religious liberty [...]").

228. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 194 (2012).

229. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2071 (2020). (J. Sotomayor, dissenting).

230. *Id.* at 2075.

231. Selmi, *supra* note 5, at 939.

to provide a shred of explanation concerning such actions, sends the message that "perhaps discrimination is not as bad as they want us to think." This is especially true in light of the unique social functions religious institutions fulfill.[232]

It should be considered that the joint outcome of *Hosanna-Tabor* and *Our Lady of Guadalupe* disproportionately favors religious autonomy at the expense of employment rights. We can learn from Israeli and European experience that the applicability of the ME to teachers and workers that do not fall under the category of religious leaders goes hand in hand with limiting the ME to religious considerations only.

This does not mean that either *Hosanna-Tabor* or *Our Lady of Guadalupe* should be overturned. Rather, they require completion via a third decision as there is a need for another part of the puzzle that brings nuance to the judgments and bridges the gap between them. While applying the ME to teachers makes sense and not interfering with the choice of faith leaders makes sense, allowing unlimited and unmonitored discrimination against teachers does not make sense. It is thus suggested that, in the future, two different versions of the ME should apply—one that requires religious considerations for discriminatory decisions against employees of religious functions and another that does not require religious considerations and applies to religious leaders. This duality does not mean that a teacher cannot be counted as a religious leader, but rather, it would require that she has a *substantive* religious function. *Hosanna-Tabor's* quadruple test should be understood as it was prior to *Our Lady of Guadalupe* (an equal evaluation of an employee's formal title, substance reflected in the title, her use of the title, and religious functions performed by the employer) and used to determine which workers are religious leaders and are thus exempt from applicability of antidiscrimination employment laws *without* a requirement of providing religious reasoning for the discriminatory decision. *Our Lady of Guadalupe's* determinations, focusing on the functional test and considering all teachers as ministers, would be used to determine workers that are exempt from antidiscrimination employment laws *with* a requirement of providing religious reasoning for the discriminatory decision. Such an approach would ensure that religious organizations would be able to choose their leaders without interference, while the autonomy to choose clergy would be limited to religious considerations. Courts would accept such religious consideration at face value, thus not violating the First Amendment.[233]

Such a proposition does not seek to equalize the US's ME with comparative versions thereof. The shared principles of the MEs actually suggest the American version of the ME should be stronger

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232. Corbin, *supra* note 83.
233. Prenkert, *supra* note 224, at 25.

than the Israeli and European versions, in-line with its complete state-church separation and lack of state-funded or state-owned religious institutions. Surely, American courts *may* create an unbalanced version of the ME as universal ME perceptions are by no means binding. However, the sharp deviation from formerly similar MEs triggers the question of whether American courts *should* construe their ME that strongly. As the ME has strong hermeneutic characteristics, such a deviation could imply the American ME is still developing. An uncareful balancing of employment rights and church autonomy would harm religious employers, weaken the norm against discrimination, and might also weaken trust in religious institutions.

V. CONCLUSION

Legal doctrine can be described as "a living and growing organism."[234] Indeed, it is quite possible that the US ME is still in a growth phase. At this specific moment of time, post-*Our Lady of Guadalupe* and before courts have had the opportunity to interpret and apply it, it seems that American ME has struck a bluntly one-sided balance between religious autonomy and antidiscrimination employment law. Such an unbalanced outcome can be judged not only on its own merits but also via a comparison to universal perceptions of the ME. When comparing MEs across different jurisprudences, it becomes evident that there are shared universal principles: ME applies more strongly in contexts where state–church separation is more evident. Further, there is a universal acceptance that the religious function of teachers in religious institutions makes them suitable to be covered under the ME— even if not holding the title of a minister. In fact, it can be argued that when it comes to teachers, we have come to a point in which the title of teacher suffices and makes the functional discussion secondary. It has also been accepted that the ME applies to decisions made in light of religious considerations. The judgment of *Hosanna-Tabor* provided that religious institutions are not required to provide religious reasoning for their decisions. In comparison, while Israeli courts and the ECtHR have applied ME to teachers, they have done so with the requirement of religious considerations. However, according to the hermeneutic perception of the ME, it made sense that the American version of the ME would be slightly stronger than that of other jurisdictions. Religious organizations in the United States are private, and this goes hand in hand with increased autonomy. The lack of religious reasoning balanced the fact that the ME applies to religious leaders only. Thus, the very strong version of the ME was contained to a narrow section of workers who embody the values of the church and chose to take such commitment on themselves. At such point in time—

234. Hannis Taylor, *The Science of Jurisprudence*, 22 HARV. L. REV. 241, 246 (1908–09).

post *Hosanna-Tabor* and prior to *Our Lady of Guadalupe*—the American ME made sense. *Our Lady of Guadalupe* had presumably equalized the American ME with the Israeli and European versions as it expanded its applicability to teachers. However, the combined outcome of being exempt from religious reasoning due to *Hosanna-Tabor* has created a situation whereby a large population of workers, which are "lay" workers rather than "called" workers, are now subject to complete exclusion from antidiscrimination employment law. Such vulnerability is magnified by the fact the religious organizations can discriminate against this large population completely arbitrarily, without having to provide religious reasoning for their actions. This arbitrary and unmonitored permission to discriminate might harm not only workers of religious institutions but also substantially weaken the norm against discrimination. The current American ME model is far removed from the balance achieved between antidiscrimination employment laws and church autonomy in the case-law of Israeli courts and the ECtHR. Such deviation may suggest that the balance point is off the reasonable spectrum that liberal democracies accommodate when it comes to the clash between antidiscrimination employment laws and religious autonomy.

It is thus suggested that the current American ME should be considered a work in progress, awaiting a third judgment to bridge the gap between *Hosanna-Tabor* and *Our Lady of Guadalupe*. A more nuanced doctrine is in order, in a manner that would subject religious leaders (identified by *Hosanna-Tabor's* quadruple test) to a strong version of the ME that does not require religious reasoning, but would apply a weaker version of the ME that requires religious reasoning to teachers and other workers with religious functions in the wide sense—as set out by the Court in *Our Lady of Guadalupe*. Such an approach is crucial to reinstate a proper balance in American ME. It would guarantee that religious organizations are able to choose their leaders freely, while the autonomy to choose lay clergy would be limited to religious considerations accepted by courts at face value. Such a balance would respect the demands of the First Amendment as well as workers' rights and the sanctity of the norm against discrimination. It also sits well with the universal principles of the ME, providing further reinforcement that such formulation satisfies the democratic requirement of a proper balance between antidiscrimination employment law and religious autonomy.