

RELIGIOUS FREEDOM, CHURCH–STATE SEPARATION, AND THE MINISTERIAL EXCEPTION

Thomas C. Berg^{*}
Kimberlee Wood Colby^{**}
Carl H. Esbeck^{***}
Richard W. Garnett^{****}

*Hosanna-Tabor*¹ concerns the separation of church and state, which is an often-misunderstood arrangement that is nevertheless a critical dimension of the freedom of religion protected by the First Amendment to our Constitution. For nearly a thousand years, the tradition of Western constitutionalism—the project of protecting political freedom by marking boundaries to the power of government—has been strengthened by the principled commitment to religious liberty and church–state separation. A community that respects both the importance of, and the distinction between, independent spheres of political and religious authority is one in which the fundamental rights of all are more secure. A government that acknowledges this distinction acknowledges limits to its own reach. Such a government, history shows, will more consistently protect and vindicate the liberties of both individuals and institutions.

The principle of church–state separation—from the time of Becket, to Blackstone, to Benjamin Franklin, to today—has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines. This independence, recognized and vindicated in a long line and wide array of decisions by the Supreme Court, is entirely consistent with the appropriate powers of civil authorities.

The “ministerial exception,” at issue in *Hosanna-Tabor*, is a clear and crucial implication of religious liberty, church autonomy, and the separation of church and state—principles embodied in both the Free Exercise and Establishment Clauses of the First Amendment. The exception, to use the

^{*} James L. Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law.

^{**} Senior Counsel, Center for Law and Religious Freedom, Christian Legal Society.

^{***} R.B. Price Professor of Law, University of Missouri School of Law.

^{****} Professor of Law and Associate Dean, University of Notre Dame Law School. This contribution to the *Colloquy* is adapted from the amicus brief that the authors submitted in support of the Petitioner in *Hosanna-Tabor*. The authors thank students Amanda Maly (University of St. Thomas School of Law) and Jacque Brazas (University of Missouri School of Law) for their valuable research assistance.

¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (link).

words of one prominent decision, “operates to bar any claim” by or on behalf of a minister—including, but not limited to, nondiscrimination suits—“the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”² It seems to us that because any worthwhile account of religious freedom would respect the authority of religious communities to select freely their own clergy, ministers, teachers, and doctrines, any such account must include some rule like the ministerial exception. Reasonably constructed and applied, this rule helps civil decisionmakers avoid deciding essentially religious questions. In addition, and more importantly, it protects the fundamental freedom of religious communities to educate their members and form them spiritually and morally. Although the exception may, in some cases, block lawsuits against religious institutions and communities for discrimination, it rests on the overriding and foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church–state separation puts beyond the law’s corrective reach. The civil authority—that is, the authority of a constitutional government—lacks “competence” to intervene in such questions, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdiction.

For these reasons, over the last forty years every federal circuit has adopted some version of the ministerial exception. From practical experience, judges know how employment litigation can entangle a court with the decisionmaking of a religious organization in the core matter of who is qualified to lead the organization and speak on its behalf. The wide range of judges who have approved of the exception are not trying to avoid applying nondiscrimination laws, but are trying to fulfill their parallel responsibility to protect religious liberty and church–state separation.

Other essays in this colloquy focus on the details of this federal case law and on the question to what extent the ministerial exception applies to teachers in religious schools. Our primary focus in this piece, drawn from an amicus brief we filed in *Hosanna-Tabor*, is more foundational and historical.³ Unfortunately, in its *Hosanna-Tabor* submissions, the federal government has chosen to reject decades of precedent and deny the existence of any distinct ministerial exception grounded in the Religion Clauses. It therefore is important to restate first principles and show why it is so important that the government respect religious organizations’

² *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) (link).

³ See Brief Amici Curiae of Professor Eugene Volokh et al. in Support of the Petitioner, *Hosanna-Tabor*, No. 10-553 (2011), 2011 WL 2470847 [hereinafter Amicus Brief] (link). That brief includes arguments that the ministerial exception should cover teachers with religious duties at religiously affiliated K–12 schools, including the plaintiff in *Hosanna-Tabor*, Cheryl Perich. See *id.* at 28–38. Those arguments are largely outside the scope of this paper, although we briefly summarize them *infra* in note 57.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

decisions on who are qualified to be their ministers—to perform important religious functions. In this Essay we review centuries of church–state history and draw two lessons. First, the ability of religious organizations to choose ministers without government interference is at the core of our tradition of institutional religious freedom and church–state separation: virtually every major advance in this tradition has involved government interference in such choices. Second, the ministerial exception follows naturally from this tradition, and—contrary to the arguments of the exception’s critics—the tradition bars government interference in the selection of those performing important religious functions, even when that interference is for ostensibly “neutral” or “secular” reasons that do not involve the government making explicit theological determinations.

I. CHURCH–STATE SEPARATION AND THE SELECTION OF MINISTERS

The separation of church and state is controversial in some of its applications, but there is long tradition and broad consensus in favor of at least institutional separation.⁴ While not completely sealed off from each other by a “high and impregnable”⁵ wall, the agencies and authority of the “state” are distinct from those of the “church,” and neither can rightfully exercise the core functions of the other. Indeed, the “establishment” of religion prohibited by the First Amendment denotes not just sponsorship or financial support of religion, but also “active involvement of the sovereign in religious activity.”⁶

Over the centuries, Western civilization gradually acknowledged an “independence between church and state” and the “existence of two authority structures.”⁷ Since the fourth century, “Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other areas in which each is noncompetent to perform the tasks of the other.”⁸ Thus, “[w]hen the civil state overreaches and performs a task within the sole province of the church, or misguided officials attempt to delegate an exclusive state function to the church, the boundary between church and state is transgressed.”⁹ This differentiation

⁴ See generally BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE: 1050–1300* (1964) (link); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

⁵ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (link).

⁶ *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970) (link).

⁷ CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES 10 (John F. Wilson & Donald L. Drakeman eds., 3d ed. 2003) (link); see also *id.* at 1–12.

⁸ Carl H. Esbeck, *Dissent and Disestablishment: The Church–State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1392 (link); see also JOHN COURTNEY MURRAY, S.J., *Are There Two or One? The Question of the Future of Freedom*, in WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 183–199 (2005 ed.).

⁹ Esbeck, *supra* note 8, at 1392 (footnote omitted).

between political and religious institutions has long been a part of the American constitutional tradition, and Americans—despite their diversity and differences—have agreed that “jurisdictional separation of the two authorities of church and state best facilitates healthy churches and a republic free of civil strife over religious doctrine.”¹⁰

Although disagreement regarding the precise details of church–state separation persists, there appears to be solid agreement that, for example, this arrangement does not permit political authorities to delegate core government functions to churches.¹¹ *Hosanna-Tabor* involves what should be seen as a complementary principle: government may not insert itself into controversies over the ecclesiastical functions of religious organizations, in particular, disputes regarding the selection and supervision of ministers. Congress, all agree, could not leave it to the United States Conference of Catholic Bishops to determine the sanctions for violations of federal drug-trafficking laws. It should be no less clear that, just as Congress should not attempt to resolve disagreements among Christians about infant baptism, a court should not presume to supervise or second-guess a religious community’s selection of one person, rather than another, to be its minister. In fact, the Court has long recognized that a key component of religious liberty and church–state separation is the autonomy of religious organizations over matters of governance as well as doctrine.¹²

Both Religion Clauses of the First Amendment, the Establishment Clause and Free Exercise Clause, protect this autonomy. In this context, the two clauses overlap and reinforce each other. The Court typically categorizes religion cases under one or the other of the two clauses, but in limiting government intervention into internal church disputes, the Court has frequently relied simply on “the First Amendment” or “the Religion Clauses.”¹³ In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, for example, the Court held that a statute transferring institutional authority and property in the Russian Orthodox Church “violate[d] our rule of separation between church and state” as well as “the free exercise of

¹⁰ *Id.* at 1497.

¹¹ See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126–27 (1982) (striking down delegation to churches of “discretionary governmental powers” to reject an applicant for a liquor license) (link).

¹² See *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (holding that the First Amendment guarantees “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”) (link); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1872) (noting the “unquestioned” right in America of “voluntary religious associations” to decide “controverted questions of faith” and matters of “ecclesiastical government”) (link).

¹³ See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499 (1979) (“the First Amendment” and “the Religion Clauses”) (link); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) (“the First and Fourteenth Amendments”) (link); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449–51 (1969) (“the First Amendment”) (link).

religion.”¹⁴ Indeed, the Court’s Establishment Clause decisions speaking of church–state separation repeatedly emphasize that it protects religious communities as well as the body politic.¹⁵

The “separation of church and state,” then, in our tradition “denote[s] a structural arrangement involving institutions, a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government.”¹⁶ The ministerial exception is just one manifestation of this tradition of institutional separation and institutional religious freedom. At the same time, it involves a crucial principle that lies close to the heart of this tradition, namely, that government may not interfere with religious institutions in controversies concerning their selection and supervision of leaders and religious teachers, and secular courts should not entertain employee lawsuits “the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”¹⁷

II. THE TRADITION OF FREEDOM TO SELECT MINISTERS

A. *History*

The ultimate authority of religious organizations to select and supervise their leaders has been vital to the development of institutional religious freedom. Virtually every major advance in that tradition has stemmed from some conflict over the government’s intervention in this area of decisionmaking. Among the best known of such conflicts in European civilization was the investiture controversy of the eleventh and twelfth centuries, in which popes and monarchs fought over who would have the authority to appoint Catholic bishops.¹⁸ Pope Gregory VII excommunicated German emperor Henry IV over the issue until Henry pleaded with the Pope for forgiveness in a blizzard at the Alpine fortress of Canossa. The clash broke out again but was settled in 1122 by a compromise that left the Catholic Church with considerable power: “the emperor guaranteed that bishops and abbots would be freely elected by the church alone,” although he retained the right to invest them with their rights of temporal property.¹⁹

¹⁴ 344 U.S. at 110, 119.

¹⁵ See *Engel v. Vitale*, 370 U.S. 421, 429, 431, 435 (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.”) (link); *Illinois ex rel. McCollum 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.”) (link).

¹⁶ Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 523 (2007) (link).

¹⁷ *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) (link).

¹⁸ See generally TIERNEY, *supra* note 4.

¹⁹ HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 98 (photo. reprint 1999) (1983).

In England, the famous conflict between King Henry II and Archbishop Thomas Becket, which culminated in Becket's murder, also stemmed from, among several other things, Henry's assertion of power to appoint bishops.²⁰

Because each side in these disputes prevailed only in a limited area—popes over spiritual offices, kings over temporal matters—the result was a “duality” of jurisdictions that “profoundly influenced the development of Western constitutionalism.”²¹ As a leading authority on the controversy has written, “The very existence of two power structures competing for men's allegiance instead of only one compelling obedience greatly enhanced the possibilities for human freedom.”²² Although Gregory VII asserted broad papal supremacy over civil rulers, what he secured was “the independence of the clergy from secular control” in ecclesiastical matters like clergy selection.²³ This established a “principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed.”²⁴ The freedom to select religious leaders was a landmark in the development of limited government in the West. By setting the precedent for limited government, institutional religious freedom has promoted both political and religious liberty for all, believers and nonbelievers alike.

Early Protestantism, in struggling against the Catholic Church, often sought assistance from civil rulers, sometimes to the point of letting them control clergy selection and other important religious functions. As Michael McConnell has observed, the Reformation, by “introduc[ing] religious factions to Western Europe,” also introduced a “novel danger[] to public peace and freedom”; the break-up in the universal church made it “possible to form national churches . . . which could be more easily dominated by the government.”²⁵ For instance, in the Church of England, the most familiar example of an establishment to the American Founders, the government appointed (and still appoints) the Archbishop of Canterbury and other leading clerics.²⁶ English civil rulers exercised many other controls as well: the monarch was the official head of the church and had the power to punish heresies, and Parliament enacted the Thirty-Nine Articles (the church's doctrinal tenets) and the Book of Common Prayer, requiring for many decades that most ministers pledge conformity to them.²⁷

²⁰ See LEO PFEFFER, *CHURCH STATE AND FREEDOM* 18 (rev. ed. 1967).

²¹ TIERNEY, *supra* note 4, at 2.

²² *Id.*

²³ BERMAN, *supra* note **Error! Bookmark not defined.**, at 87.

²⁴ *Id.* at 269; see also Garnett, *supra* note 16, at 524–25.

²⁵ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1513–14 (1990).

²⁶ See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *364–83 (link).

²⁷ MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 15 (3d ed. 2011).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

In rejecting a national establishment of religion, Americans necessarily rejected a role for the federal government to choose church leaders. The First Amendment confirms this rejection, as do early practices and policies. In 1783, the Vatican proposed an agreement with Congress to approve a Bishop-Apostolic for America since the new states were outside English authority. Benjamin Franklin, who received the proposal as ambassador to France, replied that “it would be absolutely useless to send it to the congress, which . . . can not . . . intervene in the ecclesiastical affairs of any sect.”²⁸ The proposal triggered political opposition because the bishop would be French, not American. Opponents urged Congress to reject the appointment on that theologically neutral, “secular” ground. Instead, Congress responded that it had “no authority to permit or refuse” the appointment, and the Pope could appoint whomever he wished because “the subject . . . being purely spiritual . . . is without the jurisdiction and powers of Congress.”²⁹ This hands-off attitude toward ministerial selections “was of vital importance to all subsequent American history.”³⁰

Secretary of State James Madison reaffirmed the principle in 1806 when Roman Catholic Bishop John Carroll, again following European practice, sought to consult Madison about whom to appoint to direct the Catholic Church’s affairs in the new Louisiana Territory. After conferring with President Jefferson, Madison responded that “the selection of ecclesiastical individuals”—of church “functionaries”—was an “entirely ecclesiastical” matter for the Catholic Church to decide, and that he would adhere to “the scrupulous policy of the Constitution in guarding against a political interference in religious affairs.”³¹

Throughout his life, Madison viewed the Constitution’s principle of church–state separation as forbidding government involvement in churches’ internal affairs, especially clergy selection. His first recorded pronouncement on religion and government was an impassioned denunciation of colonial Virginia’s licensing of preachers.³² Later as President, vetoing a bill specially incorporating an Episcopal church in the District of Columbia, Madison objected that the bill enacted “sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same; so that no change could be made therein*” by the

²⁸ 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 478 (1950) (quotation omitted).

²⁹ *Id.* at 479 (quotation omitted).

³⁰ *Id.* Note that Congress said that it had no jurisdiction over the subject matter, not that it had jurisdiction so long as it acted on the basis of a religion-neutral, secular, or nontheological basis.

³¹ Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), in 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 63–64 (1909) (link).

³² Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in JAMES MADISON, 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON: 1769–1793, at 10–13 (1884) (referring to the “diabolical Hell conceived principle of persecution”) (link).

congregation or the denomination.³³ For Madison, recognition of the churches' authority to choose clergy went hand in hand with religious liberty and church–state separation.

Other leading founding-era proponents of church–state separation likewise understood it to protect religious institutions' autonomy over clergy selection. Baptists and other dissenting groups who fought against religious establishments in New England and the southern colonies did so largely to preserve the autonomy of religious organizations from government interference and manipulation. Isaac Backus, the leading voice among Massachusetts Baptists, emphasized dual authorities in *An Appeal for Religious Liberty Against the Oppressions of the Present Day*,³⁴ which has been described as “the best exposition of the eighteenth century pietistic concept of [church–state] separation.”³⁵ According to Backus, “God has appointed two kinds of government in the world, which are distinct in their nature, and ought never to be confounded together; one of which is called civil, the other ecclesiastical government.”³⁶ From this distinction, Backus directly drew implications concerning the appointment of leaders in each institution. The determination of the “offices of civil government is left to human discretion,” but “in ecclesiastical affairs we are most solemnly warned not to be *subject to ordinances, after the doctrines and commandments of men*.”³⁷ God “has always claimed it as his sole prerogative, to determine by express laws, what his worship shall be, *who shall minister in it*, and how they shall be supported.”³⁸

Thomas Jefferson also saw church–state separation as guaranteeing the autonomy, independence, and freedom of religious organizations—not just churches but religious schools as well. In 1804, two years after his famous letter to the Danbury Baptists in Connecticut endorsing a constitutional “wall of separation,” Jefferson wrote another letter, this time to the Ursuline Sisters of New Orleans, who operated a school for orphaned girls. The order's prioress had written to Jefferson asking for assurance that the Louisiana Purchase would not undermine their legal rights. Jefferson replied that the principles of the Constitution “are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, *and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority*.”³⁹ Jefferson's

³³ 11 ANNALS OF CONG. 982–83 (1811) (emphasis added) (link).

³⁴ ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY AGAINST THE OPPRESSIONS OF THE PRESENT DAY (1773) (link).

³⁵ WILLIAM G. MCLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION 123 (Oscar Handlin ed., 1967).

³⁶ BACKUS, *supra* note 34, at 9.

³⁷ *Id.* at 10 (citing *Colossians* 2:20, 2:22).

³⁸ *Id.* (emphasis added).

³⁹ 1 STOKES, *supra* note 28, at 678 (emphasis added) (citation omitted) (“Be assured that [your Institution] will meet with all the protection my office can give it.”).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

powerful statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders, even if his letter does not say so explicitly. Although other arguments would be required to show that teachers in religious schools fall within the ministerial exception,⁴⁰ Jefferson's letter at least supports the proposition that religiously affiliated schools have important interests in the freedom and autonomy that goes with church–state separation.

State religious establishments, several of which continued after ratification of the First Amendment, included among their features control over the selection and conduct of clergy. Protests against such controls were essential to the successful fights for religious liberty and disestablishment in the states. Under the establishments of religion in New England and the southern colonies, civil authorities regulated the conduct of clergy in the established church, and at first prohibited, then gave limited licenses to, preachers teachers of dissenting sects. Some regulations of preachers had explicitly theological criteria.⁴¹ Other regulations did not, but nevertheless imposed serious burdens. For example, in Virginia, licenses only allowed named persons to preach in designated places and required multiple applications, seriously burdening the Baptist practice of itinerant teaching and evangelization.⁴² In New England, controversies focused on whether dissenting clergy would be exempt from paying general taxes (as were Congregational clergy) and whether dissenting groups would be exempt from paying religious taxes—taxes to support clergy. Many Baptists and Separate (or “New Light”) Congregationalists—both intensely evangelical groups—believed that personal religious conversion was more important for a preacher than professional training.⁴³ Establishment proponents, in contrast, believed that teachers of religion should be professionally educated, and both Connecticut and Massachusetts reacted by passing laws in the mid-1700s “preventing any church or parish from choosing a minister who lacked a college degree.”⁴⁴ Such laws embittered Baptists, and in 1773 led them to begin a “massive civil disobedience” campaign against religious taxes.⁴⁵

Finally, and significantly, the “death-blow” to the Massachusetts establishment came because of distress at civil authorities overriding

⁴⁰ For a brief summary of such arguments, see *infra* note 57.

⁴¹ For example, Virginia tried preachers in the 1720s for “speaking against the canons of the Church of England.” CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 24 (1900) (link).

⁴² See H. J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 37–39 (1910) (link); JAMES, *supra* note 41, at 13, 26–38, 41.

⁴³ 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 351 (1971).

⁴⁴ *Id.* at 363; see also JACOB C. MEYER, CHURCH AND STATE IN MASSACHUSETTS 51 (1930).

⁴⁵ 1 MCLOUGHLIN, *supra* note 43, at 546.

churches' choices concerning clergy.⁴⁶ The issue arose from a rule allowing each local majority to determine which religious leader would receive the proceeds of clergy taxes, subject to dissenters' opt-outs. By the early 1800s, more and more Congregational parishes split between Trinitarians and the growing number of Unitarians. In several cases, one side constituted the majority in the church, the other side the majority in the town (or "parish"). The Massachusetts Supreme Judicial Court ruled that the town's vote controlled which clergy member would occupy the "First Church" and receive tax funds.⁴⁷ In the key case, *Baker*, the majority of voters in the town of Dedham called a Unitarian minister, but the majority of church members objected and withdrew, taking records, liturgical materials, and trust funds with them.⁴⁸ When the court ruled that the town's vote—the civil determination—controlled, the previously dominant Trinitarians suddenly found themselves on the losing side. Within a few years they "conclude[d] that a religious establishment was no longer workable . . . [and] that disestablishment was necessary to protect the church against the control of the nonchurched."⁴⁹ Under *Baker*, "the secular (non-members) citizens could overrule the communicants (the members) of the church. This was the system of Erastianism from which the original Puritan founders of Massachusetts had fled to the New World—the state as superior to the church."⁵⁰ As Part III elaborates, the ministerial exception aims to prevent the very same harm: a civil body, jury, or judge, overruling the selection of a minister made by the religious organization's authorities.

B. Case Law

Given the importance of clergy selection in our tradition of religious institutional autonomy, it is unsurprising that the Supreme Court has repeatedly forbidden the government from interfering in religious institutions' decisions concerning the selection and supervision of leaders. The Court in *Kedroff* invalidated a state statute that transferred authority and property in the Russian Orthodox Church from the Moscow Patriarch to an American convention.⁵¹ The Court held that the state had trespassed on what was "strictly a matter of ecclesiastical government": "the power of the

⁴⁶ SANFORD HOADLEY COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 515 (1902) (link).

⁴⁷ *Baker v. Fales*, 16 Mass. (16 Tyng) 488, 520–22 (1820); *Burr v. Inhabitants of First Parish in Sandwich*, 9 Mass. (9 Tyng) 277, 297–98 (1812).

⁴⁸ 2 MCLOUGHLIN, *supra* note 43, at 1190.

⁴⁹ STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 143 (2010); *see also* 2 MCLOUGHLIN, *supra* note 43, at 1196 ("[*Baker*] produced the final and fatal crack in the [Massachusetts establishment].").

⁵⁰ WILLIAM G. MCLOUGHLIN, *SOUL LIBERTY: THE BAPTISTS' STRUGGLE IN NEW ENGLAND, 1630–1833*, at 299 (1991).

⁵¹ *See* Richard W. Garnett, "Things That Are Not Caesar's": *The Story of Kedroff v. St. Nicholas Cathedral*, in RICHARD W. GARNETT & ANDREW KOPPELMAN, *FIRST AMENDMENT STORIES* (forthcoming 2011).

Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America.”⁵² Likewise, in *Milivojevich*, the Court invalidated a state court decision that overturned the Serbian Orthodox Church’s defrocking of its American bishop. The Court held that civil courts must accept the decision of a hierarchical church’s tribunal in “disputes over the government and direction of subordinate [church] bodies,” including clergy selection and discipline.⁵³ Finally, the decision in *Gonzalez v. Roman Catholic Archbishop of Manila* states that “[b]ecause the appointment [of a Catholic chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.”⁵⁴ In short, the importance of organizations’ control over the selection of ministers is recognized in case law as well as history.

III. THE MINISTERIAL EXCEPTION, SEPARATION, AND FREEDOM

The ministerial exception follows directly from the principle that religious organizations should control the selection and discipline of ministers because such matters are beyond the rightful power of civil government. The exception bars any claim by an employee “the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”⁵⁵ Unquestionably, a nondiscrimination suit seeks to override the church’s decision concerning such ministerial personnel. The threatened government action is especially intrusive when the plaintiff seeks a court order reinstating her to the position. In such a case the court is literally appointing a minister. But an award of damages (including back pay, emotional distress, punitive damages and attorney’s fees) is also highly burdensome since it operates as a tax on protected decisions concerning ministerial personnel. As the Court has recognized, “Fear of potential liability [for employment discrimination] might affect the way an organization carried out what it understood to be its religious mission.”⁵⁶ Accordingly, ministerial-exception decisions

⁵² *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 115 (1952).

⁵³ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976).

⁵⁴ 280 U.S. 1, 16 (1929) (noting that secular courts must accept “decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights”) (link).

⁵⁵ *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006) (link); *see also Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (link). The absolute bar to liability erected by the ministerial exception applies to lawsuits between the minister and the religious organization, or in suits by a government agency, like the EEOC, seeking to directly assert the minister’s interest. The essence of these cases is a dispute over the organization’s right to select ministers. In some other cases, by contrast, a religious organization’s selection or supervision of ministers comes into question only as a secondary issue in a suit by a third party: for example, in suits seeking to hold the organization liable for acts of abuse committed by one of its ministers.

⁵⁶ *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (link).

recognize why selecting leaders has historically been a very sensitive task for religious organizations:

A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise. As the Fifth Circuit explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." . . . "Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."⁵⁷

Like religious institutional autonomy in general, the ministerial exception rests on both Religion Clauses. The first ministerial-exception case, *McClure*, held that the application of nondiscrimination laws violated the "free exercise of religion."⁵⁸ But the opinion added establishment-related language as well, saying that the process of court intervention and investigation "could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment."⁵⁹ One ground for the ministerial exception is that nondiscrimination suits will frequently call on civil courts to make essentially theological judgments about whether the plaintiff was suited for

⁵⁷ *Petruska*, 462 F.3d at 306 (quoting *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972) (link)).

Although this article does not address in detail which employees count as "ministers," we believe that they should include employees with duties to lead the religious organization, teach the faith, or participate in the moral or spiritual formation of community members. The definition should extend beyond formal clergy or ordained positions and should be interpreted reasonably flexibly. Religious organizations have multiple ways of defining their leadership roles—only some emphasize ordination—and the history in Parts I and II shows that narrow or formalistic state definitions of protected ministerial status have always excluded some groups and triggered dissension. For elaboration of these arguments, see Amicus Brief, *supra* note 3, at 28–32.

Under this approach, the exception should cover teachers with religious duties in religious schools, including many classroom teachers that teach a variety of subjects, who play vital roles in moral and spiritual formation by teaching students behavioral rules and enforcing discipline. At the very least, the teacher position at issue in *Hosanna-Tabor* presents an easy case: the plaintiff, Cheryl Perich, taught religion classes, led students in prayers, and was formally "commissioned" and "called" as a teacher by the Church Congregation after undergoing training in Lutheran theology over several years (see Brief for the Petitioner at 41, 47–48, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (2011), 2011 WL 2414707, at *41, 47–48 [hereinafter *Petitioner's Brief*] (link)). For elaboration of these arguments, see Amicus Brief, *supra* note 3, at 32–38.

⁵⁸ *McClure*, 460 F.2d at 560.

⁵⁹ *Id.*

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

a religious leadership role or performed it well. Nondiscrimination suits typically turn on questions of “pretext”: the employer asserts that it discharged the plaintiff for a nondiscriminatory reason, and the plaintiff challenges that reason as a pretext for discrimination.⁶⁰ In cases involving personnel with important religious functions, the organization’s asserted nondiscriminatory motive will usually be religious in nature or have religious implications. To decide whether the organization’s assertion of a religious motive is credible, judges and juries inevitably will have to examine it closely; they will have to second guess “[a] church’s view on whether an individual is suited for a particular clergy position.”⁶¹

The Sixth Circuit in *Hosanna-Tabor* concluded that such a concern was inapplicable in that case. The court reasoned that Ms. Perich’s “claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA” in the way it treated Ms. Perich.⁶² This conclusion is unsound for several reasons.

First, the ministerial exception is not designed merely to keep courts from deciding contested theological questions. The exception also protects the distinctive religious-freedom interest—deeply rooted in the history, as summarized in Parts I and II—that religious organizations should be free to choose their leaders. The question of who will give spiritual leadership to the organization is a “matter[] of church government”⁶³—of “prime ecclesiastical concern”⁶⁴—whether or not a civil court’s interference includes an explicit theological ruling. If a court reinstates a minister over the church’s objection or imposes a damages award for the church’s decision, the result is no less harmful to the church simply because it comes from the application of a theologically neutral rule. The church still is forced to accept, or pay damages for refusing to accept, a leader who it believes is unsuitable. For this reason, most courts hold, as they should, that the applicability of the ministerial exception does not depend on the church identifying a rationale in “church doctrine or ecclesiastical law” for its employment action.⁶⁵ The Supreme Court’s rulings confirm that

⁶⁰ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (link).

⁶¹ *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) (link).

⁶² *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 781–82 (6th Cir. 2010) (link).

⁶³ *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

⁶⁴ *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

⁶⁵ See *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 n.7, 307 (3d Cir. 2006) (quoting *Gellington*, 203 F.3d at 1303) (internal quotation mark omitted); *id.* at 304 n.7 (noting that the ministerial exception “protects the act of a decision rather than a motivation behind it” (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (link))); see also Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL’Y 165, 172–76 (2009).

government interference with clergy decisions is barred independent of the presence of theological questions.⁶⁶

As the history set out above shows, the government can trigger the harms that the Religion Clauses seek to avoid—coercion, church–state conflict, government overreaching—simply by overriding a church’s decision regarding an individual’s suitability to serve as its minister. Under the Massachusetts voting scheme for clergy taxes, the majority of town voters did not need to state a theological rationale for selecting one clergyman for the “First Church.” Rather, they could cast their vote based on any factor. Nevertheless, the distress caused when town voters overrode church members’ wishes was enough to end the Massachusetts establishment. Both the Virginia limit on the number of places where a minister could be licensed to speak and the Massachusetts requirement of college training for ministers were formally neutral among theologies and called for no doctrinal determination. Yet Virginia’s jailing of unlicensed itinerant preachers provoked Madison to charge “persecution,” and the Massachusetts college-education requirement embittered the Baptists enough to drive them into “massive civil disobedience.”⁶⁷

In addition, even if the government claims to rest on a formally neutral rule of law in overriding a church’s choice of minister, this claim frequently turns out to be misleading. Indeed, questions that might seem facially nonreligious take on a religious coloration in a dispute between a religious organization and one of its ministers. For example, in *Milivojevich*, the Illinois Supreme Court, in overturning the bishop’s defrocking, had “relied on purported ‘neutral principles’ . . . which would ‘not in any way entangle this court in the determination of theological or doctrinal matters.’”⁶⁸ Nevertheless, the Court found that the state court entangled itself in religious questions by “substitut[ing] its interpretation” of the church’s constitutions “for that of the [church’s] highest ecclesiastical tribunals.”⁶⁹ This pattern repeats throughout history. Advocates of the Massachusetts law requiring college education for ministers, for instance, might have argued that it did not reflect any theological determination by the state—merely a judgment that a preacher of any theology should have formal schooling given preachers’ influence in the community. But in practice, the

⁶⁶ See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (noting that the state may not intervene “in controversies over religious authority or dogma” (emphasis added)) (link). A dispute over whether a religious organization can discharge a minister is surely a controversy over religious authority. For courts to abstain only when doctrinal questions are present is to make *Smith*’s reference to controversies over religious authority meaningless. The Court could have spoken only of “controversies over . . . dogma.” *Id.*; see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (barring civil courts from matters of “ecclesiastical government” as well as “theological controversy”).

⁶⁷ See *supra* notes 32, 44 and accompanying text.

⁶⁸ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976) (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 328 N.E.2d 268, 282 (Ill. 1975) (link)).

⁶⁹ *Id.*

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

requirement implicated the deep theological division between the establishment Congregationalists and the evangelical groups over the importance of formal learning as opposed to personal religious experience.⁷⁰

Hosanna-Tabor exemplifies how theological or religious issues are almost impossible to avoid in cases involving employees with spiritual duties. When *Hosanna-Tabor* declined to let Ms. Perich return from her leave in the middle of the semester, she responded by threatening to sue and behaving in other ways that the principal and school board regarded as confrontational and disruptive. *Hosanna-Tabor* believed that her behavior violated New Testament injunctions against resorting to civil courts in disputes among Christians, and that she had “create[d] upheaval” at the school and demonstrated “a total lack of concern for the ministry of *Hosanna-Tabor* Lutheran School.”⁷¹ A majority of the local church congregation that sponsored the school agreed and voted to rescind her “call” to teach. Ms. Perich claims that these reasons are pretexts for discrimination, but her claims require the courts to delve deep into the religious motives of multiple church bodies and members. As *Hosanna-Tabor* argues in its main brief, the pretext inquiry “would necessarily devolve into an investigation of the Church’s beliefs. Do Lutherans really believe in non-litigious, internal resolution of disputes over fitness for ministry? Does that teaching apply to this case? Did it actually motivate the congregation?”⁷² Ultimately, the congregation terminated Ms. Perich’s “call” because it had lost confidence in her ability to represent *Hosanna-Tabor*’s beliefs and purposes to children in light of her behavior surrounding the request to return. If she were reinstated, every parent and every child would know she had defied Lutheran teaching to get there. Given those circumstances, it is hard to see how she could be an effective “voice to the faithful” on *Hosanna-Tabor*’s behalf.⁷³ Even more fundamentally, though, it is up to *Hosanna-Tabor*, not a jury or judge, to decide whether she could be effective.

Finally, the ministerial exception protects against the burdens of litigation and investigation, independent of the results. As the Court stated in refusing to extend National Labor Relations Board jurisdiction to religious-school teachers: “It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings

⁷⁰ This history shows that the ministerial exception should apply even when the government interferes through a rule involving no explicit theological determination. It is true that—unlike the historical laws imposing unique requirements on ministers—antidiscrimination laws may qualify as “generally applicable” under *Employment Division v. Smith* (see 494 U.S. at 878–80). But for various reasons, some of which we have already discussed, *Smith* does not bar the ministerial exception, which survives as a distinct constitutional protection. See, e.g., *supra* note 66.

⁷¹ See Petitioner’s Brief, *supra* note 57, at 10 (quotations omitted).

⁷² *Id.* at 56.

⁷³ *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006).

and conclusions.”⁷⁴ If courts permitted nondiscrimination suits to proceed, “[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers.”⁷⁵ Religious organizations not only suffer direct burdens from such expense and scrutiny; they also “might make [decisions] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.”⁷⁶

CONCLUSION

The ministerial exception is constitutionally required, historically rooted, and essential to limited government and thus to political and religious freedom. However, it does not rest on an assumption that religious institutions and employers never behave badly. Of course, they sometimes do, as do we all. Its premise is not that churches are “above the law.” They are not. Its point is not “discrimination is fine if churches do it.” It is, instead, that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church–state separation puts beyond the law’s corrective reach, and some relationships that government should not presume to supervise, such as the relationship between a religious congregation and those who lead it, teach the faith, or supervise members’ moral and spiritual formation.

To be sure, not every employee of a religious organization is “ministerial,” for many are not. And religious institutions—like all employers—have legal obligations to their employees, whether ministerial or not. Although there are difficult questions to be asked and fine lines to be drawn, when it comes to interpreting the First Amendment’s boundary between church and state, it cannot be the role of civil government to police the decisions of religious communities regarding who should be their leaders and teachers any more than the civil courts should review disputes over the meaning of religious doctrines.

⁷⁴ *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (link).

⁷⁵ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (noting that the combination of an EEOC investigation and a federal lawsuit makes for a “potentially . . . lengthy proceeding”); *see also* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466–67 (D.C. Cir. 1996) (link).

⁷⁶ *Rayburn*, 772 F.2d at 1171; *see also* *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343–44 (1987) (Brennan, J., concurring) (noting that Title VII litigation may “both produce excessive government entanglement with religion and create the danger of chilling religious activity”).