

## ACT III OF THE MINISTERIAL EXCEPTION†

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**ABSTRACT**—The Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* marks a resounding victory for the principle of church self-governance and the autonomy of religious institutions. But it is just the beginning of the story, not the end. *Hosanna-Tabor* properly recognizes that a significant measure of church autonomy is a key element part of the American church–state settlement, and may signal a broader recognition of the important role played by nonstate institutions in our social infrastructure. But it does not tell us how churches should behave under such a regime of autonomy, or how those inside and outside the church should respond. This commentary argues that these are the questions we are now obliged to consider. Institutional autonomy imposes responsibilities as well as rights, and churches must ponder when, whether, and how they will use their autonomy. It also imposes a civic duty on citizens to monitor, engage with, and sometimes criticize our central infrastructural nonstate institutions. In short, *Hosanna-Tabor* raises nonlegal questions that are just as important as the allocation of legal authority between churches and other nonstate institutions and the state.

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INTRODUCTION

Law is filled with stories without endings. Case reports and law review articles generally conclude with the judgment on a case. Once judgment is rendered, either by a judge or by a scholar analyzing an opinion, it is relatively rare for anyone to consider what happens next.<sup>1</sup> In drama, a gun that appears onstage in Act I is sure to go off in Act III: the play has not ended until there is a climax, until the full narrative has reached its conclusion.<sup>2</sup> In law, the curtain often draws shut abruptly *in medias res*, at the end of Act II.

One obvious reason for this is that the law and its students generally focus on a single question: the question of legal power, especially the power of courts to order some action and make it stick.<sup>3</sup> Authority, jurisdiction, liability, or immunity; terms like these are the meat and drink of the law. They are the answers to the question of who gets to “say what the law is.”<sup>4</sup>

It is all perfectly natural, and perfectly odd. Consider some famous cases that turn on the question of the nature and limits of judicial power. It is natural to want to know, in a case in which a police department has been using a potentially lethal “chokehold” method of restraint, whether the department can be made to cease its conduct.<sup>5</sup> If the government is accused of bombing a country with which it is not at war, you naturally want to know whether it can be ordered to ground its planes.<sup>6</sup> If a private company is collaborating with the state to engage in the extraordinary rendition of individuals to nations that commit torture, you will want to know whether it can be held to account or whether any litigation should be dismissed because it would require the revelation of sensitive confidential information.<sup>7</sup>

<sup>1</sup> As always, there are exceptions. *See, e.g.*, Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

<sup>2</sup> *See* ACADEMIC DICTIONARY OF FICTION 40 (Ashish Pandey ed., 2005) (defining Anton “Chekhov’s gun”).

<sup>3</sup> *See, e.g.*, Christoph Menke, *Law and Violence*, 22 LAW & LIT. 1, 11 (2010) (“Law is about power, its own power.”). The canonical discussion is in Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>4</sup> *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>5</sup> *See* *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>6</sup> *See, e.g.*, *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

<sup>7</sup> *See, e.g.*, *Totten v. United States*, 92 U.S. 105 (1875); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc).

Unless your focus is narrow and your curiosity highly limited, however, you will also want to know what happens next. Unless you confuse the “is” of judicial or governmental power with a moral “ought,” you are unlikely to think that the fact that a party, public or private, *can* do something without legal consequences means that it *should*. Some party will be left with the final authority to act; but *how* it acts matters as much or more than the fact that it *can* act. To say that a dispute is out of the court’s hands does not mean it is in no one’s hands at all. The party with the authority will still have a choice about what to do with that authority. And when, in one of these judicial dramas, the court’s obligations end, our obligations as citizens are just beginning. We must decide whether society should bow out of the tale, leaving the party with the authority to act as it wishes—or whether, even if the law cannot act, society should take soft or hard action to persuade the party to act as we think it should. Legal power is not always the last word.

So it is with the Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>8</sup> In *Hosanna-Tabor*, the Supreme Court affirmed what the circuit courts had long held<sup>9</sup>: that the Religion Clauses of the First Amendment protect religious organizations from employment discrimination claims brought by employees acting in a “ministerial” position.<sup>10</sup> Although the case was hotly contested before the Supreme Court and among scholars, the result came as little surprise. What was more striking was the Court’s unanimity and forcefulness. *Hosanna-Tabor* sends a powerful message about the “special solicitude” accorded by the First Amendment to “the rights of religious organizations,” not just individuals.<sup>11</sup> For students of the First Amendment and champions of religious freedom, it is a decision of profound importance.

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<sup>8</sup> 132 S. Ct. 694 (2012).

<sup>9</sup> See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040–41 (7th Cir. 2006); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350–51 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–62 (D.C. Cir. 1996); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). As one court has put it, the basic rule suggests that one or both of the Religion Clauses “deprive[] a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy, even when the church’s challenged actions are not based on religious doctrine.” *Combs*, 173 F.3d at 345.

<sup>10</sup> See *Hosanna-Tabor*, 132 S. Ct. at 702 (“Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”).

<sup>11</sup> *Id.* at 706. The Court’s emphasis on the rights of religious *organizations* is, I confess, of particular interest to me. In a forthcoming book, I argue for the importance of particular institutions, including religious entities, as key parts of our social infrastructure, and argue that courts ought to grant them considerable autonomy under the First Amendment to shape their own ends. See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (forthcoming 2012); see also Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) (making this argument with specific respect to churches).

If *Hosanna-Tabor* settled the basic question of whether the ministerial exception exists, however, it hardly ended the discussion—nor could it. The debate leading up to the Court’s decision was mostly focused on Act II questions: questions of power, jurisdiction, and immunity. As is often the case with such discussions, these debates tended to treat the answers to those questions as dispositive of the broader normative questions of whether and when churches *ought* to exercise their immunity, or at best to leave those questions to one side. To do so was arguably not enough then and is certainly insufficient now.

In this Essay, I argue that we would be wrong to treat our discussion of the ministerial exception as ending at Act II, with the decision in *Hosanna-Tabor*. Rather, in thinking about the ministerial exception, we—especially those of us who have championed it<sup>12</sup>—have a scholarly and moral obligation to think about what happens in the next Act. We need to do so from a perspective that acknowledges the dangers as well as the value of church autonomy.<sup>13</sup> This perspective treats churches as beneficial but imperfect institutions, not saintly ones, and asks what sorts of nonlegal levers—from internal debate within the church to external public criticism—might encourage churches to exercise their authority sensitively and appropriately. Conversely, opponents of the ministerial exception doctrine should cease caricaturing churches as self-interested actors whose only apparent goal is to escape legal liability for egregious employment practices—to remain “above the law.”<sup>14</sup> These critics should think instead about both the deeper meanings of the ministerial exception and the role that *nonlegal* mechanisms can play in encouraging fairness in its exercise.

I begin by offering a brief defense of the ministerial exception doctrine, emphasizing more firmly than the Court itself did the view that it

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<sup>12</sup> See HORWITZ, *supra* note 11; Horwitz, *supra* note 11.

<sup>13</sup> See Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 51–52 (discussing the “[d]ark [s]ide of [g]roups and [g]roup [r]ights,” including “the threat that groups pose to individual identity, autonomy, and freedom”); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 863 (1993) (“Religion is one of the most important forces in society. It provides immeasurable benefits to both humanity and the individual. But religion cannot be greeted in the public square solely with celebration; it must also be greeted with caution.”). For the argument that religion’s “dark side” does not adequately distinguish it from other social forces, institutions, and ideas, see STEPHEN L. CARTER, *GOD’S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 19, 21 (2000). For more on the benefits—and costs—of a more vigorous approach to institutional autonomy in First Amendment law, see generally HORWITZ, *supra* note 11.

<sup>14</sup> Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007); see also Leslie C. Griffin, *Ordained Discrimination: The Cases Against the Ministerial Exception 1* (Univ. of Houston Pub. Law & Legal Theory Series 2011-A-9, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1936073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936073) (“[T]he numerous justifications for the [ministerial] exception are all a restatement of one foundational argument: that religious groups are entitled to disobey the law.”).

reflects a fundamental division of authority between church and state.<sup>15</sup> I then discuss the role of both internal religious discussion and external public criticism as a tool for policing the use of the ministerial exception. I argue that thinking about Act III is necessary not only to properly evaluate the law in this area, but also because scholars and citizens have a moral obligation to think about what autonomous institutions like churches *ought* to do, not just about how the law allocates authority in this area.

### I. THE MINISTERIAL EXCEPTION AS POWER

The basic defense of the ministerial exception starts with history and first principles. The historical argument is ultimately a recapitulation of Western legal and political history itself. As Michael McConnell puts it:

[F]rom at least the time of Pope Gelasius [in the fifth century A.D.], standard legal thinking in Western Europe was based on the theory of Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state. These spheres were undeniably separate, and not because the state chose to make them so.<sup>16</sup>

That general distinction endured even after the schism in Western Christianity caused by the Reformation: Lutheran thought, for instance, replaced the concept of “two swords” with one of “two kingdoms.”<sup>17</sup> Despite their differences, a common theme ran through these formulations: “the spiritual and temporal powers” must “remain separate in function,” and at a minimum the temporal authority “had no power to . . . mete out religious discipline.”<sup>18</sup>

The American tradition of separation is basically continuous with this history. As one of the amici in the *Hosanna-Tabor* case observed, “Th[e]

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<sup>15</sup> This line of argument is more prominent in the concurring opinion filed by Justice Alito, joined by Justice Kagan. That opinion, rather than referring simply to a ministerial “exception” from the law, emphasizes the “crucial *autonomy*” of religious entities and states that “the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.” *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (emphasis added); see also Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE 168, 169 (2012) (“[T]he decision in *Hosanna-Tabor* is not about an ordinary constitutional right—subject to balancing—but about a structural limit on the scope of the government’s authority.”).

<sup>16</sup> Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8 (footnote omitted). For similar sentiments, see, e.g., Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869 (2009) (book review); John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003) (book review).

<sup>17</sup> See, e.g., William B. Ewald, *The Protestant Revolutions and Western Law*, 22 CONST. COMMENT. 181, 188 (2005) (internal quotations marks omitted) (reviewing HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003)).

<sup>18</sup> Witte, *supra* note 16, at 1878–79.

differentiation between the institutions of church and state has become a part of the American constitutional tradition.”<sup>19</sup> Indeed, the tradition predates the Constitution itself. It can be found in the writings of Roger Williams,<sup>20</sup> the structure of the Puritan communities in New England, and elsewhere.<sup>21</sup> The preamble to the Laws and Liberties of Massachusetts Bay in 1648, for example, proclaimed: “[O]ur churches and civil state have been planted, and grown up (like two twins)”; to conflate the two would lead to the “misery (if not ruin) of both.”<sup>22</sup> Closer to the Revolutionary Era, it was apparent in the thinking of John Adams, who admired the vision of separate spheres championed by the Puritans and made sure that the Massachusetts Constitution of 1780 guaranteed the right of churches to select their own ministers without state interference.<sup>23</sup> And it was evident in the “strikingly jurisdictional” language that James Madison employed in his influential *Memorial and Remonstrance*: “[I]n matters of Religion, no man’s right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance.”<sup>24</sup> In the post-revolutionary period, “[t]he key to resolving” church–state disputes “was to define a private sphere, protected against interference by the vested rights doctrine and the separation of church and state.”<sup>25</sup> The American tradition, in short, has long embraced “a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government.”<sup>26</sup>

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<sup>19</sup> Brief Amici Curiae of Professor Eugene Volokh et al. in Support of Petitioner at 6, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-533), 2011 WL 2470847, at \*6 [hereinafter Volokh Brief].

<sup>20</sup> See, e.g., Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 290–91 (2005).

<sup>21</sup> See Horwitz, *supra* note 11, at 100–04. For other examples, see Volokh Brief, *supra* note 19, at 12–18.

<sup>22</sup> LAWS AND LIBERTIES OF MASSACHUSETTS BAY A2 (1648) (Max Farrand ed., 1929).

<sup>23</sup> See JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 309–11 (2007); see also Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2016 (2007) (quoting the relevant passage of the Massachusetts Constitution).

<sup>24</sup> Smith, *supra* note 16, at 1880 (alterations and omission in original) (emphases omitted) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in CHURCH AND STATE IN THE MODERN AGE 59, 60 (J.F. Maclear ed., 1995)) (internal quotation marks omitted). As Chief Justice Roberts noted for the Court in *Hosanna-Tabor*, this was not the only occasion on which Madison spoke in more or less jurisdictional terms. The Chief Justice cited, inter alia, James Madison’s statement vetoing an act of Congress incorporating the Protestant Episcopal Church in Alexandria, because it “exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions . . .” *Hosanna-Tabor*, 132 S. Ct. at 703–04 (quoting 22 ANNALS OF CONG. 982–83 (1811)).

<sup>25</sup> Michael W. McConnell, *The Supreme Court’s Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 42 (2001).

<sup>26</sup> Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 523 (2007).

Some central constitutional principles rest on this historical foundation. The most important is the oft-repeated notion that religious institutions in this nation must have the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>27</sup> Similarly, the state may not interfere with a church’s selection or rejection of its religious members, let alone its leaders.<sup>28</sup>

A third principle, regularly derived both from this history and from broader views about the limits of the judicial role in church–state disputes, is that judges cannot evaluate the kinds of religious questions that come up in employment discrimination cases involving ministerial employees, among other places. This position is sometimes called the “hands off” rule.<sup>29</sup>

One standard justification for the hands-off treatment of religious questions by courts is that judges are simply incompetent to address them. For strategic reasons, opponents of the ministerial exception in the period leading up to *Hosanna-Tabor* routinely focused on the question of judicial incompetence. It allowed them to argue that many ministerial exception cases raise issues that judges *are* competent to decide,<sup>30</sup> thus narrowing the potential scope of the exception. At the same time, it allowed them to argue that courts engaged in a case-by-case analysis of such disputes end up entangled in even more theological questions, thus making it preferable to do away with the ministerial exception altogether.<sup>31</sup> In the result, the *Hosanna-Tabor* Court, while leaving open the possibility that courts can decide many disputes involving churches,<sup>32</sup> concluded that the ministerial

<sup>27</sup> *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

<sup>28</sup> *See, e.g., id.* at 119 (observing that free exercise of religion entails freedom of “an ecclesiastical right, the Church’s choice of its hierarchy”); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (“[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.”); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40 (1872) (recognizing that courts “cannot decide who ought to be members of the church”); *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood. . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.”); *id.* at 559 (noting that “matters of church government and administration” lie “beyond the purview of civil authorities”); *see also Hosanna-Tabor*, 132 S. Ct. at 706 (emphasizing “a religious group’s right to shape its own faith and mission through its appointments”).

<sup>29</sup> *See generally* Samuel J. Levine, *The Supreme Court’s Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009) (discussing the Supreme Court’s “hands-off approach”).

<sup>30</sup> *See, e.g.,* Brief of Amici Curiae Law and Religion Professors in Support of Respondents at 26, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-533), 2011 WL 3532698, at \*26 (“*Hosanna-Tabor* incorrectly assumes that adjudicating ministers’ antidiscrimination claims will require courts to decide questions beyond their institutional competence. A court may decide [a plaintiff’s] retaliation claim without ever becoming entangled in doctrinal or theological questions.”) [hereinafter Professors’ Brief].

<sup>31</sup> *See id.* at 32–35.

<sup>32</sup> *See, e.g., Hosanna-Tabor*, 132 S. Ct. at 710 (“The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today

exception's categorical nature precludes case-by-case consideration of the competence of courts to evaluate particular disputes.<sup>33</sup>

In sum, the conventional justifications for the ministerial exception consist of a set of simple principles with a long historical pedigree. Courts cannot decide religious disputes. They may not resolve questions of church doctrine or governance. And they may not interfere in a church's decision about who constitutes an acceptable leader or member. These principles are all confirmed by the Court's decision in *Hosanna-Tabor*.

These principles focus first on the fundamentals of religious freedom—those rights without which basic religious freedom could not be said to exist—and second on the incapacities of courts. For many supporters of the ministerial exception, however, they are still just surface matters, conclusions that follow from deeper premises. They lead us back to the central question that occupies the law, at least up through Act II: the question of power.

Here, some of us see a fundamental and perhaps more radical principle underlying not only the ministerial exception but the law of religious freedom generally: courts, and the state itself, are simply not authorized to intervene in life at the heart of the church. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns. The state can no more intervene in the sovereign affairs of the church than it can in the sovereign affairs of Mexico or Canada. This allocation of authority is not intended to signal the primacy of the church or the inferiority of the state; it is a settlement between coequal institutions, one that says that “[government] is not the sole possessor of sovereignty” and that the church “exercise[s] within the area of [its] competence an authority so effective as to justify labeling it a sovereign authority” all its own.<sup>34</sup> Whatever the church's “area of competence” may be, it extends at least to fundamental questions of church structure and leadership, and it

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we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”); *see also id.* (noting *Hosanna-Tabor*'s argument that “the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings”).

<sup>33</sup> *See id.* at 709 (“The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church's alone.” (citation omitted) (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 119 (1952))); *see also id.* at 715–16 (Alito, J., concurring) (rejecting the government's argument that courts should be able to evaluate whether a church's dismissal of a ministerial employee was for religious reasons or whether religion served as a mere pretext for discrimination, because such inquiries would lead inevitably to judicial “judgment[s] about church doctrine”).

<sup>34</sup> Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

precludes state control over ministerial employment decisions like those in *Hosanna-Tabor*.

As radical as this description may seem, it lies at the heart of the Western church–state settlement instantiated by the First Amendment.<sup>35</sup> It is reflected in the many decisions in which courts have said that the ministerial exception is not merely an affirmative defense, but a *jurisdictional* matter.<sup>36</sup> Although the Court in *Hosanna-Tabor* rejected that argument as a technical doctrinal matter,<sup>37</sup> its holding and language are broadly consistent with the view that “[t]he role of the contemporary state is broad indeed, but it remains circumscribed by its penultimacy. Life’s ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions.”<sup>38</sup>

This authority-based argument for the ministerial exception is not novel. But it *is* radical, or at least it may seem so to those who have grown accustomed to thinking that the state is the ultimate arbiter. Its opponents, both before and after *Hosanna-Tabor*, have room to argue that it runs contrary to the statist orientation of modern law exemplified by the Supreme Court’s opinion in *Employment Division v. Smith*, which said that

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<sup>35</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 703 (“The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”).

<sup>36</sup> See, e.g., *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1039 (7th Cir. 2006); see generally Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (exploring the jurisdictional aspects of the ministerial exception). For a broader historical argument to this effect, see Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385. See also Volokh Brief, *supra* note 19, at 4 (“The civil authority lacks ‘competence’ to intervene in such matters, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdictional power.”).

<sup>37</sup> See *Hosanna-Tabor*, 132 S. Ct. at 709 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).

<sup>38</sup> Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002); see also *Hosanna-Tabor*, 132 S. Ct. at 710 (“When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.”); Esbeck, *supra* note 15, at 169 (arguing that *Hosanna-Tabor* represents “a structural limit on the scope of the government’s authority” with respect to internal questions of church governance, and concluding that “the First Amendment, understood within the historical setting that gave rise to its adoption, has determined that there are a few areas of authority that have not been rendered unto Caesar”); Kalscheur, *supra* note 36, at 93. For more on the jurisdictional issues surrounding the ministerial exception, see Howard M. Wasserman, Essay, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENUMBRA 287, 316 (2012), <http://www.pennumbra.com/essays/02-2012/Wasserman.pdf> (arguing that the Court’s jurisdictional ruling in *Hosanna-Tabor* was correct, but insisting that the Court’s decision that “church personnel and organizational decisions [lie] beyond congressional regulation” represents a significant recognition of “[t]he church’s status as a special competing and predominant sovereign”).

the Free Exercise Clause could not stand in the way of any neutral and generally applicable law that only incidentally burdens religion.<sup>39</sup>

But even the relatively statist modern Court has recognized that there are realms the law is not free to enter.<sup>40</sup> If the greatest weakness of the proponents of the ministerial exception has been the sweeping nature of their claims, its opponents' greatest weakness is that they ignore the fact that the Court has never pushed too hard on the rule of general applicability and other imperial claims on the part of the state. It has always pulled back, recognizing limits to the state's reach where central internal religious practices are involved. As *Hosanna-Tabor* confirms, even after *Smith*, core areas of church doctrine and governance remain untouched by the state.

In short, as *Hosanna-Tabor* makes clear, the ministerial exception is not some incidental, ad hoc creation. It is a fundamental part of the structure of American religious freedom. It represents a recognition of the basic idea that the First Amendment, the Constitution, and Western constitutionalism more generally guarantee a "free church in a free state."<sup>41</sup> It ensures, at a minimum, that churches must have a free hand in selecting those who

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<sup>39</sup> 494 U.S. 872 (1990). *Hosanna-Tabor* distinguished *Smith* because it "involved government regulation of only outward physical acts," while the instant case "concern[ed] government interference with an internal church decision that affect[ed] the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. Although I think the Court was correct in distinguishing *Smith*, see, e.g., Horwitz, *supra* note 11, at 117–18, its language was not terribly satisfying. See also Esbeck, *supra* note 15, at 172 n.20 (acknowledging that "the Court's distinction of *Smith* and *Hosanna-Tabor* is contestable"). Esbeck argues that it does nonetheless "make practical sense to distinguish [church] governance from [religious] sacraments" because sacraments such as the ingestion of peyote or the use of snakes during prayer services may impose harms on others and thus require legal balancing, while internal governance affairs do not. *Id.* Again, however, that argument is not entirely satisfying; it does not tell us when different kinds of harms to individuals should be seen as involving internal or external acts, or why questions concerning sacraments should be treated as involving external matters while questions concerning an employment relationship between a minister and a church are treated as involving wholly internal matters. Suffice it to say for now that although I think the Court was right to draw a line between *Smith* and *Hosanna-Tabor*, it has not yet drawn a line clear enough to resolve such questions—and any efforts to do so may ultimately raise harder questions about *Smith* than the Court is prepared to admit as yet.

<sup>40</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 704 (noting that the Court's opinion in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), "radiates . . . 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" (omission in original) (quoting *Kedroff*, 344 U.S. at 116) (internal quotation marks omitted)).

<sup>41</sup> ABRAHAM KUYPER, LECTURES ON CALVINISM 85 (2008).

perform basic religious functions.<sup>42</sup> One need not accept the widest possible account of church autonomy in order to agree on that much.<sup>43</sup>

The Court did not say or do everything it might have done to underscore this point. Even though it rightly rejected the government's argument that churches' rights could be adequately protected through freedom of association rather than as a matter of the Religion Clauses,<sup>44</sup> the concurrence, which was strongly protective of the institutional autonomy of churches, still drew too heavily on expressive association jurisprudence in describing churches as "associations formed for expressive purposes" such as "the collective expression and propagation of shared religious ideals."<sup>45</sup> It did not give sufficient weight to the nonexpressive value of associations such as churches, which are not simply conduits for speech, but fundamental sites for the formation of identity and crucial bulwarks against the state.<sup>46</sup> Nor did the Court say enough about the degree of deference owed to churches in determining whether some question falls within its right of institutional self-governance.<sup>47</sup> Still, it did a great deal. Its broad statement that the First Amendment "gives special solicitude to the rights of religious organizations"<sup>48</sup> cannot be taken lightly. In sum, as a matter of law, history, and deeper constitutional meaning, the *Hosanna-Tabor* Court gave religious entities a signal victory in affirming the ministerial exception.

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<sup>42</sup> See, e.g., Reply Brief for the Petitioner at 10, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-533), 2011 WL 3919718 ("[*Hosanna-Tabor*] is about institutional separation—the least controversial core of separation of church and state.") [hereinafter Reply Brief]; *id.* ("The government cannot control the internal affairs of churches any more than churches can control the institutions of government.")

<sup>43</sup> See, e.g., Volokh Brief, *supra* note 19, at 32 (conceding that not everyone counts as a "minister" for purposes of the ministerial exception).

<sup>44</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 706.

<sup>45</sup> *Id.* at 712–13 (Alito, J., concurring).

<sup>46</sup> For criticisms of expressive association doctrine on the ground that it gives insufficient recognition to the communal and identity-forming importance of churches and other associations, see, e.g., Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1675–76; Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 958–60 (2004).

<sup>47</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 707 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.") The concurring opinions are much stronger on this point. See *id.* at 710 (Thomas, J., concurring) ("I write separately to note that, in my view, the Religion Clauses require civil courts to . . . defer to a religious organization's good-faith understanding of who qualifies as its minister."); *id.* at 716 (Alito, J., concurring) (arguing for a functional approach to the determination of who qualifies as a minister, and adding, "What matters in the present case is that *Hosanna-Tabor* believes that the religious function that respondent performed made it essential that she abide by the [church's] doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.")

<sup>48</sup> *Id.* at 706.

## II. THE MINISTERIAL EXCEPTION AS RESPONSIBILITY

At first glance, the question whether the ministerial exception exists may seem to be the only, or at least the most important, question raised by *Hosanna-Tabor*. It is neither. Just as we ought to care whether the United States actually bombs Cambodia and not just that the Court says it will not interfere with such a decision, we likewise ought to care what churches actually *do* with the ministerial exception, not just that it exists. We ought to care, in other words, not just whether churches possess a particular power, but what they do with it. With *Hosanna-Tabor* decided, it is well past time to ask that question. What *should* churches do with their victory? And should citizens consider their own role in the conversation to be over?

Surely the church's deliberations as to when to invoke the exception and how to treat complaints will not end now that the ministerial exception is firmly in place. While the courts must defer to the church's decision, deference does not tell us what the church should do in the context of particular disputes.<sup>49</sup>

The answer to that question will vary, just as churches vary. Even if the Court's decision in *Hosanna-Tabor* mostly takes the law out of the mix, a church facing an employment dispute will still have a number of options, and its choices will still vary, depending on a mix of factors. A church that opposed gender or racial discrimination, for example, might still want to provide ministers who complain of discrimination with an internal dispute resolution process and a set of remedies equivalent to those provided by the law. It might conclude that nothing less would satisfy its own religious belief that discrimination is wrong, and that the church owes it to victims of discrimination (and to God) to make them whole. Or it might provide meaningful alternative remedies due to a fear on the part of the church leadership that a failure to take such claims seriously would lead to dissent and a loss of confidence in the leadership. In either case, the point is clear: the ministerial exception is not the same thing as indifference to the goals of civil rights laws, nor does it mean that particular churches would inevitably insist on total immunity. Reasons of deep religious conscience, as well as practical concerns about the reaction of members, might lead a church to give claimants substantial rights, even in the absence of any judicial process.<sup>50</sup>

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<sup>49</sup> See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072–73 (2008) (defining deference as “a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently”).

<sup>50</sup> It should also be noted that even after *Hosanna-Tabor*, not *all* disputes involving ministers would necessarily lie outside the jurisdiction of the courts. As the church noted in its reply brief in *Hosanna-Tabor*:

When a church signs a contract written in secular language, the contract can be enforced unless the basic dispute is entangled in religious questions. So, for example, a contract claim challenging discharge for cause generally cannot proceed, but a contract claim for unpaid salary or benefits generally can. Such secular contract claims have always co-existed with the ministerial exception.

Another question is how the church should treat the claimants in such cases. The fact that the judicial process would be unavailable does not mean churches would lack any interest, religious or otherwise, in providing due process to claimants. Indeed, some churches provide strong procedural protections for ministers dismissed under these circumstances—protections that predate the judicial recognition of the ministerial exception.<sup>51</sup> Consider the Lutheran Church, Missouri Synod, whose conduct is at issue in *Hosanna-Tabor*. Although the church considers itself the sole arbiter of employment disputes involving its ministers,<sup>52</sup> its dispute resolution procedures are no charade. They include a basic trial process, limited discovery, the right to counsel, and an appeal process; they also establish neutral tribunals whose members are maintained by the Synod itself, not the local congregation.<sup>53</sup> Its substantive standards are also real: indeed, the Synod's laws might ultimately have vindicated Perich's complaint.<sup>54</sup> As one group of experts on religious tribunals observed in an amicus brief in *Hosanna-Tabor*, although "[r]eligious court systems can be quite varied," many "share certain primary characteristics, including discernible substantive standards and procedural rights," as well as "a stated commitment to evenhandedness" and an effort to "ensure that the religious

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Reply Brief, *supra* note 42, at 9. The Court acknowledged this point, without clearly deciding it, in *Hosanna-Tabor*. See 132 S. Ct. at 710 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."). This is consistent with a proper reading of the Court's earlier decision in *Jones v. Wolf*, 443 U.S. 595, 602 (1979), which held that state courts in cases involving church property disputes may adopt a "neutral principles" approach, under which such disputes are resolved through a standard legal interpretation of the secular aspects of deeds, church charters, and other relevant legal documents. The Court wrote that this approach "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties." *Id.* at 603. Similarly, by allowing churches to draft employment contracts with ministers that are at least partly enforceable in court despite the existence of the ministerial exception, the law allows churches to voluntarily limit the scope of their autonomy, leaving room for some legally enforceable employment claims by ministers where, for various reasons, churches wish to expose aspects of their relationships with ministers to the jurisdiction of the civil courts.

<sup>51</sup> See, e.g., Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs ("COLPA") Filed on Behalf of the Orthodox Jewish Organizations and Rabbinical Courts in Support of Petitioner at 7–8, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2470841, at \*7–8 (discussing the history of rabbinic courts) [hereinafter COLPA Brief].

<sup>52</sup> See HANDBOOK OF THE LUTHERAN CHURCH: MISSOURI SYNOD § 1.10.2 (2004), available at [www.lcms.org/Document.fdoc?src=lcm&id=926](http://www.lcms.org/Document.fdoc?src=lcm&id=926).

<sup>53</sup> See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 101, 142–43 (2011); see also Steven R. Hadley, *Handbook of American Church Courts*, 22 WHITTIER L. REV. 251, 263 (2000) (citing the Seventh-Day Adventists as one example of a church whose dispute resolution procedures call for "neutral, impartial, and independent" adjudicators).

<sup>54</sup> See Lund, *supra* note 53, at 143 (noting that "the Synod's church courts would only approve of Perich's call being terminated in rare and specifically delineated circumstances").

organization is not unfairly favored in the crafting and execution of the process.”<sup>55</sup>

In short, it would be wrong to end one’s inquiry at Act II and assume that the ministerial exception leaves claimants with no recourse whatsoever. Unsurprisingly, given the long history of church jurisdiction over internal religious matters, churches themselves regularly provide meaningful procedural and substantive justice in disputes with their members or leaders.<sup>56</sup>

Three additional issues need to be considered in our examination of Act III of the ministerial exception. First, some churches believe as a matter of religious doctrine that churches themselves ought to decide disputes with their ministers, even when those churches share the basic goals of the civil rights laws.<sup>57</sup> They believe that disputes within the church should be resolved informally and not antagonistically, that internal dispute resolution is part of the shepherding function of the church and should be undertaken with compassion and care, that litigating such cases in the civil courts is a public scandal or causes irreparable harm to the relationship between church and minister, and so on.<sup>58</sup> For such churches, this will be an important consideration in deciding how to treat disputes with their ministers, although it does not preclude, but if anything recommends, a conciliatory rather than an adversarial approach to such disputes.

Second, and relatedly, some churches hold complex views about the effect of an internal dispute on the relationship between the minister and the church. From a secular perspective, we may view the assertion of one’s legal rights as a common, even laudable, phenomenon. From a communal and religious perspective, however, such conduct may violate both church

<sup>55</sup> Brief of Religious Tribunal Experts Amici Curiae in Support of Petitioner at 6–7, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-533), 2011 WL 2470843, at \*6–7 [hereinafter Religious Tribunal Experts’ Brief].

<sup>56</sup> See, e.g., COLPA Brief, *supra* note 51, at 10 (citing a judgment in an employment dispute decided by a *Beth Din*, or rabbinic court, that “substantially exceeded any judgment the employee could have obtained in a New York State court”); Religious Tribunal Experts’ Brief, *supra* note 55, at 8 (noting that the Judicial Council of the United Methodist Church “has issued over 1,100 decisions addressing diverse ecclesiastical issues within the UMC, including ministerial employment matters” (footnote omitted)); *id.* at 8 n.9 (citing a decision of that tribunal in which it ordered the reinstatement of a clergy member, along with the payment of “retroactive benefits and compensation,” after finding a violation of due process in the prior proceeding); *id.* at 19 n.55 (citing cases in which *beth din* courts found in favor of rabbi in employment disputes with synagogues); see generally Hadley, *supra* note 53 (discussing cases).

<sup>57</sup> See, e.g., Lund, *supra* note 53, at 141–42 (“Even when churches agree with the principles behind our non-discrimination laws, they [may] still have understandable reasons to object to the government investigating, adjudicating, and remedying what the government decides are discriminatory acts. There is all the difference in the world between a church pursuing its own values and the state enforcing those values back on the church.”).

<sup>58</sup> These and other arguments can be found in Hadley, *supra* note 53.

doctrines favoring the internal resolution of disputes and the spirit of community and peacefulness that guides the church.<sup>59</sup>

Third, even if a church takes neither of these positions, and even if it strongly opposes discrimination, it may have a different view of what constitutes “discrimination.”<sup>60</sup> It is surely unsurprising that churches may champion the view that all are equal in God’s eye but take a different view than the law does about what constitutes equal status—concluding, for example, that women are equally beloved by God but occupy a role in the church that does not involve the call to ministry.

Churches need not hold any of these views, but they may hold some or all of them. That matters for both Act II and Act III reasons. First, it helps confirm that the Court was right to hold that the ministerial exception applies to retaliation suits. Unlike a decision to fire an employee on religious grounds, the argument goes, a church’s decision to fire an employee in retaliation for the exercise of her legal rights does not involve entanglement with religious doctrine; the court can accept that the church had religious reasons for retaliation but still conclude that churches are not exempt from antiretaliation laws.<sup>61</sup> As we have seen, however, churches hold complex views with respect to the nature of their relationship with ministers, and with the civil courts. A plaintiff’s decision to bring a retaliation action in a civil court, and not a religious one, can thus raise theological questions of a high order. My own view is that the ministerial exception has more to do with the limits of state power than with questions of entanglement as such. Regardless, there is little doubt that the Court was right to worry that allowing retaliation suits to proceed would raise serious concerns from the perspectives of both state entanglement and religious autonomy.<sup>62</sup>

These issues are especially relevant within the Act III realm. There is a rich diversity of potential responses by churches to claims of discrimination on the part of a ministerial employee. In concrete terms, they can offer anything from no process at all, to an informal and communal process, to a detailed trial process with substantial guarantees of fairness and

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<sup>59</sup> See, e.g., Brief for International Mission Board of the Southern Baptist Convention et al. at 22–23, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2470840, at \*22–23 (“In essence, the Church concluded that Perich’s conduct [pressing her claims through the threat of litigation] impeded, and that she was not sufficiently committed to, the Church’s religious mission.”).

<sup>60</sup> See Lund, *supra* note 53, at 145 (“[M]ost churches see themselves as fully committed to racial justice, to gender equality, to treating the disabled with dignity, and to protecting the elderly. But there is no reason to think that the church’s conception of any of these things will match the state’s conception.”). Churches can also take a view of “discrimination” that is *broader* than its legal definition. See *id.* at 146 (noting that some churches’ aggressive efforts to increase the number of women in the ministry could violate current antidiscrimination law).

<sup>61</sup> See, e.g., Brief for the Federal Respondent at 37, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 3319555, at \*37.

<sup>62</sup> See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 709; *id.* at 715–16 (Alito, J., concurring).

impartiality. Just as important, though, are the less concrete considerations. Churches can treat discrimination complaints as disruptions or even insults to the church and its members. Or they can take the view that the church has a *religious* duty to avoid discrimination, one that is every bit as central to the church as any other religious tenet. They can treat these complaints as isolated incidents, or as matters that demand a broad institutional response. They can react with defensiveness or hostility, or they can seek outreach, reconciliation, and genuine closure. They can view the complainant as an adversary and close ranks, or they can try to approach that individual with compassion, caring, and a sense of community.

In sum, even if the ministerial exception continues to exist, a court's dismissal of a case on those grounds will not signal the *end* of the church's responsibility, but rather the *beginning*. Churches will still have many decisions to make. Each one will reflect the church's deepest beliefs, its highest goals, and, sometimes, its worst failings. Indeed, most of the important questions about the ministerial exception will not arise anywhere near the precincts of the courthouse.

### III. THE MINISTERIAL EXCEPTION AND THE DUTY OF LAY AND PUBLIC DISCUSSION

So far, I have argued that church leaders have a continuing obligation to think carefully about the proper occasions for the ministerial exception and about how to treat ministers' complaints. That obligation carries a strong moral component. The church must consider its own religious duties, including the obligation to treat complainants with love and compassion; it must consider its obligations as an institution functioning at least partly in the secular world.

But the ministerial exception, like most allocations of power, does not create duties only for those who exercise it directly. As a reflection of the church's role as a major infrastructural institution within society,<sup>63</sup> the ministerial exception and its proper use should concern all of us. Monitoring its use, and sometimes criticizing it, is a civic duty as well as a religious one.

There is room here for both internal criticism and external public criticism.<sup>64</sup> Even within rigidly hierarchical institutions, there is a great deal of room for internal discussion, dissent, and reform. All institutions have many constituencies, any one of which can influence the institution's beliefs and actions. Even where a church's doctrine is set solely by its

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<sup>63</sup> See, e.g., HORWITZ, *supra* note 11 (manuscript at 224); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008); Lupu & Tuttle, *supra* note 38, at 39–40.

<sup>64</sup> For discussions applying this point to a variety of "First Amendment institutions," see HORWITZ, *supra* note 11.

leaders, those leaders must still consider the potential effects of their actions on their members and the risk that those members will abandon the church. The leadership may conclude that some doctrine is so important that it must be preserved even at the cost of losing members, but it will certainly be aware of that potential cost. In less hierarchical religious institutions, it is even clearer that a church's treatment of its ministers is a communal matter that involves the whole church.

These kinds of questions involve both specific religious norms and general civic norms. In each dispute with a ministerial employee, the church and its members will have to consider not only what their religious tenets demand, but whether they have any general moral obligations to that employee and any general civic obligations to respect the social norms of nondiscrimination and conformity to the law.

These questions can and should also be aired outside the church itself. Citizens are not only permitted, but positively obliged, to monitor and criticize our central social institutions, whether they belong to them or not. They are responsible for the civic order as a whole, including the institutions that form the bedrock of that civic order.

This duty is obvious when we are talking about the state, but it is just as true for private infrastructural institutions. Whether *The New York Times* publishes the Pentagon Papers or shares materials from the WikiLeaks archives is a decision to be made in the first instance by that newspaper, operating in accordance with professional and institutional norms, and not the state.<sup>65</sup> But that paper's readers, and citizens more generally, have the duty to speak out if they believe that publication would threaten national security—or, conversely, to urge journalists to be even more aggressive in publishing information about important government actions that have been kept secret. University professors make their own decisions about what to teach and what research to conduct, and those decisions are insulated from public interference. This autonomy rests on several justifications, one being that academic freedom serves the public interest.<sup>66</sup> But that autonomy does not prohibit the public from monitoring and criticizing what universities do; to the contrary, it is a civic duty to do so, even—or perhaps especially—when the final authority rests with the institution itself.

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<sup>65</sup> See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (reversing an injunction preventing the *New York Times* from publishing classified material); see also Reply Brief, *supra* note 42, at 26 (noting several areas of the law, all of them involving public or private institutions such as the press, in which “[legal] claims or remedies are barred because the resulting litigation would be too problematic or too threatening to other constitutional values”).

<sup>66</sup> See, e.g., MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 44 (2009) (“Academic freedom is the price the public must pay in return for the social good of advancing knowledge.”); LOUIS MENAND, *THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 130 (2010).

These principles also apply to churches. If one believes that churches are a fundamental part of our social infrastructure, and that this requires some degree of church autonomy and some limits on state authority, then surely one must believe that churches' decisions are as subject to public commendation or criticism as the actions of any other major social institution. Churches may not be answerable in a legal sense for actions that lie at the heart of their institutional role any more than newspapers are legally accountable to the public for decisions whether to publish a story.<sup>67</sup> But they are not immune from public criticism, and they are not indifferent to it either. Like any other institution, they are susceptible to moral suasion, reasoned argument, positive and negative reinforcement, and public pressure. Citizens who care about our central social institutions can and should provide exactly those sorts of pressures.

All this is worth emphasizing because I have no interest in painting a rosy picture of the church or any other central social institution. Church independence, like freedom of the press, academic autonomy, and other institutionally-oriented constitutional freedoms, is grounded in a variety of ideas: that the state is limited in its authority, that our social infrastructure encompasses a variety of nonstate institutions with their own spheres of authority, that our constitutional settlement assumes these divisions of authority, that courts are relatively incompetent to second-guess these institutions' core decisions, and others.<sup>68</sup> To subscribe to this structural view of the importance of both state and nonstate institutions in our social and constitutional firmament, one need not believe that churches and other institutions are perfect or that they will never abuse their autonomy. Churches most certainly are not perfect, and they *will* sometimes abuse their autonomy. It is unfortunate, but unsurprising, that the briefs in support of the plaintiff in *Hosanna-Tabor* said so much about church abuse of authority and the briefs in support of the church said so little about it. It is equally unsurprising that the opinions in *Hosanna-Tabor* say virtually nothing about this point.<sup>69</sup> Churches surely will fire ministers for good reasons, bad reasons, and sometimes for no reason at all.

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<sup>67</sup> There are limits, of course, in both cases. Newspapers can be held accountable for libelous statements, and churches can be liable for injuries to members or third parties, whether they involve clergy sexual abuse or a church-owned van, driven by a minister, accidentally running over an old lady in the street. See Reply Brief, *supra* note 42, at 20. To my mind, this is one way, although still an imperfect one, to understand the Court's effort in *Hosanna-Tabor* to distinguish between regulable "outward physical acts" and legally autonomous "internal church decision[s]." *Hosanna-Tabor*, 132 S. Ct. at 707. But these peripheral limits do not say much about institutional autonomy in *core* cases, like the hiring or firing of ministers.

<sup>68</sup> These and other justifications are canvassed, and sometimes criticized, in my forthcoming book. See HORWITZ, *supra* note 11.

<sup>69</sup> Professor Esbeck writes: "To the fear that the state is in danger from religion, Justice Alito suggests that another way to look at the matter is to ask, 'Who watches the watch dog?'" Esbeck, *supra* note 15, at 174 n.67 (quoting *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring)). He quotes

Supporters of the ministerial exception, and church autonomy more broadly, must avoid idealizing churches. They must acknowledge that *all* legal autonomy, even of a limited sort, carries risks of abuse. If we are right about the deep nature of the constitutional settlement between church and state, about the valuable role played by independent churches in our constitutional and social infrastructure, and about the relative lack of judicial and legislative competence and authority when it comes to core church functions such as the selection of ministers, then the risk of abuse should not shake us from our position. But a candid recognition of these concerns may lead to a richer and more realistic conversation. It may lead us to think more clearly about the role of internal and external monitoring by church authorities, the laity, and citizens at large in encouraging churches to wield their power prayerfully, compassionately, and responsibly.

Conversely, an acknowledgment of the potential role played by internal and external discussion and criticism of churches may encourage the critics of the ministerial exception to ease up on their alarmist rhetoric. Some of the briefs in *Hosanna-Tabor* were crammed with language suggesting that churches are barely leashed monsters, waiting for a chance to run amok. They described churches as espousing “a capacious theory of unaccountability,”<sup>70</sup> warned of a “lawless zone [of] defiance”<sup>71</sup> that would have “devastating” consequences, and urged the Court to reject any grant of “a special privilege to religious employers . . . that makes them a power unto themselves, separate and apart from the democratic will of the community.”<sup>72</sup> That is impoverished Act II thinking. It ignores the possibility that church employment decisions will be made in good faith, and it assumes quite wrongly that the only effective check against abuse is a legal one. Public pressure and institutional reconsideration, not judicial relief, led the Los Angeles Police Department to abandon its chokehold policy and convinced the United States to stop bombing Cambodia.

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Justice Alito’s reminder, “[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.” *Id.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (alteration in original)). This is not much of an admission that churches can act badly as well as decently. It hardly acknowledges that churches sometimes will exercise their power over ministerial employees arbitrarily, discriminatorily, and for reasons having nothing to do with faith or mission, or that, as the concurrence admits, “the goal of the civil law in question, the elimination of discrimination against persons with disabilities,” is not “oppressive” but “worthy.” *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring).

<sup>70</sup> Brief of Bishopaccountability.org et al. as Amici Curiae in Support of Respondents at 23, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-533), 2011 WL 3532696, at \*23.

<sup>71</sup> Professors’ Brief, *supra* note 30, at 2.

<sup>72</sup> Brief of Amicus Curiae Neil H. Cogan in Support of Respondents Urging Affirmance at 4, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-533), 2011 WL 3532697, at \*4. I am not sure why it is more ominous to think of churches, an important mediating institution, as being “separate and apart from the democratic will of the community” than it is to think of them as abject servants of the popular will, subject to majority rule even with respect to core operations such as the selection of ministers.

In short, consequentialist arguments against the ministerial exception, and broad arguments in favor of the exception, will both be incomplete and inaccurate unless they acknowledge the role of internal discussion and public criticism in shaping the institutional norms, policies, and actions of churches.<sup>73</sup> We cannot properly assess the costs and benefits of the ministerial exception or church autonomy—or indeed any other form of institutional autonomy—until we break out of a false dichotomy in which one side is blind to anything except state power and the other side treats the church, the press, and other institutions as paragons of virtue. The former approach pays too little attention to vast stretches of our constitutional structure and culture and ignores the vital and often underexamined role of “communities and movements” within our broader system of constitutionalism.<sup>74</sup> The latter approach will leave many difficult questions unaddressed and will lack a full sense of moral accountability and integrity unless it acknowledges the costs of institutionalism. We must talk candidly about potential abuses of the ministerial exception. But we must do so in a way that accounts for *all* the ways of addressing those abuses, including internal and public discussion within and about churches, not just state coercion.

#### CONCLUSION

To be clear, I think the Supreme Court in *Hosanna-Tabor* was entirely right to affirm the ministerial exception and to treat it as a necessary implication of both the historical church–state settlement and the basic principles of the Religion Clauses. More than that, I believe the ministerial exception stands in for broader constitutional and political principles: that state power is vital but limited, that our social and constitutional infrastructure contains not just a single monolithic authority but a number of key independent institutions, and that pluralism, public discourse, and

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<sup>73</sup> It should be clear, moreover, that many of the arguments against the ministerial exception *are* consequentialist, and that the implications of those arguments are very broad indeed. Beyond the ministerial exception itself, they also call into question the constitutionality of existing *statutory* exceptions from the employment discrimination laws for religious employers. See, e.g., Leslie C. Griffin, *No Law Respecting the Practice of Religion*, 85 U. DET. MERCY L. REV. 475, 492 (2008) (arguing that the leading decision upholding Title VII’s exemption for religious employers who discriminate on the basis of religion, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), was wrong to the extent that it allowed a church to select a nonministerial employee on the basis of religion). These kinds of consequentialist arguments will be deeply flawed unless they account for nonlegal methods of restraint as well as legal ones.

<sup>74</sup> See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983); *id.* at 4 (“The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention.”).

freedom are best served by appreciating the extent to which these institutions are and should be self-governing.<sup>75</sup>

But recognizing the power that churches and other central institutions possess is just the beginning of the conversation. Just as important as the scope of that power is the question of what should be done with it. We impoverish ourselves by talking only in Act II terms—by acting as if every important question is settled once we know whether the state or the church has the whip hand. We fail to appreciate the richness of institutional life in a pluralistic society and the duty of both citizens and institutions to participate in that society after the court has spoken. Institutional autonomy is real, but it is a burden as well as a freedom. To have a “free church in a free state,” we need reflective churches and active citizens. Now that the curtain has come down on the legal issues of power raised by *Hosanna-Tabor*, we must begin to think about our *own* parts in the drama, as churches and citizens, once the curtain comes up on Act III.

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<sup>75</sup> See HORWITZ, *supra* note 11 (manuscript at 16–20).

