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Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test

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> *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.*[1]
>
> *–Judge James P. Coleman*

> *[E]ven though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal."*[2]
>
> *–Dr. Martin Luther King, Jr.*

I. INTRODUCTION

One of the most challenging aspects of American jurisprudence is resolving a question that involves two conflicting fundamental rights. Whether those rights are codified in a statute or in the United States Constitution, courts must decide which "self-evident truth" trumps another, a difficult proposition at best. When the right of religious freedom[3] crosses the right of an American citizen to equal protection of the laws in the form of anti-discrimination statutes,[4] courts must answer this question.

For the past forty years, the circuit courts have consistently held that, when it comes to a religious organization's relationship with its ministers, religious freedom must surpass the government's interest in eliminating

1. McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972).

2. Martin Luther King, Jr., I Have a Dream, Speech at Civil Rights March on Washington (Aug. 28, 1963), *available at* http://www.archives.gov/press/exhibits/dream-speech.pdf

3. *See* U.S. CONST. amend. I.

4. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2006).

discrimination.[5] The Supreme Court has articulated that idea in the form of the ministerial exception—the right of churches and other religious organizations to select their leaders free from any government interference.[6] This proposition is simple enough. It is grounded in the idea of church autonomy, a concept espoused by the Court for well over a century.[7] However, the resolution of this question inevitably leads to a much more difficult one: who and what exactly is a minister? And, equally importantly, who decides? The circuit courts have attempted to answer those questions since the Fifth Circuit first adopted the exception in 1972, without any clear or consistent results.[8] Some courts have adopted a "primary duties test" that has led to inconsistency, sometimes within one circuit.[9] Other courts adhere to a strict scrutiny standard of review that violates the Establishment Clause through excessive entanglement.[10]

The Supreme Court recently examined the exception for the first time in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[11] and, although it confirmed the existence of the ministerial exception, the Court's unwillingness to define a clear test and put the issue to rest exemplifies the complex nature of these questions.[12] It is the complexity of the issue that ensures no bright-line rule will work 100% of the time, making an ad hoc test the only solution that stays true to the Religion Clauses in which the ministerial exception is rooted.[13]

This Comment examines the application of the ministerial exception to religious organizations when the question of whether the employee is a minister is unclear. Part II explores the history of the ministerial exception.[14] Part III examines current ministerial exception jurisprudence in the circuit

5. *See infra* Parts II.C, III.A.

6. *See infra* Part II.C.

7. *See infra* Part II.A.2.a.

8. *See infra* Part III.

9. *See infra* Part III.B.1 (containing a full discussion of the problems with the primary duties test).

10. *See infra* Part III.B.2 (discussing the application of a judicial standard of review, specifically strict scrutiny); *see also infra* Part II.A.1 (discussing the Establishment Clause and excessive entanglement).

11. 132 S. Ct. 694 (2012).

12. *See infra* Part III.C.2 (analyzing the Court's *Hosanna-Tabor* opinion).

13. *See infra* Part IV (discussing the application of an ad hoc test); *see also infra* Part II (tracing the evolution of the ministerial exception from the Religion Clauses to the church autonomy doctrine to the first articulation of the exception in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)).

14. *See* discussion *infra* Part II.

courts as well as the Supreme Court's *Hosanna-Tabor* decision.[15] Part IV scrutinizes the potential impact of the decision and suggests a sensible, ad hoc ministerial employee test before briefly concluding.[16]

II. THE HISTORY OF THE MINISTERIAL EXCEPTION

The search for a sensible ministerial exception test must begin at its roots: the Religion Clauses in the First Amendment to the Constitution.[17] By examining the history of the ministerial exception, jurists can find its original spirit and succeed in establishing a test that stays true to that spirit.[18]

A. The Religion Clauses

The First Amendment to the Constitution states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[19] The Framers debated the exact wording of these Religion Clauses before they officially adopted the final version that appears in the Bill of Rights.[20] The language was derived, in the main, from existing state constitutions that reflected American views at the time on the importance of protecting religious freedom.[21]

15. *See* discussion *infra* Part III.

16. *See* discussion *infra* Part IV.

17. *See* U.S. CONST. amend. I; *see also infra* Part II.C.

18. *See infra* Part IV.

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

20. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481 (1990). Most notably absent from the end of the Free Exercise Clause is the phrase "or to infringe the rights of conscience," which was originally adopted by the House of Representatives. *Id.* at 1482–84. Subsequently, bicameral passage required a conference committee vote wherein the final version was ratified. *Id.* "Free exercise of religion" is the more precise phrase of the two, which may have had something to do with its passage. "Free exercise" unambiguously refers to action, rather than a passive belief system, indicating protection for the practice of beliefs. *Id.* at 1488. "Rights of conscience" may also have been rejected because it is ambiguous in a way that suggests a belief system based on something other than religion may be covered by the Clause. *Id.* The Supreme Court reinforced this conclusion in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), when it held that a belief system cannot be based on secular considerations to fall under the protection of the Religion Clauses—it must be based in religious belief.

21. McConnell, *supra* note 20, at 1456. With the exception of Connecticut (the only state with no free exercise clause in its constitution), the states as a whole recognized religious freedom as an inalienable right. *Id.* at 1455. Common elements appear in each of these state constitutional provisions describing both the scope and the limits of the liberties enumerated. *Id.* at 1458–62.

1. The Establishment Clause

Many times the Religion Clauses are separated and analyzed in accordance with which is triggered by the facts of the case before the court.[22] The landmark case for the Establishment Clause is *Lemon v. Kurtzman*,[23] where the Court created a three-part test to determine whether certain state statutes violated the Establishment Clause.[24] In *Lemon*, two statutes that gave state funding to nonpublic schools were held to be unconstitutional because "the cumulative impact of the entire relationship arising under the statutes in each State involve[d] excessive entanglement between government and religion."[25] While the statutes themselves delegated funds to teachers who taught only non-religious material, statistics showed that the sole beneficiaries of the statutes were Roman Catholic schools.[26]

The *Lemon* Court identified "three main evils" the Establishment Clause was intended to combat: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[27] Accordingly, the Court delineated a three-part test under which courts should analyze all Establishment Clause issues.[28] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'"[29] Although the Court

22. *See infra* notes 34–35 and accompanying text.

23. 403 U.S. 602 (1971).

24. *Id.* at 612–13. The two statutes were separate, one from Rhode Island and one from Pennsylvania. *Id.* at 607–10. Both dealt with government funding to nonpublic schools, and both had the cumulative effect of providing state funding to Catholic parochial schools. *Id.*

25. *Id.* at 614. The Court recognized that, while technically meeting the mandate that the funds only be available to teachers who taught non-religious subjects, the support was so permeating and the religious goals of the Catholic parochial schools so significant, that the end result could not be overlooked. *Id.* at 613. In essence, the Court looked past the goal or stated purpose of the statute to the primary effect of the statute to find that the state was in fact sponsoring religion by funding the parochial schools. *Id.* at 614.

26. *Id.* at 608. The statistics supporting this finding were similar for both states. In Rhode Island, 25% of students attended nonpublic schools, and 95% of those attended Roman Catholic schools. *Id.* At the time of the decision, all 250 teachers claiming benefits under the statute were employed by Roman Catholic schools. *Id.* In Pennsylvania, 20% of students attended nonpublic schools, and 96% of those attended "church-related schools," most of which were Roman Catholic. *Id.* at 610.

27. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). The phrase "excessive entanglement"—now tied to this case and the "*Lemon* test"—originated in *Walz*. *See Walz*, 397 U.S. at 668.

28. *Lemon*, 403 U.S. at 612–13.

29. *Id.* (citation omitted). The Court later established a sub-test within part three of the *Lemon*

found that the statutes clearly had a secular purpose and declined to analyze the second part of the test, it did conclude that the third part was not met.[30] Given the nature of the parochial school system within the Roman Catholic Church, the Court found that the statutes promoted the Roman Catholic faith, resulting in excessive entanglement.[31]

2. The Free Exercise Clause

There are two lines of case precedent stemming from the Free Exercise Clause.[32] The first deals with internal management and affairs relating to church governance, which courts articulate as the church autonomy doctrine.[33] The second deals with the individual free exercise of religion protected by the First Amendment.[34] When analyzing a Free Exercise Clause issue, distinguishing between the two lines of cases and deciding which to follow becomes of paramount importance.[35]

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test for entanglement. *Id*. at 615. Because the Establishment Clause is not the focus of this Comment, this test will be identified but not discussed in detail. The court must examine (1) "the character and purposes of the institutions that are benefited," (2) "the nature of the aid that the State provides," and (3) "the resulting relationship between the government and the religious authority." *Id*. In application, the Court found that the character and purpose of the schools was so pervasively religious that the nature of the aid did not effectively separate the funding from the promotion of the Catholic faith. *Id*. at 615–20. There was no guaranteed way to separate one teacher who taught both secular and religious subjects in her use of textbooks and salaries. Despite the stipulation that the money only fund non-religious endeavors within the school, the primary goals of the Roman Catholic school system were too religious for this mandated separation to be realistic in practical application. *Id*.

30. *Id*. at 613–14. The Court dismissed the first part of the test with ease, classifying the purpose of the statutes as a secular one. *Id*. It then thoroughly analyzed the third part of the test, but spent little time addressing the second part of the test. *Id*. at 614. The Court acknowledged a balancing effect between the primarily religious mission of the parochial schools and precautions taken by the legislatures to prevent entanglement through its overarching goal but declined to take the point further given that the third element analysis was dispositive. *Id*. at 613–15.

31. *Id*. at 609; *see supra* note 25.

32. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996). More specifically, the court presented these two separate strands of law as arising purely under the Free Exercise Clause. *Id*. The court later analyzed the case at bar separately under the Establishment Clause and the three-part test identified in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Catholic Univ*., 83 F.3d at 465.

33. *See* discussion *infra* Part II.A.2.a.; *see also, e.g*., Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) (discussing the church autonomy line of cases and the well established principle that religious institutions have the right to govern free from state interference); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348 (5th Cir. 1999) (agreeing with the District of Columbia Circuit's analysis of the two strands of free exercise law); *Catholic Univ*., 83 F.3d at 460 ("[G]overnment action may burden the free exercise of religion . . . in two quite different ways: by interfering with a believer's ability to observe the commands or practices of his faith, and by encroaching on the ability of a church to manage its internal affairs." (citation omitted)).

34. *See supra* note 33; *see also* discussion *infra* Part II.A.2.b.

35. Parties have mistakenly applied precedent from the strand of free exercise law not relevant to the facts of their case. *See, e.g*., *Combs*, 173 F.3d at 349 (disagreeing with the notion that *Smith*

a. The Church Autonomy Doctrine

The church autonomy doctrine, rooted in the Religion Clauses, provides that "churches have autonomy in making decisions regarding their own internal affairs."[36] Although some argue that church autonomy is protected solely by the Free Exercise Clause,[37] the Supreme Court has held that the Establishment Clause plays an equally important role.[38]

The Supreme Court first recognized a church's right to autonomy in *Watson v. Jones*,[39] a case concerning a property dispute between two church factions.[40] The Court held that it, along with all secular courts, was bound by a church's decisions in ecclesiastical matters.[41] The Court recognized that the right to free exercise of religion came with the right to organize religious associations and to create independent church decision-making bodies.[42] The secular courts could not usurp the authority of these decision-making bodies without interfering with free exercise rights.[43] The *Watson* Court also spoke of justice when declining to intervene in the dispute:

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and *Boerne* controlled the outcome of the case); *Catholic Univ.*, 83 F.3d at 462 (holding that the burden on Free Exercise in *Smith* was "of a fundamentally different character" than that of the ministerial exception).

36. *Bryce*, 289 F.3d at 655.

37. *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). Laycock undertakes to distinguish between the two Religion Clauses, *id.* at 1378, something at which, according to Laycock, not everyone is successful. *Id.* at 1379–80. The Court talks about "sponsorship, financial support, and active involvement" as the three main evils the Establishment Clause was designed to combat, but it is unclear from where the "inhibition" implication comes. *Id.* at 1382 (quoting *Lemon*, 403 U.S. at 612). Laycock describes a straightforward dichotomy where "Government support for religion is an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim." *Id.* at 1384.

38. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (holding that the National Labor Relations Board's attempt to exercise jurisdiction over a parochial school constituted excessive entanglement with the Establishment Clause under *Lemon*).

39. 80 U.S. (13 Wall.) 679 (1871).

40. The Court recognized that this holding represented a sharp departure from English doctrine and case law but maintained that the break in tradition was acceptable—and even necessary—given the two countries' profoundly differing views on the relationship between government and religion. *Id.* at 727–28.

41. *Id.* at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final . . . .").

42. *Id.* at 728–29.

43. *Id.* The Court also noted that the "law . . . is committed to the support of no dogma," drawing from the Establishment Clause, and the act of adjudicating disputes of this nature would come too close to doing exactly that. *Id.* at 728.

> Each of these large and influential bodies . . . has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.[44]

The Court interpreted both of the Religion Clauses to deny civil courts the right to adjudicate the church's internal affairs, thus beginning the idea of church autonomy.[45]

The Supreme Court had reason to revisit the church autonomy doctrine sixty years later in *Gonzalez v. Roman Catholic Archbishop of Manila*,[46] when it held that a church has the right to determine whether a candidate for chaplaincy possessed the necessary characteristics to qualify for the position.[47] The case centered on an archbishop's refusal to appoint Gonzalez as chaplain, deeming him unqualified.[48] Though Gonzalez's prayer for relief included a demand for the chaplaincy appointment, the Court concluded that because this was a spiritual matter, the appointment to the chaplaincy ultimately was removed from the secular courts.[49] The Court held thus, despite the fact that the controversy involved civil rights:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular

44. *Id*. at 729.

45. *See id*. at 728–29.

46. 280 U.S. 1 (1929).

47. *Id*. at 16.

48. *Id*. at 12–13. Specifically, the archbishop called the boy "not legally (ecclesiastically speaking) capacitated to the employment of a chaplaincy." *Id*. at 13. He was able to tie this refusal to solid pronouncements in canon law. *Id*. Not only were his objections codified, but the grounds on which he based them were incapable of bias (or pretext, *see infra* note 50). For example, the chaplaincy required a course in theology and a minimum age of fourteen years. *Id*. Given these facts, it is not hard to understand why the Court did not reach the issue of a pretext question in this case. *See infra* note 50.

49. *Gonzalez*, 280 U.S. at 11, 15–16.

> courts as conclusive, because the parties in interest made them so by contract or otherwise.[50]

These two cases, *Watson* and *Gonzalez*, dealt with a church's right to "ecclesiastical jurisdiction," that is, its right to have the final say in its internal affairs and for those decisions not to be disturbed by the civil courts.[51] In 1952, the Supreme Court held that the Religion Clauses prohibited the legislature—as well as the judiciary—from interfering with free exercise of religion[52] when it struck down a New York law as unconstitutional in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*.[53] In *Kedroff*, the Court ruled that a New York statute that "passe[d] the control of matters strictly ecclesiastical from one church authority to another[,] . . . thus intrud[ing] for the benefit of one segment of a church . . . into the forbidden area of religious freedom" was unconstitutional under the Free Exercise Clause of the First Amendment.[54] The *Kedroff* Court recognized the church autonomy doctrine first stated in *Watson*,[55] but also acknowledged its extension of the doctrine to state law, given that *Watson* "was decided in 1872, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action."[56] Thus, the power of the Religion Clauses to protect free exercise of religion was extended to both the states

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50. *Id.* at 16. This is the first time the issue of "pretext" arose in the church autonomy context. *See id.* In an examination of church autonomy doctrine history, the sincerity of a religious organization's claims or beliefs is occasionally at issue. *See infra* notes 60, 82, 90, 279, 286, 288, 344–48. Claiming that a decision is pretextual has become a go-to argument for opponents of religious organizations. Although the facts did not implicate the pretextual question in this case, the Court here implied that there exists a factual scenario in which asking a pretextual question is appropriate. *See Gonzalez*, 280 U.S. at 16. However, asking whether "fraud, collusion, or arbitrariness" occurs (i.e., pretext) is a question that the Court recently rejected, saying it "misses the point of the ministerial exception." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012); *see also infra* notes 344–48 and accompanying text.

51. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871); *Gonzalez*, 280 U.S. at 13.

52. The Court further explained the ramifications of its *Kedroff* holding in *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) ("[I]t is established doctrine that '(i)t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.'" (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958))).

53. 344 U.S. 94 (1952). The Court ruled thusly despite a push from the New York Court of Appeals to permit the New York legislature to rely and act on its own knowledge of Soviet religious attitudes. *Id.* at 117.

54. *Id.* at 119.

55. *See supra* notes 39–45 and accompanying text.

56. *Kedroff*, 344 U.S. at 115.

and the legislature.[57]

The *Kedroff* decision also extended another aspect of the church autonomy doctrine—one perhaps more important to the ministerial exception—when it held that matters of church government are as ecclesiastical in nature as matters of faith and doctrine.[58] Despite the fact that the dispute centered on the control of a cathedral, Justice Frankfurter maintained that it was not a simple real estate dispute, but that "power to exercise religious authority" was the "essence" of the controversy, as the cathedral was "the seat and center of ecclesiastical authority."[59] The Court said that, although *Watson* centered on a property dispute as well, there was a "spirit of freedom . . . from secular control or manipulation" and held that selection of clergy must fall under the church autonomy doctrine.[60] Intervention into these church governmental matters would constitute an unacceptable breach of constitutional protection under the First Amendment.[61] The matter of control over the cathedral in *Kedroff* was equally ecclesiastical in nature and thus equally protected by the Religion Clauses.[62]

From *Kedroff*, the Court next extended the church autonomy doctrine from governmental matters to administrative matters in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*.[63] The underlying issue in the case involved control over a diocese and its property and assets.[64] The circuit court upheld a bishop's defrockment, but it struck down a reorganization within the church as illegal and unenforceable and

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57. *See supra* note 52 and accompanying text.

58. *See Kedroff*, 344 U.S. at 116.

59. *Id.* at 121 (Frankfurter, J., concurring). Justice Frankfurter pointed out the religious nature of the conflict and decided that a civil court could not dispose of it without religious intervention by the state. *Id.* However, one could argue that his determination of the cathedral as the "center of ecclesiastical authority" is a religious determination, which is the thesis of Justice Thomas's concurrence in *Hosanna-Tabor*. *See infra* text accompanying notes 236, 350–51. This is unhelpful in advancing the discussion about an appropriate ministerial exception test. *See infra* Part III.B.

60. *See Kedroff*, 344 U.S. at 116 (majority opinion). This Court, like the *Gonzalez* Court, hedged its holding: "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.*; *see supra* text accompanying note 50. The phrase "where no improper methods of choice are proven" again suggests that courts might question the underlying pretext of a selection—an analytical path that the Court has now confirmed is inappropriate in the ministerial exception context. *See supra* note 50 and accompanying text; *see also infra* notes 344–48 and accompanying text.

61. *See supra* notes 39–45 and accompanying text.

62. *See supra* notes 39–45 and accompanying text.

63. 426 U.S. 696 (1976).

64. *Id.* at 698. Of course, the Court ultimately did not reach the issue. *Id.* Church autonomy cases are decided on procedural grounds (the equivalent of a subject-matter jurisdiction dismissal) FED. R. CIV. P. 12(b)(1)—under these circumstances, on the basis that the ecclesiastical courts have already spoken and their decisions control.

held that amendments to the constitution of the diocese were without force and effect.[65] The Supreme Court held, as it now had held multiple times, that the lower court erred by adjudicating the dispute at all.[66] A new issue in this case, however, was that the nature of the controversy involved administrative decisions incidental to the main property dispute.[67] If the Court were to hold that the decision of the "highest judicatory"[68] stood, it would mean that the church had exclusive control over administrative matters, as well as those of faith, doctrine, and governance.[69] The Court held that, despite the civil nature of the property dispute, it was still ecclesiastical at its core, and, therefore, still carried the risk of excessive entanglement by the courts.[70]

b. Individual Free Exercise

The second strand of Free Exercise law deals with "restrictions on an individual's actions that are based on religious beliefs."[71] This line of cases begins primarily with *Sherbert v. Verner*,[72] where the Court held that a state's unemployment compensation eligibility policies could not restrict an individual's right to exercise her religious beliefs.[73] In *Sherbert*, a member

65. *Milivojevich*, 426 U.S. at 708–09.

66. *Id. at* 698 ("We hold that the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments.").

67. *See id.* at 709. Because the Diocesan Bishop was the principle officer of the Diocesan property holdings, the outcome would decide not only the religious nature of the dispute, but also who controlled the property interest—an administrative matter. *Id.* The Court's conclusion that this resolution was appropriate under the church autonomy doctrine is well grounded in the *Gonzalez* holding. *See* Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929) ("[T]he decisions of the proper church tribunals on matters purely ecclesiastical, *although affecting civil rights*, are accepted in litigation before the secular courts as conclusive." (emphasis added)).

68. Watson v. Jones, 80 U.S. (13 Wall.) 679, 682 (1871). The *Watson* Court illustrated the principle of the "highest judicatory" by describing the hierarchy of the Presbyterian Church, in which the General Assembly amounts to the highest judicatory: from the local church to the presbytery, from the presbytery to the synod, and then from the synod to the General Assembly. *Id.* at 727.

69. *See Milivojevich*, 426 U.S. at 710 ("This principle applies with equal force to church disputes over church polity and church administration.").

70. *See id.* at 710. The Court here made it clear that, when civil matters (such as property) and ecclesiastical matters overlap, the Religion Clauses' protection extends over the entire dispute. *See id.* Otherwise, free exercise of religion would be jeopardized. *See id.*

71. Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999).

72. 374 U.S. 398 (1963).

73. *Id.* at 401–02.

of the Seventh-Day Adventist Church was fired from her job for refusing to work on the Sabbath.[74] The state denied her subsequent application for unemployment because she did not meet the requirement under the South Carolina Unemployment Compensation Act that she "accept available suitable work when offered . . . by the employment office or the employer."[75] The South Carolina Supreme Court ruled against Sherbert and held that the unemployment law "place[d] no restriction upon the appellant's freedom of religion nor [did] it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[76]

The *Sherbert* Court disagreed with the South Carolina Supreme Court's holding that "appellant's ineligibility infringed no constitutional liberties,"[77] and enumerated a specific test to determine whether individual liberties are infringed when the regulated activities are outside the scope of state legislation, meaning they present no "threat to public safety, peace or order."[78] The Court said that:

> [T]o withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'[79]

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74. *Id*. at 399. The sincerity of Sherbert's religious beliefs was never at issue in the case, nor was the fact that Sabbath observance is a basic tenet of Seventh-Day Adventism. *Id*. at 399 n.1.

75. *Id*. at 400–01. The South Carolina law required that an individual show "good cause" when refusing to accept work. *Id*. The state court at every level reaffirmed the conclusion that Sherbert's observance of the Sabbath Day of her faith did not constitute the required "good cause." *Id*.

76. *Id*. at 401.

77. *Id*.

78. *See id*. at 403. Free Exercise scholars have used early state constitutions to assist in interpreting the Religion Clauses. McConnell, *supra* note 20, at 1456. Many of these constitutions contained language similar to that used by the Court in *Sherbert*:

> Nine of the states limited the free exercise right to actions that were "peaceable" or that would not disturb the "peace" or "safety" of the state. Four of these also expressly disallowed acts of licentiousness or immorality; two forbade acts that would interfere with the religious practices of others; one forbade the "civil injury or outward disturbance of others"; one added acts contrary to "good order"; and one disallowed acts contrary to the "happiness," as well as the peace and safety, of society.

Id. at 1461–62 (footnotes omitted).

79. *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). In other words, the Court uses a strict scrutiny standard of review to determine which interest—the individual's right of free exercise or the government's right to burden it—trumps the other. *See id*. It is for this reason that distinguishing between a church autonomy case and an individual free

In the *Sherbert* case, the Court held that, even though the burden was indirect (i.e., there were no criminal sanctions for the activity), it was nonetheless an invalid restriction that infringed on Sherbert's "constitutional rights of free exercise."[80] The denial of benefits came directly as a result of her religious practice, and, because "the pressure upon her to forego that practice [was] unmistakable," it was a clear burden on her right of free exercise.[81] When the first prong of the test was met, the Court went on to dismiss the state's argument that the possibility of fraudulent claims created a "compelling state interest" to justify the burden.[82] The Court argued that,

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exercise case is so important. *See supra* note 35 and accompanying text. Strict scrutiny, first articulated by name in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), balances individual interests against government interests:

> [I]n the development of constitutional doctrine in the decades after *Skinner*, [it] became increasingly formalized into a two "prong" test now referred to as "strict scrutiny" or "compelling interest" analysis. Courts first determine if the underlying governmental ends, or objectives, are "compelling." . . . [T]he Court uses compelling in the vernacular to describe [the] societal importance of the government's reasons for enacting the challenged law. Because the government is impinging upon someone's core constitutional rights, only the most pressing circumstances can justify the government action.

Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (fourth alteration in original) (footnote omitted) (internal quotation marks omitted). As Justice Scalia stated in *Employment Division v. Smith*, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." 494 U.S. 872, 887 (1990) (alteration in original) (quoting Hernandez v. Comm'r 490 U.S. 680, 699 (1989)); *see infra* note 90. Weighing the value of a specific creed—which would be unavoidable in a strict scrutiny balancing test—would violate this principle. *See infra* notes 82, 279–93 and accompanying text.

When the Court determines that an individual's right to free exercise is acceptably burdened, it is not placing value on one tenet over another, but instead permitting a burden on the general practice of religion. The Court decided in *Watson*, and has since consistently held, that answering to civil courts for its decisions regarding internal affairs is an unacceptable burden on a religious organization's free exercise. *See supra* Part II.A.2.a. Essentially, the Supreme Court already applied strict scrutiny to this issue, and free exercise won—the result is the church autonomy doctrine.

80. *See Sherbert*, 374 U.S. at 403–04. The Court compared acts of free exercise of religion to acts of free speech as contemplated previously by the Court. *Id.* at 404 n.5 ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950))).

81. *Sherbert*, 374 U.S. at 404. Because the lower court's decision forced her to choose between following her religion and working to earn a living, the burden was of the same type that a fine would impose. *Id.*

82. *Id.* at 406–07. The Court clarified strict scrutiny as a test requiring "only the gravest abuses" and made it clear that a "mere[] rational relationship to some colorable state interest would [not] suffice." *Id.* at 406. The Court also declined the invitation to examine the sincerity of Sherbert's beliefs—a step that the state's argument would have required—given "the prohibition against judicial inquiry into the truth or falsity of religious beliefs." *Id.* at 407. Oral arguments in *Hosanna-*

even if there was a real possibility of fraud, it did not rise to the level of a "compelling state interest."[83] The State did not have a compelling governmental interest to justify the clear burden, and thus the law violated individual free exercise protections.[84]

In 1990, the Supreme Court declined to use the *Sherbert* test in *Employment Division v. Smith*,[85] a case that dealt with a similar unemployment benefits claim in the state of Oregon.[86] In *Smith*, two employees were fired for peyote use in accordance with Native American Church practice, and their subsequent unemployment claims were denied because their termination was due to wrongful conduct.[87] The Court held that Oregon was allowed to prohibit peyote use and therefore was allowed to deny benefits based on violation of that law.[88]

Writing for the majority, Justice Scalia rejected the *Sherbert* test as limited in scope and "inapplicable to an across-the-board criminal prohibition on a particular form of conduct"[89]:

Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012), focused on this judicial limitation and the consequences of questioning the motives of a religious institution that hides behind the ministerial exception. Oral Argument at 46:30, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_553. However, the Court's opinion dismissed the debate with ease, holding that the pretextual question argument suggests a misunderstanding of the ministerial exception. *See supra* note 50; *see also infra* notes 344–48 and accompanying text.

83. *See Sherbert*, 374 U.S. at 407. The state's argument suggests that allowing any and all individuals to refuse work on Saturday could compromise the unemployment system in the state. *Id*. However, as the Court pointed out, the state already allowed (in express language no less) worshippers freedom not to work on Sunday. *Id*. at 406. To then refuse to acknowledge an individual's right to the same observance on a Saturday would be clear religious discrimination. *See id*.

84. *See id*. at 407. In closing, the Court was careful to narrow the opinion to South Carolina unemployment law relating to a religious day of rest and made it clear that this did not represent an act toward the establishment of a religion, but simply "nothing more than the governmental obligation of neutrality in the face of religious differences." *Id*. at 409. The Court's refusal to give this ruling broad meaning makes interesting the fact that the entire body of case law regarding the individual strand of free exercise revolves around use of the *Sherbert* test. *See infra* notes 80–102 and accompanying text. Nearly forty years later, Justice Scalia would make it clear that *Sherbert* was only ever intended for use in an unemployment compensation context and would not be universally applied to individual free exercise of religion. *See infra* note 89.

85. 494 U.S. 872, 885 (1990).

86. *See id*. at 874.

87. *Id*. Oregon law prohibited use of controlled substances unless prescribed by a medical doctor. *Id*. "Controlled substance" under the Oregon law was defined in accordance with the classifications in Schedules I through V under federal law. *Id*. Peyote was a Schedule I drug, and therefore its use constituted a Class B felony. *Id*.

88. *Id*. at 890.

89. *Id*. at 884–85. Justice Scalia rejected the *Sherbert* test argument and clarified its history:

> Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under

> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[90]

He drew a distinction between prohibiting an activity because of its religious nature (e.g., keeping kosher) and prohibiting across the board an activity that happens to affect a religious practice.[91] Granting an exception for peyote use would "relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)," creating a "constitutional anomaly."[92]

> conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.

Id. at 883 (citations omitted).

Justice Scalia went on to list several intervening cases in which the Court declined to follow *Sherbert*. *Id*. at 883–84; *see, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (declining to apply *Sherbert* to government construction activities on land used by Native American Tribes "even though . . . the activities 'could have devastating effects on traditional Indian religious practices'"); Bowen v. Roy, 476 U.S. 693, 699–701 (1986) (holding that a statute requiring benefit applicants to provide their Social Security number was valid "regardless of whether it was necessary to effectuate a compelling interest"); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that *Sherbert* did not apply to regulations forbidding yarmulkes in military dress).

90. *Smith*, 494 U.S. at 885 (citations omitted). Justice Scalia also foreclosed the possibility of a strict scrutiny trigger when the activity is "central" to the religion. *Id*. at 886. "It is not within the judicial ken to question the centrality of particular beliefs of practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id*. at 887 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)). This form of judicial restraint is a common theme throughout this Comment, as courts try to avoid the pretextual question often argued by litigants in ministerial exception cases. *See supra* notes 50, 60, 82 and accompanying text; s*ee also infra* notes 279, 286, 288, 344–48.

91. *Smith*, 494 U.S. at 877–78. For example, an Oregon law making the use of peyote illegal only in Native American Church ceremony should be unconstitutional under Justice Scalia's analysis. *See id*.

92. *See id*. at 879, 886. Justice Scalia said that it would "produce . . . a private right to ignore generally applicable laws." *Id*. at 886. Justice Blackmun called the majority opinion a "mischaracteriz[ation] of [the] Court's precedents" and questioned the Court's decision that strict scrutiny did not apply to criminal prohibitions. *Id*. at 908 (Blackmun, J., dissenting). The Court split 5–1–3 in *Smith*, not an overwhelming majority. *Id*. at 873. However, seven years later a

Three years later, in response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[93] Members of Congress were highly critical of the Court's decision in *Smith*, and passed RFRA in an effort to restore and codify the *Sherbert* test that it deemed "workable."[94] Under RFRA, Congress announced:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*[95] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> . . . .
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*[96] and *Wisconsin v. Yoder*[97] and to guarantee its application in

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substantially different Court (with four new members) came down against a universally applicable *Sherbert* test again in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See infra* notes 100–07 and accompanying text.

93. 42 U.S.C. §§ 2000bb to -4 (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

94. 42 U.S.C. § 2000bb(a)(5), (b)(1) (2006).

95. 494 U.S. 872 (1990); *see supra* notes 85–92 and accompanying text.

96. 374 U.S. 398 (1963); *see supra* notes 72–84 and accompanying text.

97. 406 U.S. 205 (1972). In *Yoder*, the Court held that First Amendment free exercise protections prevented the state of Wisconsin from compelling formal education up to the age of sixteen. *Id*. at 234. Respondents were members of the Old Order Amish religion, which opposes formal education after eighth grade. *Id*. at 207. The Court used in its analysis evidence that the Amish tenets were both legitimate and sincere (despite, apparently, what is or what is not in the "judicial ken," see *supra* note 90), as well as evidence of the adequacy of the alternative education. *Id*. at 222. It is one of the so-called "hybrid" cases in the *Sherbert* line of cases discussed in *Smith*. *Smith*, 494 U.S. at 881 ("The only decisions in which we have held that the First Amendment bars

> all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[98]

RFRA, in effect, reinstated strict scrutiny as the relevant constitutional test as applied to federal laws as well as state laws.[99]

Four years later, the Court returned fire and struck down RFRA as unconstitutional in *City of Boerne v. Flores*.[100] In *Boerne*, the Archbishop of San Antonio, Texas filed suit after he was denied a zoning permit to enlarge St. Peter Catholic Church in Boerne, Texas.[101] The Archbishop challenged the denial under RFRA, and the Supreme Court granted certiorari to decide whether Congress had exceeded its power in passing the law.[102] Using its Fourteenth Amendment power to enforce due process among the States, Congress argued that RFRA was "appropriate legislation" under Section Five.[103] However, the Court defined Congress's enforcement power as the ability to deter and remedy.[104] In other words, the legislature has the authority to prevent or fix constitutional violations, but not the power to determine what constitutes a constitutional violation.[105] The Court found

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application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

98. 42 U.S.C. § 2000bb (2006) (italics added) (citations omitted).

99. *See id*.

100. 521 U.S. 507 (1997).

101. *Id*. at 512. The city council had recently passed a historic landmark law, under which it argued the church fell. *Id*.

102. *Id*. at 511–12. The district court originally concluded that Congress had exceeded its power, but the Fifth Circuit reversed, concluding that RFRA was constitutional. *Id*. at 512.

103. *Id*. at 517–18. The Court acknowledged that Section Five of the Fourteenth Amendment is a positive grant of power:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. (quoting *Ex Parte* Virginia, 100 U.S. 339, 345–46 (1879)).

104. *See id*. at 518; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (holding that when a law is a well-connected remedy or deterrent, it comes within Congress's power even if it conflicts with "spheres of autonomy previously reserved to the States"); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a ban on a literacy test voting requirement); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (protecting voting rights despite burden on the states).

105. *Boerne*, 521 U.S. at 532.

that RFRA failed to identify any specific unconstitutional behavior needing deterrence or remedial action, but rather that its sweeping and broad nature intruded on government at every level and imposed restrictions on the states that the Fourteenth Amendment itself did not.[106] The Court held the law unconstitutional because, while Congress can enforce a constitutional right, it exceeded its authority by changing the meaning of the Free Exercise Clause.[107]

These two lines of Free Exercise cases, as well as the Establishment Clause *Lemon* test, seem to provide a comprehensive library of precedent to assist courts in adjudicating matters of First Amendment law relating to the Religion Clauses. However, there are still American ideals—ideals just as fundamental as religious freedom—that conflict with the Clauses, causing uncertainty in Religion Clause jurisprudence.[108]

B. Anti-Discrimination Laws

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (Title VII)[109] prohibits employment discrimination based on race, color, religion, sex, or national origin.[110] On its face, there is a natural conflict between Title VII and the Religion Clauses—the church autonomy doctrine specifically. Given that religious organizations are often employers, the right to be free from employment discrimination and the right to the free exercise of religion cause a tension that must be resolved.

a. Relevant Provisions

Several provisions of Title VII are relevant when attempting to resolve the tension between it and the church autonomy doctrine. Under section 703(a):

> It shall be an unlawful employment practice for an employer—

106. *Id*.

107. *Id*. at 519, 532.

108. *See infra* Part III (discussing approaches to the ministerial exception and highlighting the resulting problems). In particular, though not the focus of this Comment, the reach of the ministerial exception to matters such as salary is unclear, see *infra* notes 179–82, 238 and accompanying text, as well as the application of the exception to different employment laws. *See infra* note 177.

109. Civil Rights Act of 1964 §§ 701–718, 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. IV 2007–2011).

110. *Id*. § 2000e-2(a).

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[111]

Several considerations are relevant in this section. First, it must be determined whether an organization is an employer under Title VII and whether an individual is an employee, making the definitions section relevant.[112] Under section 701(b), an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ."[113] Under section 701(f), an employee is:

> [A]n individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[114]

If neither party falls under the employer or employee definition, the controversy does not fall within the provisions of Title VII.[115]

The provision of Title VII perhaps most germane to the church autonomy discussion is found in section 702(a):

111. *Id*.
112. For the Title VII definitions section, see *id*. § 2000e.
113. *Id*. § 2000e(b).
114. *Id*. at § 2000e(f).
115. *Id*.

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[116]

This section exempts religious organizations that fall under the category of employer from the prohibition against religious discrimination.[117] In other words, this statutory exception permits a religious organization to discriminate based on the individual's religious affiliations or preferences.[118]

b. Statutory Exceptions

It is important from the beginning to distinguish between the ministerial exception, which is the focus of this Comment, and the statutory exception codified in Title VII. The statutory exception under section 702(a) is codified law passed by Congress as a built-in exception to Title VII.[119] Under section 702(a), a religious organization may discriminate based on religion, but only based on religion.[120] For example, a religious employer could still be sued under Title VII for failing to hire an individual because she was a woman.[121] In contrast, the ministerial exception is "a separate judge-made exception rooted in the First Amendment designed to allow religious organizations to hire and fire religious leaders according to any criteria they choose."[122] Thus, this exception would allow a religious organization to refuse to hire a woman because she was a woman if the court deemed the position ministerial.[123]

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116. *Id*. § 2000e-1(a).

117. *See id*.; *see also infra* text accompanying notes 121–22.

118. *See infra* text accompanying notes 119–20.

119. 42 U.S.C. § 2000e-1(a).

120. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); Douglas Laycock, *A Syllabus of Errors*, Book Survey, 105 MICH. L. REV. 1169, 1181 (2007).

121. *See Rayburn*, 772 F.2d at 1166; Laycock, *supra* note 120, at 1181.

122. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 782 n.1 (6th Cir. 2010) (White, J., concurring), *rev'd*, 132 S. Ct. 694 (2012); *see also infra* Parts II.C, III.C (containing a full discussion of the ministerial exception and the *Hosanna-Tabor* case).

123. *See infra* Part III.A (discussing different tests used to determine the status of minister).

2. Other Discrimination Laws[124]

a. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA)[125] was passed in 1990 and prohibits employers, employment agencies, and labor unions from discriminating against qualified individuals with disabilities based on their disability.[126] Although the ADA differs from Title VII in significant ways, courts have held the ADA to be a general employment discrimination law substantially similar to Title VII in application.[127]

The ADA contains a religious exception similar to that of Title VII.[128] Under § 12113(d):

> (1) In general
>
> This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.
>
> (2) Religious tenets requirement
>
> Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.[129]

The legislative history shows that the ADA was not designed to broadly

124. The following are three primary employment laws; however, the list is not exhaustive. As discussed in this Comment, the ministerial exception is potentially applicable to any employment law.

125. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2006 & Supp. IV 2007–2011).

126. *Id.* §§ 12111(2), 12112(a).

127. *See, e.g.*, *Hosanna-Tabor*, 597 F.3d at 777 n.6 (finding no distinction between application of the ministerial exception to a Title VII claim and an ADA claim and also recognizing the extension of the exception to other employment discrimination laws); Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1104 (9th Cir. 2004) (holding that the Free Exercise Clause barred both an ADA claim and a Title VII claim based on the ministerial exception).

128. *See* 42 U.S.C. § 12113(d).

129. *Id.*

except religious entities.[130] Similar to Title VII, the law allows the religious entity to discriminate based on religious affiliation alone.[131]

b. The Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA)[132] prohibits employers, employment agencies, and labor organizations from discriminating based on age.[133] Under § 623:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.[134]

The ADEA applies to persons over forty years of age.[135] Like Title VII and the ADA, the ministerial exception previously has been applied to the ADEA.[136]

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130. *Hosanna-Tabor*, 597 F.3d at 777; *see* H.R. REP. NO. 101-485, pt. 2 at 76–77 (1990) (providing the following example involving a Mormon employer: "If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.").

131. *See* 42 U.S.C. § 12113(d); *see also supra* Part II.B.1.b.

132. Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2006 & Supp. IV 2007–2011).

133. *Id.* § 623.

134. *Id.*

135. *Id.* § 631.

136. *See* Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (Sotomayor, J., dissenting) (agreeing with the district court that the ADEA "does not govern disputes between a religious entity and its spiritual leaders").

c. The Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA)[137] regulates conditions in the workplace, "protect[ing] all covered workers from substandard wages and oppressive working hours."[138] The FLSA applies to industries engaged in interstate commerce, and its purpose is to eliminate labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[139] The FLSA primarily established a minimum wage,[140] set overtime at time-and-a-half,[141] and eliminated most child labor.[142] The coverage of employers and employees as defined by the FLSA is similar to that of Title VII.[143] However, the ministerial exception to the FLSA is based on different grounds.[144] The FLSA guidelines, as well as the floor debate, describe a contemplated exception within the law that supports the application of a ministerial exception: "Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be 'employees.'"[145]

C. The Ministerial Exception

Between Congress's enactment of Title VII in 1964 and the Supreme

137. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2006 & Supp. IV 2007–2011).

138. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 304 (4th Cir. 2004) (quoting Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 739 (1981)); *see* 29 U.S.C. §§ 206–207.

139. 29 U.S.C. § 202.

140. *Id.* § 206.

141. *Id.* § 207.

142. *Id.* § 212.

143. *See supra* text accompanying notes 114–16.

144. *See infra* notes 176–78 and accompanying text. It has been suggested that the FLSA should not have a ministerial exception. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 311 (4th Cir. 2004) (Luttig, J., dissenting) ("I do not believe that there is a 'ministerial exemption' to the Fair Labor Standards Act . . . .").

145. *Shaliehsabou*, 363 F.3d at 305 (quoting WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR FIELD OPERATIONS HANDBOOK § 10b03 (1967)). In contrast, courts carved out the ministerial exception to Title VII because the statutory exception covered only discrimination based on religious grounds. *See supra* Part II.B.1.b.

Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*[146] in 1976, the Fifth Circuit Court of Appeals articulated for the first time the ministerial exception to anti-discrimination laws in *McClure v. Salvation Army*.[147] The issue before the court in *McClure* was whether Title VII applied to the employment relationship between a church and its ministers.[148] The Salvation Army dismissed McClure from her position of officer,[149] for which she had trained for two years.[150] Given that training, McClure's status as a minister was not disputed.[151] The Fifth Circuit was very careful to narrow its holding expressly to the "church-minister relationship."[152] The court's unwillingness to decide the issue as relating to other church employees in this first ministerial exception case is telling. Even upon first impression, it was clear that this would be a question laden with First Amendment analysis, so much so that the court was careful not to establish a broad rule.[153]

In her suit against the Salvation Army, McClure's prayer for relief called for reinstatement, an injunction against further discrimination practices, and compensation for the discrepancy in her pay as compared to a male with the same duties.[154] The Salvation Army first argued that it was exempt from Title VII laws because it was not an employer under § 701(b)

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146. 426 U.S. 696 (1976).

147. 460 F.2d 553 (5th Cir. 1972); *see* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (stating that the ministerial exception to Title VII was first articulated in *McClure*).

148. *McClure*, 460 F.2d at 554. Put another way, the question was whether religious freedom or freedom from discrimination is more important. *See Rayburn*, 460 F.2d at 558 ("Only in rare instances where a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' is shown can uphold state action which imposes even an 'incidental burden' on the free exercise of religion."); *see also supra* notes 3–4 and accompanying text.

149. *McClure*, 460 F.2d at 555. The court substituted the word "minister" for officer, referring to the district court's determination that Mrs. McClure was a minister. *Id*. at 554. The district court reasoned, "The commanding officer of a corps acts as the 'pastor' of the corps, but both the corps commander and every other officer of the Army stationed in the locality perform the function of preaching to the congregation." McClure v. Salvation Army, 323 F. Supp. 1100, 1101 (N.D. Ga. 1971), *aff'd* 460 F.2d 553 (5th Cir. 1972).

150. *McClure*, 460 F.2d at 555. McClure trained at the Salvation Army's Officers Training School. *Id*. At that time, the courts had long recognized the Salvation Army as a religious organization. *See generally* Salvation Army v. United States, 138 F. Supp. 914 (S.D.N.Y. 1956); Bennett v. City of LaGrange, 112 S.E. 482 (Ga. 1922); Hull v. Indiana, 22 N.E. 117 (Ind. 1889).

151. *McClure*, 460 F.2d at 556. Because the Salvation Army was widely recognized as a religious organization and McClure was officially trained by that organization, her status as a minister was not in question. *Id*. This case did not force the court to reach the difficult question of who is a minister and who is not, which is the focus of this Comment. *See infra* Part III.

152. *Id*. at 555.

153. *Id*. Forty years later, the Supreme Court's narrow holding in *Hosanna-Tabor* shows that it was equally unwilling to establish such a rule. *See infra* Part III.C (discussing in full the Court's *Hosanna-Tabor* holding).

154. *McClure*, 460 F.2d at 555.

of Title VII,[155] and second that it was exempt under § 702 of Title VII[156] as a religious employer.[157] Both arguments failed.[158] However, in a third alternative, the Salvation Army contended that the application of Title VII laws to the relationship between a church and its ministers violated the Religion Clauses.[159] After a lengthy analysis, the Fifth Circuit agreed.[160] It concluded that, though this was an employment relationship under Title VII definitions, it was a protected relationship under the church autonomy doctrine and therefore exempt[161] from Title VII laws:

> 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.[162]

Because the selection of ministers is so central to a church's belief system, the application of Title VII laws to the Salvation Army would inevitably result in interference by the state into matters of church doctrine, government, and administration.[163] As the line of cases following *Watson* demonstrates, that would be an unacceptable constitutional encroachment

155. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (2006); *see also supra* text accompanying notes 113–14.

156. 42 U.S.C. § 2000e-1; *see also supra* text accompanying notes 115–16.

157. *McClure*, 460 F.2d at 556.

158. *Id*. at 557–58. The court held that the Salvation Army was an employer because it was engaged in "industry affecting commerce." *Id*. at 557; *see supra* note 114. The court found that the Salvation Army was not exempt from this type of discrimination because the statutory exemption only covers discrimination on religious grounds. *McClure*, 460 F.2d at 558; *see supra* note 117.

159. *McClure*, 460 F.2d at 556.

160. *Id*. at 560 ("We find 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.").

161. As opposed to being covered under a Title VII statutory exemption. *See supra* text accompanying notes 119–23.

162. *McClure*, 460 F.2d at 558–59.

163. *See id*.

into the protections of the Religion Clauses under the church autonomy doctrine.[164]

McClure carried the circuit courts into modern ministerial exception jurisprudence.[165] The court successfully articulated the purpose and the spirit of the law by grounding the exception in *Watson* and its progeny, thereby establishing its church autonomy roots.[166] It served as a starting point for all circuit courts to consider the application of the exception, which most have now done.[167]

III. APPLYING THE MINISTERIAL EXCEPTION: THE CIRCUITS IN DISARRAY

A. The Circuit Court Approaches[168]

After *McClure*, other circuits followed the Fifth Circuit's lead in establishing a judge-made ministerial exception that went beyond the statutory exception codified in Title VII.[169] Though the circuits have universally agreed as to the existence of a ministerial exception, in application they have "consistently struggled to decide whether or not a particular employee is functionally a 'minister.'"[170]

1. The Primary Duties Approach

a. The Fourth Circuit

The Fourth Circuit has applied the ministerial exception to both Title VII and FLSA claims. In *Rayburn v. General Conference of Seventh-Day*

164. *See* discussion *supra* Part II.A.2.a.

165. *See infra* note 168 and accompanying text.

166. *See supra* notes 159–62 and accompanying text.

167. *See infra* Part III.A.1–2 (analyzing the current circuit court approaches); *see also* cases cited *infra* note 168.

168. The circuits discussed in this section are those with extensive or substantial ministerial exception case history. However, other circuits have ruled on the exception as well. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) (holding that a former Catholic college chaplain was a minister); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) (holding that the position of music director and organist of a religious diocese fell within the ministerial exception); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) (holding that the church autonomy doctrine barred sexual harassment claims but finding the application of the ministerial exception unnecessary); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (affirming that the ministerial exception bars claims by a minister against a church but without examining the scope outside of actual clergy); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989).

169. *See infra* Parts III.A.1–2.

170. Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).

Adventists,[171] the court recognized for the first time the ministerial exception to Title VII and articulated a ministerial employee test, holding that a pastoral position was ministerial in nature despite the fact that an employee in that position would never be ordained.[172] Having no precedent in its own circuit, the court relied on the Fifth Circuit's conclusion that the determination "does not depend upon ordination but upon the function of the position."[173] The court pulled language from a law review article and stated its rule—the "primary duties test"—thusly: "[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'"[174] Though the court took the opportunity to articulate a rule, the evidence overwhelmingly supported the determination that the position was ministerial.[175]

The Fourth Circuit also has applied the ministerial exception to FLSA claims,[176] and although the court has acknowledged that the ministerial exception to Title VII is based on constitutional principles rather than congressional ones, it has held "that the ministerial exceptions under the two Acts are coextensive in scope."[177] Thus, the court applied the same primary

171. 772 F.2d 1164 (4th Cir. 1985).

172. *Id*. at 1168–69.

173. *Id*. (citing EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981)).

174. *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

175. *Id*. The holding was probably prompted by the fact, specific to this case, that the position was one that could never be ordained under Seventh-Day Adventist doctrine. *Id*. This required the court to clarify that ordination was not necessary for ministerial exception application. *See id*. Without that fact, precedent indicates that the position would have fallen squarely within the exception. *See supra* note 168.

The court later applied its primary duties test in *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000). There, a choir director filed discrimination claims under Title VII, and the court found her to be a ministerial employee because "the positions [were] 'important to the spiritual and pastoral mission' of the church." *Id*. at 802. The Fifth Circuit also classified a music director as ministerial. *See infra* notes 220–24 and accompanying text.

176. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990).

177. *Shaliehsabou*, 363 F.3d at 306. The FLSA contains a codified exception upon which the ministerial exception is based, making it substantially different from the Title VII exception. *See supra* note 145 and accompanying text. The purposes of the statutes are also quite different. The full text of congressional findings for the FLSA states:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to

duties test for each.[178] The court applied the test in *Dole v. Shenandoah Baptist Church*,[179] where a school operated by a Baptist church opposed a suit for teacher back pay under the FLSA.[180] The court determined that the pay issues "[did] not cut to the heart of Shenandoah beliefs," and therefore that the church's right of free exercise was not burdened.[181] Though Shenandoah argued that the teachers were no different from the plaintiff in *Rayburn*, the court held that to give the exception this "sweeping interpretation" because the teachers were members of the faith "would 'create an exception capable of swallowing up the rule.'"[182]

More recently, the court applied the ministerial exception to the FLSA in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*[183] It held that a kosher supervisor's FLSA overtime wages claim was barred by the ministerial exception when it found his position to be primarily religious.[184] Although his main duties consisted of supervising the delivery, inspection, and preparation of food, his primary responsibility was protecting against violations of Jewish dietary law, which the court found to be central to Jewish canon.[185] Shaliehsabou also presented himself as clergy on his federal tax returns, a fact that the court deemed to weigh heavily in favor of a ministerial finding.[186] Thus, Shaliehsabou was a minister because his

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> be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 202(a)–219 (2006). The language justifies the exercise of congressional power under the Commerce Clause, but it might also be possible to read into it a goal of protecting peace and safety among citizens. If so read, there is a strong argument that FLSA does not support the application of a ministerial exception. When drafting the Religion Clauses, the Framers took substantial language from existing state constitutions. *See supra* note 21 and accompanying text. Most of these early constitutions made it clear that peace and safety of citizens trumped free exercise of religion. *See supra* note 78. This question, however, is outside the scope of this Comment.

178. *Shaliehsabou*, 363 F.3d at 306; *see also supra* text accompanying note 174.

179. 899 F.2d 1389 (4th Cir. 1990).

180. *Id.* at 1391. The suit was initiated by the federal government. *Id.*

181. *Id.* at 1397. The court examined the Shenandoah doctrine through passages in the Bible and questioning of witnesses. *Id.* This seems at best a questionable approach, given the Supreme Court's long-standing refusal to evaluate religious doctrine. *See supra* notes 50, 60, 82, 90 and accompanying text; *see also infra* notes 279, 286, 288, 344–48 and accompanying text.

182. *Dole*, 899 F.2d at 1397.

183. 363 F.3d 299 (4th Cir. 2004).

184. *Id.* at 309.

185. *Id.* at 303.

186. *Id.* at 308. In extending the ministerial exception as far as to hold that a food supervisor was a minister, the court relied on its *Raleigh* holding to show that secular duties can be part of a primarily religious position. *Id.*; *see also supra* note 175. Here again is an example of the court

primary duties were in furtherance of the Jewish faith and its mission.[187]

b. The District of Columbia Circuit

In 1996, the District of Columbia Circuit adopted the primary duties test in *EEOC v. Catholic University of America*.[188] There, a nun filed claims under Title VII after the Catholic university where she taught denied her tenure.[189] Relying on Fourth Circuit conclusions in *Rayburn*, the court held that "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission."[190] The precepts of the tenure position were well-established by Catholic canon, stating the mission as "foster[ing] and teach[ing] sacred doctrine and the disciplines related to it."[191] The court found that the primary duties of the position were religious in nature, and thus the employment decision fell under the ministerial exception.[192]

The court addressed another important question in *Catholic University* when it held that the ministerial exception survived the Supreme Court's *Smith* decision.[193] The *Smith* Court held, in relevant part, that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . ."[194] The Equal Employment Opportunity Commission (EEOC) argued that because Title VII was a "neutral law," the ministerial exception could not stand.[195] The court disagreed, distinguishing a religious institution from an individual with regard to the protections Justice Scalia clarified in *Smith*.[196] In doing so, the

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wading into the waters of religious interpretation by determining the importance of dietary law in the Jewish faith. *See supra* notes 82, 90 and accompanying text.

187. *Shaliehsabou*, 363 F.3d at 309.

188. 83 F.3d 455 (D.C. Cir. 1996). This circuit previously applied the ministerial exception in *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). There, the plaintiff was an ordained minister—thus his ministerial status was not at issue. *Catholic Univ.*, 83 F.3d at 463.

189. *Id.* at 457.

190. *Id.* at 463. This language is similar to that of the Fourth Circuit. *See supra* text accompanying notes 174–75.

191. *Catholic Univ.*, 83 F.3d at 463–64.

192. *Id.* at 465.

193. *Id.* at 462.

194. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (internal quotations omitted); *see* discussion *supra* notes 85–92; *see also infra* notes 212–19 and accompanying text.

195. *Catholic Univ.*, 83 F.3d at 461–62.

196. *Id.* at 462.

court pointed to the strand of free exercise law dealing with church autonomy, rather than the strand dealing with individual free exercise.[197] Acknowledging that these are two separate concepts, the court concluded that the ministerial exception relies on the premise in which church autonomy is rooted: the "fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[198] Thus, the D.C. Circuit found that the *Smith* holding did not disturb the ministerial exception.[199]

c. The Sixth Circuit

The Sixth Circuit most recently applied the ministerial exception in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*,[200] where it used the primary duties test to determine that a teacher at Hosanna-Tabor Evangelical Lutheran Church and School (Hosanna-Tabor) was not a minister for purposes of the exception.[201] The plaintiff, Cheryl Perich (Perich), filed ADA claims for discrimination and retaliation after the school removed her from her teaching position due to her disability and subsequently terminated her employment in retaliation against her threat of legal action.[202] The school classified teachers as either "contract" or "called."[203] Called teachers were required to take classes in the Lutheran faith and subsequently given the title of "commissioned minister."[204] Perich served as a contract teacher for a short time before becoming a called teacher.[205] The district court dismissed the claims, holding that they fell under the ministerial exception.[206]

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197. *See id.; supra* Part II.A.2.

198. *Catholic Univ.*, 83 F.3d at 462 (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

199. *See id.* at 463.

200. 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012). The Supreme Court's grant of certiorari and reversal of the Sixth Circuit on January 11, 2012 is the focus of this Comment. *See infra* Part III.C.

201. *Hosanna-Tabor*, 597 F.3d at 782. The Sixth Circuit first adopted the primary duties test in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), where it held that ADA claims brought by a resident in a Methodist hospital's pastoral education program were barred by the ministerial exception. *Id.* at 227. In *Hollins*, the court quoted language from the Fourth Circuit, see *supra* text accompanying note 174, and followed its lead in adopting the primary duties test. *Hollins*, 474 F.3d at 226. However, the dispositive issue in the case was whether the hospital could and did waive that exception. *Id.* Thus, while it adopted the ministerial exception, the *Hollins* court did not apply the primary duties test to the facts of the case. *Id.*

202. *Hosanna-Tabor*, 597 F.3d at 774–75. The facts of the case are discussed in further detail in the analysis of the Supreme Court opinion. *See infra* Part III.C.1.

203. *Hosanna-Tabor*, 597 F.3d at 772.

204. *Id.*

205. *See infra* note 304 and accompanying text.

206. *Hosanna-Tabor*, 597 F.3d at 775.

On appeal, the Sixth Circuit applied the primary duties test to Perich's position.[207] Following its *Hollins* precedent,[208] the court stated:

> To determine whether an employee is ministerial . . . this Circuit has instructed courts to look at the function, or "primary duties" of the employee. As a general rule, an employee is considered a minister if "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[209]

The court found that Perich's main function was not religious for various reasons, including the fact that an overwhelming percentage of her day was spent teaching secular subjects; the fact that, though she had the title of minister, other employees in her position were not required to be ministers or members of the Lutheran Church; and the fact that her position as a religious "role model" did not convert her teaching duties into religious activities.[210] Thus, Perich was not a minister for the purposes of the exception.[211]

2. Other Approaches

a. The Fifth Circuit

In 1999, the Fifth Circuit ruled on two important ministerial exception cases. First, in *Combs v. Central Texas Annual Conference of the United Methodist Church*,[212] the court held that the ministerial exception survived the Supreme Court's *Smith* decision.[213] Combs, a female reverend, filed sex and pregnancy discrimination claims under Title VII and argued that the

207. *Id.* at 778–82.

208. *See supra* note 201.

209. *Hosanna-Tabor*, 597 F.3d at 778 (footnote omitted) (citation omitted); *see also supra* note 174 and accompanying text.

210. *Id.* at 780. Prior to its analysis, the court pointed out that the circuits have generally held parochial teachers not to be ministerial employees, *id.* at 778–79, citing *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1991), and *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), as examples. *See infra* Parts III.A.1.a, III.A.2.c.

211. *Hosanna-Tabor*, 597 F.3d at 780–81.

212. 173 F.3d 343 (5th Cir. 1999).

213. *Id.* at 349; *see supra* notes 85–92 and accompanying text.

ministerial exception should not apply in light of *Smith*.[214] Combs reasoned that the church should not be exempt from sex discrimination laws because they are "facially neutral,"[215] and the *Smith* Court held that the Free Exercise Clause did not exempt compliance with a "neutral law of general applicability."[216]

The court rejected this argument and agreed with the District of Columbia Circuit's analysis of the question.[217] The court focused on the distinction between the two strands of free exercise law and concluded that *Smith* definitively was a product of the individual strand of free exercise.[218] Thus, *Smith* was distinguishable from *Combs*, and the ministerial exception remained alive and well.[219]

Shortly after the *Combs* decision, the Fifth Circuit faced another ministerial exception question in *Starkman v. Evans*,[220] where it delineated its version of the ministerial employee test.[221] In *Starkman*, a choir director brought discrimination claims under the ADA, and the court concluded that she was a ministerial employee based on a three-part test:

> First, this court must consider whether employment decisions regarding the position at issue are made "largely on religious criteria.". . .
>
> Second, to constitute a minister for purposes of the "ministerial exception," the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church. . . .
>
> Third, and probably most important, is whether [the employee] "engaged in activities traditionally considered ecclesiastical or religious," including whether the plaintiff "attends to the religious needs of the faithful."[222]

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214. *Combs*, 173 F.3d at 347.

215. *Id*. at 348.

216. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990); *see also* discussion *supra* notes 85–92 and accompanying text.

217. *Combs*, 173 F.3d at 349; *see also* discussion *supra* Part III.A.1.b.

218. *Combs*, 173 F.3d at 349.

219. For a more extensive analysis of the ministerial exception after *Smith* and *Boerne*, *see* discussion *supra* Part III.A.1.b. Because the questions were almost identical, the *Combs* court heavily relied on the analysis of the District of Columbia Circuit's decision in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996). *Combs*, 173 F.3d at 348–49.

220. 198 F.3d 173 (5th Cir. 1999).

221. *Id*. at 176.

222. *Id*. (citations omitted). The court pulled each of these criterion from an earlier Fifth Circuit case, *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. 1981), the

The court determined that the employment decision was based on religious criteria because religious music was important to the "spiritual mission of the church;" that Starkman was authorized to perform ceremonies because she had several religious duties; and that she attended the needs of the faithful as a "ministerial presence."[223] Thus, Starkman was a ministerial employee for purposes of the exception, and the Fifth Circuit adopted a clear and cogent ministerial exception test.[224]

b. The Second Circuit

In 2008, the Second Circuit confirmed for the first time the existence of a ministerial exception in *Rweyemamu v. Cote*,[225] where it held that the exception barred an African-American Catholic priest's racial discrimination claim under Title VII.[226] When the Diocese promoted a white man to parish administrator over Rweyemamu, he filed racial discrimination claims with the EEOC and the Connecticut Commission on Human Rights and Opportunities (CHRO).[227] The CHRO dismissed the claim on ministerial exception grounds, and Rweyemamu subsequently was fired from his position with the Diocese.[228] Because Rweyemamu's position as priest fell squarely within the ministerial exception as articulated in *McClure*,[229] the court had no occasion to examine the scope of the exception as applied to "lay employees."[230] It did, however, express its view on the matter in dicta:

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first to consider employees outside the clergy for purposes of the ministerial exception. In that case, the church's dispute was with the EEOC itself, and the court had to decide whether the seminary in its entirety was subject to EEOC regulations. *Id*. at 279. Although it was in *Southwestern Baptist* that the court first articulated the test, the circumstances surrounding its application were atypical. *Id*. The question was whether a religious institution was exempt from EEOC regulations, not whether an employee was ministerial and therefore denied protection under anti-discrimination laws. *Id*. Thus, it was important for the court in *Starkman* to reiterate the test under model ministerial exception circumstances.

223. *Starkman*, 198 F.3d at 176.

224. *Id*. at 177. The Fourth Circuit has also held that a music-related position was ministerial. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000); *see* discussion *supra* note 175.

225. 520 F.3d 198, 207 (2d Cir. 2008).

226. *Id*. at 209.

227. *Id*. at 200. The Commission on Human Rights and Opportunities is Connecticut's equivalent to the EEOC. *Id*.

228. *Id*.

229. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *see supra* Part II.C (discussing the first application of the ministerial exception in *McClure*).

230. *Rweyemamu*, 520 F.3d at 208–09. ("We need not attempt to delineate the boundaries of the ministerial exception here, as we find that Father Justinian's Title VII claim easily falls within

> Circuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a "minister." While we agree that courts should consider the "function" of an employee, rather than his title or the fact of his ordination, we still find this approach too rigid as it fails to consider the nature of the dispute. . . . [A] lay employee's relationship to his employer may be "so pervasively religious" that judicial interference in the form of a discrimination inquiry could run afoul of the Constitution.[231]

This approach acknowledged the difficulty in creating a blanket rule to determine which employees fall within the scope of the ministerial exception and essentially advocated an ad hoc test, given that the nature of an employee's duties should be weighed differently according to context.[232]

c. The Ninth Circuit

In March of 2010, in *Alcazar v. Corporation of the Catholic Archbishop of Seattle*,[233] a three-judge panel for the Ninth Circuit adopted a ministerial employee test similar to the Fifth Circuit's test.[234] In December 2010, the Ninth Circuit vacated en banc the portion of the opinion that announced that test.[235] In the first case, Alcazar, a seminarian, filed an overtime wages claim under the state of Washington's Minimum Wage Act (Act).[236] The

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them."). The Second Circuit used the term "lay employee" as distinguished from "religious employee" to indicate an employee who is not a member of the clergy and therefore is subject to the functionality test. *Id.* Given the confusion over what test to use and how to apply it, the term is more suitable than "secular" or "non-religious," as the "laity" is defined as "the body of religious worshipers, as distinguished from the clergy." *Laity Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/laity (last visited Nov. 12, 2012).

231. *Id.* at 208 (citations omitted).

232. *See supra* text accompanying note 170. The Second, like most circuits, agreed that the ministerial exception would not apply to tort liability or breach of contract claims. *See Rweyemamu*, 520 F.3d at 208 ("The minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim.").

233. 598 F.3d 668, 676 (9th Cir. 2010), *vacated in part*, 627 F.3d 1288 (9th Cir. 2010).

234. *See supra* text accompanying note 222.

235. Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1290 (9th Cir. 2010) (en banc). Although vacated in the Ninth Circuit, due to its sensible nature and usefulness in displaying the shortcomings of the primary duties test, this Comment chooses not to vacate this test. It will be discussed in detail.

236. *Alcazar*, 598 F.3d at 671. Application of the ministerial exception to suits filed under this law is most analogous to that of the FLSA claims out of the Fourth Circuit. *See supra* notes 176–87 and accompanying text. However, the Ninth Circuit never seriously questioned the exception's applicability; on the contrary, it concluded broadly that application of the Act to the church-minister relationship would result in entanglement. *Alcazar*, 598 F.3d at 672–73 ("[T]he very process of civil court inquiry into the clergy-church relationship can be sufficient entanglement."); *see also* discussion *infra* Part III.C.3.

court rejected Alcazar's argument that "the decision whether to pay him overtime wages 'is not the sort of religious practice the First Amendment shields from secular examination.'"[237] Instead, the court pointed to Ninth Circuit precedent that included the determination of a minister's salary as part of ministerial decisions that fall within the ministerial exception.[238]

As a seminarian training to become a priest, Alcazar fell squarely within the church-minister relationship.[239] Nonetheless, Alcazar next argued for the application of the primary duties test used by the Fourth and District of Columbia Circuits, because, at that point in his training, he primarily performed maintenance duties for the church; thus his primary duties were not religious.[240] The court also rejected this argument and declined to adopt the primary duties test:

> Instead, we adopt a test similar to the Fifth Circuit's and hold that if a person (1) is employed by a religious institution, (2) was chosen for the position based "largely on religious criteria," and (3) performs some religious duties and responsibilities, that person is a "minister" for purposes of the ministerial exception.[241]

Alcazar was attending a pastoral ministry on his way to becoming an ordained priest.[242] According to the court, the primary duties test has an

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237. *Alcazar*, 598 F.3d at 674.

238. *Id*. ("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[, including] the determination of a minister's salary* . . . ." (alteration in original) (quoting Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999)). In *Bollard*, the court held that a sexual harassment claim did not fall within the ministerial exception, as it did not relate to the selection of clergy. *Bollard*, 196 F.3d at 950. In *Alcazar*, the classification of the salary decision under the ministerial exception accurately reflects the spirit of the ministerial exception. *See supra* text accompanying notes 159–66. However, the more appropriate context for this argument would be a suit for unfair wages or wage discrimination based on race or sex. *See* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (holding that the Salvation Army was exempt from a discrimination claim based on sex); *see also supra* notes 146–64 and accompanying text. A claim for overtime wages is more akin to the peace and safety concerns of the FLSA. *See supra* note 177.

239. *Alcazar*, 627 F.3d at 1290. When this is the case, no determination of functionality is required. *See* discussion *supra* Part II.C.

240. *Alcazar*, 598 F.3d at 675. This argument exposes a major flaw in the primary duties test that the court subsequently addressed. *Id*. at 675–76; *see infra* notes 243–46 and accompanying text. It makes the vacation en banc unfortunate, given that it was the best articulation of the argument against the test. *See infra* Part III.B.1 (discussing the problems with the primary duties test).

241. *Alcazar*, 627 F.3d at 676.

242. *Id*. at 670. This also adds to circuits' agreement that actual ordination is not required. *See supra* notes 171–75 and accompanying text. There should be no difference between training for

"arbitrary 51% requirement"[243] that would result in the conclusion that Alcazar was not a ministerial employee, regardless of the fact that he was in the middle of the ordination process.[244] By examining the number of hours dedicated to religious tasks, the overall spirit of the position may be missed, and the integrity of the exception compromised.[245] This test, the court argued, recognizes that a ministerial employee's job—including that of actual clergy to whom the exception undoubtedly applies—may require the performance of secular duties.[246]

The Ninth Circuit granted rehearing en banc expressly to vacate this test.[247] The court determined that, because Alcazar's employment fell easily within the ministerial exception, the court's delineation of a ministerial employee test constituted unnecessary overreaching.[248] The court acknowledged that both parties and amici wanted a "test of general applicability" regarding the ministerial exception, but the court declined to adopt either another circuit's test or the one proposed by its own three-judge panel.[249]

Before *Alcazar*, the Ninth Circuit considered the ministerial exception in *EEOC v. Pacific Press Publishing Ass'n*,[250] and later in *EEOC v. Fremont Christian School*.[251] In *Pacific Press*, the employee was an editorial secretary at a religious publishing house.[252] In *Fremont*, the employees were teachers at a Christian school.[253] While it held that the ministerial exception did not apply, the court did not use the primary duties test.[254] Instead, the court in both cases focused its analysis on whether the discrimination claim in question affected the religious beliefs of the church and whether the

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ordination and being ordained; both are equally ministerial for legal purposes. *See supra* notes 160–67 and accompanying text.

243. *Alcazar*, 627 F.3d at 676. The court also made the point that this type of inquiry may constitute excessive entanglement and thus may violate the Establishment Clause as well. *Id.* at 675; *see supra* Part II.A.1; *see also infra* Parts III.B.2, III.C.3.

244. *Alcazar*, 627 F.3d at 1292 ("We hold that the First Amendment considerations relevant to an ordained minister apply equally to a person who, though not yet ordained, has entered into a church-recognized seminary program to become a minister and who brings suit concerning employment decisions arising from work as a seminarian.").

245. *See supra* notes 160–67 and accompanying text.

246. *Alcazar*, 598 F.3d at 676.

247. *Alcazar*, 627 F.3d at 1290.

248. *Id.* at 1290–91 ("The paradigmatic application of the ministerial exception is to the employment of an ordained minister which, in cases involving Roman Catholicism, would include priests.").

249. *Id.* at 1290–92.

250. 676 F.2d 1272 (9th Cir. 1982).

251. 781 F.2d 1362 (9th Cir. 1986).

252. 676 F.2d at 1275.

253. 781 F.2d at 1364.

254. *Id.* at 1370.

state's interest in preventing the discrimination outweighed the resulting burden on free exercise.[255] The court did not analyze the function of either position, but summarily concluded that neither was ministerial in nature.[256] Thus, precedent required the court to adopt a ministerial employee test much later in *Alcazar*, as it had not articulated one before.[257]

B. The Problems with Ministerial Exception Jurisprudence (Sorting Out the Mess)

Since *McClure*, the circuit courts have accepted universally the ministerial exception as applied to the quintessential "minister."[258] When the nature of the position in question falls so comfortably within the definition of minister as to indicate unambiguously the need for church autonomy, all the circuits agree that the Religion Clauses mandate an exception.[259] However, when the facts require courts to examine the outer boundaries of the exception, hardly any of them agree.[260] Indeed, at times the circuits have even contradicted their own precedent.[261]

1. The Primary Duties Test (The Inconsistency Problem)

As the Ninth Circuit demonstrated, the facts of *Alcazar* effectively highlight the problems with the primary duties test.[262] The Supreme Court

255. *Id*. at 1368. This is essentially the *Sherbert* test, which is rooted in the individual free exercise strand of law, rather than the church autonomy strand of law, under which the ministerial exception falls. *See* discussion *supra* Part II.A.2. In *Alcazar*, the court (correctly) did not examine the burden on the church, but rather concluded that autonomy controlled regardless of the burden, creating inconsistent precedent in the Ninth Circuit. *See supra* Parts II.A.2.b, III.A.2.c; *see also* discussion *supra* Part III.A.1.b.

256. *Fremont*, 781 F.2d at 1370.

257. *See supra* notes 240–41. It is surprising that the court found no opportunity to articulate a ministerial employee test before *Alcazar*, given that both *Pacific Press* and *Fremont* involved the application of the ministerial exception to employees of a religious institution outside the clergy. *See supra* text accompanying notes 252–53.

258. As Justice Alito pointed out in his *Hosanna-Tabor* concurrence, the term minister can be misleading and should be used only as a term of art. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring). Because the United States plays host to almost every religion in the world, creating a standard around ordination or the term "minister" would create a prejudice against many religious organizations to which the exception absolutely applies. *Id*.

259. *See* discussion *supra* Part III.A.

260. *See* discussion *supra* Part III.A.

261. *See* discussion *supra* Part III.A.2.c; *see also supra* note 255.

262. *See supra* notes 233–49 and accompanying text.

decided that the Sixth Circuit, in a perfectly rational application of the test, came to the wrong conclusion.[263] The main problem with the primary duties test is the inconsistent results it produces.

The circuit courts applied the primary duties test to teachers in *Catholic University*, *Dole*, and *Hosanna-Tabor*.[264] When the District of Columbia Circuit applied the test to a teacher in *Catholic University*, it held that the position "clearly fit[] the description" of minister under the primary duties test.[265] In *Dole*, the Fourth Circuit applied the ministerial exception to a group of teachers and decided their positions were not ministerial in function.[266] The teachers taught at a Baptist school that adhered to Baptist values and doctrine, but, unlike the District of Columbia Circuit in *Catholic University*, the Fourth Circuit held that they were not ministers.[267]

In *Hosanna-Tabor*, the Sixth Circuit held that the "called" teachers at the school were not ministers even though they were ordained by the Lutheran Church, taught religious subjects, and were charged with promoting Lutheran beliefs.[268] The court ignored the fact that the church considered Perich to be an ordained minister and dissected the hours in her day to determine that her secular duties defined her teaching position more than her religious duties; it thus concluded that she was not a minister.[269] As the Ninth Circuit pointed out in *Alcazar*, however, the number of secular duties or the time spent performing them often has nothing to do with how religious a position may or may not be.[270] The disparity created in these cases by the application of the same test is disconcerting. *Catholic University*, *Dole*, and *Hosanna-Tabor* each applied the same test to essentially the same position—teaching—and came to different conclusions.[271] These cases alone demonstrate the lack of reliability in applying the primary duties test.

In other instances, the primary duties of the position have been clearly more secular than religious, and yet courts still inexplicably (and yet

263. *See infra* Part III.C.2.

264. *See supra* Part III.A.1.

265. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996).

266. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990) ("The teachers in the present case perform no sacerdotal functions; neither do they serve as church governors."); *see also supra* notes 179–82 and accompanying text.

267. *Supra* notes 179–82 and accompanying text; *see also supra* Part III.A.1.b.

268. *See supra* Part III.A.1.c.

269. *See* discussion *supra* Part III.A.1.c. The Supreme Court specifically disagreed with the court's choice not to consider Perich's ministerial title. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 698 (2012). Not only was the title not dispositive, but according to the Sixth Circuit, it was barely probative. *See infra* Part III.C.2.

270. *See supra* notes 233–49 and accompanying text.

271. *See supra* notes 179–82, 188–99, 200–11 and accompanying text.

correctly, if the spirit of the exception is the yardstick[272]) have held the positions to be ministerial.[273] In *Shaliehsabou*, the employee was a kosher supervisor in charge of inspecting food.[274] It would be very hard to argue that inspecting food is more of a religious duty than teaching a religious subject (which Perich did at Hosanna-Tabor).[275] However, that is exactly how the two decisions came out.[276] The Fourth Circuit held that the food inspector position was ministerial, while the Sixth Circuit held that the teaching position was not.[277] Because the Fourth Circuit in *Shaliehsabou* in actuality looked at the purpose of the exception and the fact that the position was "pervasively religious,"[278] it came out the right way. However, the right conclusion was a fluke. The continued use of the primary duties test will create more inconsistent results like those of *Shaliehsabou, Hosanna-Tabor*, *Dole*, and *Catholic University*.

2. Strict Scrutiny (The Entanglement Problem)

On more than one occasion the circuits have come dangerously close to "question[ing] the centrality of particular beliefs," a practice, known as asking the "pretextual question," consistently eschewed by the Supreme Court.[279] One might even argue that they have done it outright. In *Pacific Press* and *Fremont*, the Ninth Circuit not only failed to apply any ministerial employee test to the positions in question, but it also specifically analyzed the centrality of the churches' beliefs to determine that its beliefs and doctrine were not threatened.[280] Likewise, the Fourth Circuit in *Dole* determined that the question of whether to compensate heads of household differently did not "cut to the heart of Shenandoah's beliefs."[281]

272. *See supra* notes 159–66 and accompanying text.
273. *See supra* notes 183–87 and accompanying text.
274. *See supra* notes 183–87 and accompanying text.
275. *See supra* Part III.A.1.c.
276. *See supra* notes 183–87, 200–11 and accompanying text.
277. *See supra* notes 183–87, 200–11 and accompanying text.
278. Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008).
279. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); *see also supra* notes 50, 60, 82, 90 and accompanying text; *see also infra* notes 286, 288, 344–48 and accompanying text.
280. *See supra* notes 250–57 and accompanying text; *see also* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999) (applying the *Sherbert* balancing test to determine whether the application of Title VII violates the Free Exercise Clause).
281. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1397 (4th Cir. 1990); *see supra* notes 179–81 and accompanying text.

Perhaps unsurprisingly, all three cases rejected the ministerial exception.[282] The Sixth Circuit did not interpret church doctrine in *Hosanna-Tabor*, but in *Alcazar*, the Ninth Circuit posited that "the very process of civil court inquiry into the clergy-church relationship can be sufficient entanglement."[283] The main problem in these cases is the application of strict scrutiny, a standard of review that requires balancing the state's interest against the burden on free exercise.[284] This is a process that, when applied to a religious organization rather than an individual, by definition calls for inquiry into the value and importance of any number of religious tenets.[285] For this reason, Religion Clause history shows strict scrutiny as applicable to the individual free exercise line of cases, not the church autonomy line of cases.[286] The ministerial exception is based in the latter.[287] In *Pacific Press*, the court looked for a compelling state interest to justify the burden on the publishing house's free exercise and found that the state interest heavily outweighed the burden because there was no burden at all:

> Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on the basis of race, religion, sex, age, or national origin. Thus, enforcement of Title VII's equal pay provision does not and could not conflict with Adventist religious doctrines, nor does it prohibit an activity "rooted in religious belief."[288]

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282. *See supra* notes 179–82, 250–57 and accompanying text.

283. Alcazar v. Corp. of Catholic Archbishop of Seattle, 598 F.3d 668, 672, 672–73 (9th Cir. 2010); *see supra* note 236; *see also infra* Part III.C.3.

284. *See supra* note 79 and accompanying text.

285. *See supra* notes 90, 183–87 and accompanying text; *see also infra* notes 288–89 and accompanying text.

286. *See supra* Part II.A.2, III.A.1.b. Because of the required balancing of interests involved in the application of strict scrutiny, this is not a standard of review that can avoid the pretextual question if applied carefully. Strict scrutiny balancing violates the goal of the ministerial exception on its face. *See infra* note 288.

287. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) ("[W]hile it is true that some of the cases that have invoked the ministerial exception have cited the compelling interest test, *all* of them rely on a long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" (citation omitted)). It should be noted that citing a test and using it are two different things. In this instance, the court cited *McClure*, which was quoting the *Sherbert* test. *See also supra* Part II.A.2.

288. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982). The court in *Fremont* heavily relied on *Pacific Press* to come to essentially the same conclusion. *See supra* notes 250–57 and accompanying text. The Court's conclusion in *Hosanna-Tabor* regarding the pretextual question directly contradicts the Ninth Circuit's reasoning:

The court did not examine the duties of the female employee, as would have been typical in a ministerial exception case, but instead delved into the substance of Seventh-Day Adventist beliefs to conclude for them that their doctrine would not be affected—this is the precise type of question that the judiciary has no authority to determine.[289] Autonomy does not question whether activity "rooted in religious belief" is "prohibit[ed]," but whether that activity is examined at all.[290] It is not up to the courts to decide what action does or does not comport with religious doctrine.[291] It has been long recognized in the area of church autonomy that strict scrutiny (or any standard of judicial review) has no place when there are some free exercise interests that trump any state interest, compelling or otherwise.[292] As the Ninth Circuit has said, "Some religious interests under the Free Exercise Clause are so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere."[293]

Simply put, there is nothing reliable about ministerial exception jurisprudence in the circuit courts. Tests are applied and precedent interpreted so unpredictably as to warrant an explanation from the Supreme Court. When the Court granted certiorari on March 28, 2011, and agreed to hear *Hosanna-Tabor*, it seemed as though one was coming.[294]

> That . . . misses the point of the ministerial exception. 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.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) (citation omitted).

289. *Pacific Press*, 676 F.2d at 1279; *see also supra* notes 50, 60, 82, 90, 279, 286 and accompanying text. In fact, the result of this case was probably accurate. Had the court applied any of the ministerial employee tests, the employee should have been found not to be ministerial. *See* discussion *supra* III.A.1, III.A.2.a–b. But the fact that the court could have come to the right result using proper analysis makes it all the more inexcusable that it applied the wrong test.

290. *See supra* text accompanying note 288.

291. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("[W]e may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief.").

292. *See supra* Part II.A.2.a.

293. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999).

294. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 131 S. Ct. 1783 (2011) (mem.).

C. The Supreme Court (Almost) Speaks: Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

On January 11, 2012, the Supreme Court confirmed, in a quick 9–0 decision, the existence of the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[295] Although it reversed the Sixth Circuit by holding that Perich was a ministerial employee,[296] the Court upheld over forty years of circuit law by adopting the exception.[297] However, it did little more than that. Chief Justice Roberts announced the opinion of the Court, which unanimously held that there was a ministerial exception and that it did apply to Perich.[298] However, the decision was silent on many issues the circuits have debated amongst themselves since the *McClure* court first articulated the exception in 1971.[299] The narrow holding failed to clarify any number of issues raised by the circuit courts over the years, and the questions that surround the ministerial exception went unanswered.

1. Facts of the Case

In 1999, Perich began her employment relationship with Hosanna-Tabor as a "lay teacher."[300] Hosanna-Tabor, a member of the Lutheran Church-Missouri Synod, operates a small school where students can receive a "Christ-centered education" and employs "lay" and "called" teachers.[301] Lay teachers (also called "contract" teachers) do not require any particular training and are only hired when called teachers are unavailable.[302] "Called" teacher requirements include substantial theological study, as well as endorsement by the teacher's Synod.[303] Hosanna-Tabor employed Perich as a lay teacher for only a short time until she obtained her diploma of vocation, designating her a commissioned minister, and she became a called teacher.[304] In addition to various secular subjects such as math and science, Perich taught a religion class four days a week.[305] She also led organized prayers, and both attended and occasionally led the weekly school-wide

295. 132 S. Ct. 694 (2012).
296. *Id.* at 707.
297. *See supra* Parts II.C, III.A (discussing the circuit court ministerial exception cases).
298. *Hosanna-Tabor*, 132 S. Ct. at 710.
299. *See supra* Part III.A–B.
300. *Hosanna-Tabor*, 132 S. Ct. at 700.
301. *Id.* at 699.
302. *Id.* at 699–700.
303. *Id.* at 699.
304. *Id.* at 700.
305. *Id.*

chapel service.[306]

In June 2004, Perich developed narcolepsy and went on disability leave before the start of the 2004–2005 school year.[307] In January 2005, Perich notified the school that she was able to return to work.[308] However, the principal informed her that the school had filled her position for the remainder of the school year.[309] The school not only replaced Perich but also questioned her fitness to be around students in the classroom and doubted that she would be able to return to work at all.[310] The administration asked her to "peaceful[ly]" resign her call and Perich refused, producing a note from her physician that indicated her ability to return to work.[311] When Perich presented herself for work, the principal asked her to leave, which she did only after obtaining written documentation of her appearance.[312] When the principal later told Perich that she likely would be fired, Perich threatened legal action.[313] The school board met and decided to rescind Perich's call; she was sent a letter of termination in April.[314]

Perich, together with the EEOC, brought claims against Hosanna-Tabor for unlawful retaliation, and she sought both reinstatement and damages.[315] The school moved for summary judgment, citing the ministerial exception as a bar to Perich's claims.[316] The district court granted Hosanna-Tabor's motion, but the Sixth Circuit reversed on appeal, finding that Perich's position was not ministerial.[317]

2. Chief Justice Roberts Delivers the Opinion of the Court

In the majority opinion, Chief Justice Roberts first established that the question presented was "whether the Establishment and Free Exercise

306. *Id*.
307. *Id*.
308. *Id*.
309. *Id*.
310. *Id*.
311. *Id*.
312. *Id*.
313. *Id*.
314. *Id*.
315. *Id*. at 701.
316. *Id*.
317. *Id*.; *see also supra* Part III.A.1.c. The Sixth Circuit vacated the order and remanded, instructing the district court to make a finding on the merits of Perich's discrimination claim. EEOC v. Hosanna-Tabor Lutheran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

Clauses of the First Amendment bar . . . an [employment discrimination] action when the employer is a religious group and the employee is one of the group's ministers."[318] Roberts moved through the history of the Religion Clauses and the development of church autonomy.[319] He ended the journey by acknowledging that the ministerial exception has been recognized by the circuit courts for many years and adopted it into Supreme Court jurisprudence.[320]

Perich argued that there is no need for a special rule rooted in the Religion Clauses when the same First Amendment rights that protect everyone else also protect ministers.[321] The Court declined the invitation to hold thusly.[322] It next refused to adopt Perich's position that the ministerial exception could not stand in light of *Smith*.[323] Like the District of Columbia Circuit,[324] the Court concluded that the *Smith* decision was unrelated to the application of the ministerial exception.[325]

Nothing about the Court's conclusions up to this point was surprising, as the circuits had held unanimously thus for over forty years.[326] The aspect of the Court's decision that had been eagerly anticipated—the aspect that had garnered national attention—was the Court's explication of a rule defining the boundaries of a ministerial position under the exception.[327] The Court,

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318. *Id*. at 699. By framing the question thusly, the Court immediately demonstrated its unwillingness to establish a clear ministerial employee test by addressing the issue on which the circuit courts agree, rather than the one that has created such disparity among them. Since *McClure*, the circuits courts have universally recognized that the ministerial exception exists. *See supra* Parts II.C, III.A; *see also infra* note 320 and accompanying text.

319. *Hosanna-Tabor*, 132 S. Ct. at 702–05; *see also supra* Part II.

320. *Hosanna-Tabor*, 132 S. Ct. at 705–06 ("[T]he Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception.").

321. *Id*. at 706. This proposition contravenes *Watson* and its progeny. *See supra* Part II.A.2.a. The Court is quite right in calling Perich's position "untenable" when the importance of the church-minister relationship is so well established. *See Hosanna-Tabor*, 132 S. Ct. at 706; *supra* notes 159–66 and accompanying text. Justice Scalia particularly was unimpressed with the argument. Oral Argument at 31:15, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (No. 10-553), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_553 ("We are talking here about the Free Exercise Clause and about the Establishment Clause, and you say they have no special application? . . . [Y]ou can, by an extension of First Amendment rights, derive such a [result], but there, black on white in the text of the Constitution are special protections for religion. And you say that makes no difference?").

322. *Hosanna-Tabor*, 132 S. Ct. at 706.

323. *Id*.

324. The Court did not take the time to discuss in detail the reasons behind its dismissal of this proposition; however, the District of Columbia Circuit thoroughly justified its reasoning in *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996); *see also supra* Part III.A.1.b.

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

326. *See* discussion *supra* Part III.A.

327. *See EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, THE BECKET FUND,

however, was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister."[328] Instead, it delineated all the facts that, according to the Court, put Perich squarely within the exception.[329]

It placed heavy emphasis on the fact that both the church and Perich herself held her out to the world as a minister to the congregation.[330] The church did so by giving Perich the official title of minister, while Perich did so by claiming housing allowances on her taxes, accepting the call from Hosanna-Tabor, and referring to herself as a minister in written correspondence.[331] The Court gave substantially more weight to Perich's title as minister than did the Sixth Circuit before it;[332] however, while the Court said that the Sixth Circuit erred in concluding that a title is not relevant,[333] it did not consider as a factor the title alone.[334] Chief Justice Roberts considered the title only because of the significant amount of religious training that accompanied it:

> Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry-related questions. Finally, she had to pass an oral examination by a faculty committee at a

http://www.becketfund.org/hosannatabor/ (last visited Nov. 12, 2012) (listing press publications regarding *Hosanna-Tabor*).

328. *Hosanna-Tabor*, 132 S. Ct. at 707. Chief Justice Roberts was satisfied "that the exception cover[ed] Perich, given all the circumstances of her employment." *Id*.

329. *Id*. at 707–08.

330. *Id*. at 707.

331. *Id*. at 707–08.

332. *Id*. at 708 ("It was wrong for the Court of Appeals—and Perich, who has adopted the court's view—to say that an employee's title does not matter." (citation omitted)).

333. *Id*. ("Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position.").

334. *Id*. at 707.

> Lutheran college. It took Perich six years to fulfill these requirements.[335]

The reasoning behind the Court's conclusion that title is a relevant factor is undermined by the fact that it felt the need to support that conclusion with evidence, not of Perich's title, but of her extensive religious training.[336] In holding that the title of minister always carries significant weight, the Court ignored a possible factual scenario in which someone is given the title arbitrarily.[337]

The Court criticized the primary duties test when it disagreed with the weight the Sixth Circuit gave to the fact that lay and contract teachers at Hosanna-Tabor had the same duties, as well as to the fact that Perich performed many secular duties.[338] Because the Sixth Circuit used the primary duties test, the functional comparison between the two types of teachers was given substantial weight.[339] The only basis the Court gave for this conclusion, however, was that contract teachers were only hired when called teachers were unavailable.[340] In rejecting the secular duties emphasis,[341] the Court took a position similar to that of the Second and Ninth Circuits, which both expressed concerns about a purely functional approach.[342] The Court seemed to accept the general idea that some employment relationships "may be so pervasively religious" that the number of secular duties becomes irrelevant.[343]

Finally, the Court did speak on one unsettled issue. Throughout church autonomy and ministerial exception jurisprudence, as well as the *Hosanna-Tabor* oral arguments, the issue of the so-called "pretextual question" continued to arise.[344] The Court, however, dismissed the issue with haste:

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335. *Id*.

336. *Id*. at 707–08.

337. This holding also makes interesting Justice Alito's observation that "some faiths consider the ministry to consist of all or a very large percentage of their members." *Id*. at 713–14 (Alito, J., concurring); *see also supra* note 357 and accompanying text. If the title of minister weighs heavily in favor of applying the exception, it should follow that there are some faiths wherein the exception would apply to every member. The Fourth Circuit in *Dole* specifically dismissed this possibility. *See supra* text accompanying note 182.

338. *Hosanna-Tabor*, 132 S. Ct. at 708.

339. *See* EEOC v. Hosanna-Tabor Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012); *see also supra* Part III.A.1.c.

340. *Hosanna-Tabor*, 132 S. Ct. at 708.

341. *Id*. at 709 ("The issue before us . . . is not one that can be resolved by a stopwatch.").

342. *See supra* Parts III.A.2.b–c. The Ninth Circuit, of course, vacated this conclusion. *See supra* note 235.

343. *See supra* text accompanying note 231.

344. *See supra* notes 50, 60, 82, 90, 279, 286, 288 and accompanying text; *see also* Oral Argument at 46:30, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (No. 10-553), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_553.

> The EEOC and Perich suggest that Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. 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.[345]

In this brief statement, the Court rejected the idea that it is appropriate to examine a church's decision for "fraud, collusion, or arbitrariness"[346] and to deny ministerial exception protection on those grounds.[347] This conclusion is supported by ample precedent holding that, in general, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[348]

3. Justices Thomas and Alito Concur

Despite the Court's surprising 9–0 decision, Justices Thomas and Alito added concurring opinions expressing views tangential to the Court's holding.[349] Justice Thomas did not add much to the majority opinion, except to say that "[t]he question whether an employee is a minister is itself religious in nature,"[350] a point that echoes the Ninth Circuit's in *Alcazar* that the "very process of civil court inquiry into the clergy-church relationship can be sufficient entanglement."[351]

Justice Alito clarified his view on the confusion surrounding the term "minister."[352] He made it clear that the term should only be thought of as a

345. *Hosanna-Tabor*, 132 S. Ct. at 709 (citation omitted) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952)). This conclusion invalidates reasoning in multiple circuit cases. *See supra* note 288 and accompanying text.

346. *See supra* note 50 and accompanying text.

347. *See Hosanna-Tabor*, 132 S. Ct. at 709.

348. Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) (alteration in original) (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)); *see also supra* notes 50, 60, 82, 90, 279 and accompanying text.

349. *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring); *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring).

350. *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring).

351. *Supra* notes 236, 283 and accompanying text.

352. *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring).

type of "shorthand" because if taken literally, it would surely exclude some of the many different religions represented in the United States.[353] He took a somewhat radical view on what type of employee should fall under the ministerial exception. Justice Alito argued that autonomy must be maintained because "[f]orcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express."[354] He said religious groups are "the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."[355] These ideas support the argument that all employees of a religious organization should fall under the ministerial exception, depending on what a church considers an action that gives "a voice" to their faith.[356] A church could argue that employment of an individual in any position is a tacit admission that the individual's beliefs are representative of those held by the religious organization as a whole. Justice Alito continued this theme by pointing out that many churches consider most, if not all, of their members to be ministers.[357]

IV. WHAT HAPPENS NOW: THE AD HOC TEST ARGUMENT (THE SENSIBLE SOLUTION)

The Court deliberately and specifically avoided settling the questions raised by the application of the ministerial exception.[358] Ruling on the case more quickly and in more agreement than most constitutional law scholars predicted, the Court's only aim was to adopt the ministerial exception while avoiding the "tough constitutional question."[359] The Court dismissed the "parade of horribles" espoused by the government in *Hosanna-Tabor* that included sexual harassment and other such torts.[360] The Court was quite

353. *Id*.

354. *Id*. at 712 (alterations in original) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)); *see also infra* note 357.

355. *Id*. at 713.

356. *Id*.; *see also supra* note 351.

357. *Hosanna-Tabor*, 132 S. Ct. at 713–14. This marked the second time Justice Alito implied that perhaps all members of the church should be covered by the exception. It first occurred when he quoted *Dale* without any attempt to distinguish between the words "member" and "employee." *Id*. at 712; *see also supra* notes 337, 351 and accompanying text. This is an interesting and seemingly meritorious proposition, but its examination is outside the scope of this Comment.

358. *See supra* Part III.C.2.

359. Oral Argument at 46:30, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (No. 10-553), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_10_553.

360. *Hosanna-Tabor*, 132 S. Ct. at 710. The circuits have generally agreed that such claims would not be barred. *See supra* note 232 and accompanying text.

right; that will not be the lasting problem created by the decision.[361]

The circuit courts have not been able to agree on a clear test and at times have even contradicted themselves.[362] The only possible direction the circuits can take from the Supreme Court's decision—though not ironclad—is that it seems that the Court does not agree with the primary duties test.[363] However, even this conclusion requires an inference because the Court held (very narrowly) only that the exception exists and that it applied to Perich.[364] This leaves the circuits, as they have done for forty years, to fend for themselves. Given that strategy's past application and resulting confusing,[365] this is not exactly an encouraging prospect.

In *Rweyemamu*, the Second Circuit, though not dealing with the application of a ministerial employee test, nonetheless explicated an ad hoc-type test that most accurately reflects the spirit of the ministerial exception.[366] By acknowledging that the relationship in question may be "so pervasively religious" as to warrant a ministerial finding, the court recognized that these are questions of such complexity that a blanket rule may not be possible.[367] The inconsistencies in other circuit decisions also demonstrate that this issue should be examined on a case-by-case basis.[368] Many courts have acknowledged that "virtually every religion in the world is represented in the population of the United States."[369] With different religions come different doctrines and different ideas of what constitutes a ministerial position.[370] As has been shown, it is possible to have a "pervasively religious" position that comprises mostly secular duties.[371]

Creating an inflexible rule or list of criteria, such as the primary duties test, will only lead to more inconsistent holdings like those in the circuit

361. *Supra* note 358.

362. *See supra* Part III.B.

363. *See supra* notes 338–43 and accompanying text.

364. *See supra* notes 327–29 and accompanying text.

365. *See supra* Part III.B.

366. *See supra* Part II.C.

367. Rweyemamu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008). The fact that the Supreme Court chose to rule so narrowly in *Hosanna-Tabor* also supports this conclusion. *See infra* Part III.C.2.

368. *See supra* Part III.B.1 (discussing the inconsistent application of the primary duties test).

369. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring).

370. For example, Justice Alito recognized the diversity when he criticized the Christian connotation of the exception because "the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions." *Id*.

371. *See supra* notes 240–44 and accompanying text.

courts.[372] Church autonomy is at the root of the ministerial exception,[373] and it is based on a religious organization's fundamental right—a right that surpasses the government's interest in eradicating discrimination—"to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[374] This conflict between fundamental rights is too substantial to support anything but a fact-intensive analysis. Each ministerial exception case should, as *Rweyemamu* suggests, look at the nature of the dispute. This way, the courts can determine whether the exception is required to maintain a religious organization's right of autonomy that is based in the Religion Clauses.[375]

V. CONCLUSION

There is much breadth to the church autonomy doctrine. One aspect of it—the ministerial exception—requires courts to answer difficult constitutional questions that arise when two fundamental rights conflict. While the Supreme Court has established that the Religion Clauses supersede the government's interest in enforcing anti-discrimination laws,[376] its unwillingness to explicate or adopt a clear ministerial employee test leaves open the question of the shape and extent of the exception. As long as they do not directly contradict *Hosanna-Tabor*—a near impossibility—the circuit courts likely will continue to apply tests of their own design. As articulated in this Comment, an ad hoc approach that examines the religious nature of the position in question would cause the least amount of confusion.[377] In order to avoid inconsistent application of the ministerial exception, the circuit courts should utilize this ad hoc test until the Supreme Court speaks on this issue again.

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372. *See supra* Parts III.A.1.a, III.A.1.c, III.B.1.

373. *See supra* Parts II.A.2, II.C.

374. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

375. The test articulated by the Fifth Circuit in *Starkman* is also essentially ad hoc and holds true to the spirit of the exception. *See supra* notes 220–24 and accompanying text.

376. *See supra* Parts II.A.2.a, II.C, III.C.2.

377. *See supra* notes 366–75 and accompanying text.

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