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All For One, And One for All-Comers! University Nondiscrimination Policies in Light of Hosanna-Tabor and the Ministerial Exception

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All for One, and One for All-Comers! University Nondiscrimination Policies in Light of *Hosanna-Tabor* and the Ministerial Exception

When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters.[1]
– Justice Samuel Alito

I. INTRODUCTION

On January 11, 2012, the Supreme Court decided a case in which a seemingly unstoppable force was halted by a constitutionally immovable object.[2] The case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, involved a claim brought by fourth-grade teacher Cheryl Perich against her previous employer, a Lutheran school, seeking damages for her allegedly retaliatory termination under the terms of the Americans with Disabilities Act.[3] The case represented the first time that the constitutionality of the "ministerial exception"—a judge-made doctrine that precludes courts from deciding any employment discrimination claim brought against a religious organization by or on behalf of one of its ministers[4]—would be considered by the Supreme Court.[5] The case also provided the long-awaited opportunity for the Court to answer the question that had plagued the circuit courts for over four decades: how and by whom should an employee's "ministerial-status" be determined?[6]

The Court managed simultaneously to bring clarity and confusion to the future of the ministerial exception. While the constitutionality of such a doctrine—as well as its applicability to the case at hand—was agreed upon unanimously, the Court refused to establish any "rigid formula" for the future determination of one's status as minister, instead relying solely on the specific circumstances presented in the case.[7] Regardless of the means, however, the end result—that the First Amendment unequivocally protects a

1. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).
2. *See Hosanna-Tabor*, 132 S. Ct. 694 (2012).
3. *See id*. at 699–701; *see also* discussion *infra* Part III.A.1.
4. *See Hosanna-Tabor*, 132 S. Ct. at 705; *see also* discussion *infra* Parts II, III.A.
5. *See Hosanna-Tabor*, 132 S. Ct. at 705–10; *see also* discussion *infra* Part III.A.
6. *See infra* notes 50–51 and accompanying text.
7. *Hosanna-Tabor*, 132 S. Ct. at 707–08.

religious organization's freedom to choose its ministers free from governmental intrusion—was indeed a victory for religious liberty.[8]

In the light of another Supreme Court case, decided just two years earlier, this victory was very much needed. In *Christian Legal Society v. Martinez*, the Court, in a 5–4 decision, upheld a university nondiscrimination policy that conditioned the availability of funding and facilities on a religious student group's willingness to open up its membership and leadership positions to individuals whose beliefs were exactly opposite of the collective's.[9] The case sparked a fire that, in the two years following the decision, resulted in universities across the country denying dozens of religious student groups official recognition due to the groups' unwillingness to give up control over their requirements for an individual to join and lead the collective.[10]

The mixed messages these two cases send with regard to a religious group's ability to choose its leadership are concerning. How can a federally enacted piece of antidiscrimination legislation have less power over a religious organization's right to choose its leadership than a university-enacted nondiscrimination policy? Surely the constitutional considerations underlying the ministerial exception would be just as applicable on a university campus as in an employment discrimination case, wouldn't they?

In light of the more recent *Hosanna-Tabor* decision, this Comment seeks to answer these questions by extending the reasoning behind the ministerial exception to the university context in order to build a foundation upon which a future exception can be built to ensure that religious student groups are sufficiently free to choose their own leaders. Part II sets forth a brief history of the ministerial exception and its application in the circuit courts.[11] Part III addresses two recent Supreme Court cases, *Martinez* and *Hosanna-Tabor*, and their practical effect on religious liberty, as well as the public's perception of both cases.[12] Part IV then offers observations and comparisons regarding antidiscrimination legislation and their university-based counterparts and the parties affected by both, as well as a brief explanation of the lack of distinction between governmental imposition of

8. *See infra* notes 125–28 and accompanying text.
9. 130 S. Ct. 2971 (2010); s*ee* discussion *infra* Part III.B.2.
10. *See* discussion *infra* Part III.C.
11. *See infra* notes 16–52 and accompanying text.
12. *See infra* notes 50–134 and accompanying text.

monetary penalties and governmental withholding of benefits.[13] Part V explores the hypothetical application of current case law regarding the ministerial exception to the relationship between a student-chapter president of Christian Legal Society—the party bringing suit in *Martinez*—and the organization on the whole.[14]

II. THE MINISTERIAL EXCEPTION PRIOR TO *HOSANNA-TABOR*

The "ministerial exception" is a judicially created doctrine that serves to bridge the gap between the requirements of the U.S. Constitution and the mandates of modern antidiscrimination legislation.[15] The ministerial exception is grounded in the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[16] The simultaneous constitutional protections of both the Establishment Clause and the Free Exercise Clause ensure that a religious group is free to determine its own faith and mission, unencumbered by any governmental interference in the ecclesiastical decisions of the group.[17]

When Congress passed the Civil Rights Act of 1964, Title VII of which prohibits employers from discriminating against their employees on the basis of race, color, religion, sex, or national origin, it made sure to carefully carve out an exception for religious institutions to avoid infringing on their First Amendment rights.[18] Section 702 of Title VII exempts religious institutions from the requirements of Title VII with regard to "the employment of individuals of a particular religion," thereby ensuring that religious institutions cannot be required to employ individuals whose fundamental

13. *See infra* notes 132–202 and accompanying text.

14. *See infra* notes 204–40 and accompanying text.

15. *See generally* Todd Cole, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703 (2010).

16. U.S. CONST. amend. I.

17. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

18. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

religious beliefs are at odds with those of the institution.[19] Such a provision is intuitive, as most would agree that the Catholic Church is free to guard the tenets of its faith by precluding Protestant pastors from leading a Catholic Mass. Still, this statutorily created exception only extends to employment discrimination based on religious belief and not on the basis of race, gender, or any other criteria prohibited by Title VII.[20]

Soon after the enactment of Title VII, various circuit courts began taking independent steps to protect religious institutions from unconstitutional intervention by government agencies under Title VII.[21] In 1972, the Fifth Circuit Court of Appeals instituted a court-made exception separate from Section 702 of Title VII that expanded religious institutions' discretion in hiring and firing "ministers."[22] The new exception was based on the understanding that "[t]he relationship between an organized church and its ministers is its lifeblood" and that "[m]atters touching this relationship [are] . . . of prime ecclesiastical concern."[23] In essence, this "ministerial exception," as it has since been called, provides a jurisdictional bar to all discrimination claims brought against religious institutions by their ministers, *even if* the discrimination alleged by those ministers is based on race, gender, age, or any other category prohibited by Title VII or other antidiscrimination legislation.[24]

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19. *See id.* § 2000e-1(a).

> 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.

Id.

20. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("[R]eligious institutions may base relevant hiring decisions upon religious preferences, [but] Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin." (citations omitted)).

21. *See infra* notes 23–25 and accompanying text.

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

23. *McClure*, 460 F.2d at 558–59.

24. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) ("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 . . . is the church's alone." (citation omitted)); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007) ("The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its

Since its inception in the Fifth Circuit, the ministerial exception has been accepted and applied in each of the circuits except for the Federal Circuit.[25] Though unanimously accepted,[26] the ministerial exception has been applied under a variety of analyses, differing with regard to whether the employee bringing suit is a minister for purposes of the ministerial exception.[27] Though each circuit employs its own unique and nuanced approach, a "role-based" and a "claim-based" approach have emerged as the two overarching forms of analysis employed by circuit courts to address this

ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees."); *see also Hosanna-Tabor*, 132 S. Ct. at 701, 709–10 (barring suit alleging discrimination in violation of the Americans with Disabilities Act); Rweyemamu v. Cote, 520 F.3d 198 (2d. Cir. 2008) (barring suit alleging race discrimination); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (barring suit alleging gender discrimination); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (barring suit alleging both gender and race discrimination); *McClure*, 460 F.2d at 561 ("The order of the District Court sustaining The Salvation Army's motion to dismiss the complaint *for want of jurisdiction* is affirmed." (emphasis added)).

The ministerial exception has also been applied to suits between a minister and his religious employer *not* based on employment discrimination. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004) (barring suit based on a violation of the overtime provisions of the Fair Labor Standards Act).

Furthermore, the exception "encompasses all tangible employment actions and disallows lawsuits for damages based on lost or reduced pay[,] . . . [as] [s]uch damages would necessarily trench on the Church's protected ministerial decisions." Alcazar v. Corp. of Catholic Archbishop of Seattle, 598 F.3d 668, 674 (9th Cir. 2010) (internal quotations and citations omitted); *see also Hosanna-Tabor*, 132 S. Ct. at 709 (noting that a minister's suit for damages against her religious employer was still prohibited by the ministerial exception).

25. *See, e.g.*, Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010); McCants v. Ala.-West Fla. Conference of United Methodist Church, Inc., 372 F. App'x 39 (11th Cir. 2010); Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

26. As the Federal Circuit's jurisdiction is limited to certain subject matters, such as intellectual property and government contracts, that are unrelated to the ministerial exception, the circuit's failure to hear a case in which the ministerial exception is at issue does not detract from the unanimity under which the ministerial exception is accepted. *See* Joseph R. Re, *Brief Overview of the Jurisdiction of the U.S. Court of Appeals for the Federal Circuit Under § 1295(A)(1)*, 11 FED. CIR. B.J. 651, 653–55 (2002); *see also* 28 U.S.C. §§ 1292, 1295, 1296 (2012).

27. *See* Cole, *supra* note 15, at 729–33.

question.[28]

The role-based approach decides whether an employee is a minister by determining if the employee's position is "important to the spiritual and pastoral mission of the church," and not simply whether that employee possesses the formal title of "minister."[29] In order to lay out a more practical framework for determining the spiritual or pastoral importance of an employee's position, courts applying the role-based approach look more specifically to whether an employee's "duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[30] If so, that employee is barred from bringing an employment discrimination claim against his or her religious employer.[31] The breadth of the role-based approach is evidenced by the fact that a variety of employees have been deemed "ministers" for purposes of the ministerial exception—among them a non-ordained associate in pastoral care,[32] music director and organist,[33] manager of Hispanic communications,[34] and associate professor of Canon Law at a Catholic university.[35]

Those circuits that apply a claims-based approach look not to the role of the individual's position within the religious institution, but to the nature of the claim brought against the religious institution.[36] Under such an approach, the ministerial exception only applies to cases involving claims in which "resolution . . . would limit a religious institution's right to choose who will perform particular spiritual functions."[37] This necessitates a

28. *See id*.

29. *See id*. at 704 (citing EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461 (D.C. Cir. 1996)). "[T]he ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." *Catholic Univ. of Am.*, 83 F.3d at 463.

30. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

31. *See supra* note 25 and accompanying text.

32. *Rayburn*, 722 F.2d at 1165.

33. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006); *see also* EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 797 (4th Cir. 2000) (music director and part-time elementary school music teacher); Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999) (choir director).

34. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 700 (7th Cir. 2003).

35. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457 (D.C. Cir. 1996).

36. Cole, *supra* note 15, at 733.

37. *Id*. (quoting Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006)).

determination of whether the claim is based on religious "discipline, faith, internal organization, or ecclesiastical rule, custom or law, or whether it is a case in which [courts] should hold religious organizations liable in civil courts for purely secular disputes."[38] This approach thus allows a court to hear purely secular claims such as one of sexual harassment.[39] However, if the religious institution claimed that the alleged harassment was based in or justified by the institution's religious doctrine, then the court would ultimately be unable to hear the claim, as doing so would result in the court scrutinizing and second-guessing such doctrine in violation of the First Amendment.[40]

Though not as prevalent or as divisive as the issue of an employee's status as minister, there are also varying approaches to determining whether the employer is a religious institution—a necessary element of the ministerial exception.[41] Generally speaking, whether an employer is a religious institution for purposes of the ministerial exception requires the same inquiry as whether the employer could be defined as "a religious corporation, association, educational institution, or society" under Section 702 of Title VII.[42] The analysis used to determine the religious nature of the

38. *Id*. (quoting Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657 (10th Cir. 2002) (internal quotations omitted)).

39. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004).

40. *See id*.

> Elvig may, consistent with the First Amendment, attempt to show that she was sexually harassed and that this harassment created a hostile work environment. This showing would, after all, involve a purely secular inquiry. Assuming Elvig can prove a hostile work environment, the Church may nonetheless invoke First Amendment protection from Title VII liability if it claims that her subjection to or the Church's toleration of sexual harassment was doctrinal. We do not scrutinize doctrinal justifications because it is . . . not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment of Elvig.

Id. (internal citations and quotations omitted).

41. *See* Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2010); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3d Cir. 2007). As the ministerial exception only protects the relationship between a religious institution and its ministers, the court must find that the institution is indeed "religious" in nature *and* that the employee in question was a minister of that religious institution. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

42. 42 U.S.C. § 2000e-1 (2012). Generally, the issue in cases applying the ministerial exception is not whether the employer is religious, but whether the employee is indeed a minister. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988). This has resulted in minimal jurisprudence specifically analyzing *both* the religious nature of the institution *and* the employee's status as minister for purposes of applying the ministerial exception to employment discrimination claims. *But see* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310–11 (4th

employer looks to whether the organization or institution is "primarily religious," which would qualify the institution or organization for statutory exemption and, simultaneously, potential protection under the ministerial exception.[43]

Two of the most recent cases involving such analysis were decided in the Third and Ninth Circuits, each utilizing a unique standard for determining whether the organizations at issue were indeed religious under Section 702 of Title VII.[44] In *LeBoon*, a 2007 Third Circuit case, the court identified and relied on nine factors to determine whether the organization at issue was "primarily religious."[45] The court emphasized that all of these factors would not necessarily be considered in each case, nor would the weight of each factor remain constant from case to case, so as to ensure that the specific facts of each subsequent case would be adequately considered.[46]

In 2011, the Ninth Circuit in *Spencer* rejected the *LeBoon* factors and instead used a different standard to determine if an organization was primarily religious.[47] The *Spencer* court determined that an entity is "religious" for purposes of Title VII exemption:

Cir. 2004) (finding that, for purposes of the ministerial exception's application to the provisions of the Fair Labor Standards Act, a primarily Jewish home for the elderly was a religious institution and a mashgiach—an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws—was a minister).

Thus, the most pertinent inquiry concerning the religiosity of the institution in employment discrimination suits relates directly to whether it would be exempted under Title VII from claims of religious discrimination. Even jurisprudence relating to the Section 702 exemption is sparse, as "[i]n most cases, the organization seeking the exemption is 'clearly' religious, and the result is straightforward." *Spencer*, 633 F.3d at 726 (quoting *Townley Eng'g & Mfg. Co.*, 859 F.2d at 618).

43. *See Spencer*, 633 F.3d at 729; *LeBoon*, 503 F.3d at 226.

44. *See Spencer*, 633 F.3d at 729; *LeBoon*, 503 F.3d at 226.

45. *See LeBoon*, 503 F.3d at 226. The court acknowledged and applied the following factors for determining whether an organization is primarily religious:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

Id.

46. *Id.* at 227.

47. *See Spencer*, 633 F.3d at 734.

> [I]f it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[48]

In coming to its conclusion, the court explicitly rejected the contention that the statutory exemption only applied to "churches, synagogues, and the like" and instead expanded the application to "some religious corporations, associations, and societies that are *not* churches."[49]

Prior to *Hosanna-Tabor*, the aforementioned principles governed the application of the ministerial exception. The circuit courts were split regarding how to determine an institution's "ministers" and a non-church's status as a religious institution. The muddled state of the ministerial exception's application at the time of *Hosanna-Tabor* begged for Supreme Court clarity and guidance. Unfortunately, such judicial direction would not be had.

III. RELIGIOUS LIBERTY TODAY

A. Hosanna-Tabor *and Its Contributions to the Ministerial Exception*

On March 28, 2011, the Supreme Court granted certiorari to hear, for the first time, a case concerning the ministerial exception: *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[50] In the months between the grant of certiorari and the eventual issuance of the opinion on January 11, 2012,[51] law reviews across the nation published articles predicting the Supreme Court's decision, most of which concluded that the ministerial exception would be greatly limited and that *surely* the plaintiff—an elementary teacher at a Lutheran school—could not be considered a minister under any standard.[52] Each of the nine Supreme Court justices, however,

48. *Id.* at 724.
49. *Id.* at 728 & n.4.
50. 131 S. Ct. 1783 (2011).
51. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).
52. *See, e.g.*, Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 97–98 (2011). Corbin's introduction alone illustrates her views of the case:

concluded otherwise.[53]

1. The Facts

Hosanna-Tabor involved an employment dispute between Cheryl Perich and her employer, the Hosanna-Tabor Evangelical Lutheran Church and School, a member congregation of the Lutheran Church-Missouri Synod.[54] Perich began working at the school in 1999 as a "lay" teacher—a position based on a year-to-year contract with no requirements concerning the employee's religious background or training.[55] A year after beginning work at the school and after completing a colloquy program at a Lutheran university,[56] Hosanna-Tabor offered Perich the opportunity to become a

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> According to the lower courts, interfering with clergy employment decisions would undermine the church autonomy guaranteed by the Free Exercise Clause. Furthermore, they fear that these suits would lead to entanglement with religious doctrine and therefore violate the Establishment Clause.
>
> They are mistaken. Neither the Free Exercise Clause nor the Establishment Clause necessitates the ministerial exception. As a neutral law of general applicability, the ADA does not violate the Free Exercise Clause. Furthermore, trying to discern whether or not Perich is a minister creates more Establishment Clause problems than simply resolving her retaliation claim.

Id; *see also* Brad Turner, *It's My Church and I Can Retaliate If I Want To: Hosanna-Tabor and the Future of the Ministerial Exception*, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 21, 21–22 (2011). Like Corbin's, Turner's introduction expressly predicted exactly the opposite of what the Court would eventually hold:

> Imagine a world in which a parochial school teacher can be fired for reporting the sexual abuse of a child to the government. Now imagine that teacher cannot seek legal recourse because a so-called "ministerial exception" immunizes religious employers against lawsuits brought by their employees. Depending on how the Supreme Court rules in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, that hypothetical world could become ours.
>
> . . . .
>
> This commentary will examine *Hosanna-Tabor* in all its complexity. After providing the factual and legal background, addressing the appellate court's decision, and examining the arguments before the Supreme Court, the commentary will return to the previously posed hypothetical. This commentary will then conclude that, fortunately for parochial school teachers, such a hypothetical world is, at least for now, probably only hypothetical.

Turner, *supra*, at 21–22.

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

54. *Id*. at 699–700.

55. *Id*.

56. This colloquy program consisted of taking eight courses of theological study, obtaining the

"called" teacher.[57] Though her teaching responsibilities did not change,[58] Perich was then considered "called to [her] vocation by God through a congregation."[59] Along with her "call," Perich received the formal title of "Minister of Religion, Commissioned" and an open-ended term of employment that could only be rescinded for cause and by a supermajority vote of the Hosanna-Tabor congregation.[60]

As a called teacher, Perich taught math, language arts, social studies, science, gym, art, and music to elementary-age children.[61] She was also required to teach a religion class four days a week, and she led prayers and religious devotions each day during her time at Hosanna-Tabor.[62] She also attended a weekly school-wide chapel service and, on a bi-yearly basis, led the chapel service herself.[63]

Near the beginning of the 2004–2005 school year, Perich was absent from her teaching position at the school for a substantial amount of time due to an illness that was eventually diagnosed as narcolepsy.[64] In January 2005, Perich informed the school's principal, Stacey Hoeft, that she would be able to return to work in February as her symptoms were under control.[65] Hoeft then told Perich that the school had filled her position with a lay teacher for the remainder of the school year and expressed concern that Perich was not yet able to return to the classroom.[66]

Three days after the conversation between Perich and Hoeft, the congregation of Hosanna-Tabor met to discuss Perich's future, concluding that she "was unlikely to be physically capable of returning to work that school year or the next."[67] The congregation decided that it should "offer Perich a "peaceful release from her call, whereby the congregation would

endorsement of the Missouri Synod, and passing an oral examination of Hosanna-Tabor's faculty committee. *Id*. at 699.

57. *Id*. at 700.

58. *Id*. ("[T]eachers at the school generally performed the same duties regardless of whether they were lay or called . . . .").

59. *Id*. at 699.

60. *Id*.

61. *Id*. at 700.

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

pay a portion of [Perich's] health insurance" on condition that she resign.[68] However, Perich refused to resign and, instead, appeared at the school a few weeks later and ignored Hoeft's request that she leave school grounds.[69] Perich's actions and her subsequent threat of litigation prompted Hosanna-Tabor to officially terminate Perich, which ultimately led to Perich filing a charge with the Equal Employment Opportunity Commission alleging that she was terminated in violation of the Americans with Disabilities Act.[70]

2. The Opinions

The Supreme Court decided unanimously that the First Amendment indeed forbids courts from hearing employment discrimination claims brought against religious employers by their ministers.[71] And, more pertinent to the resolution of the case, such unanimity extended to the Court's finding that Perich was indeed a minister for purposes of the ministerial exception.[72] The way in which one's status as a minister should be determined, however, posed a question that could not—or simply *would* not—be answered with the same kind of clarity.

Chief Justice Roberts, writing for the Court, clearly expressed intent to refrain from establishing any sort of "rigid formula" for determining a person's status as a minister, and instead concluded that the totality of the circumstances of Perich's employment made her such.[73] The circumstances

68. *Id*.

69. *Id*.

70. *Id*. at 700–01.

71. *See id*. at 710. Chief Justice Roberts succinctly laid out this understanding as follows:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit . . . .
>
> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Id.

72. *Id*. at 708.

73. *Id*. at 707. ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.").

to which the Court ascribed particular significance were Perich's formal title, "the substance reflected in that title, her own use of that title, and the important religious functions [Perich] performed."[74] In reaching its conclusion, the Court also pointed out the errors in the Sixth Circuit's finding that Perich was *not* a minister, namely the court's failure to place any weight on Perich's title, its decision to place too much weight on the fact that lay teachers performed the same functions as Perich, and the improper emphasis the court put on the secular duties that Perich also performed.[75]

Though they agreed with the result reached by the majority, both Justice Alito[76] and Justice Thomas filed separate concurrences where they set forth

74. *Id*. at 708. More particularly, Perich's title of "commissioned minister" reflected the six years of training, education, and testing, along with a formidable application process, required to become a called teacher. *Id*. at 707. As to Perich's own use of her title, the Court relied on the fact that she gladly accepted such a formal call to religious service, she repeatedly referred to her position as part of her "teaching ministry," and she even claimed a housing allowance on her taxes available only to employees who earned their compensation "in the exercise of the ministry." *Id*. at 707–08. As to the important religious functions that Perich performed, the Court noted the fact that she taught her students religion four days a week, led prayer three times a day, and took her students to a school-wide chapel service each week. *Id*. at 708.

75. *See id*. at 708–09. The Court stated the following to clarify its decision:

> First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. 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 . . . .
>
> Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.
>
> Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. It is true that her religious duties consumed only 45 minutes of each workday, and that the rest of her day was devoted to teaching secular subjects. The EEOC regards that as conclusive, contending that any ministerial exception "should be limited to those employees who perform exclusively religious functions." We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Id. (internal citations omitted).

76. Justice Kagan joined in Justice Alito's concurrence. *Id*. at 711 (Alito, J., concurring).

their views on how courts should determine one's status as a "minister."[77] Based on the fact that the ordination process of ministers, or even the use of the term "minister," differs greatly between religions, Justice Alito asserted that the determination of an employee's status as minister within a religious institution should be based solely on that employee's function within that particular religious body.[78] Thus, such an approach would look not at an employee's title, but whether the employee is essential in carrying out those operations of a religious body that are constitutionally protected—leading the organization; conducting worship services, religious ceremonies, or rituals; or communicating, as a messenger or a teacher, the tenets and beliefs of the religious body.[79] This objective focus on the function of a particular

77. *See id*. at 710–11 (Thomas, J., concurring); *id*. at 711–14 (Alito, J., concurring).

78. *See id*. at 711 (Alito, J., concurring).

> The term "minister" is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, 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. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.

Id.

79. *Id*. at 711–12. Justice Alito's concurrence, in pertinent part, argued the following:

> The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions.
>
> The "ministerial" exception should be tailored to this purpose. It should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.

Id. The focus on an employee's function over his title recognizes the fact that the validity and credibility of a particular religious body's doctrine—whether regarding moral conduct or metaphysical truth—relates directly to the character and conduct of *any* employee charged with disseminating such doctrine to others, not just those employees labeled a "minister" by the religious body itself. *See id*. at 713. As Justice Alito succinctly asserts, "A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses." *Id*. Justice Alito's approach closely resembles the "role-based" approach that many of the circuit courts employed. *See supra* notes 28–35 and accompanying text.

employee within the religious body would, in Justice Alito's opinion, provide the court with a means of determining the applicability of the ministerial exception to an employee of any religious body regardless of its beliefs and without detracting from a religious body's constitutionally protected autonomy.[80] Justice Thomas, in his concurrence, advocated for an approach that would require a court to give deference to a religious body's understanding of who qualifies as its ministers—an approach that rests on the understanding that *any* judicial determination of an employee's status as a minister for purposes of the ministerial exception is itself a violation of the autonomy afforded religious bodies by the First Amendment.[81]

Though the decision was unanimous, *Hosanna-Tabor* provides very little clarity regarding how courts should apply the ministerial exception.[82]

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80. *See Hosanna-Tabor*, 132 S. Ct. at 711–13. The relevant language of the concurrence is as follows:

> Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance. Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.
>
> Applying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs.

Id. at 712.

81. *Id*. at 710. Justice Thomas communicated his view as follows:

> [I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. As the Court explains, the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a "minister" under the organization's theological tenets.

Id.

82. *See* Lauren N. Woleslagle, *The United States Supreme Court Sanctifies the Ministerial Exception in* Hosanna-Tabor v. EEOC *Without Addressing Who Is a Minister: A Blessing for Religious Freedom or Is the Line Between Church and State Still Blurred?*, 50 DUQ. L. REV. 895, 912–13 (2012).

> While the decision clearly indicates that the religion clauses of the First Amendment protect churches' religious freedom to hire and fire their ministerial employees by forbidding governments from second-guessing religious communities' decisions about who should be their teachers, leaders, and ministers, the Court played it safe by limiting

The majority's refusal to establish any sort of "rigid formula" and its reliance on an analysis based entirely on the unique combination of facts and circumstances present in *Hosanna-Tabor* only provides judicial guidance to future cases factually and circumstantially identical to *Hosanna-Tabor*.[83] Furthermore, Justice Alito's concurrence lends credence to the role-based approach employed by many circuit courts while Justice Thomas's concurrence seems to introduce an entirely new approach to the ministerial exception.[84] Regardless of the Justices' varying approaches to the ministerial exception, the Supreme Court in *Hosanna-Tabor* reinforced the long-understood idea that a religious institution is to be free from governmental intrusion into the selection of its "ministers"[85]—a classification that seemingly extends far beyond formal titles and ordination.[86]

B. The All-Comers Policy of Christian Legal Society v. Martinez

Less than two years before the Supreme Court issued its unanimous ruling in *Hosanna-Tabor*, another case involving the relationship between church and state sent shockwaves through the legal community. *Christian Legal Society v. Martinez*, a case concerning the institution of a non-discrimination policy at a state university and its preclusive effect on religious student organizations, resulted in a 5–4 split decision upholding the policy, giving state universities the judicial blessing to withhold official recognition from religious student organizations that operate in a discriminatory manner due to their religious beliefs.[87]

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its holding to the facts presented in this particular case.

The Court's analysis will be perfect if all future employment discrimination lawsuits brought against a religious organization involve an employee with the same job functions as Cheryl Perich. In reality, that will not happen. Inevitably, lower courts will be faced with determining whether a certain employee, other than a minister, qualifies for purposes of applying the ministerial exception. The Hosanna-Tabor decision, however, does not provide the guidance needed to determine this issue.

Id.

83. *See id.*

84. *See infra* notes 76–81 and accompanying text.

85. *See Hosanna-Tabor*, 132 S. Ct. at 706–07.

86. *See id.* at 707–09.

87. 130 S. Ct. 2971 (2010).

1. The Facts

In September 2004, a group of students partnered with the national organization Christian Legal Society[88] (CLS) and applied to become a Recognized Student Organization (RSO) of Hastings School of Law.[89] After reviewing the bylaws of CLS, which included the mandate that all members and officers sign a "Statement of Faith,"[90] the school denied RSO status to the CLS group because the CLS bylaws violated Hastings's nondiscrimination policy as they necessarily discriminated against anyone whose religious beliefs did not align with the CLS Statement of Faith.[91] The

88. The Christian Legal Society "is a non-denominational Christian membership association of lawyers, judges, law professors, law students, and other associates (friends of CLS who do not have a law degree) whose members participate in the broad and rich variety of Christian congregational life and traditions." *Statement of Faith*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=367 (last visited Oct. 22, 2013). The organization's mission statement asserts the following:

> The mission of the Christian Legal Society is to inspire, encourage, and equip Christian lawyers and law students both individually and in community to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of the inalienable rights to life and religious freedom.

Vision & Mission Statement, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=820 (last visited Oct. 22, 2013).

89. *See Martinez*, 130 S. Ct. at 2980. When a student organization is given RSO status, that group becomes eligible to seek financial assistance from Hastings, such funds coming from the mandatory student-activity fee imposed on all students. *Id.* at 2979. An RSO can also communicate with students via "[l]aw-[s]chool channels," which includes placing announcements in the student newsletter, posting advertisements on bulletin boards, participating in the yearly Student Organizations Fair held on-campus, and sending emails to the entire student population through a Hastings email address system. *Id.*

90. The "Statement of Faith" is as follows:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> • One God, eternally existent in three persons, Father, Son and Holy Spirit.
> • God the Father Almighty, Maker of heaven and earth.
> • The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> • The presence and power of the Holy Spirit in the work of regeneration.
> • The Bible as the inspired Word of God.

Id. at 2980 n.3; *see also Statement of Faith*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=367 (last visited Oct. 22, 2013).

91. *Martinez*, 130 S. Ct. at 2980. More specifically, the Court determined that signing the Statement of Faith as a condition to membership and candidacy for office excluded those students who held religious convictions different than those embodied in the Statement of Faith. *Id.* Furthermore, the Court found that each member, when signing the statement, pledged to "conduct their lives in accord with prescribed principles," which included the belief that sexual activity should

discrimination policy applied to all groups associated with Hastings, including RSOs, and prohibited any illegal discrimination based on "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[92] When CLS's request for an exemption from Hastings's policy was denied, the organization chose to operate independently from the school as it refused to change its bylaws to comply with Hastings's policies.[93] A month after being denied RSO status, CLS filed suit against Hastings alleging that its nondiscrimination policy infringed upon the organization's First and Fourteenth Amendment rights.[94]

2. The Majority Opinion

Justice Ginsburg, writing for the majority, found that the nondiscrimination policy employed by Hastings School of Law did not violate CLS's constitutional rights—the right to expressive association, free exercise of religion, or free speech.[95] While the Court's analysis of CLS's free-exercise argument was limited to a mere endnote,[96] the issue of whether

take place only in the context of a marriage between one man and one woman; thus the bylaws excluded CLS's affiliation with anyone engaged in "unrepentant homosexual conduct"—a stance that, in the Court's view, amounted to discrimination based on sexual orientation. *See id*. at 2980, 2989–90; *id*. at 2998 (Stevens, J., concurring).

92. *Id*. at 2979.

93. *Id*. at 2981. As a part of its independent operation, "CLS held weekly Bible-study meetings and invited Hastings students to Good Friday and Easter Sunday church services." *Id*. It also hosted a campus lecture on the Christian faith as well as various social events including a beach barbecue and a Thanksgiving dinner. *Id*.

94. *Id*.

95. *Id*. at 2981, 2995 & n.27.

96. *Id*. at 2995 n.27. The majority's brief response to CLS's free-exercise argument was as follows:

> CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith,* the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.

Id. (internal citations omitted) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–82 (1990)). The Court also noted the Ninth Circuit's finding that "CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation, . . . but that does not convert the reason for Hastings' [Nondiscrimination Policy] to be one that is religiously-based." *Id*. at 2981 (citation and internal quotations omitted) (brackets in original).

Hastings's policy infringed upon CLS's right to expressive association and free speech required a much more in-depth inquiry.

The Court made a pivotal preliminary decision when it refused to analyze Hastings's policy as written and instead analyzed the policy as applied, which resembled an "all-comers policy"—a policy that mandates that *all* students have access to *all* student groups associated with Hastings.[97] In determining the proper level of scrutiny to apply to Hastings's all-comers policy in light of its effect on CLS's rights to both free speech and expressive association, the Court decided that the application of two different standards would be "anomalous" and that the Court's "limited-public-forum" line of precedent supplied the proper analytical framework.[98]

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97. *Id*. at 2982–84. At the summary-judgment stage of trial in the district court, CLS and Hastings submitted a joint stipulation of facts which read as follows:

> Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.

Id. at 2982. Because CLS willingly agreed to such a stipulation and both the district court and the Ninth Circuit adjudicated the case upon such an agreement, the Court rejected "CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written" and thus considered "only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution." *Id*. at 2984.

98. *Id*. at 2985–86. Historically, the limited-public-forum analysis applied only to situations in which a governmental entity placed limitations on speech in order to regulate property in its charge. *Id*. at 2984. Such limitations would be permissible as long as they were both reasonable and viewpoint-neutral. *Id*. On the other hand, laws and regulations that in some way constrained associational freedom were "rigorously reviewed," *id*. at 2984–85, and only upheld if such regulations served "compelling state interests" that "[could not] be advanced through . . . significantly less restrictive [means]" and were "unrelated to the suppression of ideas." *Id*. at 2985 (citations and internal quotations omitted) (some alterations in original). Though the all-comers policy indeed constrained CLS's associational freedom, the Court chose to refrain from employing the rigorous review generally reserved for such constraints, instead looking solely to the policy's reasonability and viewpoint-neutrality, for the following three reasons. *Id*.

First, the Court determined that the considerations that allow for less-restrictive review of limitations on speech in a limited public forum equally apply to constraints on associational freedom in such forums. *Id*. Based on the understanding that "speech and expressive-association rights are closely linked," the Court reasoned that "it would be anomalous for a restriction on speech to survive constitutional review under [a] limited-public-forum test only to be invalidated as an impermissible infringement of expressive association." *Id*.

Second, the Court determined that the application of strict scrutiny review of associational constraint would inherently invalidate the very purpose of the limited public forum—allowing a public university to "confin[e] a [speech] forum to the limited and legitimate purposes for which it was created." *Id*. at 2986 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819,

Under such a framework, the all-comers policy's constitutionality would hinge on whether it was both reasonable and viewpoint-neutral.[99]

With the framework of the pertinent analysis established, the Court then determined that, in light of a public university's interest in fostering an inclusive and tolerant educational atmosphere, the policy under which Hastings denied CLS RSO status was indeed reasonable.[100] This conclusion was based also on the fact that CLS's lack of RSO status did not preclude it from operating as a student group independent from Hastings.[101]

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829 (1995)) (alterations in original).

Third, the Court placed great weight on the fact that the all-comers policy placed only "indirect pressure" on CLS with regard to its membership policies. *Id*. In the majority's opinion, the policy did not directly compel CLS to associate with unwanted persons, but rather gave CLS the option to amend its bylaws and receive the benefits of being an RSO *or* refuse and simply operate as an independent student group without any sort of subsidy or institutional help. *Id*. The distinction between a policy that requires action and one that simply withholds benefits further solidified the Court's understanding that its limited-public-forum line of precedent was proper. *Id*.

99. *Id*. at 2984.

100. *Id*. at 2988–91. Giving appropriate deference to the decisions of the Hastings administration, the Court relied on four main considerations in determining that the "all-comers policy" was, indeed, reasonable. *Id*. First, the Court acknowledged the reasonable understanding of the School that the "educational experience is best promoted when all participants in the forum must provide equal access to all students" ensuring that "no Hastings student [through payment of the mandatory student-activity fees] is forced to fund a group that would reject her as a member." *Id*. at 2989.

Second, the all-comers policy allowed Hastings to ensure that no discriminatory practices were being allowed without having to determine the motivation behind any such discrimination. *Id*. This finding rejected CLS's contention that the policy should only prohibit status-based discrimination as opposed to belief-based discrimination. *Id*. at 2990. Such distinction, in the Court's view, would prove difficult to determine and would "impose on Hastings [the] daunting labor" of separating permissible discrimination from the impermissible. *Id*. As such, the across-the-board application of the policy was, at least, reasonable. *Id*.

Third, the Court viewed as reasonable Hastings's belief that the inclusive effect of the all-comers policy "encourages tolerance, cooperation, and learning among students" when effectuated peacefully and provides opportunities to develop "conflict-resolution skills, toleration, and readiness to find common ground" in those instances where the policy produces discord. *Id*. (internal quotations omitted).

Lastly, the fact that Hastings's policy "subsume[d]" California's own laws pertaining to discrimination further lent credence to the Court's finding that the policy was indeed reasonable. *Id*. at 2990–91.

101. *Id*. at 2991–92. As the applicability and effect of the all-comers policy was viewpoint neutral in the opinion of the Court, the Court gave further blessing to Hastings's policy by weighing the alternative means of communication available to CLS. *Id*. at 2991. The fact that Hastings allowed CLS access to classrooms for meetings and chalkboards for advertising events, coupled with CLS's access to social-networking sites and a Yahoo! message group, led the Court to determine that the barrier of the all-comers policy to CLS's free-speech rights was not unreasonable. *Id*.

Furthermore, the fact that each and every organization was required to accept each and every student—thus prohibiting discrimination on *any* basis—led to the determination that the policy was inherently viewpoint-neutral.[102] As such, in the majority's opinion, the all-comers policy employed by Hastings infringed neither on CLS's right to free speech nor its right to expressive association.[103]

3. The Dissenting Opinion

Justice Alito's dissent—in which Justices Roberts, Scalia, and Thomas joined—began by "correcting the picture" that the majority previously painted.[104] First, the dissent pointed out that the all-comers policy that survived the constitutional analysis of the majority was, in fact, not the policy in effect at the time CLS was denied RSO status; rather, Hastings applied its Nondiscrimination Policy, not the "belatedly unveiled" all-comers policy, when it denied RSO status to CLS.[105] The dissent further attempted to correct the majority's allegedly inaccurate portrayal of the hardship CLS experienced due to the denial of its RSO application.[106] According to the dissent, Hastings's offer to grant CLS access to its facilities was, in reality, without practical substance, as any attempt made by CLS to

102. *Id*. at 2993–94. In the words of the Court, it was "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers." *Id*. at 2993. Furthermore, the Court rejected CLS's contention that though the policy was admitted to be "nominally neutral," it was constitutionally impermissible as "it systematically and predictably burden[ed] most heavily those groups whose viewpoints [were] out of favor with the campus mainstream." *Id*. at 2994 (citation and internal quotations omitted). In doing so, the Court reiterated the fact that "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id*. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (alteration in original).

103. *Id*. at 2995.

104. *Id*. at 3001 (Alito, J., dissenting).

105. *Id*. at 3001, 3003–06 (Alito, J., dissenting). Though the events that gave rise to the litigation occurred in 2004, the all-comers policy on which the majority focused its analysis was, in the dissent's opinion, not mentioned—much less in effect—until July 2005 when the Dean of Hastings was deposed. *Id*. at 3001, 3003–04. Furthermore, regardless of the fact that CLS had acknowledged the all-comers policy in the Joint Stipulation that was so heavily relied on by the majority, the dissent argued that the acknowledgement of Hastings's policy at the time of the Joint Stipulation did not preclude CLS from asserting that the policy leading to the denial of its RSO status—the Nondiscrimination Policy—was unconstitutional. *Id*. at 3005.

106. *Id*. at 3006.

take advantage of such access was largely ignored.[107]

Having sufficiently corrected the factual premises upon which the case was based, the dissent began to analyze the relevant legal issues.[108] First, the dissent likened the factual scenario at hand to that in *Healy v. James*[109]—a case that the majority had deemed irrelevant to its analysis—asserting that *Healy's* reasoning applied just as forcefully to the situation at Hastings.[110] In light of such precedent, the dissent found that the denial of CLS's RSO

107. *Id.* The president of CLS allegedly made such an attempt in August of 2005, requesting permission from Hastings to set up an "advice table" on a campus patio to meet and speak with students. *Id.* Despite the time-sensitive nature of the request, CLS received no response until long after the date sought in the request, and Hastings's response was accompanied by an instruction that CLS only contact the school administration through CLS's attorney. *Id.* CLS's attorney made a second attempt a month later when he, per Hastings's instruction, contacted the school's administration to reserve a room so CLS could bring a guest speaker to campus to address interested students; again, Hastings failed to respond until after the date of the proposed event. *Id.*

108. *Id.* at 3007–20.

109. 408 U.S. 169 (1972).

110. *Martinez*, 130 S. Ct. at 3007–08 (Alito, J., dissenting). *Healy* was a case in which a public college refused to recognize the local chapter of Students for a Democratic Society (SDS) as a student group associated with the college. 408 U.S. at 187. There, SDS's national reputation for violence led the school administration to refuse official recognition due to the understanding that the philosophy of SDS was "antithetical to the school's policies." *Id.* at 174–75. As a result, SDS suffered the denial of access to school facilities as well as the customary means used for communication among the student population. *Id.* at 176, 181–82. When SDS's claim that the college had acted unconstitutionally came before the Supreme Court, the Court ruled that the burdens to SDS's freedom of association—namely the lack of access to the campus facilities and normal means of communication—were sufficient to deem the college's actions unconstitutional, despite the fact that SDS could still conduct their associational business off-campus. *Id.* at 181–83. Furthermore, the Court gave no deference to the school administrator's reasoning behind precluding SDS from operating as a recognized group, as the *Healy* Court rejected the idea that "First Amendment protections should apply with less force on college campuses than in the community at large." *Id.* at 180.

The dissent in *Martinez* took an approach similar to that of the Court in *Healy*. First, the dissent pointed out the similarities between the burdens placed on CLS and SDS—lack of access to campus facilities and normative means of community-wide communication—and argued that the added issue of school funding in the CLS case should not justify straying from *Healy's* precedent. *Martinez*, 130 S. Ct. at 3008 (Alito, J., dissenting). Second, the dissent insisted that the majority's high deference to Hastings's reasoning for denying CLS RSO status was exactly opposite to the approach in *Healy* and thus, unwarranted. *Id.* Instead, the dissent asserted "that when it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment[;] [w]e do not defer to Congress on such matters, and there is no reason why we should bow to university administrators." *Id.* (internal citation omitted). To the dissent, if the college's views regarding the philosophy of SDS in *Healy* could not justify the denial of SDS's First Amendment rights, neither could Hastings's disapproval of CLS's membership and leadership requirements. *Id.* at 3008–09.

status was constitutionally impermissible regardless of the level of alleged access it had to Hastings's facilities thereafter.[111]

For the sake of argument, the dissent then engaged in its own application of the limited-public-forum line of cases to Hastings's Nondiscrimination Policy.[112] The viewpoint-neutrality prong of the analysis proved to be, in the dissent's opinion, the downfall of the Nondiscrimination Policy—due to the fact that student groups were consistently allowed to discriminate against others so long as the reason was not religiously based.[113]

In order to sufficiently challenge the majority, the dissent even addressed the constitutionality of the all-comers policy, despite the understanding that such policy was not in effect when CLS applied to the RSO program.[114] Focusing on the expressive-association purposes of the RSO program as a limited public forum, the dissent argued that the all-comers policy was not reasonable because it stifled the diversity of viewpoints that the program was designed to create.[115] The dissent further

111. *Id*. 3007–08; *see also id*. at 3006 ("This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable.").

112. *Id*. at 3009 ("While I think that *Healy* is largely controlling, I am content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion.").

113. *Id*. at 3010–12 . The dissent sharply highlighted the lack of viewpoint neutrality:

> As Hastings stated in its answer, the Nondiscrimination Policy "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." But the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination . . . . It is no wonder that the Court makes no attempt to defend the constitutionality of the Nondiscrimination Policy.

Id. at 3010 (internal citations omitted) (brackets in original).

114. *Id*. at 3013–20.

115. *Id*. at 3013–15. Quoting the joint stipulation offered by both CLS and Hastings, the dissent points out the fact that the RSO program was created to "promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality." *Id*. at 3013 (internal quotations omitted). Furthermore, the development of the RSO forum over time evidenced such purposes, as each of the RSOs was free to assert and operate under "its own independently devised purpose"—and many RSOs promulgated a specific viewpoint about a certain subject rather than aspiring to neutrality about that particular subject. *Id*. at 3013–14. As an example, the dissent noted that there was no "Party Politics Club" at Hastings; rather, there was both the "Hastings Democratic Caucus" and the "Hastings Republicans." *Id*. at 3014.

questioned the majority's finding of viewpoint neutrality in light of evidence that the all-comers policy was belatedly announced by Hastings as a pretext for engaging in viewpoint discrimination against organizations like CLS.[116]

Because of the perceived inadequacy of the majority's reasoning, the dissent labeled the majority's decision "a serious setback for freedom of expression."[117] The dissent, along with multiple amici, recognized the practical effect that upholding Hastings's policy would likely have in the future: religiously based student groups at public universities across the country could be forced to choose between adhering to their deeply held beliefs at the expense of their ability to fully function as a recognized student group and laying down such beliefs to avoid potentially crippling burdens.[118]

In the dissent's view, the institution of an "all-comers policy" inherently *stifled* the expansion of a diversity of viewpoints within the RSO program as it restricted the ability of students to express, through the creation of a new student group, any viewpoint contrary to the viewpoint embodied by the all-comers policy. *Id*. at 3014–15. Thus, the dissent determined that the policy was "not reasonable in light of the stipulated purpose of the RSO forum: to promote a diversity of viewpoints '*among*'—not within—'registered student organizations.'" *Id*. at 3016 (citation omitted).

116. *Id*. at 3016–19. Such evidence mainly related to the shifting policies of Hastings with regard to anti-discriminatory measures, the non-enforcement of the all-comers policy prior to CLS's application, the timing of the official announcement of the policy in relation to the litigation between CLS and Hastings, and the lack of documentation of any all-comers policy in Hastings's records. *Id*. These circumstances, in the opinion of the dissent, warranted a finding that the policy, though facially neutral with regard to viewpoint, was enacted as a pretext for viewpoint discrimination and was thus unconstitutional. *Id*. at 3018.

117. *Id*. at 3020.

118. *See id*. at 3019–20. The dissent's perception of the future consequences of the majority's holding was shared by multiple amici:

> There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. See Brief for Evangelical Scholars (Officers and 24 Former Presidents of the Evangelical Theological Society) et al. as *Amici Curiae* 19 (affirmance in this case "will allow every public college and university in the United States to exclude all evangelical Christian organizations"); Brief for Agudath Israel of America as *Amicus Curiae* 3, 8 (affirmance would "point a judicial dagger at the heart of the Orthodox Jewish community in the United States" and permit that community to be relegated to the status of "a second-class group"); Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 3 (affirmance "could significantly affect the ability of [affiliated] student clubs and youth movements . . . to prescribe requirements for their membership and leaders based on religious beliefs and commitments"). This is where the Court's decision leads.

Id. (alterations in original).

*C. Post-*Martinez *America and the Potential Influence of* Hosanna-Tabor

Justice Alito and his fellow dissenters in *Martinez* seem to have possessed a level of clarity usually relegated to hindsight. More and more colleges, both public and private, have instituted and enforced various nondiscrimination policies that effectively force all religious student groups operating according to bylaws in opposition to such policies to disregard cherished aspects of their beliefs to remain recognized as a student group.[119]

At San Diego State University, two religious student groups—the Alpha Delta Chi sorority and the Alpha Gamma Omega fraternity—were denied official recognition under the university's nondiscrimination policy.[120] Vanderbilt University's all-comers policy, which the school's administration defended on the basis of *Martinez*, led to the dismissal of thirteen student groups whose bylaws included provisions determined to be discriminatory by Vanderbilt's administration.[121] At Yale University, the Christian fraternity Beta Upsilon Chi chose to de-register as a recognized student group—giving up the ability to receive grant money, participate in school events, and access school facilities—so as to maintain its policy of only allowing Christians to become members.[122]

The widespread refusal to officially recognize groups whose religious beliefs compel them to act contrary to the antidiscrimination considerations embodied by all-comers policies could eventually result in the absence of religious viewpoints in the forums where diversity of viewpoints should be most highly regarded.[123] The effects of *Martinez* on religious liberty are

119. *See infra* notes 120–22 and accompanying text.

120. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795 (9th Cir. 2011). The Ninth Circuit upheld the district court's grant of summary judgment in favor of the defendant university's policy, finding the nondiscrimination policy constitutional with regard to the free-speech and expressive-association arguments brought by the student groups. *Id.* at 805.

121. *Exiled from Vanderbilt: How Colleges Are Driving Religious Groups Off Campus,* FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Aug. 20, 2012), http://thefire.org/article/14778.html. The video featured on this page narrates the process by which Vanderbilt came to its decision to implement an all-comers policy and the subsequent consequences that decision had on groups, both religious and secular, on campus. *Id.*

122. *See* Katherine Weber, *Yale's First Christian Fraternity Begins Spring Rush Without University Benefits*, CHRISTIAN POST (Jan. 23, 2013, 9:30 AM), http://www.christianpost.com/news/yales-first-christian-fraternity-begins-spring-rush-without-university-benefits-88718/.

123. *See* William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473, 496 (2010). The authors recognized the long-term implications that *Martinez* could have on the presence of religion on university

clear and severe: religious student groups seeking to exercise their expressive association rights within the walls of a public university are no longer free to do so unless such expression is strictly in accordance with the will of the school.[124]

Despite *Martinez*'s effect, *Hosanna-Tabor* presents a glimmer of hope for religious liberty in America.[125] The holding of *Hosanna-Tabor*—that a school teacher was a minister and was thus precluded from having her claim of illegal discrimination heard by the Court—helps ensure that all religious organizations maintain unadulterated control over who represents them as "ministers."[126] Though the public's reaction to such unfettered religious

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campuses, noting that:

> Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale . . . .
>
> The marketplace of ideas must remain free and all viewpoints must have space to flourish.
>
> Unfortunately, in *Christian Legal Society* a bare majority of the Supreme Court ignored this principle.

Id.

124. *See id*. at 488–89 ("If an organization expresses a belief that is offensive to a segment of society, then the government may force the group to dilute its message or abandon use of government property and communication channels.").

125. John Inazu, an associate professor of law at Washington University in St. Louis, noted that "[i]n light of . . . *Martinez*, *Hosanna-Tabor* is a welcome reminder that the Court has not lost sight of the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor an Important Victory for Religious Liberty*, NEWSROOM, WASH. UNIV. IN ST. LOUIS (Jan. 12, 2012), http://news.wustl.edu/news/Pages/23215.aspx (internal quotations omitted); *see also* Matthew J. Franck, *What Comes After Hosanna-Tabor*, FIRST THINGS (Jan. 12, 2012), http://www.firstthings.com/onthesquare/2012/01/what-comes-after-hosanna-tabor ("Yesterday's unanimous Supreme Court decision in *Hosanna-Tabor* . . . is very good news indeed for religious freedom.").

126. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012). Chief Justice Roberts, writing for the Court, clearly articulated the relationship between church and state with regard to employment practices:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the

freedom with regard to employment practices is split,[127] those who agree with the Court's decision do so fervently, heralding it as one of the most important religious liberty decisions in decades.[128]

To those unfamiliar with the constitutional considerations that led to their respective holdings, *Martinez* and *Hosanna-Tabor* seem to send mixed messages with regard to the sanctity of religious liberty in this country.[129] On the one hand, those young men and women attending public universities who desire to run a student group in accordance with their faith are faced with substantial associational burdens due to the potential lack of access to university facilities.[130] On the other, an employee of a religious organization may lose all protections of Title VII and other antidiscrimination legislation when the circumstances of her job persuade a court to deem her a minister.[131] Why would the Court unanimously condone a religiously affiliated school firing a teacher in violation of a federal statute but uphold a policy that penalizes a religious group for deciding who can join its ranks? Both cases involve governmental interests concerning the prevention of discrimination

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Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id.

127. Fairleigh Dickinson University's poll of 855 registered voters nationwide revealed a clear split in American opinion on the issue: 46% of those polled said that "churches should have the right to hire and fire employees for religious reasons without having to follow government employment rules," while 43% of those polled felt that "churches should follow the same rules as government and business when it comes to hiring and firing." *In Contrast to High Court, US Voters Split on Freedom of Churches to Hire and Fire*, PUB. MIND, FAIRLEIGH DICKENSON UNIV. (Jan. 11, 2012), http://publicmind.fdu.edu/2012/hosanna/.

128. *See* Robert Barnes, *Supreme Court: Discrimination Laws Do Not Protect Certain Employees of Religious Groups,* WASH. POST (Jan. 11, 2012), http://www.washingtonpost.com/politics/supreme-court-discrimination-laws-do-not-protect-certain-employees-of-religious-groups/2012/01/11/gIQAIbO4qP_story.html (quoting Richard W. Garnett, the director of Notre Dame Law School's Program in Church, State, and Society, as saying that "the ruling is the court's most important decision on religious freedom in decades"); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 837 (2012) ("It is not too much to say that the decision augurs a 'new birth of freedom' for the religious communities of America.").

129. In a short essay written days after the *Hosanna-Tabor* decision, David French addressed the apparent inconsistencies as well as the key legal and factual distinctions between the two cases and correctly concluded that though *Hosanna-Tabor* does not overrule *Martinez*, it does potentially present a new view of religious liberty. David French, *Is the Court Changing Its Stand on Religious Freedom?*, MINDING THE CAMPUS (Jan. 16, 2012), http://www.mindingthecampus.com/forum/2012/01/is_the_court_changing_its_stan.html.

130. *See supra* notes 120–22 and accompanying text; *see also* discussion *supra* Part III.C.

131. *See supra* notes 29–34 and accompanying text.

and the freedom of religious groups or organizations to choose who will represent them; how can the Constitution lead to such opposite conclusions?

As previously explained, this Comment explores the potential influence that the ministerial exception, and the constitutional considerations behind it, could have on the relationship between religious student groups such as CLS and the public universities where such groups gather. The purpose of this Comment is not to criticize the Court's reasoning in *Martinez*, but simply to offer a different perspective on the situation, now quite common, dealt with in that case. The issue of religious liberty is of the utmost importance to those whose lives are inextricably tied to the beliefs to which they adhere, and thus, it is necessary to look at the ways by which protection of such liberty can be ensured as broadly as the Constitution allows by creatively and thoughtfully asking questions, the answers to which may provide further clarity as to the appropriate relationship between church and state.

IV. UNIVERSITY NONDISCRIMINATION POLICIES IN LIGHT OF THE MINISTERIAL EXCEPTION

The circumstances surrounding the application of the ministerial exception and the interests involved in such application are closely mirrored in university student-group situations like the one in *Martinez* where a religious student group's desire to remain true to its convictions clashes head-on with a university nondiscrimination policy.[132] More often than not, the ministerial exception is asserted by religious organizations as a jurisdictional defense to suits brought against them that allege employment practices in violation of antidiscrimination legislation such as Title VII.[133] The rigorous application of the ministerial exception in such cases seems to imply that the reasons behind it could, theoretically, mandate a similar exception that would apply in scenarios where discrimination is alleged outside of the employment context—specifically, to situations where the alleged discrimination is conducted by a religious student group at a

132. *See infra* notes 135–83 and accompanying text.

133. *See supra* note 24 and accompanying text. Because most cases in which the ministerial exception is applied revolve around claims of discriminatory employment practices, the remainder of this article will focus mainly on similarities between situations where employment discrimination in violation of Title VII is alleged and situations such as the one in *Martinez* where CLS's practices were deemed discriminatory.

university.[134] Though neither the Court's opinion nor even CLS's briefing made any mention of the ministerial exception, the circumstantial similarities between *Martinez* and case law interpreting and invoking the ministerial exception beg the question: should the ministerial exception be used as a basis for establishing an exception to nondiscrimination policies with regard to religious student groups and their ability to choose which students will serve as their leaders?

A. Title VII and University Nondiscrimination Policies: A Common Purpose

Title VII and other antidiscrimination legislation, the all-comers policy in *Martinez,* and various nondiscrimination policies in effect at universities across the country all serve the same end: combating discrimination.[135] Title VII, applicable to all employers, prohibits any discrimination on the basis of race, color, religion, sex, or national origin.[136] While the all-comers policy analyzed by the majority in *Martinez* forbids discrimination on any basis,[137] more common nondiscrimination policies forbid discrimination on the basis of enumerated traits and statuses.[138]

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134. *See infra* notes 135–83 and accompanying text.

135. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct.. 2971, 2994 (2010) ("The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' desire to redress the perceived harms of exclusionary membership policies provides an adequate explanation for its all-comers condition . . . ."") (internal quotations and alterations omitted); Landgraf v. USI Film Prods., 511 U.S. 244, 254 (1994) (noting that the statutory purpose of Title VII and the ADA are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination") (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14 n.5 (1988) (noting that federal and state governments have a "compelling interest in combating invidious discrimination" (internal quotations omitted)).

136. 42 U.S.C. § 2000e-2(a)(1) (2012).

137. *See supra* note 96 and accompanying text.

138. *See A.5 Equal Opportunity*, UNIV. OF S. CAL. STUDENT GUIDEBOOK, http://scampus.usc.edu/a-5-equal-opportunity (last updated July 2013) [hereinafter *USC Policy*] (forbidding discrimination based on "sex, race, color, national origin, citizenship, ancestry, religion, gender, gender identify, gender expression, sexual orientation, age, physical disability, medical condition, mental disability, marital status, pregnancy, veteran status, genetic information, and any other characteristic that may be specified in applicable laws and governmental regulations"); *Chapter 6: Nondiscrimination Statement*, UNIV. OF IOWA OPERATIONS MANUAL, http://www.uiowa.edu/~our/opmanual/ii/06.htm (forbidding discrimination on the basis of "race, national origin, color, creed, religion, sex, age, disability, veteran status, sexual orientation, gender

Historically speaking, Title VII was the first congressionally implemented program that successfully changed the discriminatory practices that had become prevalent in the first half of the twentieth century.[139] Since then, additional antidiscrimination laws have been passed at both the federal and state level in order to further protect employees from termination based on a trait over which they have no control.[140] Fifty years ago, the idea of requiring employers to *not* discriminate based on race or gender was new and controversial.[141] Now, any lesser standard seems odd and out of place. In light of this socially accepted and legally mandated norm of inclusion and acceptance in the workplace, it would indeed be odd for different standards to exist in our universities. This country has witnessed in the last half-century monumental strides toward equality, and universities are simply keeping pace.[142] Indeed, Hastings, in its brief to the Supreme Court in *Martinez*, defended its all-comers policy on the fact that "California law declares that no person shall be subjected to discrimination on the basis of various enumerated factors, including sexual orientation and religion, in 'any program or activity conducted by any postsecondary educational institution' that receives any financial assistance from the state."[143] The direct

identity, or associational preference"); *Duke University Non-Discrimination Policy*, DUKE LAW, http://law.duke.edu/admis/nondiscrimination/ (last visited Oct. 22, 2013) (prohibiting discrimination on the basis of "race, color, religion, national origin, disability, veteran status, sexual orientation, gender identity, sex, genetic information, or age").

139. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 431 (1966) ("[T]he history of [Fair Employment Practices] legislation prior to 1964 was characterized by repeated failures for civil rights advocates."). The incredible change induced by Title VII was not lost on Vaas as he noted that the Act "brought to fruition the labors and aspirations of civil rights proponents everywhere, made possible that which has never before been possible in America and will leave a lasting mark on the structure of American society." *Id*. at 457.

140. One such piece of legislation is the Americans with Disabilities Act, which prohibits an employer from discriminating against someone on the basis of disability. 42 U.S.C. § 12112(a) (2012). Another is the Age Discrimination in Employment Act of 1967, which prohibits an employer from discriminating against an employee on the basis of age. 29 U.S.C. § 623 (2012).

141. *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 432 (2005) (noting the "pervasiveness of racial discrimination" in the United States prior to the enactment of the Civil Rights Act of 1964).

142. *See, e.g.*, *USC Policy*, *supra* note 138 ("The university is committed to complying with all applicable laws and governmental regulations at every level of government which prohibit discrimination . . . . This commitment applies to all of the university's educational programs and activities . . . .").

143. Brief of Hastings Coll. of the Law Respondents at 33–34, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010), 2010 WL 1513023,

relationship between Hastings's all-comers policy and the antidiscrimination legislation used to defend it further justifies applying to the all-comers policy the same judicial exceptions that apply to, and limit, such antidiscrimination legislation.

Admittedly, the goal of ending discrimination is one worth working towards, and every policy—whether applicable nationally, statewide, or simply within the walls of a university—that is implemented in good conscience as a means to attain that goal is one worthy of enforcement. However, exceptions must exist. After four decades of the ministerial exception's recognition within the circuit courts, the Supreme Court in *Hosanna-Tabor* unanimously concluded that a religious organization, be it a church or otherwise, must be free from such policies in order to maintain control of its faith and mission.[144] Chief Justice Roberts, writing for the unanimous court, illustrated this truth quite clearly:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[145]

This understanding—that the mandates of Title VII, despite their legitimacy and value, must, in certain situations, yield to the right of a religious organization to choose who will "guide it on its way"[146]—supports the applicability of a similar exception in the context of a religious student group that seeks to control who will guide it on its own way as a campus organization.[147] To provide a religious organization with an exception under

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at *33–34 (quoting CAL. EDUC. CODE § 66270 (West, Westlaw through 2013 Reg. Sess.)).

144. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

145. *Id.* at 710.

146. *Id.*

147. To be clear, this Comment purports to provide reasons for the creation of an exception to university nondiscrimination policies based on the existing ministerial exception that would give religious student groups the right to choose its leaders even if the bases for such a decision is in violation of those nondiscrimination policies. It is not this Comment's position that the ministerial exception provides grounds for a religious student group to discriminate with regard to its members,

which it can choose, on its own terms, who will represent it as employee-ministers, while at the same time withholding the right from religious student groups to at least choose their representative leaders is inconsistent. Such inconsistency begs for reconciliation.

B. The Individual Interests Protected

While both legislative- and university-enacted antidiscrimination policies work towards the same goal, the interests of the individuals protected by those respective policies are distinct in a way that lends further support for the creation of an exception to university nondiscrimination policies[148] that would allow a religious student group to choose, even in violation of such policies, its leadership.[149] Title VII, in its nearly fifty-year existence, has served to vigorously protect employees from any unlawful discrimination initiated by their employers at any stage of the employment process.[150] In the years between 1997 and 2012, the EEOC—the agency

but rather only its leaders. Though a religious student group has a large interest in ensuring that its membership profess and adhere to the same beliefs and moral code as the collective, the ministerial exception's rationale is likely not applicable to mere members of a religious student group.

Furthermore, CLS "has always welcomed all students to attend its events and activities" and only takes issue with all-comers policies or other nondiscrimination policies when they are applied in a way that precludes them from choosing their leaders. *Relations with the University*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/pages/law-students/chapter-manual-relations-with-the-university (last visited Oct. 22, 2013); *id*. ("An all-comers policy is only a problem if it is applied to a group's leaders.").

148. The term "university nondiscrimination policy" is henceforth used to refer to both all-comers policies like that analyzed in *Martinez* as well as other university policies that forbid discrimination on specifically enumerated grounds. *See supra* Part III.B; *see also* note 138 and accompanying text.

149. *See infra* notes 155–68 and accompanying text.

150. *See, e.g.*, *EEOC Litigation Statistics, FY 1997 Through FY 2012*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Oct. 22, 2013). Title VII not only protects against discriminatory hiring or firing, but protects an individual through his term of employment by establishing that it is illegal for an employer:

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

42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

charged with the enforcement of Title VII and other antidiscrimination legislation[151]—filed 3,854 cases in which a Title VII claim was alleged.[152] As a result, roughly $1,012,900,000 was awarded in monetary benefits to those individuals who, during that time, suffered employment discrimination.[153] For those individuals whose livelihoods are inextricably tied to an employer's willingness to employ them, Title VII serves as the key means of ensuring that such livelihood remains unthreatened.[154]

Ultimately, by establishing clear law that gives notice to employers of the severe penalties for discriminatory employment practices, Title VII ensures that an individual's livelihood will not be compromised due to another's views regarding race, color, religion, sex, or national origin.[155] Thus, the practical effect of Title VII is the preemptory protection of an individual's interest in earning a living, coupled with a mechanism by which an individual can sue for the deprivation of that interest in any case where his or her employer violates Title VII.[156]

Few would argue that the protections afforded by Title VII to an individual whose inherent traits subject them to potential discrimination are insignificant. In fact, it seems quite reasonable to assert that a person's interest in maintaining an avenue through which one can earn a living is, indeed, one of the most important interests any individual possesses. The controversy surrounding the ministerial exception for the past forty years, in light of the interests involved, is understandable; the exception, at least from the viewpoint of the individuals who have been discriminated against in violation of Title VII, strips them of the protections they assumed were theirs under Title VII and similar legislation.[157] Even from the perspective of one who fully supports and agrees with the ministerial exception, it is hard not to pity someone whose position within a religious institution, unbeknownst to her, resembled that of a "minister," depriving her of any

151. *See* 42 U.S.C. §§ 2000e-4 to -5 (2012).

152. *See EEOC Litigation Statistics*, *supra* note 150.

153. *Id*.

154. *See* Belton, *supra* note 141, at 432–33.

155. *See* Bob Rosner, *'Working Wounded': What Is Title VII?*, ABC NEWS (Jan. 6, 2006), http://abcnews.go.com/Business/WorkingWounded/story?id=86334&page=1 ("For an employee, Title VII is there to ensure they have the fairest opportunity for employment. For an employer, ignoring or skirting the title can be costly.").

156. *See supra* note 150 and accompanying text.

157. *See supra* note 24 and accompanying text.

redress with regard to an allegedly discriminatory termination.[158]

In comparison to the employment interest protected by Title VII, the practical interest protected by the all-comers policy and other nondiscrimination policies—essentially, the opportunity to associate with people who, for one reason or another, do not want such association to occur—seems rather trivial. Admittedly, regardless of such triviality, the reasonableness and constitutionality of such policies have been approved by the Supreme Court and thus, that precedent is the law.[159] However, just because a policy is constitutionally permissible does not negate the fact that the interests protected by such policy are arguably paradoxical. In reality, an all-comers policy protects an atheist's interest in becoming the president of a Christian group. It protects a Jewish student's interest in leading an anti-Semitic rally on behalf of a neo-Nazi student group. It protects a black student's interest in becoming a card-carrying member of a White Supremacy group. It protects a Republican student's interest in serving as co-chair of a University Democrats group.[160] The hyperbolic nature of these examples is not without purpose; rather, it illustrates a very real truth—the situations where a group would likely preclude an individual from joining as a member or serving as a leader are probably the same situations where the individual would have little desire to join or lead in the first place.[161]

158. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 694 (2012) (elementary school teacher was a minister); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006) (music director and organist was a minister); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (Hispanic communications manager was a minister); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 797 (4th Cir. 2000) (music director and part-time elementary school music teacher was a minister); Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999) (choir director was a minister).

While it is generally impossible to know whether each of the plaintiffs represented in these cases were aware of the ministerial exception, it seems likely that very few of them did. Furthermore, it seems even more likely that their positions in their respective religious organizations, in their minds, made it quite clear that they were not actually ministers, even if they were a part of the "ministry" of their employers. This understanding seems to support the conclusion that each of these plaintiffs expected to be granted recourse through Title VII (or the ADA) and were likely very surprised to discover that their position in the religious organization precluded them from doing so.

159. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2988–92 (2010) (holding that the all-comers policy was indeed both reasonable and viewpoint-neutral and thus, constitutional).

160. *See supra* note 97 and accompanying text.

161. *See Martinez*, 130 S. Ct. at 2992 ("Students tend to self-sort and presumably will not endeavor en masse to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs.").

The point of this illustration is not to cast doubt on the legitimacy of one's *right* to access a group, but rather to point out the practical lack of *interest* one has in acting upon that right. Clearly, the Court in *Martinez* felt that an individual's right—created by an all-comers policy—to serve as a leader within a group where both the individual and the collective would likely be entirely uninterested in entertaining that idea, is worth preserving.[162] Similarly, there is little doubt that a person's *right* to secure and maintain employment solely on the basis of one's abilities is a right worth protecting.[163] The fact of the matter remains, though, that the disparity in interest between the protection of one's source of income and one's theoretical membership or leadership role in a club is great.[164] Yet, one's employment interest has been deemed subservient to the right of religious institutions to choose their ministers[165]—even when such ministers look a lot like schoolteachers[166]—while one's interest in preserving the option of joining and leading a club whose announced purpose is exactly opposite to one's belief reigns supreme over a religious student group's ability to choose who will lead it.[167] If the Supreme Court is unanimously willing to apply the ministerial exception in a way that deprives a schoolteacher of the statutorily established means by which she could repair her employment interest,[168] then surely a similar exception could be extended to dilute a college student's interest in leading a club that he likely has no desire to join.

C. A Religious Student Group's Interest in Choosing its Leaders

Unlike the individual interests protected by Title VII enforcement and an all-comers or nondiscrimination policy, the interests of those employers seeking exemption from the mandates of Title VII through the application of the ministerial exception are parallel to the interests of those religious student groups, like CLS, seeking exemption from the nondiscrimination policies of their respective universities with regard to the selection of their

162. *See supra* notes 102–03 and accompanying text.
163. *See supra* note 135 and accompanying text.
164. *Compare supra* note 150 (discussing the interests protected by Title VII), *with supra* note 96 (discussing the interests protected by an all-comers policy).
165. *See* discussion *supra* Parts II–III.A.
166. *See* discussion *supra* Part III.A.
167. *See* discussion *supra* Part III.B.
168. *See* discussion *supra* Part III.A.

student leadership.[169] For over four decades, federal appellate courts across the country—including, as of recently, the Supreme Court—have repeatedly protected the rights and interests of religious organizations by allowing such organizations the freedom to choose who will represent them as ministers.[170] This interest does not simply involve the freedom to choose who will guide the faithful in the tenets and moral code of the religious organization, but it also includes the interest in choosing which persons qualify to serve as representative ambassadors to the public at large, exemplifying the lifestyle and beliefs of the organization on the whole.[171] Though an organization's interest in choosing its members is generally protected solely by the First Amendment right to freedom of association,[172] courts have repeatedly recognized that the *decision* of who will serve in the position of minister within a religious organization, due to the important function such a role plays within a religious organization and in the public eye, is further protected by the Free Exercise clause.[173] This is the essence of the ministerial exception.

It is prudent to address some glaring differences between the ministerial exception as historically applied and the theoretical extension of such

169. *See infra* notes 170–96 and accompanying text.

170. *See* discussion *supra* Parts II–III.A.

171. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012) (Alito, J, concurring). Justice Alito, writing a separate concurrence, recognized the dual nature of a minister's role, stating that:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

Id. (Alito, J., concurring) (internal citations omitted).

172. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010). The *Martinez* Court, before determining that a limited-public-forum analysis was proper, recognized that "[f]reedom of association . . . plainly presupposes a freedom not to associate" and that "[i]nsisting that an organization embrace unwelcome members . . . directly and immediately affects associational rights." *Id*. (internal citations and quotations omitted).

173. *See* discussion *supra* Parts II–III.A.

doctrine to exempt, in part, a religious student group from various antidiscrimination policies that have been deemed both reasonable and constitutional by the Supreme Court.[174] First, religious student groups like CLS are generally not employers as defined by Title VII, and they generally do not sell products, provide services for purchase, or pay wages to those associated with them.[175] Neither members nor leaders of such student groups receive any monetary benefit for their participation in the group, but rather choose to volunteer their time to help further the goals of the organization itself.[176] Secondly, members are only associated with the group for the time during which they attend the university where the group meets; leaders, on the other hand, generally serve in such capacity for only a one-year term, to be replaced by those members voted into the leadership position for the following year.[177] Some may argue that these distinctions, in and of themselves, should preclude religious student groups from enjoying the freedoms created in the employment context by the ministerial exception. However, the factual distinctions between a religious employer and a religious student group do not lessen the similar interests such organizations have with regard to choosing their leadership. It is this similarity in interest

174. *See* discussion *supra* Part III.B.

175. According to Title VII, the following delineates which organizations are classified as employers:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include . . . (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 . . . .

42 U.S.C. § 2000e(b)(2) (2012).

According to its Articles of Incorporation and their subsequent amendments, CLS is exempt from taxation under section 501(c)(3) as a corporation organized exclusively for religious purposes and is thus not an employer for purposes of Title VII. *Articles of Incorporation*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/document.doc?id=1 (last visited Oct. 23, 2013).

176. This is true of most student organizations, regardless of whether they self-identify as religious. CLS, in its "Running a Student Chapter" manual, recognizes the lack of payment to leaders in its statement that "students who *volunteer* should occupy the offices most suited to their strengths and talents." *Running a Student Chapter*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/pages/law-students/chapter-manual-running-a-chapter [hereinafter *CLS Chapter Manual*] (last visited Oct. 23, 2013) (emphasis added).

177. Though the *CLS Chapter Manual* does not explicitly point out this fact, it is clearly inferred that leadership positions are limited in time, as officers and other leaders are encouraged to "'work themselves out of a job' by training and delegating tasks to the new leadership well before graduation . . . so that one of them can quickly assume [the] position the next year." *Id*.

that provides further justification for the creation of an exception from the mandates of a university nondiscrimination policy, at least with regard to a religious student group's ability to ensure that its leaders share the same beliefs as the collective.

For devoted religious students interested in building their faiths during their time at a university or a post-graduate institution, a religious student group presents the invaluable opportunity to engage in fellowship with like-minded peers, serves as a forum to collectively study the scripture in which their faith is grounded, provides an opportunity to worship, and, in many cases, offers the privilege to hear from various speakers on topics related to the faith, including how the faith has impacted their own lives.[178] Depending on the university, a student's participation in a group that shares his or her own beliefs may be the only way to experience relationships with others who are religiously like-minded. Thus, though a religious student group is not the equivalent of a church or a religious employer, it serves a vital function on a university campus for those seeking to build and express their own faith.[179] It is the importance of a religious student group from the perspective of a religious student that creates the interest in the group's ability to choose a leader whose beliefs coincide with that of the group so as to ensure that the operation of the group continues to provide the invaluable spiritual and relational support that a religious student on a secular campus so desperately needs.[180]

A second parallel between a church's interest in choosing its ministers and a religious student group's interest in choosing its leadership exists in the representational role that an individual appointed to the position of

178. *See Campus Fellowships*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=411 (last visited Oct. 23, 2013). In an introduction to its student affiliates' role on their respective campuses, CLS acknowledges that:

> Law school is the formative period in every attorney's life—setting patterns and habits that will long endure and, in the case of bad tendencies, will only be broken with anguish. It is imperative that Christian law students seek out one another for fellowship, encouragement, and accountability. As a supplement to involvement in the local church, a Christian law fellowship should facilitate a closer relationship with Christ, so that in the words of the 10th century prayer, He may defend, refresh, preserve, guide, justify, and bless us.

Id.

179. *See, e.g.*, *supra* note 85 and accompanying text.

180. *See, e.g.*, *CLS Chapter Manual*, *supra* note 176 ("The maintenance of a vibrant chapter rests in large part on the ability of its leadership to motivate the general membership to undertake the group's activities and responsibilities.").

minister or leader has in relation to the public perception of the church or group, respectively. The effect of church scandals in the past decade illustrates this truth.[181] The child-abuse scandal that has continued to plague the Catholic Church has resulted in the majority of Americans expressing an unfavorable opinion of the institution on the whole, leading the Church to "devote every available resource to restoring the public image of the Catholic priesthood."[182] Similar reputational devastation befell the National Association of Evangelicals in 2006 when Ted Haggard—the pastor of the New Life mega-church in Denver, president of the National Association of Evangelicals, and "poster child for the evangelical movement in the United States"—"admitted that he had been involved with a male prostitute," which resulted in gay activists who opposed the evangelical movement "gloating over the apparent hypocrisy of Christians who oppose homosexuality on one hand while they participate in it secretly."[183] As Justice Alito noted in *Hosanna-Tabor*, when it comes to religion, "the messenger matters."[184]

While those who subscribe to a set of beliefs on their own merits rather than on the merits of the person preaching them may not impute the shortcomings of the messenger onto the message, people unfamiliar with or in opposition to the beliefs espoused by church leaders whose hypocritical actions expose them to public scorn will likely, either consciously or subconsciously, view the merits of such beliefs in a light less favorable than before. Religious student groups face this same reality.[185] While the

181. *See infra* notes 182–83 and accompanying text.

182. *See, e.g.*, Dalia Sussman, *Poll: Catholic Church's Image at New Low*, ABC NEWS, http://abcnews.go.com/US/story?id=90409&page=1 (last visited Oct. 23, 2013) (internal quotations omitted). The report showed that 52% of Americans expressed an unfavorable opinion of the Church following the child-abuse scandal, a figure up 25 percentage points over a ten-month period. *Id.*

183. *See* J. Lee Grady, *Making (Some) Sense of the Ted Haggard Scandal*, CHRISTIAN BROADCASTING NETWORK, http://www.cbn.com/spirituallife/churchandministry/charisma_grady_haggard_scandal.aspx (last visited Oct. 23, 2013); Jesse Carey, *Michael Phelps and Ted Haggard: The Connection*, CHRISTIAN BROADCASTING NETWORK, http://www.cbn.com/spirituallife/BibleStudyAndTheology/perspectives/Carey_haggard_phelps.aspx (last visited Oct. 23, 2013) ("In 2006, allegations were made that Ted Haggard maintained an inappropriate relationship with a male prostitute and used drugs during their meetings.").

184. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).

185. This understanding is not lost on religious groups like CLS, which, in its manual for running a student chapter, outlined the requirements that its leaders "should be committed Christians" and that "[t]hey ought to so manifest 'the fruit of the Spirit, which is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness and self-control' (Galatians 5:22–23) that their profession of

president of a religious student organization is likely faced with a lesser degree of scrutiny in the public eye, the fact remains that the relationship between a student group and the university's administration, student body, and faculty hinges on the ability of the group's leadership to act in a way that positively portrays the goals and beliefs of the group.[186]

It is, admittedly, difficult to say that the *gravity* of a student group's interest in choosing its leaders is equal to a church's monumental interest in choosing its ministers. However, the dual-nature of the interest is the same.[187] And in light of the disparity between the individual interests protected by Title VII and an all-comers policy,[188] the interest of a religious student group in choosing who will lead it seems more than sufficient to warrant an exception to the mandates of any university antidiscrimination policy, thus allowing such choice to be available.

D. Imposing Penalties and Withholding Benefits: An Unwarranted Distinction

Beyond the similarities between Title VII and a university nondiscrimination policy and the effects each program has on the individuals and groups that fall under their mandates,[189] the recent application of the ministerial exception in *Hosanna-Tabor* addresses some of the exact issues that the *Martinez* Court analyzed with regard to their effect on CLS's expressive-association rights.[190] In *Martinez*, the Court relied heavily on the distinction between compelling action and withholding benefits in coming to its conclusion that the RSO program's constitutionality was to be analyzed

Christian faith is credible." *CLS Chapter Manual*, *supra* note 177. This requirement of not only personal belief in the tenets of Christianity but also the manifestation of such beliefs in the actions of the leader is indicative of the fact that those in leadership positions serve as messengers and representatives of CLS's beliefs. *See id*.

186. *See id*. ("You and your leadership team will need to work intentionally in order to maintain a vibrant group . . . and cultivate good relationships on campus and with university authorities.").

187. The "dual-nature" of this interest refers to an officer's role in leading those within the student group in accordance with the purpose and beliefs of the group and the officer's role as liaison between the religious student group and the university on the whole—including the administration, the faculty, and the student body. *See supra* notes 181–186 and accompanying text.

188. *See* discussion *supra* Part IV.B.

189. *See* discussion *supra* Part IV.B–C.

190. *See infra* notes 191–202 and accompanying text.

under the limited-public-forum framework.[191] This distinction served as the foundation on which the constitutionality of the all-comers policy and the subsequent burdens it placed on religious student groups like CLS were built.[192]

The distinction between compelling action and imposing monetary sanctions is less outcome-determinative in the ministerial exception context.[193] In *Hosanna-Tabor*, the unanimous Court decided that enforcing monetary penalties against a religious organization for firing a minister in violation of the ADA is just as constitutionally impermissible as forcing the organization to retain that minister against its will.[194]

Some likely would argue that the inconsistent conclusions in *Martinez* and *Hosanna-Tabor* regarding the difference between compelling action and penalizing inaction are defensible due to the distinction between withholding a monetary benefit and enforcing a monetary penalty. In essence, however, the distinction lies only in the observable effect on the bank account of the religious student group or religious organization in question.[195] The action prohibited by *Hosanna-Tabor*—enforcing a monetary penalty in the form of damages against a religious organization because of its decision to fire its minister[196]—would essentially result in that religious organization having *less* in its bank account than it *should* have had. In *Martinez*, part of the punishment for CLS's refusal to forego its right to choose its leaders on its own terms was the withholding of funds available to all RSOs—essentially resulting in CLS's bank account staying the same when, but for the enforcement of the all-comers policy, it *should* have increased in size.[197] This simple truth was recognized in *Sherbert v. Verner* when the Court

191. *See supra* note 98 and accompanying text. To the Court, the fact that "Hastings, through its RSO program, [was] dangling the carrot of subsidy, [and] not wielding the stick of prohibition[,]" compelled the use of the less-restrictive limited-public-forum analysis. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2975 (2010).

192. *Martinez*, 130 S. Ct. at 2986, 2975*; see also supra* note 98 and accompanying text.

193. *See supra* note 24 and accompanying text; *see also infra* note 194 and accompanying text.

194. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) ("Perich continues to seek frontpay . . . backpay, compensatory and punitive damages, and attorney's fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.").

195. *See infra* notes 196–200 and accompanying text.

196. *Hosanna-Tabor*, 132 S. Ct. at 709.

197. *See Martinez*, 130 S. Ct. at 2974.

stated, "[T]o condition the availability of benefits upon [one's] willingness to violate a cardinal principle of [one's] religious faith effectively penalizes the free exercise of [one's] constitutional liberties."[198] This precedent, however, seems to have gone unnoticed by the Court in *Martinez* when it found that depriving CLS of funds it *should* have had through the implementation of an all-comers policy was constitutional;[199] yet, the Court in *Hosanna-Tabor* found that even hearing a case that could result in depriving the Hosanna-Tabor Lutheran School of funds it *should* have had was unconstitutional.[200]

While the limited-public-forum analysis employed in *Martinez* relies heavily on a distinction between compelling action and withholding benefits with regard to a group's First Amendment right of expressive association,[201] such distinction is much less consequential with regard to the application of the ministerial exception.[202] This difference in analysis, coupled with the circumstantial similarities between Title VII and a university nondiscrimination policy,[203] provides further reason to implement an exception to a university nondiscrimination policy that would allow for a religious student group to choose who will serve as its leaders.

198. Sherbert v. Verner, 374 U.S. 398, 406 (1963). *But cf*. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990) ("Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges." (internal citations omitted)); Stroman v. Lower Merion Twp., No. 06–3858, 2007 WL 475817, at *3 (E.D. Pa. Feb. 7, 2007) ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith* . . . the Supreme Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. This case, in effect, overruled *Sherbert v. Verner* . . . ."). *But see* Agostini v. Felton, 521 U.S. 203, 237 (1997) (reaffirming that lower courts cannot maintain that the Supreme Court overruled a case unless the court explicitly states as much).

199. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2995 (2010).

200. *See Hosanna-Tabor*, 132 S. Ct. at 709 ("Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.").

201. *See Martinez*, 130 S. Ct. at 2986.

202. *See supra* note 194 and accompanying text.

203. *See* discussion *supra* Part IV.A.

V. MINISTERS ON CAMPUS: APPLICATION OF THE CURRENT MINISTERIAL EXCEPTION

While the preceding sections dealt specifically with the creation of an exception to university nondiscrimination policies that would give religious student groups the freedom to choose their leadership, this section looks instead to the current state of the law surrounding the ministerial exception and the extent to which CLS and its student leadership could satisfy the various standards used in applying the ministerial exception. In reality, the ministerial exception as it currently exists—as a jurisdictional bar precluding a court from hearing an employment discrimination claim brought against a religious organization by one of its ministers[204]—gives little direct relief to religious student groups, as their predicament is not being brought to court, but rather being kept from operating as recognized student groups at various universities across the country.[205]

Though the historical application of the ministerial exception can provide little *direct* relief to religious student groups, the analysis used by courts over the last forty years to determine whether the ministerial exception is applicable to a case is helpful to show how religious student groups and their leaders are not so different from religious organizations and their ministers as defined by various courts.[206] Upon such analysis, a hypothetical inquiry into whether CLS—the religious student group bringing suit in *Martinez*—would be protected from an employment discrimination suit brought by one of its leaders is helpful in further establishing the need for an exception to university nondiscrimination policies.

Let us assume, then, that a fired president of a student chapter of CLS brought suit against the organization on the grounds that he was terminated in violation of Title VII. In determining the applicability of the ministerial exception to the case, the court would have to answer two questions in the affirmative: First, is CLS a religious organization for purposes of the exception? Second, if so, is the president of a student chapter a minister of CLS?[207]

204. *See* discussion *supra* Parts II–III.A.
205. *See* discussion *supra* Part III.C.
206. *See* discussion *supra* Parts II–III.A.
207. *See supra* note 41 and accompanying text.

A. CLS as a Religious Organization for Purposes of the Ministerial Exception

The analysis used to determine whether an entity is a religious organization varies from circuit to circuit.[208] However, the analytical distinctions between circuits have little practical effect, as CLS is quite clearly a religious organization under any test.[209] Under the *Leboon* factors[210] or the *Spencer* test,[211] CLS—as a national organization comprised of both student and non-student chapters—is a "primarily religious"[212] organization because: it is a non-profit corporation;[213] the products CLS sells in its online store are embroidered with its logo and are sold to allow people to "proudly display [their] support of CLS;"[214] CLS's articles of incorporation explicitly set forth a religious purpose;[215] CLS, through its name and actions, holds itself out to the public as a religious organization primarily concerned with carrying out its religious purpose;[216] and CLS's

208. *See supra* notes 44–49 and accompanying text.

209. *See infra* notes 210–17 and accompanying text.

210. *See* Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007); *see also supra* note 45 and accompanying text.

211. *See* Spencer v. Word Vision, Inc., 633 F.3d 723, 734 (9th Cir. 2010); *see also supra* note 48 and accompanying text.

212. *See Leboon*, 503 F.3d at 226.

213. *See Articles of Incorporation*, *supra* note 175 and accompanying text.

214. *CLS Store*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=472 (last visited Oct. 23, 2013).

215. *See Articles of Incorporation*, *supra* note 175.

216. *See About Us,* CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=327 (last visited Oct. 23, 2013). CLS is made up of the following four ministries:

> Attorney Ministries[:] CLS Local Chapters throughout the country provide opportunities for Christian witnessing, law-focused discipleship, law student mentoring, contributions to our magazine The Christian Lawyer, legal referrals, and volunteer legal service on behalf of the disadvantaged.
>
> Law Student Ministries[:] CLS helps students in law schools across the country integrate their Christian faith with the study and eventual practice of law. The ministry includes Bible studies for students, one-on-one mentoring by CLS members, student-focused conferences, and faith-based curriculum services to law schools.
>
> Legal Aid Ministries[:] Since 2000, thousands of CLS members have donated hundreds of thousands of legal service hours helping the disadvantaged untangle debilitating legal issues, seek Christian guidance for personal problems, and understand their rights under the law.
>
> Center for Law and Religious Freedom (CLRF)[:] As the country's oldest Christian advocacy ministry for religious liberty, CLRF has initiated law suits, filed amicus briefs, argued cases, and worked with Congress to defend our Constitution's First Amendment

membership is made up entirely of Christian lawyers and law students partnering together to further that purpose.[217] It would be hard to imagine a more "religious" organization.

B. A Student President's Role as a Minister of CLS

Whether a student-chapter president could be a minister under current precedent is a different story. The analyses used by circuit courts are varied, and the Court in *Hosanna-Tabor* provided very little clarity with regard to the proper way to determine ministerial status.[218] Thus, the ministerial exception will continue to be applied via a malleable standard and not a "rigid formula" until the Supreme Court has the opportunity to once again revisit the doctrine.[219]

Presently, the majority's fact-specific analysis in *Hosanna-Tabor* indicates at least a partial reliance on role-based considerations.[220] The majority's consideration of the "important religious functions" that Perich performed as a teacher at Hosanna-Tabor recognizes that titles alone are not indicative of one's legal status of "minister;" still, the majority did factor into its analysis the fact that Perich possessed the title of minister and held herself out as such.[221] While the majority clearly considered the importance of a person's function within a religious organization, its refusal to consider the legal significance of this function independent from the title Perich possessed makes application of the Court's analysis extremely difficult with regard to a hypothetical case between a president of a CLS student chapter and CLS itself.[222] However, the majority's insistence that the issue of

protection of religious freedom.

Id. The work done by CLS through these four ministries—the publication of *The Christian Lawyer* magazine, the facilitation of Bible studies for law students and practitioners, the pro bono legal work for the disadvantaged through the Legal Aid Ministries, and the advocacy done by CLRF—clearly indicates that CLS holds itself out to the public as a religious organization furthering a clearly religious purpose. *See id*.

217. *See Vision & Mission Statement*, CHRISTIAN LEGAL SOC'Y, http://www.clsnet.org/page.aspx?pid=820 (last visited Oct. 23, 2013) (CLS's vision is of "[a] growing nationwide fellowship of Christian lawyers and law students who act justly, love mercy, and walk humbly with their God.").

218. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705–10 (2012); *see also* discussion *supra* Parts II–III.A.

219. *Hosanna-Tabor*, 132 S. Ct. at 707; *see also* discussion *supra* Parts II–III.A.

220. *Hosanna-Tabor*, 132 S. Ct. at 707–09; *see also supra* notes 74–75 and accompanying text.

221. *Hosanna-Tabor*, 132 S. Ct. at 708–09; *see also supra* notes 74–75 and accompanying text.

222. *Hosanna-Tabor*, 132 S. Ct. at 709; *see also supra* note 75 and accompanying text.

whether someone is a minister for purposes of the ministerial exception "is not one that can be resolved by a stopwatch" does strongly suggest that a person's religious functions are not to be weighed against the amount of time spent on purely secular functions.[223]

Under the fact-specific majority approach, it is very difficult to determine whether a president of a CLS student chapter would be a minister. Unlike Perich, whose position as a "called" teacher bestowed upon her the title of minister,[224] a student's role as president does not do the same. And, without such a title, that president could not hold himself out as a minister by claiming a tax-exemption based on his position, as Perich did.[225] However, it seems that the religious functions performed by a CLS president—praying for the student chapter and facilitating bible studies, worship nights, and other member meetings—would act as a counterbalance to the lack of any technical title indicative of a ministerial position.[226] Whether such functions would outweigh the absence of any formal title is difficult to determine under the majority approach.

Justice Thomas's approach and the high level of deference it gives "to a religious organization's good-faith understanding of who qualifies as its minister" would, arguably, bar a suit between a president of a CLS student chapter and the organization itself.[227] This bar, however, would entirely depend on CLS's good-faith views with regard to the importance of a student leader within the organization on the whole.[228] Under such an approach, if CLS could honestly say that the presidents of its student chapters all serve as ministers of the organization, then suits by any of those student presidents would be barred.

The approach delineated in Justice Alito's concurrence, seemingly based on the analysis used by circuit courts employing a "role-based" test,[229]

223. *Hosanna-Tabor*, 132 S. Ct. at 709; *see also supra* note 75 and accompanying text.

224. *Hosanna-Tabor*, 132 S. Ct. at 708; *see also supra* note 75 and accompanying text.

225. *See supra* note 75 and accompanying text.

226. *See CLS Chapter Manual, supra* note 176. The "Running a Student Chapter" section of the Chapter Manual sets forth the obligations for leaders to "meet at least twice a month as a team to pray for one another and for other members, to cultivate a spirit of unity and friendship, and to plan the group's meetings and events." *Id*.

227. *Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring); *see also supra* note 81 and accompanying text.

228. *See supra* note 81 and accompanying text.

229. In his concurrence, Justice Alito relied on the widespread application of the functional approach among the circuit courts in coming to his determination regarding the correct test for

provides the most room for argument with regard to whether the president of a CLS student chapter is a minister under the ministerial exception. Justice Alito's understanding that the ministerial exception should bar any claim made by someone "who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith" reflects the fact that religious organizations vary in the terminology used to identify who their religious leaders are.[230] Under this approach, it would be immaterial that the highest officer of a CLS student-group is called the "president" rather than the "minister."[231] *Alicea-Hernandez v. Catholic Bishop of Chicago*, a 2003 case from the Seventh Circuit, illustrates the breadth of the functional approach adhered to by Justice Alito.[232] There, an employment discrimination claim was brought against a religious organization by a woman whose duties as a Hispanic Communications Manager "included composing media releases and correspondence as well as developing a working relationship with various constituencies of the Hispanic community and composing articles to be published in the Church media."[233] Relying on the understanding that the plaintiff served as "a liaison between the church as an institution and those whom it would touch with its message," the court determined that her suit was barred by the ministerial exception.[234]

The title of Hispanic Communications Manager, a position essentially equivalent to that of a press secretary, is not one that connotes a ministerial role.[235] However, the practical importance of such a role in disseminating the message of the religious organization, in the opinion of the Seventh Circuit, mandated dismissal of the case on account of the ministerial exception.[236] In light of cases like *Alicea-Hernandez* and the understanding that "the messenger matters,"[237] a strong argument could be made for

whether one is a minister. *See Hosana-Tabor*, 132 S. Ct. at 713–14 (Alito, J., concurring). This functional approach is encompassed, for purposes of this Comment, under the term "role-based approach."

230. *Id.* at 712; *supra* notes 79–80 and accompanying text.

231. *See supra* notes 79–80 and accompanying text.

232. 320 F.3d 698, 703–04 (7th Cir. 2003).

233. *Id.* at 703–04.

234. *Id.* at 704 (internal quotations omitted).

235. *See id.*

236. *Id.* at 703–04.

237. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).

applying the ministerial exception in a case between a CLS student president and the organization on the whole. A president of a CLS student chapter is charged with joining with other officers in prayer, is often responsible for organizing bible studies and other gatherings designed to strengthen the faith of those members in attendance, and is indeed the liaison between CLS and the university where the student group meets.[238] Such functions are vital to the success of a CLS student-chapter—both in terms of internal growth and external influence on the rest of the student population—and therefore there is a compelling case, under a functional approach, for a CLS student-chapter president qualifying as a minister for purposes of the ministerial exception.

That a reasonable argument can even be made to qualify a religious student group's president as a minister under current case law lends further credence to the contention that an exception to university nondiscrimination policies should be instituted that would allow such groups the unadulterated right to choose those who will serve as their leaders. It is well understood that a person's status as "minister" for purposes of the ministerial exception does not hinge solely on the individual's title; rather, the role that person plays within the religious organization in question is of the utmost importance.[239] For religious student groups, the role that the group's officers play is vital to the spiritual growth of its membership as well as the relationship created between the group and the university where it is based.[240]

VI. CONCLUSION

Conflicts in which competing interests are represented pose difficult and consequential questions for those in charge of diffusing them. When those competing interests are of a nature such that their bases are found in the text of the Constitution, the resolution of such conflict becomes especially consequential. In the conflict between the employment and equal-protection rights protected by antidiscrimination legislation—namely Title VII—and the right of a religious organization to choose who will "guide it on its way," Chief Justice Roberts and the rest of the unanimous *Hosanna-Tabor* Court stated plainly that it is the First Amendment that strikes the balance, giving

238. *See supra* note 226 and accompanying text; *see also* discussion *supra* Part IV.C.
239. *See* discussion *supra* Part III.A.2.
240. *See* discussion *supra* Part IV.C.

religious organizations the right to engage in employment practices that violate the statutory mandates of Title VII.[241]

When the parties within the conflict change, however, the balance seemingly changes along with them. The Court's ruling in *Martinez*, upholding a university nondiscrimination policy that would withhold benefits from a religious student group whose religion compels them to violate that policy due to its eligibility requirements for members and leaders, effectively placed an individual's right to inclusion within a club above the right of that club to operate as its religion requires.[242] This conclusion, two years before the Court's unanimous ruling in *Hosanna-Tabor*, now seems inconsistent. Though the two cases presented claims arising under differing constitutional provisions, the people and policies involved in those disputes are, on a very basic level, quite similar.[243] Both involved the modern idea of combating discrimination.[244] Both involved a religious group's right to govern itself, free from governmental interference.[245] And both involved the possibility of a government-issued penalty where a religious group acted upon that right.[246]

Similar conflicts should lead to similar resolutions. As the Court in *Martinez* submitted that "it would be anomalous for a speech restriction to survive constitutional review under the limited-public-forum test only to be invalidated as an impermissible infringement of expressive association,"[247] one could submit that it too is anomalous to, at the same time, allow a religious organization the unencumbered right to choose its leadership despite the mandates of a federal antidiscrimination statute while stripping a religious student group of that same right due to a university-enacted nondiscrimination policy. Churches, religious employers, and religious student groups are all founded upon a message that influences how they operate internally and how the community in which they gather perceives them.[248] And when it comes to ensuring the clarity and credibility of that

241. *Hosanna-Tabor*, 132 S. Ct. at 710.
242. *See* discussion *supra* Part III.B.2.
243. *See* discussion *supra* Parts III.A–B, IV.A.
244. *Id*.
245. *See* discussion *supra* Parts III.A–B, IV.A–C.
246. *See* discussion *supra* Part IV.D.
247. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2975 (2010).
248. *See* discussion *supra* Part IV.C.

message, the messenger matters. It is this truth that laid the foundation for the construction of the ministerial exception, and it is this same truth that should lead to the creation of an exception to university nondiscrimination policies that would enable a religious student group to freely exercise its constitutional right to choose those who will guide it on its way.

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