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A RELIGIOUS ORGANIZATION’S AUTONOMY IN MATTERS OF SELF-GOVERNANCE:

HOSANNA-TABOR AND THE FIRST AMENDMENT

By Carl H. Esbeck*

In the second week of January, the U.S. Supreme Court handed down its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.¹ The case involved a fourth-grade teacher, Cheryl Perich, suing her employer, a church-based school, alleging retaliation for having asserted her rights under the Americans with Disability Act (ADA).² The Equal Employment Opportunity Commission filed the original suit, and the teacher intervened as a party. In the lower federal courts *Hosanna-Tabor* raised the “ministerial exception,” which recognizes that under the First Amendment religious organizations have the authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, retention, and other terms and conditions of employment. Over the last forty years the ministerial exception has been recognized by every federal circuit to have considered it. Indeed, the exception overrides not just the ADA but also a number of venerable employment nondiscrimination civil rights statutes.³ Just who is a “minister,” however, has varied somewhat from circuit to circuit—and in any event the Supreme Court had never taken a case involving the ministerial exception.

The Supreme Court, in an opinion by Chief Justice John Roberts, wrote that “[r]equiring 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.”⁴ The Court went on to say that although “the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”⁵ Accordingly, in a lawsuit that strikes at the ability of the church to govern the church, any balancing of interests between a vigorous eradication of employment

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¹ 132 S. Ct. 694 (2012).

² 42 U.S.C. §§ 12101 *et seq.*

³ *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (race, color, national origin, sex, and religious discrimination); The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex discrimination); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; 42 U.S.C. §§ 1981 and 1981a (race discrimination).

⁴ *Hosanna-Tabor*, 132 S. Ct. at 706.

⁵ *Id.* at 710.

discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck by the First Amendment.⁶

I. Internal Governance of Religious Organizations

The U.S. Department of Justice's Office of the Solicitor General (OSG) claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the OSG, was that government be formally neutral with respect to religion and religious organizations. That was successfully done here, said the OSG, when Congress enacted the ADA, which by its terms treated religious organizations just like every other employer when it came to discrimination on the basis of disability. By extension, the same would be true of federal and state civil rights statutes prohibiting discrimination on the bases of sex, age, race, and so forth. The OSG allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were subject to the ADA.⁷ In the great cause of equal treatment, intoned the OSG, the government could be blind to religion. To be sure, Congress could choose to accommodate religion, but the First Amendment did not require it to do so.

The Court's reaction to the OSG's religion-blind government was to call the proposition "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."⁸ Solicitude, of course, means attentive care or protectiveness. Religious organizations do have freedom of expressive association to the same degree as other expressional groups.⁹ But religious organizations have more. The very text of the First Amendment recognizes the unique status of organized religion, a status that makes a properly conceived separation of church and state desirable because the right ordering of these two centers of authority is good for both.¹⁰

So the *Hosanna-Tabor* Court held that there is a constitutional requirement for a ministerial exception.¹¹ Before proceeding to examine more closely the facts that convinced the Court that this fourth-grade teacher was a "minister," the Chief Justice had to distinguish the leading case of *Employment Division, Department of Human Resources of Oregon v. Smith*.¹² The State of Oregon listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* held jobs as counselors at a private drug

⁶ *Id.* ("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.")

⁷ *Id.* at 706.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See, e.g.,* *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."). *McCullum* held that for a public school to open its classrooms to the teaching of elective religion classes was a violation of the Establishment Clause. *Engel* held that teacher-led prayer in a public school classroom violated the Establishment Clause.

¹¹ *Hosanna-Tabor*, 132 S. Ct. at 706.

¹² 494 U.S. 872 (1990).

rehabilitation center.¹³ They were fired for illegal drug use (peyote), and later denied unemployment compensation by the state because they were fired for cause. Male members of the Native American Church ingest peyote in the course of a sacrament. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a neutral law of general applicability that happened to have an adverse effect on a religious practice. Chief Justice Roberts admitted that the ADA was a general law of neutral application that happened to have an adverse effect on *Hosanna-Tabor's* ability to fire a classroom teacher.¹⁴ But he then, for a unanimous Court, drew this distinction between the present case and *Smith*:

[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma").¹⁵

Accordingly, there is a subject-matter class of cases to which the rule in *Smith* does not apply described as "an internal church decision that affects the faith and mission of the church itself." The firing of Perich was characterized as "internal," meaning a decision of self-governance. The firing of the plaintiffs in *Smith* was characterized as "outward," meaning that the state's denial of unemployment did not regulate a decision of church governance. Moreover, the ingestion of peyote regulated in *Smith* was characterized as a "physical act," whereas the firing of Perich regulated by the ADA was not a physical act but a "church decision."¹⁶

Obviously a sacrament is an important religious practice. Obviously the plaintiffs in *Smith* suffered a burden on religious conscience that was unrelieved by the rule of *Smith*. But the point of *Hosanna-Tabor* was not to relieve burdens on religious conscience. If it were, then *Hosanna-Tabor* would have overruled *Smith*. That did not happen. Rather, *Hosanna-Tabor* distinguished *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on religious conscience¹⁷ but government interference with the organizational autonomy of religious groups.¹⁸

¹³ *Id.* at 874.

¹⁴ *Hosanna-Tabor*, 132 S. Ct. at 707.

¹⁵ *Id.*

¹⁶ This passage in *Hosanna-Tabor* references *Smith* where it also says that the exercise of religion often involves "the performance of (or abstention from) *physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." 494 U.S. at 877 (emphasis added).

¹⁷ *Hosanna-Tabor*, 132 S. Ct. at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."). See *infra* notes 30-32 and accompanying texts.

¹⁸ One can predict that the Court's distinction between *Smith* and *Hosanna-Tabor* will be contested. It is true that a governance decision by the church was not directly countermanded in *Smith* like it was by the ADA in *Hosanna-Tabor*. In *Smith*, the plaintiffs were fired from their jobs because of peyote use and then later denied unemployment compensation. Neither the loss of the jobs nor the denial of compensation directly countermanded the sacramental practice of the Native American Church. For all practical purposes, however, the actual practice of peyote ingestion

Following the quoted language above, the *Hosanna-Tabor* Court went on to provide another example where *Smith* does not apply: in lawsuits over church property, the government must not take sides on the question concerning the rightful ecclesiastical authority to resolve the property question.¹⁹ These two examples—a church selecting its own minister and a church determining the rightful ecclesiastic to solve property disputes—are contrasted with the religious practice at issue in *Smith*, namely the ingestion of peyote as part of a sacrament. The Court distinguished *Hosanna-Tabor* from *Smith* because the decision to hire and fire a minister is about who governs the church.²⁰

It follows that projecting the scope of *Hosanna-Tabor*'s distinction from *Smith* means determining what additional subject matter falls into the description “internal church governance.” There is help from another quarter: Justice Alito’s concurring opinion, joined by Justice Kagan, said that this subject-matter class of cases recognizes a “religious autonomy” found in the Establishment and Free Exercise Clauses that together protect “a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.”²¹

A survey of the cases yields relatively few—but important—subject-matter areas within which civil officials have been barred categorically from exercising authority²²: (1) questions about correct doctrine and resolving doctrinal disputes;²³ (2) the choice of ecclesiastical polity,

during the sacrament was prevented or driven underground. But—as I say in the text—Oregon imposed a burden on religious conscience, whereas *Hosanna-Tabor* is not about remediating burdens on religious conscience.

¹⁹ This passage need not be read as in tension with *Jones v. Wolf*, 443 U.S. 595 (1979), which the Court does not cite. In intra-church disputes over church property, *Jones* permitted state courts to use neutral principles of law so long as in locating the person or body with authority to resolve the dispute the tribunal does not consider, in the Court’s words, “religious doctrine and polity.” *Id.* at 608. *Jones*, of course, was consistent with prior church autonomy cases such as *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 116 (1952), which reserves to the church alone questions of “church government as well as those of faith and doctrine.” *See Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff*). *Hosanna-Tabor* does stand against those who read *Jones* as confining notions of religious autonomy to the sole task of preventing the civil resolution of religious questions.

²⁰ Another way to think about neutral laws that apply generally but happen to have a disparate effect on a particular religion (the *Smith* rule) is to focus on the practical implications of the Supreme Court extending the categorical autonomy of *Hosanna-Tabor* to the means of performing religious sacraments. With minors present, the taking of LSD or the handling of poisonous snakes could not be prohibited if categorical autonomy was extended to this subject matter. Drug use and other inherently dangerous activities are best handled by a balancing test where the government’s interests in health and safety can be factored into the mix. *Cf. Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 546 U.S. 418 (2006) (Religious Freedom Restoration Act’s balancing test applied to importation of otherwise illegal drug for use only by adult members of sect in the course of religious rite). Accordingly, while the Court’s distinction of *Smith* and *Hosanna-Tabor* is contestable, it does make practical sense to distinguish governance from sacraments.

²¹ *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring); *see Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (“[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.”) (Brennan, J., concurring) (internal quotations and citation omitted).

²² I do not claim that the series of subject-matter classes to follow is necessarily a closed set. There may be other types of disputes the subject of which fit the description of “internal church governance,” but my research failed to turn them up.

²³ *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes); *Presbyterian Church v. Hull Mem’l Church*, 393 U.S. 440, 449-51 (1969) (rejecting rule of law that discourages changes in doctrine); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981)

including the proper application of procedures set forth in organic documents, bylaws, and canons;²⁴ (3) the selection, credentials, promotion, discipline, and retention of clerics and other ministers;²⁵ (4) the admission, discipline, and expulsion of organizational members;²⁶ (5) disputes over the direction of the ministry, including the allocation of resources;²⁷ and, (6) communication to the organization's clerics or the laity about matters of governance.²⁸

The types of lawsuits that fall into the *Hosanna-Tabor* category of internal church governance are likely few because, inter alia, no reply is permitted based on governmental interests. That is, once it is determined that a suit falls within the subject-matter class of church governance, there is no judicial balancing. There is no balancing because there can be no legally

(courts not arbiters of scriptural interpretation); *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914) (religious practices concerning vow of poverty and communal ownership of property are not violative of individual liberty and will be enforced by the courts).

²⁴ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (same); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts will not interfere with merger of two Presbyterian denominations).

²⁵ In addition to *Hosanna-Tabor*, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976) (civil courts may not probe into defrocking of cleric); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (courts not to probe into clerical appointments); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office). Cf. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892) (refusing to apply general law preventing employment of aliens to church's clerical appointment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1872) (unconstitutional to prevent priest from assuming ecclesiastical position because of refusal to take civil oath).

²⁶ *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them); cf. *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914) (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to the rules consensually entered into, such as vow of poverty and communal ownership of property).

²⁷ What is meant by "direction of the ministry" are decisions like the adoption of a budget, expanding the existing church building in the downtown area rather than to sell and move to the suburbs, and to continue renting a building for worship so as to have more resources for the support of missionaries. Decisions of this sort have led to church splits and generated lawsuits.

²⁸ See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002). In *Bryce*, a local Episcopalian church was sued by its fired youth pastor and her domestic partner. The church had communicated among its leaders and to the parents of the youth in the church with respect to why the youth pastor had been dismissed, giving her lesbian relationship as a primary reason. Among the various claims was the theory that the privacy of the two was invaded by the communication of the sexual relationship to the leaders and parents. The court held that the church's communication was protected by the First Amendment. *Id.* at 657-59. The communication was relevant to the governance of the church so as to explain to the leaders and parents the reason for the dismissal. Similarly, the claim of the domestic partner was dismissed because her claim for invasion of privacy was derivative of the decision not to retain the youth pastor. *Id.* at 658-59.

sufficient governmental interest. The First Amendment has already struck that balance.²⁹ In this regard, the Court lectured the OSG concerning its argument that *Hosanna-Tabor*'s religious reason³⁰ for firing Perich was pretextual.³¹ "This suggestion misses the point of the ministerial exception," wrote the Chief Justice.

The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.³²

Again, the religious autonomy recognized in *Hosanna-Tabor* is categorical. A federal court has Article III jurisdiction to determine whether the employee in question is a minister. If so, that is the end of the lawsuit.³³ Neither the government nor the employee is permitted to reply that there is an offsetting interest.

As should now be apparent, the decision in *Hosanna-Tabor* is not about an ordinary constitutional right—subject to balancing—but about a structural limit on the scope of the government's authority. That *Hosanna-Tabor* is a limit on the regulatory authority of the

²⁹ *Hosanna-Tabor*, 132 S. Ct. at 710 ("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.").

³⁰ Perich told *Hosanna-Tabor* that she had seen an attorney and intended to assert rights under the ADA. *Id.* at 700. One response was for the church to invoke the Lutheran teaching that ministers must not sue their congregations or fellow ministers, but instead seek to resolve complaints through church judicatories. This teaching, first articulated by Luther himself, is premised on the New Testament passage found at First Corinthians 6:1-8. Given the Supreme Court's disposition of the case, it turned out to be irrelevant that *Hosanna-Tabor* had a religious reason for dismissing Perich. *Id.* at 709.

³¹ *See id.* at 715-16 (Alito, J., concurring) (discussing limits on the operation of "pretext" if raised by an employee). Unlike *Hosanna-Tabor*, claims for employment discrimination based on sex, race, and so forth, may be brought against a religious organization by an employee who is not a minister. The organization may defend itself by saying that the employee was dismissed for religious reasons. There are two possible issues here, and care should be taken so as not to conflate them. One issue is sincerity, and the other is pretext. The plaintiff may respond by arguing that there is no such religious belief and the assertion by defendant that there is one is fake (insincere). *See United States v. Ballard*, 322 U.S. 78 (1944) (holding that courts may inquire into the sincerity of claims of religious belief (Is he faking it?), but not the truth or falsity of a religious tenet (Is it heresy?)). Pretext is different. Pretext is a common response by plaintiffs when a religious employer raises the defense that the plaintiff's dismissal from employment was for religious reasons. By raising pretext the plaintiff is saying that religion was not the real reason for the dismissal, but that the actual reason was plaintiff's disability, or plaintiff's sex, or the like. Pretext cannot challenge whether the asserted religious belief exists; pretext merely claims that the religious belief was not the cause of the dismissal. *Hosanna-Tabor* at 715 (Alito, J., concurring) (Even when employee is not a minister, First Amendment constrains weighing both "the importance and priority of the religious doctrine in question with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.").

³² *Hosanna-Tabor*, 132 S. Ct. at 709 (internal citation omitted).

³³ *Id.* at 709 n.4. The ministerial exception is characterized in this footnote as an affirmative defense, which means that the religious organization has the duty to plead the matter and meet the burdens of producing evidence and persuasion if the defense is factually in contention. In most instances the question ("Is plaintiff a minister?") is to be disposed of as a threshold matter. *See* FED. R. CIV. P. 12(b)(6), 12(c) & (d); *id.* ("District courts have power . . . to decide whether the claim can proceed or is instead barred by the ministerial exception."). Courts initially should restrict discovery to the "minister" question lest the burden of discovery qua discovery violate religious autonomy. It is a question of law, of course, whether the court has before it a lawsuit that falls into one of the subject-matter classes that *Hosanna-Tabor* has set aside as a matter of categorical religious autonomy.

government explains why the case is based in part on the Establishment Clause.³⁴ The text of that clause bespeaks a structural limit on authority: “Congress shall make no law” about a given subject matter described as “an establishment of religion.”³⁵ As the Chief Justice wrote, “[T]he Free Exercise Clause . . . protects a religious group’s right to shape its own faith and mission” by controlling who are its ministers, and “the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions.”³⁶ The Chief Justice gave examples where the English Crown had interfered with the appointment of clergy in the established Church of England.³⁷ The Establishment Clause was adopted to deny such authority to our national government.³⁸ Justice Alito is helpful here as well by pointing out one of the historic reasons for why the separation of church and state limits the civil government: “[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”³⁹ Religious organizations working to check a government with authoritarian pretensions is one way in which church-state separation does useful work.

Balancing is done in free exercise cases, but not cases decided under the Establishment Clause. In *Hosanna-Tabor*, there is a welcome absence of verbal tests: enjoining “excessive government entanglement with religion”; prohibiting “endorsement” of religion that lessens the standing of some in the political community; and the “principal or primary effect must be one that neither advances nor inhibits religion.” Such tests are still valid when applicable, but not in cases like *Hosanna-Tabor* where the subject matter warrants the categorical protection of what Justice Alito called “religious autonomy.”⁴⁰ In such cases, the First Amendment, understood within the historical setting that gave rise to its adoption, has determined that there are a few areas of authority that have not been rendered unto Caesar.

II. Testing the Scope of “Internal Church Governance”

In future litigation, advocates on the losing side of *Hosanna-Tabor* will push hard to narrow the foregoing subject-matter classes that implicate internal church governance. Contrariwise, advocates for churches and other religious organizations will push to read the class of decisions affecting “the faith and mission of the church itself” as broader than mere governance—arguing that the mission of church is as expansive as reaching the entire world. The civil courts will do well to resist both of these pressures. The *Hosanna-Tabor* categories are

³⁴ See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

³⁵ The First Amendment to the U.S. Constitution provides in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

³⁶ *Hosanna-Tabor*, 132 S. Ct. at 706.

³⁷ *Id.* at 702.

³⁸ *Id.* at 703-04. The Court relied on two events involving James Madison, one while he was Secretary of State and one while President. *Id.*

³⁹ *Id.* at 712 (Alito, J., concurring).

⁴⁰ The label “ministerial exception” does not really fit the holding, and Justice Alito’s use of “religious autonomy” could be understood as an attempt to give a new name to the affirmative defense. *Hosanna-Tabor* is not about an exception to a general rule granted at the benevolence of a tolerant state. Rather, we have a civil government of limited authority, and one of those limits is acknowledged by the Court in *Hosanna-Tabor*. In the American constitutional settlement, the King’s writ simply does not run to matters that concern the inner governance of a church.

workable so long as they are kept to the sphere of church governance, within which religious organizations are truly autonomous.

Assume that on a Sunday morning the senior pastor of a large church endorses a political candidate for public office whose name will appear on the ballot in a partisan election. The endorsement is integrated into the pastor's sermon, and comes nine days before the general election in which the candidate in question is the challenger to a sitting incumbent. There is no attempt by the pastor to claim that in giving the endorsement he is speaking only in his individual capacity, and not for the church. Polls say the race is tight. Further assume that the church is tax-exempt under Internal Revenue Code § 501(c)(3), and thus the endorsement violates IRS statutes and regulations. Is this the type of church communication to the laity that is protected by *Hosanna-Tabor*? Because the communication is about a matter other than governance within the church, I think the endorsement is not protected by *Hosanna-Tabor*.⁴¹

We should not suppose that *Hosanna-Tabor* reaches communication to the congregation about everything, even when done by a cleric on a Sunday from the pulpit. Appeals from a church to the effect that the laity should vote against President Obama because he failed to approve the TransCanada Keystone XL pipeline coming out of Alberta is not about church governance. There may well be a Christian view of the environment and the continued use of fossil fuels, but any such religious teaching is remote to the question of a church's self-government.

An example of a communication that was about governance led to a defamation claim growing out of the oversight of a local church by denominational leaders. In a case that arose in Iowa, the district superintendent of the United Methodist Church had heard that certain disruptive activities were occurring at a local church. The superintendent visited the church, attended a worship service, and talked widely with congregants. After returning to his office, the superintendent wrote a letter to the congregation urging that the local church no longer tolerate the disruptive actions of one of its members (she was not named, but it was apparent to most congregants who was being singled out). That person sued, alleging that the letter was defamatory. The state court acknowledged that the letter could not be the basis of a tort claim with respect to "communications between members of a religious organization concerning the conduct of other members or officers."⁴² This is consistent with the approach in *Hosanna-Tabor*. A problem developed, however, because the letter was mailed by the superintendent to an audience wider than just the officers and members of the church.⁴³ The broader distribution took the letter—and the alleged libel—outside the sphere of church governance.

An illustration of the "direction of the ministry" issue implicating *Hosanna-Tabor* occurs in the spate of denominational decisions to close local churches and schools. The Archbishop of

⁴¹ The political endorsement by the pastor may well be protected by the Free Speech Clause. However, that is an altogether different analysis than the one present in *Hosanna-Tabor*, and it will involve a discussion of unconstitutional conditions.

⁴² *Kliebenstein v. Iowa Conf. of the United Methodist Church*, 663 N.W.2d 404, 407 (Iowa 2003). The court also noted with approval that the parties filing the tort "[c]onced that the Free Exercise and Establishment Clauses of our federal and state constitutions preclude civil court interference in the disciplinary and governance matters of a religious entity." *Id.* at 406.

⁴³ *Id.* at 407.

Boston sought to close a parish church as part of an overall plan to consolidate resources in a time of financial stress and a shortage of priests. Several parish members sued and sought a preliminary injunction. The district court denied the injunction and held that parish property was under the control of the Archbishop. The court found no evidence of a constructive or resulting trust on behalf of the parish church, as an entity, or the parish members, as individuals.⁴⁴ That result is certainly correct, but *Hosanna-Tabor* would take a more direct approach. That the Catholic Church has an episcopal polity is well understood, and that polity places the final decision concerning matters of property in the hands of the diocesan bishop. *Hosanna-Tabor* tells us that civil courts are to defer to the decisions of the highest ecclesiastical authority with respect to disputes like this that concern the future direction of the ministry.

Three years ago legislation was debated in the State of Connecticut that would have reshaped the future direction of Catholic ministry at each local parish. The bill would have taken financial oversight of each local church away from the diocesan bishop and given the authority to a board of directors made up of lay parishioners. What engendered the bill was a case of embezzlement by a parish priest, a matter already addressed by a criminal prosecution. The proposed legislative remedy was far broader. Only after considerable public controversy and a demonstration of opposition by Catholic leaders was the bill withdrawn.⁴⁵ Under *Hosanna-Tabor*, a court would find that the bill strikes at self-governance and so is per se unconstitutional.

Consider a more nuanced illustration. A female minister on the staff of a large municipal church is sexually harassed by her supervisor. He pressures for quid pro quo sex, and she finally relents in return for a favorable promotion and transfer within the denomination. Three months after the transfer she sues her church under employment civil rights legislation for having permitted a workplace environment where sexual harassment was widespread. The denomination promptly dismisses her. The minister then amends her complaint, adding a claim for retaliation. With reference to *Hosanna-Tabor*, a civil court should dismiss nearly the entire claim of sexual harassment because the selection of ministers is a matter of internal governance. However, a limited civil rights claim can be kept but sharply pared down to a remedy for tort-like damages as a result of the sexual harassment. The minister cannot sue for reinstatement, or for back pay, front pay, or any other compensation, punitive damages, or attorney's fees based on the loss of her job. The retaliation claim is derivative of the claim for sexual harassment; because the primary job-loss claim is precluded by *Hosanna-Tabor*, the retaliation claim must fail as well. The minister can sue her former supervisor alleging an intentional tort.⁴⁶ And the state may try to prosecute the supervisor for a sexual assault.⁴⁷

⁴⁴ *Akoury v. Roman Catholic Archbishop of Boston*, 2004 WL 2341333 (Mass. Super. Ct. Sept. 14, 2004).

⁴⁵ *See Bill Would Place State in Charge of Catholic Church*, ONENESSNOW.COM, Mar. 11, 2009, <http://www.onenewsnow.com/Printer.aspx?id=441410>; *Catholics Protest Connecticut Church Finance Bill*, REUTERS, Mar. 11, 2009, <http://www.reuters.com/article/2009/03/11/us-usa-religion-catholics-idUSTRE52A7EQ20090311>.

⁴⁶ *Cf. Hosanna-Tabor*, 132 S. Ct. at 710 (“Today we hold only that the ministerial exception bars [an employment discrimination] suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”). Whether the female minister can prove the elements of an intentional tort is another matter.

⁴⁷ *See id.* (“*Hosanna-Tabor* responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. . . . Today we hold only that the ministerial exception bars [an employment discrimination] suit.”). Whether the prosecutor can prove the elements of a sexual assault is another matter.

Finally, consider a case where the spouse of a minister alleged that she suffered harm as a result of her husband's dismissal from a church's employment. Such a claim is entirely derivative of the church's decision not to retain her spouse.⁴⁸ Following *Hosanna-Tabor*, such claims will continue to be dismissed.

III. Who is a “Minister”?

While declining on this occasion to set down a more rigid test or list of factors for determining who is a “minister,”⁴⁹ a unanimous Supreme Court easily found that in function and credentials Cheryl Perich was a minister. While declining to range too far beyond the case at hand, the Court said it agreed with the circuit courts “that the ministerial exception is not limited to the head of a religious congregation.”⁵⁰ It seems implicit in *Hosanna-Tabor* that for the ministerial exemption to be in play the employer would likely need to be religious⁵¹—but it does not need to be a church.⁵² Additionally, if the employer is not a church, the religious fervor of the religious organization may influence the determination of whether the employee is a minister. None of these issues was present in *Hosanna-Tabor*, and so they were not discussed.

Chief Justice Roberts began by noting that *Hosanna-Tabor* held Cheryl Perich out as a minister. She had received the title of “Minister of Religion, Commissioned,” which was attained only with formal training that took her six years to complete.⁵³ Perich also held herself out as a minister in her communication with others and by taking a housing allowance for ministers on her tax return.⁵⁴ As to job functions, Perich taught religion classes four days a week, led her

⁴⁸ *Lewis v. Seventh-day Adventists Lake Region Conf.*, 978 F.2d 940 (6th Cir. 1992) (wife's claims dismissed along with the underlying claims of minister-husband); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974) (wife's 42 U.S.C. §§ 1985 and 1986 claims barred along with underlying claims of her minister-husband); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (wife's claims dismissed along with the underlying claims of minister-husband); *Tidman v. Salvation Army*, 1998 Tenn. App. LEXIS 475, 136 Lab. Cas. (CCH) ¶ 58,441 (Tenn. Ct. App. 1998) (both husband's and wife's claims barred by First Amendment, including all claims indirectly related to church-minister employment relationship).

⁴⁹ *Hosanna-Tabor*, 132 S. Ct. at 707. Shortly after the decision in *Hosanna-Tabor*, the Supreme Court dismissed petitions for certiorari in two cases that were being held pending the decision. See *Weishuhn v. Catholic Diocese of Lansing*, No. 10-760, *cert. denied*, 2012 WL 117540 (U.S. Jan. 17, 2012) (where elementary teacher at religious school was a “minister” subject to the exception, is teacher barred from bringing state whistleblower claim against church for failure to report violations of state law?); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, No. 10-769, *cert. denied*, 2012 WL 117541 (U.S. Jan. 17, 2012) (where director of religious formation was “minister” subject to the exception, is she barred from pursuing civil rights claim for hostile work environment?).

⁵⁰ *Hosanna-Tabor*, 132 S. Ct. at 707.

⁵¹ The civil courts understandably struggle when defining “religious organizations,” for they do so against the backdrop of limitations imposed by the First Amendment. The struggle is equally difficult when the term or its equivalent is used by Congress in legislation. For an impressive effort, see *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (setting forth a nine-factor test for determining if an organization is religious for purposes of sec. 702(a) of title VII of the Civil Rights Act of 1964).

⁵² In its corporate form, *Hosanna-Tabor* was a church that operated a school. However, throughout *Hosanna-Tabor* the Justices freely interchanged “church” and “religious organization.” It is safe to conclude that *Hosanna-Tabor* is not limited to churches.

⁵³ *Hosanna-Tabor*, 132 S. Ct. at 707.

⁵⁴ *Id.* at 707-08.

students in prayer three times a day, conducted a daily devotional, accompanied her class to chapel every Friday, and took her turn with the other teachers in leading the chapel service.⁵⁵

The OSG and Perich both pointed out to the Court that other teachers in the school who do not hold the title of a “commissioned” teacher did the same above-listed religious activities. In reply, the Court first agreed that a religious title, like that held by Perich, without the substance, would not itself make an employee a minister. But it was also wrong to dismiss the significance of a title: it is properly a factor in concluding that Perich was a minister.⁵⁶ Second, the fact that other teachers did not have a religious title but did the same religious duties did not help Perich’s case. First, it might be that the other teachers were also ministers within the meaning of the exception. Second, it cannot be dispositive that performing the religious duties did not require the title held by Perich, wrote the Chief Justice, especially in light of the agreed facts that there was a shortage of commissioned teachers.⁵⁷

The circuit court had ruled that Cheryl Perich was not a minister because the religious duties such as religion class, prayer, and chapel consumed only a small part of her school day, perhaps as little as forty-five minutes. To that line of analysis, the Chief Justice said, “[T]he issue before us . . . is not one that can be resolved by a stopwatch.”⁵⁸ It is not that the amount of time spent on particular duties is irrelevant, wrote the Court, but that the time “factor cannot be considered in isolation, without regard to the nature of the religious functions performed,” as well as the other factors.⁵⁹

Summarizing his points, the Chief Justice wrote: “In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”⁶⁰

Justice Thomas, concurring, took a view more favorable to the church. So long as a church asserted in good faith that one of its employees was a minister, it was his argument that this should be the end of the matter. To probe beyond testing the sincerity of the church’s assertion was to have a civil court resolve a religious question, a matter prohibited by the First Amendment.⁶¹

Justice Alito, concurring, joined by Justice Kagan, believed that the Court should take more affirmative steps to resolve the inevitable cases that will come before the lower courts. While Justice Thomas would leave the definition of minister entirely up to the church, Justices Alito and Kagan would not. These two Justices twice described in near identical terms three functions, at least one of which is performed by an employee who they would consider a minister. The first passage reads: “The ‘ministerial’ exception . . . should apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious

⁵⁵ *Id.* at 708.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 709.

⁵⁹ *Id.*

⁶⁰ *Id.* at 708.

⁶¹ *Id.* at 710-11 (Thomas, J., concurring).

ceremonies or rituals, or serves as a messenger or teacher of its faith.”⁶² The second passage reads:

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.⁶³

Justices Alito and Kagan sought to guide future courts. They believed that a minister will serve at least one of three functions: lead the organization, conduct worship and rituals, or teach the faith. Given that the Chief Justice’s opinion does not provide a baseline for defining who is a minister, I predict many lower courts will at least mention, if not follow, Justices Alito and Kagan when it comes to the three alternative functions of a minister.

What about the status of a faculty member at a religious school who teaches only subjects such as history, mathematics, science, or grammar, and is not involved in classroom prayer, devotions, or chapel? Justices Alito and Kagan opined that such a teacher is not a minister.⁶⁴ Although a religious school that wholly integrates faith and temporal learning might provide a counterexample,⁶⁵ I think Justice Alito’s presumption will generally hold up. I hasten to add that this does not mean that a religious school has lost all of its First Amendment rights vis-à-vis the teacher devoted exclusively to math or history. For example, the math teacher could be hired and fired on a religious basis, albeit not on the bases of race, sex, disability, and so forth. For a religious school to discharge a teacher for religious cause is parallel to a legitimate business reason.

CONCLUSION

⁶² *Id.* at 712 (Alito, J., concurring).

⁶³ *Id.*

⁶⁴ *Id.* at 715 (“It makes no difference that [Perich] also taught secular subjects. While a purely secular teacher would not qualify for the ‘ministerial’ exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones.”).

⁶⁵ Justices Alito and Kagan take for granted independent religious and secular realms each largely defined as the opposite of the other. Secular is not religious; religious is not secular. That dichotomy is liberalism’s worldview, but it is not reality for others. For others, religious convictions and practices typically shape the totality of life, including educational, economic, and political life. For people with a completely integrated world and life view, granting equal treatment to people of diverse faiths in a constitutional system does not set the political system apart from the religious convictions of its citizens, it just means that the political community is not constituted as a community of faith. To teach math or science from a comprehensive viewpoint, for them, is not only a choice but inevitable. The only question is: whose viewpoint? These religious folks enroll their children in a school as an act of choosing—as every parent chooses—a confessional worldview for their children that includes how one thinks about God’s hand in all creation, including mathematics. They see liberalism as unthinkingly excluding religion from the public realm because liberalism presumes an absence of God. This is fine as a personal position, they would argue, but discriminatory when it is the government’s position.

In *Hosanna-Tabor*, a unanimous Supreme Court took a discrete line of cases involving religious disputes and church property⁶⁶ and enlarged on it so as to give rise to a full-throated protection of religious institutional autonomy. The Court did not assume that religious organizations act without error. But when mistakes are made of a certain subject-matter class, *Hosanna-Tabor* locates authority solely in the religious organization as a matter of self-governance. Far more harm than good would result if civil government were to intervene in this class of cases, harm that would flow from a disorder of relations between church and state.

Going forward, there is danger from those who were on the losing side of *Hosanna-Tabor* and who will deny the decision's obvious importance.⁶⁷ But *Hosanna-Tabor* is also in danger from those who embrace it eagerly and then proceed to apply it where not intended. An overly-eager embrace will yield a series of lower court opinions seeming to cut back on *Hosanna-Tabor*, with all the attendant rhetoric about a "clear and present danger" of religion unregulated and out of control.

⁶⁶ *Id.* at 704-05. The *Hosanna-Tabor* Court cited *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); and *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Additional cases involving religious disputes and church property are *Jones v. Wolf*, 443 U.S. 595 (1979); *Md. & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367 (1970) (per curiam); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam); and *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

⁶⁷ Another approach is alarmism, suggesting that results like that in *Hosanna-Tabor* threaten liberalism and its hold on the state. Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 51-52, 61-64 (2010); *see id.* at 62 ("The toleration of illiberal groups is fraught with danger for liberal democracy, which by definition cannot guarantee that such groups will not seize the reins of democratic power." (footnote omitted)). To the fear that the state is in danger from religion, Justice Alito suggests that another way to look at the matter is to ask, "Who watches the watch dog?" *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) ("[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.").