

**NEITHER “MINISTERIAL” NOR AN “EXCEPTION”:
THE MINISTERIAL EXCEPTION IN LIGHT OF
*HOSANNA-TABOR****

INTRODUCTION

In January 2012, the Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.¹ In that case, a unanimous Court affirmed the existence of the so-called “ministerial exception” within the First Amendment’s religion clauses—a doctrine that had previously been recognized and applied by all courts of appeals to bar wrongful termination suits brought by “ministerial” employees of religious institutions against their religious employers under the various employment-discrimination laws.² In short, the Court held that although state and federal employment-discrimination bans generally protect all employees—from Walmart to Wall Street—an “exception” is made for the “ministers” employed by churches, parochial schools, and other religious institutions. Those employees serve at the pleasure of their religious employer, and governments may neither prescribe nor second-guess their hiring or firing.

In spite of—and perhaps even as a result of—the Court’s unanimity, *Hosanna-Tabor* has proven controversial. No one likes to see justice denied, and many scholars believe the ministerial exception does just that. Criticism was swift and varied. Some reflected incredulity; a reluctance to accept the Court’s apparent conclusion that the First Amendment says churches get to break

* I owe the title of this Note to Professor Rick Garnett of Notre Dame Law School. In one of our many discussions about the ministerial exception, he remarked that the name of the doctrine reminds him of the Saturday Night Live sketch “Coffee Talk” in which Linda Richmond—the stereotypical Jewish talk-show host portrayed by Mike Meyers—would ask her audience to “talk amongst yourselves” any time the conversation topic made her emotional—or, as she put it, “verklemp!” To stimulate audience discussion while she composed herself, Richmond would offer conversation topics, including the observation that “Rhode Island is neither a road nor is it an island. Discuss!” The ministerial exception strikes me as something similar, and so I offer the title as a starting point for my analysis.

1. 132 S. Ct. 694 (2012).

2. *See id.* at 705.

the law with impunity.³ Other objections were measured and specific; taking exception to a seemingly unjustified departure from settled law⁴ and mangling of First Amendment doctrine.⁵ But, *Hosanna-Tabor* calls for neither alarm nor a frantic rewriting of constitutional law textbooks. Instead, the ministerial exception is simply one dimension among many of a structural principle long recognized as a central component of our separation of church and state—in full compliance with prior law and entirely explicable under our familiar lines of cases.

This Note argues that the best way to conceptualize the ministerial exception in light of *Hosanna-Tabor* is as a doctrine that is neither “ministerial” nor an “exception.” As the Court held, the ministerial exception’s reach extends beyond priests and other traditional “ministers” to cover part-time religion teachers. But more importantly, its application does not provide an “exception” from anything. *Hosanna-Tabor* did not involve a balancing of interests and a magnanimous accommodation of religion in the form of an exception to a law that, without legislative or judicial grace, would have applied with constitutional authority. Additionally, the case does not represent a conveniently discovered exception to *Employment Division v. Smith*,⁶ the lodestar in Free Exercise jurisprudence regarding neutral rules of general applicability. Instead, *Hosanna-Tabor* involved the recognition of a jurisdictional boundary, in full compliance with *Smith*.⁷

After close inspection of the case, this Note concludes that the ministerial exception embodies two distinct structural prin-

3. See, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983–84 (2013) (“What the Court sees as ‘special solicitude,’ however, I see as lawlessness; the Court held that religious organizations enjoy special freedom to disobey the law.”).

4. See, e.g., Caroline Mala Corbin, *The Irony of Hosanna-Tabor* Evangelical Lutheran Church & School v. EEOC, 106 NW. U. L. REV. COLLOQUY 96, 98 (2011) (“Because the ADA is both neutral and generally applicable, *Smith* should defeat any free exercise justification.”).

5. See, e.g., Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 407 (2013) (“*Hosanna-Tabor* is filled with incongruous stories and doctrinal inconsistencies.”).

6. 494 U.S. 872 (1990).

7. The ministerial-exception-as-constitutional-structure explanation is not a new one. See, e.g., Thomas C. Berg et al., *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175 (2011); Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMENDMENT L. REV. 233 (2012); Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307.

ciples that apply differently depending on the nature of the ministerial dispute before the court. In some cases—where the dispute involves questions entangled with the meaning and weight of religious doctrine—the ministerial exception is a structural bar, denying courts the ability to lend their hands to help answer those questions.⁸ In other cases—where the dispute involves no risk of entanglement and the questions presented are entirely secular—the doctrine allows for a phenomenon that this Note terms “cooperative separationism,” meaning essentially a waiver of structural protection by a religious institution, thereby lending its jurisdiction to the state for the purpose of submitting to the application of, and adjudication under, state law. Both principles can be vindicated and enforced given the case-by-case nature of the ministerial exception’s application, and both were always intended to survive in the wake of the *Employment Division v. Smith* sea change.

I. WHAT THE MINISTERIAL EXCEPTION IS

Hosanna-Tabor grew out of the decision to fire Cheryl Perich, an elementary school teacher and commissioned minister at Hosanna-Tabor Evangelical Lutheran School.⁹ After five years of employment as a part-time religion teacher for kindergarteners and fourth graders, Ms. Perich was diagnosed with narcolepsy and began her sixth year of employment on disability leave.¹⁰ When she approached the school several months later seeking to resume her duties, the school’s principal refused to reinstate Ms. Perich, citing lingering concerns over her health and the school’s obligation to her replacement. Ms. Perich threatened to sue the school if she was not reinstated, and the congregation responded by voting to end her employment.¹¹ Ms. Perich made good on her threat and brought suit, claiming that her firing was unlawful retaliation under the Americans with Disabilities Act, giving her a right to damages.¹² The school responded that her termination was the result of her breach of Lutheran doctrine—namely,

8. See generally Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009).

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

10. *Id.*

11. *Id.*

12. *Id.* at 701.

a commitment among church members to resolve intracongregational disputes internally—and, in any event, Ms. Perich qualified as a “minister” under the ministerial exception, barring her claim regardless of reason.¹³

Writing for a unanimous Court, Chief Justice Roberts primed his analysis of the matter with an observation: Unlike so many other cases involving our separation of church and state, ministerial-exception cases do not involve a clash between the religion clauses requiring the scales of justice and judicial balancing.¹⁴ In fact, in the area of ministerial selection, “[t]he First Amendment has struck the balance for us.”¹⁵ The Free Exercise Clause grants religious institutions the right to decide whether or not to employ certain ministers, and the Establishment Clause denies government the power to second-guess those decisions.¹⁶ In this way, the religion clauses compliment and reinforce each other, reminding us that whatever our feelings might be about the value of church autonomy in ministerial selection, our Constitution is clear and emphatic: “The church must be free to choose those who will guide it on its way.”¹⁷

A. *Where It Fits Within Doctrine*

The Court’s view of the ministerial exception as a co-venture between the Religion Clauses has proven both confusing and concerning to many scholars. Professor Frederick Gedicks argues that the ministerial exception described in *Hosanna-Tabor* is “a strange mixture of rights and structure”¹⁸ forging a “constitutional right on steroids” that creates doctrinal incoherence under both the Free Exercise and Establishment lines of cases.¹⁹ Although Professor Gedicks is right that the ministerial exception raises questions going forward—a point even supporters of the doctrine are willing to admit²⁰—the doctrine is not nearly as foreign or frightening as the picture he paints. In fact, its du-

13. *Id.*

14. *Id.* at 702.

15. *Id.* at 710.

16. *Id.* at 706.

17. *Id.* at 710.

18. Gedicks, *supra* note 5, at 407.

19. *Id.* at 429.

20. See Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 834 (2012).

al composition is easy to disentangle, is justified by the nature of the structural principle being advanced, and reflects a milder principle than those announced in other cases enforcing constitutional structure.

1. *Free Exercise Versus Establishment*

Under the Free Exercise Clause, the ministerial exception protects a church's "right to shape its own faith and mission through its appointments."²¹ As explained in the next section of this Note, this right was infringed by application of the ADA in *Hosanna-Tabor* notwithstanding *Smith*. But, one might think—because, in this respect, the ministerial exception protects a "right"—that it can be waived by its holder or trumped by a compelling state interest, in direct contradiction to its structural character.²² The ministerial exception can be waived in certain situations, but can never be trumped. The reason to distinguish these two qualifiers that normally attach to rights in tandem is the effect *consent* potentially has on the offensiveness of court involvement on the establishment side of the ledger.²³

Under the Establishment Clause, the ministerial exception prevents the "[g]overnment from appointing ministers"²⁴—a principle that is "no less" infringed when courts award damages instead of reinstatement because the constitutional violation is the state making "a determination" that a church was wrong to have removed its minister.²⁵ To properly understand the offensiveness of such a determination, it is important to recognize a peculiarity about the ministerial exception as a structural doctrine. In *New York v. United States*,²⁶ the Court held that federalism structure prohibits the federal government from commandeering state legislatures to take part in a federal regulatory program.²⁷ In so holding, the Court rejected the idea of "cooperative federalism," meaning an ability of the States to

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

22. See Gedicks, *supra* note 5, at 421–25.

23. This explains why the Court in *Hosanna-Tabor* did not consider the magnitude of the state interest in enforcing the ADA. Because the ministerial exception cannot be trumped, such discussion would have been irrelevant.

24. *Hosanna-Tabor*, 132 S. Ct. at 702.

25. *Id.* at 709.

26. 505 U.S. 144 (1992).

27. *Id.* at 175.

collectively agree to “waive” their federal protection in order to allow Congress to solve intractable problems among the States.²⁸ Accommodation of state interests was impossible in that case because the structure being enforced protects our system of “dual sovereignty.” Here, again and in contrast, the ministerial exception protects, in part, the church’s “right to shape its own faith and mission through its appointments.”²⁹ Because sovereignty protects all citizens, and not merely the sovereign, it cannot be waived.³⁰ But a right can be waived by the right’s holder. Thus, so long as the Establishment Clause is not uniquely offended, the ministerial exception—in contrast to federalism—*can* be waived in “cooperation” with the courts.

2. Jurisdictional Bar Versus Affirmative Defense

The ability of religious institutions to waive their structural protection was at least ostensibly given a procedural vehicle in footnote 4 of *Hosanna-Tabor*, where the Court summarily concluded that “the [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”³¹ Professor Michael Helfand seizes on this language in a recent essay, and suggests that this understanding of the ministerial exception signals a “radically new conception” of church-state relations at the Court.³² Instead of a theory of “structural and jurisdictional limitations” defining church-state separation, the Court now sees only “the autonomy and authority we grant religious institutions” as a barrier to state involvement in religious disputes.³³ In other words, church-state separation has nothing to do with the absence of state power. In fact, churches obtain their power *from* the state that they then use to resolve

28. *Id.* at 182 (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”).

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

30. *New York*, 505 U.S. at 181 (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself.”).

31. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

32. Michael A. Helfand, *Religion’s Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1892 (2013).

33. *Id.* at 1901.

internal disputes—but, always under the watchful eye of courts whose job is to ensure that no “misconduct, fraud, or other forms of adjudicative ‘naughtiness’” taint religious arbitration.³⁴

Professor Helfand vastly overstates the significance and meaning of footnote 4. As an initial matter, it seems highly implausible that the entire Court would place a ground-shifting elephant in a footnote-sized mousehole without qualification, explanation, or disavowal from any Justice. But, even if his view is just a tea-leaf reading of *Hosanna-Tabor*—an interpretation of what the Court said, but perhaps does not know it means yet—it is a misreading. Professor Howard Wasserman persuasively argues that *Hosanna-Tabor* was a case about jurisdiction notwithstanding footnote 4.³⁵ In his view, “[c]onstitutional existence conditions limit prescriptive jurisdiction”—meaning that, in the context of *Hosanna-Tabor*, the First Amendment limits the power of Congress to regulate religious institutions through the ADA.³⁶ Accordingly, *Hosanna-Tabor* enforces constitutional structure, but the structure it enforces is primarily against Congress and only incidentally against the courts. The First Amendment does not leave courts powerless to hear ministerial-exception cases; it merely leaves them with no law to enforce because Congress lacks the power to regulate ministerial relationships.

Ironically, in his own footnote *thirty-four*, Professor Helfand acknowledges that Professor Wasserman’s analysis provides a sound structural explanation of *Hosanna-Tabor*, but argues that it rests on a “contestable view of the ministerial exception” in that it is not one that boldly asserts an “adjudicative disability of courts.”³⁷ Professors Wasserman and Helfand each provide a piece to a three-part ministerial-exception puzzle. Providing the first piece, Professor Wasserman rightly concludes that asserting the ministerial exception denies Congress the power to regulate ministerial relationships and thus courts the ability to enforce the substance of those regulations. Professor Helfand, however, adds another piece when he ascribes some indication of waivability to the Court’s decision to recognize the ministe-

34. *Id.* at 1902.

35. See generally Howard M. Wasserman, Essay, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289 (2012).

36. *Id.* at 299.

37. Helfand, *supra* note 32, at 1897–98 n.34.

rial exception as an affirmative defense. If a church or a parochial school were to properly waive the ministerial exception, it seems sound to conclude that legislatures have the authority, at least in those instances, to regulate ministerial relationships and for courts to apply those regulations. Admitting some degree of waivability, however, is not the same as saying that courts are always able to adjudicate ministerial disputes. The third piece, which this Note adds, is the assertion of adjudicative disability that Professor Helfand seeks. In some cases, the ministerial exception precludes court involvement notwithstanding a religious litigant's attempt to waive, or accidental waiver of, the defense. The key to identifying the contours of this differential treatment of waiver is understanding the potential for two distinct kinds of Establishment Clause violations created by judicial application of law to ministerial relationships: inhibition and entanglement.

3. *Inhibiting Religion Versus Entanglement with Religion*

As explained above, a comparison between the ministerial-exception cases and the Court's cases enforcing federalism suggests that it is possible for churches, in cooperation with the state, to waive their structural protection over internal affairs. It must be pointed out, however, that the Establishment Clause is not always copacetic with a church's invitation to the courts to make "a determination" of wrongfulness regarding its internal governance decisions. Treatment differs depending on whether state involvement would *inhibit* religion or *entangle* state with religion. Both have long been understood as prohibited "establishments" under the test laid down in *Lemon v. Kurtzman*.³⁸

Professor Michael McConnell indicates that the ministerial exception might prevent government from "inhibit[ing] religion" in theory, but does not firmly assert that this is the case.³⁹ This is understandable as the Supreme Court has never keyed on this part of the *Lemon* test to hold a law unconstitutional as applied due to its inhibition of religion.⁴⁰ Nevertheless, there are good reasons to think the ministerial exception precludes this kind of state interference. First, that the Court has never

38. See 403 U.S. 602, 612 (1971).

39. McConnell, *supra* note 20, at 824.

40. *Id.*

expressly applied the "inhibition" prong of *Lemon* is not surprising. Religious decisions on churches' internal governance represent a small subset of religious exercise and, for the most part, laws do not attempt to inhibit them. And, when they do, there are generally "entanglement" concerns that give the Court an independent basis to strike down those laws. Thus, novelty should not surprise us.

Second, the Supreme Court has nodded in this direction across cases enforcing constitutional structure. In *Gregory v. Ashcroft*,⁴¹ the Court considered the constitutionality of the application of a federal age-discrimination ban to Missouri's constitutional provision mandating the retirement age of state judges. After noting that "[c]ongressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the constitutional balance of federal and state powers," the Court adopted a clear-statement rule and read the law as not applying to the judges.⁴² In other words, after setting itself up to hold that the application of the federal ban to the state's relationship with its judges would "inhibit" Missouri's free exercise of state sovereignty, the Court avoided the constitutional question altogether.⁴³ Professor Carl Esbeck points out that the Court took this same tack with regard to the structural dimension of the separation of church and state several years earlier in *NLRB v. Catholic Bishop of Chicago*.⁴⁴ There, the Court adopted a clear-statement rule to avoid a "significant risk" of violating church-state separation structure by applying a labor law to require churches to recognize and negotiate with union representatives.⁴⁵ Although Professor Esbeck voices specific concern for entanglement in the *Catholic Bishop* context,⁴⁶

41. 501 U.S. 452 (1991).

42. *See id.* at 460.

43. We can be sure that the Court's concern in *Ashcroft* was analogous to "inhibition" and not "entanglement" because the Court decided six years earlier that no "traditional government function" exists that is uniquely left for the States to regulate under our federalism structure. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985). In other words, the Court in *Ashcroft* did not understand federalism to mark off certain subject matters for states to govern in which the federal government could wrongfully entangle itself.

44. 440 U.S. 490 (1979); *see also* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 380 (1984).

45. *See Catholic Bishop*, 440 U.S. at 502.

46. *See Esbeck, supra* note 44, at 380.

the value of comparing that case with *Ashcroft* is that it exposes the concern that inhibition played as well. In fact, this concern is uniquely exposed in the ministerial-exception context because its application is case-by-case, whereas recognizing the jurisdiction of union representatives is a broad, one-size-fits-all-contexts determination that would potentially empower the state to resolve all manner of future religious disputes.

To isolate the distinction between inhibition and entanglement, consider the following hypotheticals:

Case #1: A religion teacher is fired from her parochial school employer. She brings suit alleging gender discrimination under the state's gender-discrimination ban. The school, believing it properly terminated the teacher for theft, responds with a for-cause defense. The school is deciding whether to assert or waive the ministerial exception as an additional defense. Waiving the defense is an attractive option given the school's interest in vindicating its termination decision in open court, thereby protecting its reputation as a fair employer.

Case #2: A religion teacher is fired from her parochial school employer. She, too, brings suit alleging gender discrimination under the state's gender-discrimination ban. The school, however, believes it properly terminated the teacher for writing an op-ed in the local newspaper expressing her support for polyamorous marriage. Feeling that her public position against the school's religious commitment to traditional marriage makes her unfit to teach religious instruction to the school's students, the school removed the teacher from her position. The school faces litigation but, as a result of poor lawyering, does not realize the ministerial exception exists as a defense.

These two hypothetical cases highlight the two kinds of Establishment Clause violations the ministerial exception is meant to guard against. In the first case, the potential offense is *inhibition*. The parochial school has a free-exercise right to independently determine whether or not to employ its religion teacher. By asserting the ministerial exception as an affirmative defense, the school exercises that right. Nevertheless, the school could choose to waive the ministerial exception, and thus not exercise its right, without violating the Establishment Clause. This is because the question of whether the religion teacher was fired because of her gender or her theft is not a religious question that creates church-state entanglement. The

only concern is inhibition, and the court cannot "inhibit" the school by making "a determination" it was asked by that school to make. In other words, the "right" held by the school is a right to structure, and waiving that right eliminates the need to enforce structure.⁴⁷ This kind of circumstance indicates the possibility of "cooperative separationism" (as opposed to cooperative federalism) between church and state that is uniquely possible given the nature of the structural principle enforced through the ministerial exception.⁴⁸

That said, such cooperation is not always possible. In the second case above, the potential offense is both inhibition *and* entanglement. Even if the school mistakenly failed to raise, and thus waived, the ministerial exception as a defense, the court would have to raise it *sua sponte* to avoid the prospect of re-

47. It is worth highlighting that the Court has functionally recognized a "waiver" of sorts in its application of the "advance or inhibit" language of the *Lemon* test in its public display cases. Compare *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005), with *Van Orden v. Perry*, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring) (explaining that in *McCreary*, "th[e] short (and stormy) history of the courthouse Commandments' displays demonstrate" state efforts to "advance" religion, whereas in *Van Orden*, "40 years passed in which the presence of th[e] monument, legally speaking, went unchallenged[,] suggesting no state effort to "advance" religion). The enforcement of the "advance" prong of the effects test is applied here essentially as a "waiver," turning on the amount of time it takes an offended citizen to mount an Establishment Clause challenge in the courts. Admittedly, this point is not the strongest given that several current Justices question the endorsement test full stop, and only Justice Breyer's analysis in the *McCreary* and *Van Orden* cases turned on functional waiver, but the point is not without merit.

48. The concept of "cooperative separationism" seems to fit within Professor Wasserman's analysis. Regarding *Hosanna-Tabor*, he insists that the ADA could not be applied given the school's ministerial-exception defense because that defense meant that the ADA did "not exist as law." Wasserman, *supra* note 35, at 299. Conceptually, waiving the ministerial exception *allows* the ADA to exist as law, but not because it always did as an exercise of proper congressional jurisdiction. The proper way to think about it can be gleaned from imagining what the jurisdictional picture in *New York v. United States* would have looked like had the Court accepted the "cooperative federalism" argument. 505 U.S. 144 (1992). Religious institutions have complete jurisdiction to decide whether to employ ministers, but they can *cede* that jurisdiction to the state in certain instances (provided no unique Establishment Clause issue) in order to allow for the application of, and adjudication under, state law that has the effect of determining the wrongfulness of that institution's decision to fire its minister. Further, recognizing the potential for adjudicative disability is consistent with Professor Wasserman's acknowledgement that "nonjurisdictional doctrines [such as the ministerial exception] can be accorded procedural incidents of jurisdiction, such as nonwaivability, where the policy goals and values underlying the doctrine demand it." Wasserman, *supra* note 35, at 315.

solving an essentially religious question: whether the school's religious commitment to traditional marriage is of such weight that it actually motivated the school's decision to terminate the employment of its religion teacher.

In summary, the ministerial exception may at first appear a bit vexing given its joint construction: part Free Exercise right, part establishment structure. This should not, however, surprise us because those two clauses work together to protect our *one* religious freedom that cannot always be broken down so easily into two discrete halves. And, in fact, a bit of disentangling reveals that the ministerial exception can still be conceptualized in familiar terms under our established lines of cases.

Where the sole establishment threat is the state's "inhibiting" religion, the ministerial exception is a religious right to structure that can be waived, but never trumped. In this way, the doctrine is a mild structural principle compared with federalism and the separation of powers, which cannot be waived as complete assurances of the proper placement of sovereignty and power.

But the ministerial exception is not without dictates regarding power and pluralism. Where the establishment threat is state "entanglement" with religion, the structural component to the ministerial exception dominates and prohibits waiver, enforcing the long-held principle that courts can, under no circumstances, intervene into ecclesiastical disputes to assess questions of faith and religious doctrine. In *Hosanna-Tabor*, the Court held that the ministerial exception prevents the government from involving itself in disputes over ministerial selection. Recognizing the distinct concerns created by state inhibition and entanglement provides a note of inflection to this principle. With inhibition, the concern is the state's involving *itself*. With entanglement, the concern is the state's *involving* itself. The case-by-case nimbleness of the ministerial exception's application assures us that we can protect constitutional structure against both.

B. How It Complies with Employment Division v. Smith

In *Employment Division v. Smith*, the Supreme Court affirmed the validity of neutral, generally applicable regulations of conduct under the Free Exercise Clause. Many believed that *Smith* precluded not only application of the ministerial exception to

Ms. Perich's claim, but recognition of the doctrine at all.⁴⁹ The argument went something like this: If the Free Exercise Clause does not require an exemption to a general drug law for Native American religious observers seeking to ingest peyote as part of their sacramental activities, it will not require an exemption to a general antidiscrimination law for Lutheran congregants seeking to end their employment relationship with one of their school's ministers for retaliatory reasons. Puzzling in light of this expectation was the fact that every court of appeals had heard the *Smith* argument and rejected it.⁵⁰ Chief Justice Roberts did the same, and in short order, finding that "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."⁵¹

Several commentators have criticized this manner of distinguishing *Smith*, calling it "unconvincing"⁵² and conclusory,⁵³ or even patronizing the very attempt.⁵⁴ The Chief Justice, however, did not say much about *Smith* because not much needed to be said, and any search for a more "convincing" justification ought to begin with an earnest re-reading of *Smith's* limitations and the *Watson v. Jones*⁵⁵ line of cases. But, of course, much more can be said. The best way to proceed is to focus on two distinctions: the one between "act" and "decision," and the one between "degree" and "kind."

49. See, e.g., Brief for Respondent Cheryl Perich at 42–45, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553); Brief for the Federal Respondent at 20–29, 37–38, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Corbin, *supra* note 4, at 98; Griffin, *supra* note 3, at 992.

50. Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 854 (2012).

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

52. Comment, *First Amendment—Freedom of Religion—Ministerial Exception: Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 126 HARV. L. REV. 176, 183 (2012).

53. See Leslie C. Griffin, *Reconsidering Free Exercise: Hosanna-Tabor v. EEOC*, ACS BLOG (Jan. 13, 2012), <http://www.acslaw.org/acsblog/reconsidering-free-exercise-hosanna-tabor-v-eeoc>, [<http://perma.cc/GY82-WTG6>] (noting that the Chief Justice distinguished *Smith* "quickly" in a "strange" way that raises many questions).

54. See Gedicks, *supra* note 5, at 432 (calling the Court's efforts "gamely" before sarcastically rejecting them).

55. 80 U.S. (13 Wall.) 679 (1871).

1. "Act" Versus "Decision"

At its core, the Chief Justice's distinction keyed on six words—"outward physical acts" compared with "internal church decisions." Critics have tended to focus on the words "physical" and "act," incredulously rejecting the straw-man suggestion that firing Ms. Perich was not as much of a physical act as possessing peyote.⁵⁶ Of course that is right, but it is also irrelevant.

Professor Douglas Laycock, who successfully argued for *Hosanna-Tabor* at the Supreme Court, makes this point by refocusing our attention on the difference between "outward" acts and "internal" governance.⁵⁷ Although the ultimate prize is taking that distinction to heart, the best way to get there is to focus on the words "act" and "decision." Every act first requires a decision to act. In *Smith*, the Native American congregant had to *decide* to possess peyote before actually *possessing* peyote. Likewise, in *Hosanna-Tabor*, the school had to *decide* to fire Ms. Perich before actually *firing* her. Although the drug ban in *Smith* and the discrimination ban in *Hosanna-Tabor* were both neutrally enacted and generally applicable, each applied in its respective case on either side of the decision-act divide. In *Smith*, the regulation targeted the *act* of possessing peyote in order to promote Oregon's interests in citizen health and thwarting intrastate drug markets.⁵⁸ It was a regulation of action, not decision, that was offended by peyote possessors compelled by religious, non-religious, and irreligious reasons alike. In this sense, *Smith* was consistent with all manner of cases stressing the presumptive validity of neutral, generally applicable regulations of action that came before it.⁵⁹

Hosanna-Tabor is night-and-day different. No doubt the anti-discrimination regulation required the school to first *act* by firing Ms. Perich, but that act was relevant only as a trigger needed to perfect an injury worthy of statutory remedy. Had the school

56. See, e.g., Helfand, *supra* note 32, at 1900.

57. See Laycock, *supra* note 50, at 855.

58. See *Emp't Div. v. Smith*, 494 U.S. 872, 904–05 (1990) (citing Oregon's interest in "prohibiting the possession of peyote by its citizens" to prevent its "abuse").

59. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (noting that a neutral, generally applicable ban on solicitation would require no Free Exercise exemption); *Reynolds v. United States*, 98 U.S. 145 (1878) (denying a Free Exercise exemption to a law prohibiting polygamy regardless of reason); cf. *United States v. O'Brien*, 391 U.S. 367 (1968) (denying a Free Speech exemption to a law prohibiting destruction of draft cards regardless of reason).

simply *decided* to fire Ms. Perich, but not actually fired her, she would have had no claim, and rightfully so. The government does not generally regulate our thoughts or proscribe attempted discrimination or conspiracy to discriminate. But, once Ms. Perich *was* fired and the regulation was triggered, the ADA targeted the *decision* to fire her, in order to promote our national interest in preventing termination decisions from being made for wrongful reasons. It was this regulation of *decision*—of internal deliberation and reason—that offended the structural nature of the First Amendment by placing the proverbial “cop inside the confessional.” In *Smith*, the ban on peyote possession could be policed entirely by witnessing and reviewing “physical acts” that took place “outside” of internal church discussions on governance. In *Hosanna-Tabor*, by stark contrast, the force of the ban on discrimination was entirely internal, impacting and reviewing those discussions. It was as if a congressional representative was placed at the voting table alongside each member of the Hosanna-Tabor congregation, whispering into his ear the various reasons the state had decided he could not consider in his decisionmaking process over whether to maintain the minister.⁶⁰ *Watson* and its progeny reject this intrusion in the name of a structural right to church autonomy, and *Smith* not only never said otherwise—it said exactly that.⁶¹

60. This analysis provides an answer to Professor Michael Dorf, who challenged the *Smith* distinction with the following hypothetical: “Suppose that a sect of the Native American Church selected its ministers by a ceremony in which novices, in order to be ordained, must ingest peyote. Could participants in that ceremony be imprisoned, and thus rendered unable to perform their duties as ministers, pursuant to the rule of *Smith*[?]” Mike Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 A.M.), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html>, [<http://perma.cc/T4RX-78ZQ>]. The answer is yes. The drug ban continues to target action in that scenario—not the reasoning of the Native American church leaders who decided, internally, that smoking peyote was a valuable method for selecting ministers. The ministerial exception is not a structural guarantee that church leaders can do whatever they want so long as they do it behind closed doors in the context of ministerial selection. It is a guarantee that internal church discussions and decisions about the hiring and firing of ministers will not be adulterated by state interference, regardless of how well-intentioned. Swapping “ingest peyote” with “perform a human sacrifice” in Professor Dorf’s hypothetical makes this point in a more intuitively appealing way.

61. For an analysis of what this religious distinction could mean going forward in other contexts, see Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 168 (2012).

2. "Degree" Versus "Kind"

An important and supplemental basis for understanding the limits Justice Scalia intended to impose on *Smith*, and to properly cabin the widespread skepticism that flowed from that case, inheres in the distinction between "degree" and "kind." In the early 1960s, the Supreme Court shifted its focus in free-exercise cases away from the purpose of contested regulations to the substantiality of the effects they created.⁶² This shift—which corresponded with a similar shift in establishment cases⁶³—had the predictable effect of increasing judicial scrutiny and empowering plaintiff-challengers. It was under this mode of analysis that the Court decided *Sherbert v. Verner*⁶⁴ and *Wisconsin v. Yoder*,⁶⁵ and it was precisely this mode of analysis that Justice Scalia took issue with in *Smith*.

Justice Scalia has always been a vocal critic of judicial tests that embrace a constitutional touchstone of "substantiality" or anything like it. Dissents that he either wrote or signed onto abound across the constitutional terrain, attached to Court opinions affirming those touchstones in cases decided under, among other provisions, the Commerce Clause,⁶⁶ the Necessary and Proper Clause,⁶⁷ and our separation-of-powers structure.⁶⁸

62. Compare *Braunfeld v. Brown*, 366 U.S. 599 (1961) (rejecting a free-exercise exemption from a Sunday closing law even though the law made religious practice more expensive because the purpose of the law was to promote the state's secular goals), with *Sherbert v. Verner*, 374 U.S. 398 (1963) (creating a free-exercise exemption from a "good cause" restriction on unemployment benefits because the law inflicted a "substantial" burden on Sabbath observance by forcing a choice between religious observance and economic livelihood).

63. Compare *McGowan v. Maryland*, 366 U.S. 420 (1961) (rejecting a claim that a Sunday closing law violated the Establishment Clause because its present purpose was to provide a uniform day of rest for all citizens, not advance religion), with *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down a public school-board policy of beginning the school day with a Bible passage under a "purpose or primary effect" neutrality test), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing the current *Lemon* test with a powerful "effects" prong).

64. 374 U.S. 398 (1963).

65. 406 U.S. 205 (1972).

66. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (rejecting the *Pike* balancing test on the basis that it essentially asks judges to determine "whether a particular line is longer than a particular rock is heavy").

67. See *United States v. Comstock*, 560 U.S. 126, 158–80 (2010) (Thomas, J., dissenting) (rejecting Justice Breyer's "novel five-factor" test, Justice Kennedy's "essential attributes of state sovereignty" test, and Justice Alito's "appropriate link" test).

It no doubt struck Justice Scalia as question-begging to conclude that two years of compulsory school-attendance created a "substantial" restriction on the free exercise of the Amish religion, as in *Yoder*; or that a so-called "Hobson's choice" between adhering to one's religious precepts or remaining eligible for unemployment benefits created a "substantial" restriction on the free exercise of one's Sabbath observance, as in *Sherbert*. It simply is not obvious what nudges the harm created by each regulation from the realm of the incidental into the realm of the substantial. The issue is a squishy test of *degree*.

There is every reason to think that one of Justice Scalia's motivations in *Smith* was to eliminate the unworkability of the *Yoder* inquiry by reestablishing the constitutional touchstone of purpose in those cases in which the inquiry must be made.⁶⁹ To this effect, Justice Scalia (in)famously employed a bit of interpretive (dis)ingenuity, calling *Yoder* and similar cases "hybrid"⁷⁰ rights cases and *Sherbert* and its progeny cases involving an "individualized governmental assessment."⁷¹ The cognitive dissonance caused by these reimaginings led many observers to doubt *Smith*, lock, stock, and barrel. As Professor Laycock observes, "Las Vegas could have made a betting book" to profit from all the skepticism on whether Justice Scalia was sincere about any of the limitations announced in *Smith*.⁷² If it had, any betting man would have done well to recall the manner in which Justice Scalia reinterpreted *Sherbert* and *Yoder*—by changing the test necessary to align future disputes with those cases from one of *degree* to one of *kind*.

68. See *Morrison v. Olson*, 487 U.S. 654, 691–734 (1988) (Scalia, J., dissenting) (rejecting a removal test that asks whether a protected executive officer performs functions that are "so central to the functioning of the Executive Branch" that the President needs unrestricted oversight).

69. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." (emphases added)).

70. *Id.* at 882.

71. *Id.* at 884.

72. Laycock, *supra* note 50, at 854.

Some might believe that Justice Scalia did this only because he could not muster the votes to overturn *Sherbert* and *Yoder*. That may very well be true, and does give observers a valid reason to be skeptical of whether those “tests” will ever be embraced by the present Court. But the reasons to be skeptical of those limitations of *Smith* do not apply to the limitation recognized in *Hosanna-Tabor*. Even if, as some believe, the line separating “outward physical acts” and “internal church decisions that affect[] the faith and mission of the church itself” is “fuzzy,”⁷³ it is still there, as it has been for over 140 years, and it represents a test that is fundamentally one of *kind*. In fact, Justice Scalia made his belief in this hard distinction of kind very clear in *Smith* when he made the following observation:

It would be true, we think (though no case of ours has involved the point), that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such *acts* or abstentions only when they are engaged in for religious *reasons*, or only because of the religious belief that they display.⁷⁴

In other words, the Constitution is not blind to whether a regulation targets *action* or *reason* for action. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court finally got a case that involved this point and struck down a prohibition on certain animal killings.⁷⁵ The fact that the targeted action (killing animals) was proscribed as part of “rituals” but not when the purpose was “food consumption” convinced the Court that the regulation targeted *religious reason*, not action, and must fall outside the scope of *Smith*.⁷⁶

As explained earlier, the ADA similarly targets decision and reason, not action. That the ADA did not specifically target religion *too* is irrelevant given that *Smith* expressly affirmed the *Watson* line of cases and their principle of church autonomy by citing the “obvious[]” inability of government to “lend its power to one or the other side in controversies over religious authority or dogma.”⁷⁷ The ministerial exception simply reminds us that disputes over ministerial selection are disputes over “religious authority.” Recalling the distinction between “de-

73. Dorf, *supra* note 60.

74. *Smith*, 494 U.S. at 877 (emphases added).

75. See 508 U.S. 520 (1993).

76. See *id.* at 527.

77. *Smith*, 494 U.S. at 877.

gree" and "kind," and Justice Scalia's attitude toward each, helps make sense of the Court's unanimous enforcement of *this* limitation of *Smith* in *Hosanna-Tabor* and the Justice's own emphatic insistence that he never intended for *Smith* to preclude recognition of the ministerial exception.⁷⁸

II. CONCLUSION

Justice Brandeis, widely regarded as one of the great expounders of the First Amendment, once remarked that:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁷⁹

This sentiment lies at the heart of *Hosanna-Tabor*. Historical witness reveals too many instances of disastrous secular interference in ministerial selection to permit our democratic order to suffer from that infirmity. As much of a threat as our Framers considered this to be, the Supreme Court in *Hosanna-Tabor* resoundingly affirmed the necessity of placing a structural principle within the partial control of religious institutions to deny the state competence and jurisdiction over who will control the religious voice. Although there is little doubt that the ministerial exception will be wielded in the future to prevent the application of well-meaning regulations crafted to confront newly discovered threats to our liberal democracy, it should not be forgotten that the ministerial exception is itself the fusion of two of the greatest liberal principles of all: religious freedom and limited government.

John Robinson

78. Transcript of Oral Argument at 38, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-533) (insisting that *Smith* "had nothing to do with who a church could employ" and that he failed to "see how [*Smith* had] any relevance to [*Hosanna-Tabor*]").

79. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).