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WHAT'S RELIGION GOT TO DO WITH IT?¹ VIRTUALLY NOTHING: *HOSANNA-TABOR* AND THE UNBRIDLED POWER OF THE MINISTERIAL EXEMPTION

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INTRODUCTION

The United States Supreme Court recently ruled against a high school teacher who had claimed discrimination under the Americans with Disabilities Act (ADA) after being fired from her lay position at a church-run high school.² While the case ostensibly revolved around her claim for reasonable accommodation for a medical condition,³ the decision was based not on whether such an accommodation was both available and reasonable under the Act, but on whether the school had to provide one even if it were, holding that the Act exempted the school from such requirements merely because of its religious status.⁴

The Americans with Disabilities Act of 1990 expanded the protections already available under the Rehabilitation Act of 1973.⁵ Section 504 of the Rehabilitation Act banned discrimination on the basis of disability by the federal government, federal contractors, and any organization receiving federal financial assistance.⁶ The ADA covers not only these entities, but all state and local governments and even private businesses and employers that meet the definition of a “public accommodation,” such as theaters, hotels, restaurants, hospitals and medical offices, office buildings, and similar arenas.⁷

The ADA is considered one of the most important pieces of civil rights legislation to have been enacted by the nation, following in the footsteps of the landmark Civil Rights Act of 1964.⁸ President George H. W. Bush signed the legislation into law on July 26, 1990, saying

¹ With reference to TINA TURNER, *WHAT'S LOVE GOT TO DO WITH IT* (Capitol Records 1984).

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² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

³ The teacher in question has a condition known as narcolepsy, which can cause her to fall asleep in front of a class. Medication, however, controls the condition. The school argued it did not have to accommodate her even on medication, as it was a religious institution and therefore exempt under the ministerial exemption to the ADA, 42 U.S.C. § 2000e-1(a). The counterargument of this article is that the ministerial exemption was intended to apply only to those in an actual ministerial position, not to the institution itself regarding virtually anyone it employs.

⁴ *Hosanna-Tabor*, 132 S. Ct. at 714.

⁵ Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006).

⁶ *See id.*

⁷ 42 U.S.C. § 12181(7) (2006). The Act provides exemptions to the requirement to refit buildings in many instances. *See, e.g.*, 28 C.F.R. §§ 36.404–.405 (1997); 28 C.F.R. § 36.102(e) (1997).

⁸ *See* 42 U.S.C. § 12101(a)(4) (1994); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *ADA Basics: Statutes and Regulations*, in ADA BEST PRACTICES TOOL KIT FOR STATE AND LOCAL GOVERNMENTS, Ch. 1 at 1 (2006), available at <http://www.ada.gov/pcatoolkit/chap1toolkit.pdf>.

“[I]et the shameful wall of exclusion finally come tumbling down.”⁹ These words were likely not haphazardly uttered, nor should they be casually referenced. The basic tenets of the ADA are that it applies to anyone who has a mental or physical impairment that substantially limits one or more major life activities, has a record of having such, or is regarded as having such,¹⁰ and that any person who meets any of these requirements may not be discriminated against through exclusion or denial of benefits or services by any covered entity.¹¹

Unless, of course, they work for a religious institution. Religious entities have been granted exemptions under the ADA. Specifically, the Act exempts *all activities* of the religious organization, even if they are secular in nature.¹² Religious entities may give preference in hiring to religious followers and may even require applicants or employees to adhere to the institution’s specific religious doctrines.¹³ Religious entities, however, are *not* exempt from the employment requirements of the Act if they meet the same prerequisites as other employers, i.e. having a certain number of people working for the organization.¹⁴ The Act also provides that religious entities are subject to the prohibition against retaliation against an employee who brings or threatens to bring a claim under the Act.¹⁵ The latter in particular is important in *Hosanna-Tabor*, where the teacher was fired after threatening to sue under the Act.¹⁶

The reasons for the ministerial exemption to the ADA are most logical when examined in light of the long-standing prohibition against government entanglement with religion under the First Amendment’s Establishment and Free Exercise Clauses.¹⁷ Under such restraints in general, the government cannot require a religious institution to hire a pastoral leader of another faith or force an entity such as the Catholic Church, with its adherence to male-only priests, to hire a female in that role.¹⁸ When applied in a similar manner, the ministerial exemption is both appropriately protective and a common-sense treatment of the law. The courts have applied the exemption as an interpretive tool, used to ensure that a statute’s application will not offend the constitutional principles of separation of church and state.¹⁹ Courts have, however, historically and appropriately distinguished between a religious entity’s religious and secular, or lay, employees, finding that applying antidiscrimination laws to secular employees does not run the risk of entanglement or Free Exercise issues.²⁰

⁹ *ADA Basics: Statutes and Regulations*, *supra* note 8 (citing to speech by President Bush at the signing of the Act).

¹⁰ 42 U.S.C. § 12102(1)(A)–(C) (2006).

¹¹ 42 U.S.C. § 12132 (2006).

¹² *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, U.S. DEP’T OF JUSTICE, III-1.5000-1.5200 (1993), available at <http://www.ada.gov/taman3.html>.

¹³ See Brad Turner, Comment, *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. LAW & PUB. POL’Y 21, 25 (2011).

¹⁴ See *ADA Title III Technical Assistance Manual*, *supra* note 12, III-1.5000.

¹⁵ Turner, *supra* note 13.

¹⁶ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 700 (2012).

¹⁷ U.S. CONST. amend. I. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁸ Turner, *supra* note 13.

¹⁹ See *id.* at 26.

²⁰ See *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188, 1189 (S.D. Ohio 1988) (finding that a suit for age discrimination did not raise concerns about entanglement or Free Exercise issues); Turner, *supra* note 13, at 26 & n.46.

In a case such as *Hosanna-Tabor*, the immediate question then becomes: how does the court see the plaintiff—as a religious or secular employee? Generally, courts will look to the duties and responsibilities of the employee to determine where he/she falls.²¹ Often referred to as a facially reasonable “primary duties” test regarding what specific, religious-based responsibilities the employee may have, this test has unfortunately evolved over time into a question of whether the employee’s position is “important to the spiritual and pastoral mission of the church.”²² This evolution, while sounding semantic in nature, can result in theoretically far narrower holdings than if the question truly rested on the employee’s actual “primary duties.” It can also lead to the two main concerns evinced in the litany of cases leading up to *Hosanna-Tabor* that the court will violate the church’s freedom of expression under the First Amendment if it questions the entity’s determination as to what and who is “important” to the religious and pastoral mission of an institution,²³ and that the court will appear to second-guess a religious institution’s proffer of a religious, rather than secular, reason for the apparent discrimination, thereby entangling it under the Establishment Clause.²⁴

The courts have allowed what was created as a seemingly narrow exception geared to protecting an institution’s religious freedom to be broadened considerably. Today this exception is used to rebuff plaintiffs on issues that have little if any bearing to religion or religious freedom. Part II of this article will examine the myriad ways the courts have interpreted the constitutional avoidance doctrine²⁵ to apply the religious exemption to non-discrimination statutes, including the ADA, on issues having virtually no relation to an institution’s religious goals. This allows religious institutions to protect themselves from liability and, more importantly, to openly discriminate based on their own whims rather than constitutional necessity. Part III will seek a better resolution for those cases revolving around non-religious issues, even when involving a ministerial employee. It will recommend a narrower interpretation of the rule to effectuate fairness to both the institutions and their employees.

I. MISAPPLICATION OF THE LAW

Far from being merely another piece of legislation in the course of business, the ADA took on far greater importance. It was seen as the logical continuum of the progress made with the Civil Rights Act of 1964,²⁶ which prohibited discrimination based on race, color, and national

²¹ Turner, *supra* note 13, at 27 & n.48

²² *Id.* See also Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1777 (2008) [hereinafter *The Ministerial Exception to Title VII*] (arguing that “the First Amendment provisions that motivate the existence of the ministerial exception should also guide its application”).

²³ Compare Turner, *supra* note 13, at 27 & n.54 (citing to *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (applying the ministerial exception to uphold the dismissal of an age-discrimination suit brought by a choir director)), with *EEOC v. Mississippi Coll.*, 626 F.2d 477, 485 (5th Cir. 1980), and *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) (both holding that teachers in a religious school are not necessarily ministers even if the school regards them as such).

²⁴ See *Lemon v. Kurtzman*, 403 U.S. 602, 615-22 (1971).

²⁵ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (construing broad meaning to federal statutes to avoid conflict with the Constitution).

²⁶ 42 U.S.C. § 12101(a)(4) (1994).

origin,²⁷ and was later amended to prohibit discrimination based on gender.²⁸ The language of the ADA cites to the Court's exact prior language in describing the historical plight of racial minorities,²⁹ highlighting the tremendous importance Congress placed on this expansion of civil rights to people with disabilities.³⁰ The Act was described as the "next giant step" in American civil rights.³¹ It was promulgated with the intent that disabled citizens would become the "master of their own fates."³² The Act was, in the words of one congressman, intentionally fashioned to give protections against discrimination for disabilities in a manner mimicking the existing civil rights statutes.³³ Very importantly, the Act was designed to cover the same range of protections in employment, transportation and accommodation as those included in the Civil Rights Act of 1964.³⁴

One cannot realistically examine the religious exemption to the ADA without similar analysis of such exemptions to the Civil Rights Act and other non-discrimination Acts. All such Acts have the purpose of giving legal protection to persons based on specific attributes, and all have carved out specific and narrow exceptions to the requirements of such protections. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex or national origin.³⁵ A narrow exception was carved out by Congress, allowing religious organizations to hire based on faith (eliminating the hypothetical problem of the non-Catholic priest, etc.), but still allowed for discrimination claims based on race, sex or national origin.³⁶ Religious entities argued such cases still allowed the courts to be impermissibly involved in church decisions, leading to the first major common law religious exception to the Act.³⁷ In that case, the Fifth Circuit found that claimant, a female minister in the Salvation Army, was not entitled to employment discrimination protections based on sex under the Act, holding that religious entities were entitled to act in their church's best interest without interference from the state.³⁸

²⁷ 42 U.S.C. § 2000d (1994); *See also* Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 536 (2001) ("[T]he 1964 Civil Rights Act, which prohibited discrimination on the basis of race, color, and national origin.").

²⁸ *See* Mayerson & Yee, *supra* note 27, at 536; Education Amendments of 1974, 20 U.S.C. § 1681(a) (1994).

²⁹ *See* Mayerson & Yee, *supra* note 27, at 536 (citing 42 U.S.C. § 12101(7) (1994) and *United States v. Caroleone Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (finding that "discrete and insular minorities" may not be properly protected by the political processes relied on by the citizenry)).

³⁰ *See* Mayerson & Yee, *supra* note 27, at 536.

³¹ *To Establish A Clear and Comprehensive Prohibition of Discrimination on the Basis of Handicap: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong. 4 (1988) [hereinafter *Prohibition of Discrimination on the Basis of Handicap*] (statement of Hon. Major R. Owens, Rep. from N.Y.).

³² *Id.* at 5.

³³ *Id.* at 13 (statement of Tony Coelho, Rep. from Cal.).

³⁴ *See id.* at 16.

³⁵ 42 U.S.C. §§ 2000e–2000e-17 (2000) (applying statute to all employers with at least 15 employees, including religious entities), *cited in* Todd Cole, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703, 705-6 & n.11 (2010).

³⁶ *See* Todd Cole, *The Ministerial Exception: Resolving the Conflict Between Title VII and the First Amendment*, 4 CHARLESTON L. REV. 703, 705-6 & n.11 (2010).

³⁷ *Id.* at 706-07 (citing *McClure v. Salvation Army*, 460 F.2d 553, 554-55 (5th Cir. 1972)).

³⁸ *Id.*

This original court exception, dealing not with the religious direction of the church already carved out by Congress (the hypothetical female Catholic priest), but rather specifically granting a religious entity immunity from liability for discrimination on other grounds, led inevitably to bigger and broader exclusions.³⁹

While logic dictates that a religious organization should not be required to hire a clergyperson of a different faith, the courts have swung far wider in allowing religious entities to discriminate based on virtually any reason, and today, under the most tenuous ties to religion. Leading up to the Supreme Court's decision in *Hosanna-Tabor*, every circuit except the Federal had adopted the religious exception in some form or other.⁴⁰ Most held that it applied not only to ordained clergy of the institution, but to any employee whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."⁴¹ This has come to be accepted as the "primary duties" test, used at least theoretically to determine if the employee is acting mainly in furtherance of the organization's religious agenda,⁴² and again can be seen as a not necessarily fair (to those affected by the alleged discrimination) but a somewhat logical extension of the original narrow exception. Under an *actual* primary duties test, *McClure* would make sense even when allowing for discrimination based on sex, *assuming the employee's sex had some tangible impact on his or her work*. The Fifth Circuit, however, held that it was the church's view of why or how the employee's sex impacted her work, and not the state's, that mattered; in actuality all the Court decided was that the church had the right to determine how any employee can be treated as long as the person has at least a relation to the church's doctrine.⁴³

The problem, however, is that what was touted as a supposedly narrow "primary duties" test has undergone huge expansion. Today, courts interpret a primary duties test as whether the employee's responsibilities are "important" to the organization's goals.⁴⁴ While theoretically paying deference to the Free Exercise Clause, it hypothetically allows for religious entities to discriminate unfettered; even the janitor who prepares the sanctuary and cleans up after Mass could be found to be "important" to the church's ability to disseminate its message. While this is hopefully an exaggeration,⁴⁵ it is the problem courts have in trying to fit a seemingly narrow exception such as a "primary duty" of the employee into a far broader-based application of the organization's main goals. Some favor this broad interpretation, even acknowledging it may have the effect of harm to the individual in areas not related to the church's religious goals: Laycock expounds that it is the church's right to autonomy, not the employee's right to be free of

³⁹ See *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Bogan v. Miss. Conference of The United Methodist Church*, 433 F. Supp. 2d 762, 765-66 (S.D. Miss. 2006).

⁴⁰ *Cole*, *supra* note 36, at 707.

⁴¹ *Id.* (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

⁴² *Id.*

⁴³ See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

⁴⁴ See *Ministerial Exception to Title VII*, *supra* note 22, at 1776.

⁴⁵ Perhaps not so much of one. The test has been held to apply to music teachers and even the church organist. See generally *Tomic v. Catholic Diocese of Peoria*, 442 F. 3d 1036, 1037, 1040-41 (7th Cir. 2006) (holding the duties of the church organist to have a "significant religious dimension"); *Starkman v. Evans* 198 F.3d 173, 173-75, 177 (5th Cir. 1999) (determining a choirmaster to be a "spiritual leader" for purposes of the ministerial exception).

discrimination, that matters, no matter the issue.⁴⁶ Laycock argues that churches have the right to manage themselves, free of government intrusion. While he acknowledges the right of government interference for reasons of compelling state interests, he apparently does not include protection from employment discrimination in that description, but rather believes that as a general rule, most state interests designed to protect workers will be “illegitimate.”⁴⁷

The concerns of scholars such as Laycock for the potential infringement on church matters is echoed in the court decisions that tend to err on the side of caution, despite potential harm to the employee, rather than risk even the hypothetical infringement into a church’s religious role. Some argue the very inquiry by a court into how an employee’s role fits into the church’s dogma is in itself an entanglement with religion.⁴⁸

The Fair Housing Act (FHA) also has specific religious exemptions, limited to the ability of a religious entity to limit the sale, rental or occupancy of dwellings *not used for commercial purposes* to those of a particular faith. The exemption itself is constrained by the caveat that *membership in the religion is not restricted on account of race, color or national origin*.⁴⁹ Looking at the words of the FHA, it seems clear the congressional intent was to allow freedom of expression in private dwellings, while requiring adherence to non-discrimination tenets in commercial properties. This comports with other sections of the Act, where private property owners may restrict occupants residing within the owner’s personal dwelling, but not if they are renting or selling as a professional landlord.⁵⁰ Like the application of the religious exception to the Civil Rights Act, courts examining discrimination claims under the FHA are equally reluctant to limit the rights of religious organizations, often relying on (possibly spurious) findings that the organizations’ endeavors do not fit under the Act at all.⁵¹

II. DEFINING, OR DIVINING, PURPOSE

While the religious exemption to the ADA seems fairly straightforward, its application has been anything but. While the Constitution does proscribe government interference with religion, compelling state interests can and do sometimes triumph over these constraints.⁵² Although Congress promulgated the ADA as a major complement to the Civil Rights Act of 1964,⁵³ courts

⁴⁶ See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373-74 (1981).

⁴⁷ *Id.* at 1374.

⁴⁸ See Dunlap *infra* note 80, at 1776-77.

⁴⁹ See Fair Housing Act (FHA), 42 U.S.C. § 3607(a) (2006) (emphasis added).

⁵⁰ See Fair Housing Act (FHA), 42 U.S.C. § 3604. *But see* Cmty. House, Inc. v. City of Boise, 623 F.3d 945, 969-70 (9th Cir. 2010) (holding that non-profit organization running a homeless shelter restricted to males and including religious indoctrination did not violate the FHA); Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F.Supp. 2d 1101, 1112 (D. Idaho 2010) (holding that homeless shelter which included alcohol treatment program was not a “dwelling” under the FHA and therefore there was no violation). The holdings of these cases seem to turn on the determination that the non-profits running the shelters were not using them for “commercial” enterprises.

⁵¹ Fair Housing Act (FHA), 42 U.S.C. § 3604.

⁵² See Laycock, *supra* note 46, at 1374.

⁵³ See *Prohibition of Discrimination on the Basis of Handicap*, *supra* note 31, at 9 (statement of Sen. Tom Harkin, Co-Chairman, S. Comm. on the Handicapped) (“Almost a quarter century after the passage of the Civil Rights Act of 1964, [the Americans with Disabilities Act] is long overdue.”).

have consistently been reluctant to apply the non-discrimination policies of any of the major Acts to religious entities, apparently finding that almost nothing in them is constitutionally compelling enough to justify holding religious institutions to the same standards as the rest of society.

The problem with this court-driven analysis is that it disregards Congress's intent to protect citizens from the abuses of employers, one of the basic tenets of all of the non-discrimination Acts, including the ADA. By treating religious employers as a totally separate class, the courts have carved out an almost foolproof exception, allowing hypothetically for almost any scenario of discrimination to occur without remedy in religious employment settings.

Although the courts have maintained that they look to an employee's "primary duties," those duties have been whittled down to whether the employee serves an "important" religious interest of the employer.⁵⁴ But when it comes to deciding what may be important to a religious organization, the courts have been reluctant to second-guess the religious employer on virtually any issue. While the courts have notionally limited the churches' immunized acts to those involving "ministers," this already weak defining line has been blurred considerably by *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.⁵⁵

In *Hosanna-Tabor*, the Supreme Court held that a parochial school teacher could not sue her employer under the ADA, even though her duties were primarily the same as those of lay employees.⁵⁶ Cheryl Perich was hired on contract to teach a range of academic subjects and spend a short period four days a week on religious issues.⁵⁷ She was eventually granted "called teacher" status, allowing her more job protections and the title of "commissioned minister," although her duties remained the same.⁵⁸ After an extensive medical leave, the school board expressed doubts about her ability to perform her teaching duties, and, although her doctor affirmed her capabilities, pushed her to resign. When she refused, the board found her insubordinate, in large part because of her threat to take legal action if they followed through on a warning to rescind her "called," or protected, status.⁵⁹

The ADA, under which Perich sought protection, forbids retaliation by employers for threats of legal action.⁶⁰ *Hosanna-Tabor* successfully argued that it was immune from suit under this clause based on Perich's role, presumably as a "called teacher" and "commissioned minister."⁶¹ In a nod to the fox guarding the hen house, the Court relied entirely on the school's view as to whether and why an employee is a "called teacher."

There are those who argue that religious entities should be virtually immune from government "intrusion" into even their decision-making on how they determine an employee's "im-

⁵⁴ Laycock, *supra* note 46, at 1374.

⁵⁵ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

⁵⁶ *Id.* at 708.

⁵⁷ *Id.* at 700; *see also* Turner, *supra* note 13, at 22.

⁵⁸ Turner, *supra* note 13, at 22.

⁵⁹ *Id.* at 23–24.

⁶⁰ Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

⁶¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708–09 (2012).

portance” to their cause.⁶² There is an obvious fallacy to this argument. If the courts cannot inquire into how and why an employee is determined to be a “minister” for work purposes, especially when the bulk of their duties are non-ministerial, or as to how the institution determines his/her “importance” to its goals, the courts are not making informed decisions, but merely decisions based on an almost absolute adherence to the exception as defined by the institutional defendant. Even when applied to an obvious and legitimate “minister,” the exception is fraught with problems. To use a hopefully ludicrous example, what of a wheelchair-bound pastor who is denied employment apparently on the basis of his/her physical disability? Under such a theory, a church would need to do no more than assert *its* belief that the pastor, concededly important to the religious goals of the organization, would not be able to be effective as a religious leader; a court would not inquire why not nor ask how it arrived at such a conclusion. In distinct contrast, any secular employer would be required to prove a non-discriminatory reason for the non-hire in such a situation. Under the current application of the exemption, the religious employer cannot be probed either as to its designation of possibly questionable ministerial duties on an employee, nor as to the availability or validity of a non-discriminatory defense.

In essence, the Fifth Circuit Court of Appeals found in *McClure* that the Salvation Army could sexually discriminate against its female minister simply because they alleged a need to do so based on its religious requirements; the court held it could not actually challenge the appropriateness or even the validity of those requirements for fear of infringing on the church’s autonomy and/or entangling the government in the church’s private business.⁶³

When applying the non-discrimination policies to religious organizations, courts have given broad and consistent leeway to the defendants. Starting with the Fifth Circuit in *McClure*, courts have clearly chosen to err on the side of almost virtual church autonomy and far away from even a hint of government “entanglement.”⁶⁴ By the time *Hosanna-Tabor* reached the Supreme Court, most circuits had affirmed the right of religious institutions to be free from “interference” in their employment decisions, regardless of how tenuous a relation the employee or the discrimination had to the religious goals of the institution.⁶⁵ Proponents argue, and the courts appear to agree, especially since *Hosanna-Tabor*, that the Free Exercise Clause does not merely protect religious organizations from state intrusion into their clergy employment practices, but totally screens them against all inquiries relating to them.⁶⁶

As noted, this almost blanket protection from state questions regarding religious employment practices is theoretically limited to clergy, or those in “ministerial” positions. In reality, that line has also been totally blurred, if not before then certainly by *Hosanna-Tabor*. The teacher in *Hosanna-Tabor* was designated by the church a “called teacher,” or “commissioned minister,” but her duties as described were almost totally secular and identical to her earlier pre-title respon-

⁶² See, e.g., Laycock, *supra* note 46, at 1408–1409 (arguing that church labor relations are internal affairs and therefore not subject to state intervention to protect employees from treatment that is “merely arbitrary or unfair”).

⁶³ *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

⁶⁴ See, e.g., *id.* at 558–61 (reviewing the history of governmental noninterference with church matters). See generally *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (holding that a choir director qualified as a “minister” for purposes of the ministerial exception); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

⁶⁵ Caroline Mala Corbin: *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1973–81 (2007).

⁶⁶ *Id.* at 1979.

sibilities.⁶⁷ *Hosanna-Tabor* allows a religious organization to theoretically escape scrutiny, let alone liability, for their employment decisions by simply giving appropriate labels to their workers. And under these theories, a court should not even inquire as to whether the label itself is appropriate,⁶⁸ eliminating virtually any level of oversight.⁶⁹ While it might be appropriate under these Acts to allow religious schools to require all educators, even lay teachers, to share the same overall beliefs as their employers and presumably students,⁷⁰ it seems incongruous that every lay teacher will also be denied protections under the law simply by virtue of being designated something more, without the actual corresponding duties.

This leads to the question of whether these church activities are truly “private,” as the courts suggest, or themselves infringe on the public life of their employees. Whether one works for a religious or secular entity, doing the same job should result in the same protections. Does working for a religious entity, even in a primarily non-ministerial capacity, automatically eliminate common legal protections available for everyone else? The answer, especially after *Hosanna-Tabor*, appears to be yes, but the broader question is: should it?

A. Misuse of Authority

The courts have relied on both Freedom of Expression and the Establishment Clause⁷¹ to invalidate claims under employment discrimination. It is argued that courts risk entanglement merely by questioning an employer’s decision about a ministerial employee,⁷² including apparently whether the employee’s duties actually constitute a ministerial role. One court argued that it could not substitute its judgment for a church’s determination of “God’s appointed.”⁷³ The fallacy of this argument is that the courts have decided they cannot even question a religious entity’s reasoning in determining who is “God’s appointed,” thereby leaving a vast vacuum of religious institution oversight for any reason, justified or not. Although a “ministerial employee” is theoretically one who “helps shape and develop doctrine,”⁷⁴ it is at least questionable that Cheryl Perich, although charged with leading prayers and teaching a religious class for approximately forty-five minutes out of the full school day,⁷⁵ was in fact responsible for doing either; it is far more likely she followed religiously (pun intended) the curriculum and prayers chosen for her.⁷⁶

⁶⁷ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699-700 (2012).

⁶⁸ See Laycock, *supra* note 46, at 1412.

⁶⁹ See Corbin, *supra* note 65, at 1979 (expressing concerns that the Free Exercise Clause has been used to both protect religious entities from substantial burdens and safeguard them from any and all interference from the state).

⁷⁰ Although this article is not advocating it, it is conceivable that a lay teacher with no responsibilities of leading or even participating with students in prayer or other religious activities would serve perfectly well in a religious institution. It is certainly the case in higher education, where of course the institutions are generally more open to diversity than they are on the lower levels.

⁷¹ U.S. CONST. amend. I.

⁷² See Corbin, *supra* note 65, at 1980.

⁷³ *Id.* (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985)).

⁷⁴ *Id.*

⁷⁵ See Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. 96, 107 (2011) (citing *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 773 (6th Cir. 2010)).

⁷⁶ The Court apparently did find that Perich taught secular subjects “from a Christ-centered perspective.”

After *Hosanna-Tabor* it is debatable that any court will be able to determine whether an employee is in fact charged with these duties; religious institutions can prevent even the concern about lawsuits for employment discrimination by choosing appropriate titles for their employees, based on nothing but their own affirmation that the labels are appropriate. One of the more questionable tenets of the ministerial exception from its inception is that the alleged discrimination does not need to be necessary for the religious institution's work;⁷⁷ the lower courts asserted (and the Court agreed in *Hosanna-Tabor*) that the Free Exercise Clause *allows religious entities to decide for themselves what is appropriate, and whether and how it relates to religion*, and that even questioning the institutions about such decisions would violate the Establishment Clause.⁷⁸

This court-driven analysis disregards Congress's intent to protect citizens from the abuses of employers, one of the basic tenets of all of the non-discrimination Acts, including the ADA. By treating religious employers as a totally separate class, the courts have carved out an almost foolproof exception, allowing for hypothetically almost any scenario. The wheelchair-bound pastor would be required to be hired at Target, but not in his or her own field, regardless of the fact that preaching from a wheelchair would not likely hinder his or her abilities to be effective, *and that this therefore is precisely the kind of discrimination Congress intended to prevent*. At the very least, requiring a showing of necessity for the discrimination, *even for a ministerial employee*, should be a given. Although theoretically developed as a protection against forcing religious institutions to hire those who might not appropriately espouse their views, by being applied to virtually any employee to whom the entity wishes it to apply, the Court has validated discrimination that has little or nothing to do with the original purposes of freedom of expression. The generally appropriate recognition of church autonomy in all matters religious or spiritual has evolved into a virtual total limitation on (or elimination of) the state's ability to protect employees of these institutions, with or without ties to the religious domain.⁷⁹

This interpretation is not necessarily related to Congress's intent. The original Civil Rights Act of 1964 provided narrow statutory protections for religious entities, limited to the inability of an employee who was engaged in religious activities of his or her employer to sue for religious discrimination.⁸⁰ Congress amended the Act in 1972, specifically rejecting language that would have exempted religious employers altogether from the requirements of Title VII, instead adopting language excluding religious institutions' employees who "perform work connected with the carrying on . . . of its activities."⁸¹

which made her ineligible under the ministerial exception to sue for employment discrimination under the ADA. See Howard M. Wasserman, Essay, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289 (2012), <http://www.pennumbra.com/essays/02-2012/Wasserman.pdf>. Without the ability to question how specifically this is true, for fear of violating the Establishment Clause, virtually any employee of an institution could be said to be doing his or her work "from the institution's religious perspective." Under such analysis, a nurse, accountant or janitor who agrees to work for a religious entity could all be said to do their work from such a perspective, perhaps in practicality eliminating even the need for appropriate titles.

⁷⁷ See *id.*

⁷⁸ See *id.* at 289-90.

⁷⁹ *Id.* at 292.

⁸⁰ Joshua D. Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2008 (2007) (citing Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1(a) (2000))).

⁸¹ *Id.* at 2008.

Although Congress held religious institutions to the dictates of the Civil Rights Act and declined to further broaden the protections available to religious institutions, the courts have been far more generous in doing so.

The courts have carved out a couple of general requirements regarding first, what qualifies as an exempted institution, and second, who is a ministerial employee.⁸² Under the first, any entity that is controlled by or financed by a religious organization, acts as an instrument of a church, or fulfills *some* religious activity, can qualify.⁸³ As to the second, the employee must fulfill a spiritual or religious function—in theory, at least, his or her *primary* duties should be in furtherance of the institution’s religious work, although not necessarily as clergy.⁸⁴ Much of the problem with this reasoning, however, is that the courts are reluctant to delve into the institution’s determination that the employee is in fact “important” to its spiritual functions, lest it unconstitutionally entangle itself in violation of the Establishment Clause.⁸⁵ Under this circular analysis, the institution is virtually free to assert an employee is barred from protections under the employment acts simply *because they say so*, without having to offer more than the most minimal proof of their assertions.

And although the courts have apparently put their confidence in the institutions’ good faith in dealing with their employees, that is a questionable philosophy at best, exemplified by the cases that have gone before.

In limiting inquiry about a ‘ministerial’ position, the courts have drafted great protections for the institution rather than the employee, using both the Free Exercise and Establishment Clauses as rationale for their limited inquiries. The Fifth Circuit found it could not discern whether an employment decision concerning a ministerial employee was valid without inserting itself into the inner management of the institution.⁸⁶ Other courts have held that *even requiring a religious institution to give a religious rationale for a facially discriminatory employment decision would be an unconstitutional interference with religion*,⁸⁷ yet such a non-discriminatory basis for an employment decision is at the heart of the non-discrimination statutes. The Seventh Circuit found that allowing any questioning of a church’s employment decisions would “enmesh the court in endless inquiries as to whether *each discriminatory act was based in Church doctrine or simply secular animus*.”⁸⁸ Such a statement makes clear the court’s collective reasoning in applying the ministerial exemption: it is better to err on the side of free expression and non-entanglement even if leaving an employee at the mercy of “secular animus.” When a Catholic University decided to change the position of the President of the University, which was filled by

⁸² See *id.* at 2010-11.

⁸³ *Id.* at 2011.

⁸⁴ *Id.* at 2011-12.

⁸⁵ See, e.g., Laycock, *supra* note 46, at 1376-77. (citing EEOC v. Southwestern Baptist Theological Seminary, 485 F.Supp. 255, 261 (N.D. Tex. 1980), rev’d in part, 651 F.2d 277 (5th Cir. 1981) (“Enforcement of Title VII claims against a seminary . . . even in the absence of articulated doctrinal compulsion, will lead inevitably to excessive governmental entanglement with religion . . .”).

⁸⁶ See Dunlap, *supra* note 80, at 2009 (citing Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999)).

⁸⁷ See *id.* (citing Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004)).

⁸⁸ See *id.* (citing Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698, 703 (7th Cir. 2003) (*emphasis added*)).

its first female occupant, the court disallowed her Title VII gender discrimination claims under the rationale that the board could discriminate against her due to the religious connections to her position, but let stand her breach of contract claim, finding no religious connection.⁸⁹ Tellingly, the court was far more concerned with its own possible intrusion into church affairs than it was with whether there was a legitimate non-discriminatory reason for the action.

Although Congress was clear in its rejection of language excluding religious entities from Title VII, the courts have nevertheless read into Congress's intent just such an application. The *McClure* court specifically held that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."⁹⁰ The *McClure* court set the tone for not merely limiting inquiry into church employment decisions but virtually eliminating it altogether, a policy followed by all the circuits up to and through *Hosanna-Tabor*, but most prominently expressed in *Rayburn*.⁹¹

The *Rayburn* court found that a female applicant for a pastoral position could not sue for gender or race discrimination, solidifying the ministerial exception.⁹² The court founded its decision on both Free Expression and the Establishment Clauses, finding that the church was free from state influence to make its ecclesiastical choices and that merely applying the relevant federal statutes to those decisions would entangle the state in church affairs.⁹³ The court further addressed the balancing concerns under the Free Expression Clause, finding that ". . . while 'an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs,'"⁹⁴ and held that the mere questioning of the church's decision would illegally entangle the court with the church.⁹⁵ Flowing from *McClure* and *Rayburn*, the courts have made clear that the purpose of the exception is transparent: once the defendant is found to fit the role of a ministerial employee, the exception will then prohibit even the possibility of judicial intervention in determining either the existence or the validity of any nondiscriminatory rationale.⁹⁶

Beginning with these cases, flowing through every circuit, and culminating with *Hosanna-Tabor*, the courts have been consistent in their appraisal that employment discrimination claims will not survive scrutiny under the Free Exercise and Establishment Clauses. The church may designate whomever it wishes as 'ministerial' with the barest of standards to be met, and the courts will not then challenge its right to discriminate against them, even in areas totally unrelated to ministry.⁹⁷

⁸⁹ See *id.* at 2014 (citing to *Petruska v. Gannon Univ.*, 462 F.3d 294, 307-10 n.6 (3d Cir. 2006)).

⁹⁰ Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 125 (2009) (citing *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972)).

⁹¹ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1172 (4th Cir. 1985).

⁹² See Lupu & Tuttle, *supra* note 90, at 126.

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See *id.* at 128.

⁹⁷ See *Schleicher v. Salvation Army*, 518 F.3d 472, 477 (7th Cir. 2008) (holding that once petitioners meet the ministerial definition, they are not protected by federal law including wage and hour disputes of the Fair Labor Standards Act, finding that ministers may resemble business employees but for purposes of these Acts are not synonymous with them).

III. EXCEPTION, NOT EXEMPTION

The confusion generated by the niche carved out by the courts to the antidiscrimination statutes is evidenced even in the different names assigned it: some refer to the ministerial exception, while others call it the exemption. But these are not truly synonymous, and their overlap is symptomatic of the problems with the policy itself. An exception is adverse to the general rule, but not necessarily an absolute; it must be shown to apply.⁹⁸ An exemption, on the other hand, is an unconditional immunity from action.⁹⁹ While the courts, and more specifically Congress, theoretically carved out an exception to the general rules of employment discrimination law, subject to examination and analysis case-by-case,¹⁰⁰ it has come to be regarded as an exemption, or bar, to such scrutiny.¹⁰¹ And therein lies a major problem with the policy.

Even those who extoll the virtues of the exemption—religious freedom, separation of church and state—presume it to be applied in a reasonable manner, designed to protect religious communities from impermissible interference from the state.¹⁰² But they also acknowledge that its application may well bar legitimate lawsuits for discrimination—and that is a legitimate result for them.¹⁰³ The rationale is that the courts must choose between protecting citizens from discrimination or protecting the separation of church and state, and this exception solidifies that choice.¹⁰⁴

Perhaps, if the definition of “ministerial” had not been seriously diluted over the years, this would be a more valid argument. But the fact is that many courts, culminating with the Supreme Court, have eliminated almost wholly the need for the religious institution to prove the main component of the exception—that the employee is, indeed, in a ministerial position. Moving from a “primary duties” test¹⁰⁵ to the far more ambiguous “important to the church’s functions”¹⁰⁶ analysis, and making clear along the way that courts will not delve into the meaning of either,¹⁰⁷ the courts have turned what started out as a legitimate compromise between religious institutions and their workers into a one-sided, inflexible repudiation of Congress’ intent and workers’ rights.¹⁰⁸ The courts have made the decision to accept the word of the defendant em-

⁹⁸ Dictionary.com, <http://dictionary.reference.com/browse/exception?s=t> (defining exception).

⁹⁹ Dictionary.com, <http://dictionary.reference.com/browse/exempt?s=t> (defining exempt).

¹⁰⁰ See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

¹⁰¹ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170-72 (4th Cir. 1985) (using far more specific and absolute language).

¹⁰² See Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. 96, 175-76 (2011).

¹⁰³ See *id.* at 176.

¹⁰⁴ See *id.*

¹⁰⁵ See Edward G. Phillips, *Ministerial Exception Meets Its Match: Primary Duties of Secular Employees*, TENN. B.J., Oct. 2010, at 32, 33 (explaining that the “primary duties” test removes individuals like administrative staff, custodians, and athletic coaches from the ministerial exception because they are not critical to the church’s spiritual mission).

¹⁰⁶ See *The Ministerial Exception to Title VII*, *supra* note 22, at 1778-79 (describing the broadening of the “primary duties” test to include individuals ranging from a press secretary to a choir director within the ministerial exception).

¹⁰⁷ See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

¹⁰⁸ See *Lupu & Tuttle*, *supra* note 90, at 128. The authors contend that once the court has made the determi-

ployers regarding facially discriminatory actions with virtually no investigation or challenge as to whether their actions are, in fact, merely pretext to unlawful discrimination.¹⁰⁹

One commentator sums up probably the major concern regarding the exemption: it has next to nothing, and frequently literally nothing, to do with religion.¹¹⁰ The cases creating the exemption are about non-religious issues: sex, age, disabilities.¹¹¹ Tellingly, there are few, if any religious institutions defending their actions by claiming the right to discriminate based on their religion.¹¹² And it would be difficult for them to do so—the Free Exercise clause, even if applied to entities rather than individuals, does not grant religions the right to discriminate against others; it merely grants the right to free expression of their own religious beliefs.¹¹³ But the courts have allowed religious employers an exception Congress did not—the right to be shielded for non-religious impermissible behavior.¹¹⁴ Requiring a church to hire someone with a disability (or at least prove a non-discriminatory reason for not doing so) is not the same as ordering it to hire someone of a different faith—a clear religious ground.¹¹⁵ Applying non-discrimination laws in this manner would do nothing to encroach on the church’s *religious* freedom, but would merely hold it to the same standard as other employers on non-religious issues.¹¹⁶ There is little danger of the courts holding the Catholic or Orthodox Jewish faiths liable for not hiring women clergy, because the exclusion of women clergy is a part of their doctrinal beliefs.¹¹⁷ But it is difficult to reconcile the reasoning of the courts in declining to hold them liable for refusing to hire a disabled male clergy who is capable of performing the required tasks (even with the reasonable accommodations required under the ADA).¹¹⁸ And this is exactly the likely result of holdings like *Hosanna-Tabor* and all that came before it. Requiring a non-discriminatory reason for such actions from the church, *even for a ministerial position*, simply allows the employee to attack the validity of the reason; proving *pretext* on the part of the church does not intrude into the church’s *religious* functions.¹¹⁹

The dilution of even the inquiry into whether an employee is a “minister” under the free expression clause leaves the court with little ability to oversee actual discriminatory practices by a religious institution. In addition, courts have held that if an employee is somehow, even with the

nation that the employee fits into the “ministerial” definition—a fairly brief examination at this point—the exception literally cuts off all possibility of court analysis of the claims. *Id.* This includes assertions by the institutional defendant that it has not discriminated but rather has justifiable and permissible (religious-based) reasons for the treatment, which do not even have to be disclosed. *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *See* Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1058 (1996).

¹¹¹ *Id.* at 1106-07.

¹¹² *See id.* at 1107.

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.* at 1108.

¹¹⁷ *See id.* at 1108-09.

¹¹⁸ 42 U.S.C. § 12111(9)(A)(2009).

¹¹⁹ *See* Rutherford, *supra* note 110, at 1108 (citing *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1043 (8th Cir. 1994)).

most minimal inquiry (so as not to violate the Freedom of Expression clause), found not to be in a ministerial position,¹²⁰ the institution can then argue a violation of the Establishment Clause, citing impermissible entanglement of church and state by the court's investigation of the *non-religious rationale* for the alleged discrimination.¹²¹ A double-edged sword, indeed.

IV. THE FIRST AMENDMENT NEVER LOOKED LIKE THIS

There are concerns that the prevailing view, validated in *Hosanna-Tabor*, dismisses the true virtues of the Free Expression and Establishment Clause by combining permissible religious-based discrimination, such as the requirement for male-only clergy of some religions, with the (theoretically, at least) non-permissible types of discrimination levied against ministerial employees.¹²² This gives religious institutions an ability to shield themselves from liability for discriminatory practices that is not afforded to other employers.¹²³ This does not merely recognize the Constitutional protections of separation of church and state, but elevates religious entities to a far higher ground than everyone else.¹²⁴ One noted commentator opines that “[i]o say that religious liberty must encompass the right to harm others is to turn the First Amendment on its head.”¹²⁵ (*emphasis added*). Indeed, years of allowing religious institutions to “handle” their own sex abuse problems necessitated mass overhauls of criminal statutes only after scores of children were harmed by the inaction of the state.¹²⁶

In extending the ADA to religious institutions, one need not and should not compare child sexual abuse to employment or other types of discrimination. The theory that status as a religious entity should release that entity from liability for otherwise legally impermissible acts actually runs counter to the concept of separation of church and state, and would mean that we would be granting the church the right to harm others.¹²⁷ Release from liability permits religious institutions to claim immunity in areas not intended by our constitution or our legislature.

¹²⁰ Some argue that even allowing the courts to determine whether the employee is, in fact, a minister within the church's definition risks substituting the secular judgment of the court for the church's view. See *The Ministerial Exception to Title VII*, *supra* note 22, at 1777.

¹²¹ See Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 512 (2001).

¹²² See Jessica R. Vartanian, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049, 1049-50 (2009).

¹²³ See *id.* at 1050.

¹²⁴ See *id.*

¹²⁵ See *id.* (citing MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 7 (2005)). Hamilton cites the sad and lengthy history of child sexual abuse by religious figures, often condoned by the religious institutions themselves, as reason for concern that we not elevate religion to such an exalted position that we fail to hold it accountable for impermissible acts. See David Gibson, *Monsignor William Lynn Convicted in Landmark Catholic Sex Abuse Case*, WASH. POST (June 22, 2012) http://www.washingtonpost.com/national/on-faith/monsignor-william-lynn-convicted-in-landmark-catholic-sex-abuse-case/2012/06/22/gJQA1cJsvV_story.html; Sharon Otterman & Ray Rivera, *Ultra-Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y. TIMES (May 9, 2012) <http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all>.

¹²⁶ See generally Act of May 3, 2002, ch. 107, 2002 Mass. Acts, available at <http://www.malegislature.gov/Laws/SessionLaws/Acts/2002/Chapter107> (requiring certain religious officials to report abuse of children).

¹²⁷ Vartanian, *supra* note 122, at 1050.

For example, the Catholic Church and other religious entities opposed to the individual mandate of the Affordable Care Act are waging a major battle in protest of the Act's requirement that all employers provide contraception coverage under the Affordable Care Act.¹²⁸ The churches claim the law impinges on their ability to function within their own religious doctrines, even after a compromise agreement that would have insurance companies paying for the disputed care.¹²⁹

In a case similar to *Hosanna-Tabor*, a church fired a lay teacher in a Catholic school after she admitted to undergoing in vitro fertilization.¹³⁰ The Church maintains its position that its employees must follow the tenets of the Church even if they are *not* religious teachers.¹³¹ The case will be a test of how far courts will extend *Hosanna-Tabor*. It could mean an extension beyond religious employees, since the teacher has never taught or had any interrelation with religion at the school.¹³²

In the aforementioned case, if the court were to apply ministerial exception doctrine to the Church, it would be an enormous expansion of what "ministerial" actually means. It would also lead to concerns – in addition to the concerns raised by the contraception debate of the Affordable Care Act – about whether and how religious employers can demand their employees *observe* the faith in their *personal* lives, including instructing them on the medical care and treatment they may receive.

As one commentator noted, it is unlikely the courts are shielding religious entities from liability for discrimination because they do not care if churches discriminate; instead, courts may think they must shield them from liability under the First Amendment.¹³³ The ministerial exemption grew out of an exception to Title VII of the Civil Rights Act of 1964 permitting religious organizations to discriminate on the basis of religion (i.e. no female Catholic priests), but not for other protected attributes: race, sex, national origin.¹³⁴ The Fifth Circuit in *McClure* extended the ministerial exception, without explanation, to a church minister allegedly discriminated against by the church on the basis of her sex, and reasoned that the church's actions were fundamentally and inextricably tied to its ecclesiastical functions.¹³⁵

Some defenders of the exception point to the difficulty for courts to separate ministerial from non-ministerial duties for persons such as lay teachers who teach standard materials but also lead a class in prayer.¹³⁶ Some courts use a religious historical analysis that cites the church's

¹²⁸ See, e.g., Melinda Henneberger, *Obama Ruling Requires Catholic Institutions to Violate Church Teaching*, WASH. POST (Feb. 2, 2012, 7:57 PM), http://www.washingtonpost.com/blogs/she-the-people/post/obamas-health-care-mandate-on-birth-control-is-alienating-catholics/2012/02/02/gIQA0k0WlQ_blog.html.

¹²⁹ See Kate Brumback & Greg Bluestein, *Court Hears Case of Pregnant St. Cloud Teacher Firing*, ORLANDO SENTINEL (Apr. 10, 2012, 3:56 PM), http://articles.orlandosentinel.com/2012-04-10/news/os-pregnant-teacher-fired-in-court-041012-20120410_1_jarretta-hamilton-southland-christian-school-maternity.

¹³⁰ Leigh Remizowski, *Teacher Who was Fired After Fertility Treatments Sues Diocese*, CNN (Apr. 26, 2012), http://articles.cnn.com/2012-04-26/us/us_indiana-in-vitro-lawsuit_1_fertility-treatments-fertility-doctor-diocese-officials?_s=PM:US.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Rutherford, *supra* note 110, at 1113-14.

¹³⁴ See Laycock, *supra* note 46 at 1375 (citing 42 U.S.C. § 2000e-1 (1976)).

¹³⁵ *Id.* (citing to *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972)).

¹³⁶ See, e.g., Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 64-65 (2011).

evolution of two spheres of authority, spiritual and secular; some courts compare the religious historical analysis to the church's functions today to determine that religious institutions are entitled to decide all matters of church governance, faith and doctrine.¹³⁷

The problem with the historical analysis approach is that it directly contradicts the very concept of separation of church and state embodied in the First Amendment. If the state simply accedes to all actions of the church, it is not asserting its own actions nor protecting its citizens from possible abuses, it is simply accepting the church's assertions as evidence of non-abuse. The current application of the ministerial exception provides for minimal inquiry at best into whether the employee is in a covered ministerial position, and virtually none as to whether the church's rationale for discrimination is pretextual.

A unanimous Court in *Hosanna-Tabor* accepted that a "called" teacher instructs secular subjects from a "Christ-centered perspective," making her a ministerial employee and barring her from action under the ADA.¹³⁸ As in earlier cases, the question in *Hosanna-Tabor* rested on who exactly is a minister: is it someone who is directly involved in formulating and/or promoting church policy, or is it someone on the very fringes of such actions, such as the lay teacher who may lead a class in prayer or teach an occasional religion course?¹³⁹ The Court here recognized both the exemption and the right of the church to define for itself its employees, while declining to find a bright line in categorizing a "minister," thus leaving it for further debate.¹⁴⁰ This of course further exacerbates the concerns with the exception, including that the courts will not even attempt to determine if religious entities are engaging in impermissible, non-religious based discrimination. *Hosanna-Tabor* does not explain away the unease over the ministerial exception, it merely affirms its existence and leaves thousands of workers further susceptible to pretextual and thus impermissible discrimination. One had hoped at the very least the Court would have either demanded a modicum of transparency in apparent church discrimination, or at least explained better why it should not. These too, are unfortunately left to another day – or perhaps another source. In 1999, the Court revised the ADA in another area, holding that its protections did not apply to those whose disabilities had been mitigated by medications or other devices.¹⁴¹ Much criticism and confusion ensued,¹⁴² causing Congress to finally address the issue in an amendment to the Act clarifying its original intent.¹⁴³ Time, and perhaps political accountability, will tell if the same will occur in this instance.

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

¹³⁷ Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 156, 158-60 & n.25 (2011).

¹³⁸ Wasserman, *supra* note 76, at 289.

¹³⁹ *Id.* at 293 (citing *Hosanna-Tabor*, 132 S. Ct. 694 (2012)).

¹⁴⁰ *Id.*

¹⁴¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

¹⁴² *See, e.g.*, Frank S. Ravitch & Marsha B. Freeman, *The Americans with "Certain" Disabilities Act: Title I of the ADA and the Supreme Court's Result Oriented Jurisprudence*, 77 DENV. U. L. REV. 119 (1999-2000).

¹⁴³ *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553, 3553 (2008) (finding the holdings of *Sutton v. United Airlines* and its companion cases to have eliminated "protection for many individuals whom Congress intended to protect").