Narrative Pluralism and Doctrinal Incoherence in *Hosanna-Tabor*

Frederick Mark Gedicks
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I. INTRODUCTION: THICK RELIGION?

The federal laws prohibiting employment discrimination are among the most important statutes ever enacted. They constitute the most significant federal commitment to eradication of the unjustified discrimination in the economic sector that has persisted since Reconstruction. The laws nevertheless did not address one significant issue: whether and how anti-discrimination norms should apply to ministers and other religious leaders employed by churches and other religious congregations.

The laws are not wholly silent, to be sure. They allow religious groups to discriminate in favor of members of their own religion when they hire...
leaders, thus avoiding (what we might hope are) hypothetical absurdities like a Baptist minister who sues because no synagogue will hire him as its rabbi. The laws do not, however, generally exempt churches from statutory sanctions against racial, national-origin, sex, or disability discrimination when they deal in the employment of ministers and other church leaders. By their terms, the federal anti-discrimination laws would prohibit the Roman Catholic Church from discriminating on the basis of sex in filling positions with ordained priests, or the African Methodist Episcopal Church from discriminating on the basis of race in hiring and firing its congregational ministers.

The federal courts of appeal handled this issue by reading a "ministerial exception" into federal anti-discrimination laws. The exception originated as a rather aggressive statutory interpretation of Title VII of the Civil Rights Act of 1964. Later decisions constitutionalized the exception, rooting it in one or both of the Religion Clauses or in the First Amendment generally. Some version of the exception has now been adopted by every judicial circuit.

Commentators have long disputed the doctrinal basis of the ministerial exception, and until last term the United States Supreme Court had

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3. E.g., Title VII, 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); id. § 2000e-2(e)(2) ("It shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.").


never passed on its constitutional validity. In *Hosanna-Tabor Church & School v. EEOC*, however, the Court held for the first time that the Religion Clauses require the ministerial exception to federal antidiscrimination laws.

*Hosanna-Tabor* is filled with incongruous stories and doctrinal inconsistencies. First, there are at least three plausible accounts of what happened in *Hosanna-Tabor*, each of which is in tension with the others. Second, the Court's endorsement of the ministerial exemption as a necessary feature of church autonomy overlooks that churches subvert autonomy as often as they protect it. Third, the exception described by the Court is a strange mixture of rights and structure that is likely to be carved up with exceptions and limitations. And finally, the

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9. *See infra* Part II.B.

10. *See infra* Part III.

11. *See infra* Part IV.
Court goes to this trouble to protect a conception and practice of institutional religion that are quickly passing away.  

II. STORIES

A. Religion/Law/Life

1. Believers. The Court's story of the case begins with the plaintiff Cheryl Perich, a member of the Hosanna-Tabor Evangelical Lutheran Church (Missouri Synod) and a teacher at one of its “ministries,” a K-8 Lutheran school. Perich was originally hired as a “lay” teacher on a one-year contract, but near the end of her first year, the Hosanna-Tabor congregation appointed her as a “called” teacher. A called Lutheran teacher has completed a course of theological study, passed an oral faculty examination, been endorsed by his or her local synod, and called by a congregation. Called teachers are formally commissioned “ministers,” and may be terminated only for cause upon a supermajority vote of the calling congregation.

Once called, Perich taught at the school for several apparently uneventful years. Towards the end of the 2003-2004 school year, however, she began to suffer health problems that interfered with her ability to teach. Perich began the 2004-2005 school year on disability leave and was eventually diagnosed with narcolepsy, a condition which caused “sudden and deep sleeps from which she could not be roused.”

On January 27, 2005, after her condition had been treated and stabilized with prescription medication, Perich notified the school that she had been medically cleared to work and planned to begin teaching again within a month. The school principal responded that the school had already filled Perich’s position with a lay teacher and thus had no class for her to teach; she also expressed doubt that Perich was in fact ready to return to teaching. Within a matter of days, the school board endorsed this judgment and advised the congregation that Perich would be incapable of returning to teach for at least the current and the following school year. The congregation accordingly voted to offer Perich a “peaceful release” from her position under which she would voluntarily resign in exchange for partial payment of her health insurance.
premiums for the remainder of the calendar year. Perich declined to resign and instead provided written certification from her doctor attesting that she was capable of working. The school reiterated that it had no position for her to return to and again urged her to resign.17

Nevertheless, Perich appeared at the school to resume teaching on February 22, refusing the school’s request to leave until she received a written certification that she had reported for work. Later that same day, the principal advised Perich that her earlier “insubordination” would probably result in her termination.18 Perich replied that she had consulted an attorney and “intended to assert her legal rights” under the Americans with Disabilities Act (ADA).19 That evening, the school’s governing board initiated the process of rescinding Perich’s call, and subsequently gave her notice of its recommendation that she be terminated from her position as a called teacher. The board’s stated reasons for termination were Perich’s behavior on February 22 and her later threat of legal action, the latter of which violated Lutheran doctrine mandating that ministers resolve their differences within the church and not in a secular court. The congregation rescinded Perich’s call and formally terminated her as a teacher on April 11, 2005, less than three months after Perich had advised the school of her diagnosis and intention to return to work.20 In short, the Court tells the apparently straight-forward story of a Lutheran congregation defending the integrity of its beliefs by terminating a Lutheran minister who had violated Lutheran doctrine.

2. Discriminators. The timeline alone contradicts the Court’s story that Perich was fired because she violated Lutheran doctrine prohibiting ministers from resolving their differences in secular litigation rather than internally through the church: Even in the Court’s version of events, Perich did not threaten legal action until after the principal had informed her that the school was going to fire her.21 A fuller consideration of the record reveals the story of a principal, school board, and congregational leader actively working to keep a narcoleptic off their faculty—the very sort of discrimination prohibited by the ADA and, ironically, by the school itself.22

17. Id.
18. Id.
19. Id. at 700-01.
20. Id. at 700.
21. Id.
22. See EEOC v. Hosanna-Tabor Evangelical Luteran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010) (stating that the Lutheran Church (Missouri Synod) “personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly
This story begins with Perich's taking disability leave at the beginning of the 2004-2005 school year on the express understanding that her position would be held for her while she recovered.23 Perich's doctors had a difficult time pinpointing the source of her illness, but on December 16, 2004, Perich advised the school that she had been definitively diagnosed with narcolepsy, and that medication would allow her to return to work within two to four months.24

On January 10, less than a month later and despite her knowledge that Perich was planning to return in the near future, the school principal filled Perich's position for the remainder of the school year.25 The school also viewed this new teacher as a likely permanent “called” replacement for Perich.26 On January 19, the principal inquired of Perich whether she would be subject to restrictions when she returned; in reply Perich communicated her doctor's prognosis that she would be “fully functional with the assistance of medication.”27 Two days later, the principal advised Perich of the school's intention to amend its disability policy to require that called teachers resign when their disability leaves reach six months; by this time, Perich had been on disability leave “for over five months.”28

contemplate that teachers are protected by employment discrimination and contract laws”); Brief for Respondent Cheryl Perich, Hosanna-Tabor 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 3380507, at *6, (“Even when [the ADA is] not technically applicable to a church, as a Christian organization the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.”) (quoting the Synod personnel manual).

23. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008), vacated, 597 F.3d 769 (6th Cir. 2010), rev'd, 132 S. Ct. 694 (2012); see Hosanna-Tabor, 597 F.3d at 773 (noting that school principal Stacey Hoeft promised Perich a position at the school when she regained her health); Joint Appendix, Hosanna-Tabor, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 2940670, at *161 [hereinafter J. App.] (“I don't want you to feel like I'm trying to push you out. You still have a job with us we just want what's best for you and for our students.”) (e-mail from principal to Perich).

24. Hosanna-Tabor, 582 F. Supp. 2d at 884.

25. Id.

26. J. App., supra note 23, at *134. The principal later claimed that it was this new hire, and nothing else, that prevented the school from allowing Perich to return to work. Id. at 138 (Perich's termination had “nothing to do with the disability. It was wholly on the policy of there was no position to return to for the remainder of that year.”) (deposition testimony); accord id. at 158 (“Perich] was not going to be able to return to work, whether her doctor said she was able to or not . . . the fact was there was no position for her to return to at that time.”) (deposition testimony).

27. Hosanna-Tabor, 582 F. Supp. 2d at 884.

28. Id.
On January 27, Perich advised the principal that she would be medically able to return to work in mid or late February. Three days later, in direct contradiction to the opinion of Perich's doctor and without consulting any reliable medical authority, the school board concluded that Perich would be unable to work for the rest of the current school year, as well as the year after that, and recommended that the congregation terminate her call. In short order the congregation voted to ask Perich for her voluntary resignation, and consulted an employment law attorney about terminating her. Although the board and congregational leaders lacked any information or expertise about the effectiveness of prescription drug treatments for narcolepsy, they repeatedly expressed their concern that Perich's return would threaten the safety of children in her classroom.

29. Id. This surprised the principal because only a few days earlier Perich's condition had prevented her from completing some forms requested by the school. Id.

30. E.g., J. App., supra note 23, at *74 (congregational president admitting he had no medical expertise) (deposition testimony); id. at *123 ("Q. [C]an you tell me what material you looked at [regarding narcolepsy]?" A. "I just looked it up on the Internet.") (deposition testimony of principal); id. at *132-33 (conceding that board had "no medical recommendation either way" when it decided that Perich was not capable of teaching for the next two school years, but was unable to recall what the non-medical information and considerations that informed that decision) (deposition testimony).

A board member claiming a "medical background" advised the board and the congregational leadership that a narcoleptic needed to be asymptomatic for at least three months before one could be certain that medication had controlled his or her condition, and that parents of the schoolchildren would want to see six months to a year without symptoms. Id. at *84-85 (deposition testimony of Congregation president); id. at *114 ¶ 9 (Perich affidavit). This board member turned out to be a nursing school dropout who had no expertise in narcolepsy and no medical expertise or experience beyond introductory nursing classes and certification as a medical assistant. Id. at *195-97 (deposition testimony of board member).

31. Hosanna-Tabor, 582 F. Supp. 2d at 884.

32. Id. at 884-85. Formally, the congregation asked Perich to request a "peaceful release" from her position, which all parties agree was equivalent to asking for her resignation. Id.

33. J. App., supra note 23, at *103 (deposition testimony of Synod's district superintendent of schools).

34. Hosanna-Tabor, 582 F. Supp. 2d at 884-85 (stating concern that "Perich's condition would jeopardize the safety of the students" in her class) (deposition testimony of principal); J. App., supra note 23, at *84 ("Q. Do you recall [the principal] saying that she didn't understand how — how Ms. Perich could be responsible for a classroom of children when she wasn't even allowed to drive? A. I remember hearing that comment.") (deposition testimony of congregation president); id. at *136 ("There was no education on the disorder at all, so there was — there was, I would say, a feeling of being uncomfortable because there was — there was an unknown . . . . I mean, we were talking about her going into and being responsible for a classroom full of children.") (deposition testimony of principal); id. ("Q. [W]as the school board concerned about whether or not, you know, Cheryl would be able
Within a week, Perich's doctor cleared her "to return to work without restrictions on February 22," which constructively terminated her disability leave as of that date.\(^{35}\) The board and congregation ignored the doctor's clearance,\(^ {36}\) and they repeated their request for her resignation.\(^ {37}\) On February 21, Perich emailed the principal that she intended to report for work the next day, but when she showed up the principal asked her to leave because there was no position left for her at the school.\(^ {38}\) Perich refused to go until she received written confirmation that she had reported for work, apparently to avoid a constructive resignation under the school's employment policies and practices.\(^ {39}\) As the Court indicated,\(^ {40}\) that evening the principal told Perich she would be fired for "insubordination,"\(^ {41}\) only then did Perich threaten to sue.\(^ {42}\)

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\(^{35}\) Hosanna-Tabor, 582 F. Supp. 2d at 885.

\(^{36}\) Id. ("Despite the doctor's note, the board remained concerned about Perich's ability to supervise students for an entire school day."); J. App., supra note 23, at *197 ("Q. Did the folks at the meeting, the members of the school board decide to disregard the doctor's opinion? A. Yes.") (deposition testimony of board member).

\(^{37}\) Hosanna-Tabor, 582 F. Supp. 2d at 885.

\(^{38}\) Id.

\(^{39}\) Id. ("[T]he Hosanna-Tabor employee handbook states that failure to return to work on the first day following the expiration of an approved medical leave is viewed as a voluntary termination.").

\(^{40}\) See Hosanna-Tabor, 132 S. Ct. at 700.

\(^{41}\) Hosanna-Tabor, 582 F. Supp. 2d at 885. Neither the Court's opinion nor the opinions or record below make clear why Perich's presence and behavior on February 22 might have been a fireable offense: The record discloses only that Perich went first to the teacher preparation room before classes started, and from there was directed to the principal's office; she apparently left the school directly from the principal's office after obtaining written acknowledgment that she had reported for work. There is no indication that she had any contact with school children or that she interfered with the work of teachers or administrators. Compare J. App., supra note 23, at *142 ("I found that to be wholly insubordinate that she found that her form of communication to her superior to return to work after nine months of not being in the building – that her way of notifying me would have been at 9:00 at night through my work e-mail.") (deposition testimony of principal), and id. at *229 (By e-mailing the principal the night before about returning to work, after having been informed that the school no longer had a position, "it is clear that your intent was not to return to work, but rather to create upheaval at our school .... Your behavior demonstrates your total lack of concern for the ministry of Hosanna-Tabor Lutheran School.") (e-mail to Perich by school board chairman), with id. at *96 (denying that Perich was terminated because of her behavior on February 22) (deposition testimony...
In short, this story shows the ministerial exception deployed as a pretextual smoke-screen to hide classic disability discrimination and retaliation prohibited by the ADA. From the moment Perich advised Hosanna-Tabor of her diagnosis, the principal, the school board, and congregational leaders worked to force her out of her position because they feared a narcoleptic in their classrooms. Perich's belated threat to sue was an ironic gift to Hosanna-Tabor, without which the congregation could not have credibly maintained that her termination was about her doctrinal violation rather than her disability.

3. Administrators. This story begins with the pressures that Perich's illness and leave placed on almost everyone associated with the school. At the time of the events that gave rise to this case, the school had only seven teachers; it cannot have been easy to run such a small school in Perich's absence without hiring a replacement teacher. The principal tried to cover Perich's classes by assigning existing teachers responsibility for Perich's students, thereby combining three grades in a single classroom. What was intended as a temporary situation became a drain on the teachers as it wore on through the first semester and into the second. It was also apparently less than ideal for student learning. School administrators understandably received Perich's December estimate of a two- to four-month return with some skepticism, given her extended difficulty in obtaining diagnosis and treatment and her previous postponement of other target return dates.
Even if accurate, the estimated return date would have required the students to adjust to yet a third teacher in a single school year when Perich returned, while also placing pressure on a budget not designed to compensate both Perich and the substitute for the remainder of the year. Yet, there is also evidence that the community sincerely cared about Perich personally, regularly encouraging her in her effort to heal and return to teaching, and shielding her from the problems her illness was creating for the school and others.

In the chronically underfunded environment of religious private education and faced with understandable teacher complaints about overwork, legitimate worries about student well-being, and the desire to support a struggling colleague, school administrators muddled through, inconsistently responding to these incompatible demands until, in their view, the situation became impossible. As Professor Failinger trenchantly observed, “even from the emails, one can sense the growing desperation.” At that point, they finally chose faculty, students, and budget over Perich by hiring a permanent replacement teacher and asking for Perich’s resignation. This was perhaps not the best choice, but it was understandable, probably not illegal, and in any event, not evil. It left a trail of challenging facts for Hosanna-Tabor’s lawyers to deal with in litigation, but largely because the principal, the school board, and the congregation reacted to the situation like normal people.

48. See Hosanna-Tabor, 582 F. Supp. 2d at 884.
49. See, e.g., J. App., supra note 23, at *160-75 (e-mails from principal to Perich).
51. See Laycock, Ministerial Exception, supra note 7, at 843.
53. J. App., supra note 23, at *73 (“Q. [It was not the intent – the intent was not for Ms. Perich to return the following school year? A. That is correct. Q. And what was the reason . . . ? A. [W]e wanted to do a – a – have a replacement teacher . . . [s]o we could continue . . . with the operation of the school.”) (deposition testimony of congregation president); see Hosanna-Tabor, 582 F. Supp. 2d at 885 (Principal advising Perich when she reported for work on February 22 that there was “no job for Perich to return to.”); J. App., supra note 23, at *173-74 (“There will have to be some major preparations to be made to provide for a smooth return. I'm sorry if I don't sound excited for you. I guess the administrator in me is nervous about how to make the best of this situation for everyone. Of course, I'm concerned for you, but please remember that my main concern as the principal is doing what's best for the ministry as a whole especially my students.”) (e-mail from principal to Perich).
54. Laycock, Ministerial Exception, supra note 7, at 843 (arguing that the school accommodated Perich's hardship far beyond what the ADA required).
making ill-advised promises and inconsistent choices under the pressure of conflicting demands, rather than legal professionals trained to avoid institutional liability.

In this story, Hosanna-Tabor is neither a church fighting to defend the integrity of its doctrine nor a school whose leaders gave vent to a legally prohibited prejudice, but a group of ordinary people dealing with the messiness of real life.

B. Holdings

All of the stories end, of course, in the Equal Employment Opportunity Commission's (EEOC) and Perich’s bringing suit against Hosanna-Tabor for unlawful retaliation under the ADA. The congregation argued that the suit was constitutionally barred by the ministerial exception, because Perich was a minister of the congregation and her employment included ministerial duties. The federal district court dismissed the suit under the exception, but was reversed by the United States Court of Appeals for the Sixth Circuit, which held that Perich was not a minister for the purpose of the exception because her duties and responsibilities were primarily secular. The Supreme Court subsequently granted certiorari review.

Based on its own factually constrained story, the Supreme Court unanimously endorsed the ministerial exception, holding that if Perich were a minister, the exception would absolutely immunize Hosanna-Tabor from ADA liability. "Both Religion Clauses," declared Chief Justice Roberts, "bar the government from interfering with the decision of a religious group to fire one of its ministers." Noting historical intrusions on religious liberty from royal appointments of ministers in the English medieval and early modern eras, the Court held that

56. Id. at 887.
57. Id. at 891-92.
58. Hosanna-Tabor, 597 F.3d at 781-82.
60. Hosanna-Tabor, 132 S. Ct. at 709 n.4, 710.
61. Id. at 702.
62. Id. at 702-05. Commentators have strongly criticized the Court's blithe assumption that abandoned, centuries-old practices of the established Church of England were relevant to the existence or breadth of a constitutionally or common law ministerial exception in a constitutional republic. See, e.g., Griffin, supra note 7, at 11 (noting that England abolished exclusive ecclesiastical jurisdiction in the 17th century, and that the United States subjected clergy to secular court proceedings from the beginning); see also Winnifred Fallers Sullivan, The Church, IMMANENT FRAME, available at http://blogs.ssrc.org/tif/2012/01/31/the-church/ ("The majority opinion in the unanimous decision from the Court in the
state imposition of an "unwanted minister" on a church would violate a "religious group's right to shape its own faith and mission through its appointments," which the Free Exercise Clause protects. Relying on the church property and office cases, the Court further held that government interference in ministerial appointments violates the Establishment Clause, "which prohibits government involvement in such ecclesiastical decisions."

The Court went on to find that Perich was indeed a minister, though it declined to articulate a general definition and signaled its intention to proceed case-by-case. The Court particularly noted that Perich held the formal title of "minister," that the school and Perich each held her out as and subjectively believed she was a minister, that she had received formal ministerial education and training, and that her duties "reflected a role in conveying the Church's message and carrying out its mission." This placed Hosanna-Tabor's decision to terminate Perich within the ministerial exception, and the Court accordingly reversed the circuit court.

III. GROUPS

A. Autonomy/Oppression

Social groups both enhance and subvert the individual autonomy of their members. On the one hand, groups are typically described as

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Hosanna-Tabor case affirming the constitutional status of the ministerial exception as a right of the church is supported by a curious mash-up of religious and political history... Profound differences in Roman Catholic, Reformation, and Anabaptist ecclesiologies and understandings of the freedom of Christians are finessed in this breezy historical account.

64. Id. at 704-05 (discussing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871)).
65. Id. at 706.
66. Id. at 707.
67. Id. at 707-08.
68. Id. at 710.
crucial to the creation and maintenance of personal meaning and identity; most people define who they are by reference to groups to which they belong or with which they identify. Groups also protect individuals from the contemporary liberal state, before which single individuals are largely powerless. And finally, groups are an important source of social values, which the liberal state is severely constrained from developing and promoting itself.

Yet, the very contributions of groups to individual autonomy—their crucial roles in the formation of personal identity, protecting individuals


I began my academic career with enthusiasm for religious group rights, see Gedicks, Group Rights, supra, but have since had second (and third) thoughts, see Frederick Mark Gedicks, The Recurring Paradox of Groups in the Liberal State, 2010 UTAH L. REV. 47 [hereinafter Gedicks, Recurring Paradox]; Frederick Mark Gedicks, Three Questions About Hybrid Rights and Religious Groups, 117 YALE L.J. POCKET PT. 192 (2008).

70. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 246 (1975) ("[M]an makes himself through the different forms of social life he establishes."); Cover, supra note 69, at 31 (Religious groups provide "a refuge not simply from persecution, but for associational self-realization in nomian terms."); see also Brady, supra note 69, at 1677; Gedicks, Group Rights, supra note 69, at 108, 116; Horwitz, Sovereignty and Spheres, supra note 69, at 41; Stephen L. Pepper, Autonomy, Community, and Lawyers' Ethics, 19 CAP. U.L. REV. 939, 940-41 (1990).

71. E.g., Unger, supra note 70, at 282; Cover, supra note 69, at 49-50; Garnett, Do Churches Matter?, supra note 69, at 294-95; Gedicks, Group Rights, supra note 69, at 115-16; cf. Pepper, supra note 70, at 944 ("If one has on the one side very large governmental institutions and very large corporate entities and on the other side isolated individuals, freedom for the individuals is not likely to mean a lot.").

72. Gedicks, Group Rights, supra note 69, at 116 ("In theory, at least, the goals of liberal democratic government must depend on the moral values held by those that it governs—values that originate outside of government in churches, families, political parties, trade unions, private schools, and other voluntary associations."); see also Bruce M. Landesman, The Responsibilities of the Liberal State: Comprehensive v. Political Liberalism, 2010 UTAH L. Rev. 171, 177 (2010) ("The development of liberalism arose with the idea that equally reasonable people can have very different notions of a good life, and none can claim obvious superiority over the others. Imposing one conception on everyone through the power of the state is thus illegitimate.").
from government excess, and supplying social values—may also subvert it. The dependence of individuals on group norms and narratives for the definition of who they are leaves them vulnerable to group coercion and oppression. Individuals whose identity is psychologically embedded in a group culture often feel pressure to behave in ways they otherwise would not to avoid the existential crisis of expulsion. And while groups buffer their members from oppressive government action, they also buffer them from liberating government action: when government intervention in group matters would enhance individual autonomy, as in the enforcement of anti-discrimination laws, group rights that block such intervention subvert individual autonomy. Finally, groups are important sources of social values, but group values are often not the values endorsed by democratic majorities.

Hence the paradox of groups: They are simultaneously instruments of individual liberty and individual oppression, in the precise measure that they are insulated from government oversight and control.

Religious groups present an especially intense instance of this paradox. They usually supply complex explanations and thick narratives of the meaning of human life, and in the name of "religious freedom" claim special exemption from laws that bind everyone else. Religious groups are thus an especially important source of the personal identities of their believers who, in turn, are thus especially vulnerable to pressure and oppression by the religious group to which they belong. These connections to individual autonomy and vulnerability are heightened when the member is employed by the group, which adds economic dependence to the mix of vulnerabilities.

And make no mistake, churches do bad things. They can be racist,
they can be sexist, they can be mean, bureaucratic, and vindictive. Stereotypical thinking assumes that churches engage in bad behavior at lower rates than secular groups, but recent history suggests otherwise. Instances of clergy abuse and sex discrimination, for example, seem as common in churches as in American society generally; certainly, they are not uncommon in churches.\textsuperscript{80}

B. \textit{Hosanna-Tabor}

Although the Court had previously hinted at the notion that religious groups might enjoy constitutional protection independent of that afforded by the individual rights of their members,\textsuperscript{81} \textit{Hosanna-Tabor} is the clearest endorsement of a doctrine of religious group rights in recent memory. It repeatedly characterizes the congregation as an independent constitutional rights-holder without any suggestion that those rights derive from its members.\textsuperscript{82}

\textsuperscript{80} See, e.g., Hamilton, supra note 7, at 1204-10 (describing clergy child abuse scandals in the Catholic church and other religions).


\textsuperscript{82} See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."); \textit{id.} at 705 ("Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment."); \textit{id.} at 706 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."); \textit{id.} (noting that "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations" and rejecting "the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"); \textit{id.} at 709 ("By requiring the Church to accept a minister it did not want, [a reinstatement] order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers."); \textit{id.} at 710 (emphasizing the importance of "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" and concluding that the "church must be free to choose those who will guide it on its way"); see also \textit{id.} at 713 (Alito, J., concurring) ("Both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses.").
Hosanna-Tabor illustrates well the paradox of religious groups in liberal society. The congregation and school represent the effort of a group of believers to build a community where they could live out their beliefs more fully, transmitting their values to the next generation by educating their young within the community and providing opportunities to believing teachers to participate in that ministry.\textsuperscript{83} There is little doubt that this community informed the personal identity of its members and employees and their understanding of the purpose and meaning of life. There can also be little doubt that Hosanna-Tabor as a group provided its members with a much more effective defense to government intervention into their hiring decisions than any single member could have raised on his or her own. The Court is correct that, as with many religious groups, preserving the value of Hosanna-Tabor to its members and to society depends on an unrestricted power to choose who will personify and transmit its values.\textsuperscript{84}

But Hosanna-Tabor also illustrates the "dark side" of religious groups. Not unlike secular employers who stereotype employee disabilities, Hosanna-Tabor feared Perich's condition because it knew little about it, and on that uninformed basis determined that they no longer wanted her teaching at their school.\textsuperscript{85} That Perich trusted the principal and the school is obvious from her openness about her condition as her treatment progressed to diagnosis and expected return—an openness that was not reciprocated by the group, which used its own considerable resources and leverage to give effect to their disability prejudice and prevent Perich from returning to teach despite their previous promise to hold her position while she recovered.\textsuperscript{86} The buffering effect of the congregation and school, their ability to protect their members from

\textsuperscript{83. See EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008) (Hosanna-Tabor "provides a 'Christ-centered education' that helps parents by 'reinforcing biblical principals [sic] and standards.' Hosanna-Tabor also characterizes its staff members as 'fine Christian role models who integrate their faith into all subjects.'") (alteration in original) (quoting Hosanna-Tabor website); Opening Brief for Petitioner, supra note 13, at *4 ("Since its founding in the mid-1800s, the Synod has held that the work of called teachers is sacred because, by teaching the faith in word and deed, they perform part of the pastoral functions of the church."); id. at *7, *41 (describing Perich's duties as an exemplar of "Christian faith and life" who was to transmit those values to her students by means of the "close, personal relationship" with them developed as their teacher, and to "live in Christian unity with the members of the congregation and co-workers"); Reply Brief for Petitioner, supra note 50, at *21, ("Schools like Hosanna-Tabor[] exist to transmit the faith to children already in the church and to share the faith with interested newcomers.").

\textsuperscript{84. See supra note 83.}

\textsuperscript{85. See supra Part II.A.2.}

\textsuperscript{86. Id.}
excesses of the liberal state, here are deployed to prevent Perich from calling upon the democratically enacted protections of that same state against the school's disability discrimination and retaliation, leaving Hosanna-Tabor free to deal with Perich in a way that violated national values codified in federal law.

IV. UBÉR-RIGHTS

A. Rights / Structure

Constitutional law distinguishes rights from structure. Constitutional rights protect personal liberty interests against otherwise legitimate government action, and constitute duties owed by the government to the individuals who hold them. Constitutional structure, on the other hand, allocates sovereign power in the first place, granting or withholding such power from government, for the benefit of society as a whole.

87. See Matthew D. Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1, 3, 14 (1998); Kurt T. Lash, Power and the Subject of Religion, 59 Ohio St. L.J. 1069, 1091 (1998); e.g., Printz v. United States, 521 U.S. 898, 941 (1997) (Stevens, J., dissenting) ("[T]he First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I . . ."); R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) ("The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts."); Jay S. Bybee, Common Ground: Robert Jackson, Antonin Scalia, and a Power theory of the First Amendment, 75 Tul. L. Rev. 251, 324, 325 (2000) ("Amendments III through VIII address boundaries between the federal government and individuals that demand some kind of rule . . . . [T]hey are a kind of procedural constraint—they do not restrain the government from acting at all in a particular area, but restrain the way the government conducts its legitimate functions."); Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1, 8 (1998) ("For a rights clause to succeed in the task of securing personal religious liberty, the political majority must be compelled to adjust its police power objectives to the needs of the religious minority or religious nonconformist.").

88. See Bybee, supra note 87, at 324, 325; Esbeck, supra note 87, at 2-3.

89. Ernest A. Young, The Supreme Court and Constitutional Structure 621-22 (2012); see 1 Laurence Tribe AMERICAN CONSTITUTIONAL LAW § 2-3, at 125-26 (3rd ed. 2000); Esbeck, supra note 87, at 5; e.g., Dennis v. Higgins, 498 U.S. 439, 463 (1991) (Kennedy, J., dissenting) ("[T]he Commerce Clause is a structural provision allocating authority between federal and state sovereignties.").

90. See Bybee, supra note 87, at 327 ("Once Congress is disabled from doing something, it is immaterial who the intended beneficiaries of the clause were; the disability is absolute and works to the benefit of everyone.").
Because a constitutional right conditions or limits the exercise of sovereign power that the government legitimately holds and would otherwise be free to exercise, the individual who holds the right generally may waive it, and the right may also be set aside when larger demands of society so require. When the Constitution affirmatively denies sovereign power to the government, however, the government is absolutely disabled from exercising the power so denied. Structural limitations may not be waived because they are imposed for the benefit of the whole society, not just those whose personal liberty might be threatened in a particular instance. Nor does it matter that the government has an important or even "compelling" reason for exercising the power: There is no justification sufficient to invest in the government sovereign power that the Constitution withholds from it.

91. Esbeck, supra note 87, at 3; Kimberly A. Yuracko, Education Off the Grid: Constitutional Constraints on Homeschooling, 96 Cal. L. Rev. 123, 153 (2008); e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-49 (1986) (“[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.”); Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”); Bybee, supra note 87, at 325 (“Amendments III through VIII are personal privileges or immunities; they are rights in personam against the government, and may be waived.”).


93. Esbeck, supra note 87, at 3; Yuracko, supra note 91, at 153-54; e.g., Schor, 478 U.S. at 850-51 (“Article III, § 1 . . . serves as an inseparable element of the constitutional system of checks and balances . . . . To the extent this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2.”) (internal quotation marks and citations omitted); Compagnie des Bauxites, 456 U.S. at 702 (Subject-matter jurisdiction “functions as a restriction on federal power . . . . Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.”) (citations omitted). See also Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.”).

94. E.g., New York v. United States, 505 U.S. 144, 178 (1992) (“No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.”).
Government action taken in violation of structural limits is never legitimate.95

From the founding era through the nineteenth century, the entire First Amendment was thought to impose a structural disability on federal government action.96 During the twentieth century, however, most provisions of the First Amendment were reconceptualized as individual rights that impose duties on government, probably under the pressure of incorporating them against the states as due-process "liberties."97 The Establishment Clause, however, continues to be understood as a disability that immunizes the people from government action that exceeds the limits of constitutional power.98 Thus, the Free

95. See Printz, 521 U.S. at 937 (1997) (Thomas, J., concurring) ("[T]he Federal Government may act only where the Constitution authorizes it to do so."); cf. Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L.J. 16, 45, 55 (1913) (stating that a disability is literally a "no-power").


96. See Downes v. Bidwell, 182 U.S. 244, 277 (1901) (dictum); accord id. at 297-98 (White, J., concurring) (First Amendment prohibitions are "absolute withdrawals of power which the Constitution has made in favor of human liberty" which "are applicable to every condition or status."); Thomas Jefferson, "Resolutions Adopted by the Kentucky General Assembly," Res. III (Nov. 10, 1798), in 30 PAPERS OF THOMAS JEFFERSON: 1 JANUARY 1798 TO 31 JANUARY 1799, at 550, 550-51 (2003) (stating that the First Amendment confirms that the Constitution afforded the federal government "no power over the freedoms of religion, speech, or press . . . ").


98. E.g., Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (affirming that civil courts are barred from "resolving church property disputes on the basis of religious doctrine and practice," but allowing that civil courts may properly decide such disputes on the basis of "neutral principles" of secular law such as "objective, well-established concepts of trust and property law"); see Lamont v. Woods, 948 F.2d 825, 835 (1991) (Downes "suggested that the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place."); Lee, supra note 97, at 129 (The Establishment Clause "has a different thrust" than the Free Exercise Clause: "Unlike any other First Amendment provision, [it] deals with structural matters, specifically the relationships between government and religious institutions or religious movements."); Lupu & Tuttle, Ecclesiastical Immunity, supra note 7, at 1795 ("[The
Exercise Clause now protects an individual right subject to waiver and interest-balancing,\textsuperscript{99} whereas the Establishment Clause sets a government limit that may not be transgressed regardless of whether a powerful government interest might justify the transgression,\textsuperscript{100} or those affected by it might be thought to have waived their right to object.\textsuperscript{101}

Establishment Clause imposes jurisdictional limits on courts' authority to adjudicate issues of religious import, and the Free Exercise Clause imposes limits on laws or doctrines that single out religion for disfavored treatment.\textsuperscript{99}

99. See Lee, supra note 97, at 129; e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (stating religiously burdensome laws that are not religiously neutral or generally applicable must be narrowly tailored to protect a compelling government interest).

100. See, e.g., Lee v. Weisman, 505 U.S. 577, 596 (1992) (Establishment Clause violations may not be balanced against majoritarian preferences); Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) (Establishment Clause violations (other than those involving religious discrimination) "flatly forbidden without reference to the strength of governmental purposes."); Lupu & Tuttle, Courts, Clergy, and Congregations, supra note 7, at 129 ([A]n Establishment Clause-anchored doctrine of ministerial exemption . . . would admit of no interest-balancing whatsoever.).

101. See, e.g., Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994) (holding that a majority student vote to allow graduation prayer could not waive constitutional limitations imposed by Establishment Clause), vacated as moot, 515 U.S. 1154, 1155 (1995); EEOC v. Catholic Univ. Am., 856 F. Supp. 1, 12-13 (D.D.C. 1994) (holding sua sponte that court lacked jurisdiction under Establishment Clause to adjudicate theological questions despite failure of either party to raise issue), aff'd, 83 F.3d 455 (D.C. Cir. 1996); Johnson v. Sanders, 319 F. Supp. 421, 433 n.32 (D. Conn. 1970) ("The Establishment Clause is the guardian of the interests of society as a whole and is particularly invested with the rights of minorities. It cannot be 'waived' by individuals or institutions, any more than the unconstitutionality of state-prescribed school prayers could be 'waived' by certain pupils absenting themselves from the classroom while they were conducted.");, aff'd mem., 403 U.S. 955 (1971); Lupu & Tuttle, Courts, Clergy, and Congregations, supra note 7, at 135-36, 146 (The limitations imposed by the Establishment Clause "cannot be waived or conferred by consent of the parties . . . . [E]ven if all of the parents in a public school district agreed to permit official prayers in the schools, the practice would still violate the Establishment Clause . . . ."); Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 333 n.14 (1985) (The Establishment Clause "gives rise to rights that are clearly not subject to waiver or alienation by any individual—certainly not by a recipient of government aid to religion, or by a citizen-taxpayer who is the source of such aid. Thus it is plain that a church or church-related school could not, for example, 'waive' the right to avoid intrusive governmental entanglement in order to receive direct monetary aid from the public treasury."); Yuracko, supra note 91, at 153-54 ("[T]he Establishment Clause of the First Amendment ensures a government in which church and state are separate. The goals and benefits of the Establishment Clause are primarily social and structural, not individual. As such, individuals may not choose to waive the protections of the Establishment Clause."). But see Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Home, 698 F.3d 1295 (10th Cir. 2012) (impliedly
B. Hosanna-Tabor

1. Either/Or. The Court might have conceptualized the ministerial exception as purely a right protected by the Free Exercise Clause, albeit one held by a group rather than an individual. As a right, the exception would generally allow religious groups freedom to choose their leaders without government interference, but it would be lost if in a particular circumstance the group acted in a manner inconsistent with an intention to assert the right, or the government demonstrated an interest that outweighed it. Thus, the Court might have addressed, for example, whether the Synod’s representation that church employees enjoy protection against disability discrimination impliedly waived the school’s right to rely on the ministerial exception when such discrimination is alleged. One would also have expected some weighing of the government’s important interest in providing a remedy for disability discrimination, against Hosanna-Tabor’s interest in shaping the religious character of its congregation and school by selecting its ministers free of government interference, together with consideration whether the government might have provided that remedy in a less intrusive manner. The ministerial exception-as-right would have had potentially broad application, but both waiver and balancing would have provided some insurance against situations where the exception’s application would be unjust or undesirable.

The Court also might have conceptualized the ministerial exception as a purely structural limitation imposed by the Establishment Clause. In that event the potential waiver and balancing inquiries discussed above would have been irrelevant, since structural limitations discussed above may not be set aside by such considerations. Instead, the Court’s focus would have been on the bounds of the government’s disability. The Establishment holding laches a defense to Establishment Clause violation).

102. I am setting to one side the level of judicial scrutiny and other questions relating to the precise balancing mechanism, although one would generally expect that some sort of heightened scrutiny would be required to set aside the right in a ministerial exception case.

103. See supra note 23 and accompanying text.

104. See Lupu & Tuttle, Courts, Clergy, and Congregations, supra note 7, at 122 (“[T]he Constitution does not systematically protect the interests of certain classes of parties, defined by religious mission; rather, the Constitution disables civil courts from resolving certain classes of questions. This is an adjudicative disability.”); id. at 148 (In deciding whether it may resolve a dispute about ministerial appointment, “the court asks which positions involve the kinds of assessments that courts should be forbidden to make.”); cf. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 199 (2011) (Hohfeldian relations are...
Clause disability bars government from, among other things, resolving disputed questions of religious doctrine and otherwise entangling itself in religious matters. The structural limitation on such entanglement, however, does not prevent government from intervening in religious disputes when it can do so on the basis of secular law without deciding religious questions. The Court itself has held that a court may resolve litigation involving disputed ownership of church property if it can do so by recourse to neutral principles of secular law.

At least two judicial inquiries might have resolved this case without exceeding the limits of Establishment Clause structure: ordinary principles of contract law, and pretext analysis under the ADA. The detrimental-reliance inquiry is simple and secular: Did Hosanna-Tabor promise Perich her job back after she recovered? Did she rely to her detriment on that promise? The answer to both questions seems to be, "yes," but in any event the inquiry would not have involved interpreting Lutheran doctrine or resolving uncertainties about its content or significance.

The pretext inquiry is secular as well and, at least in this case, also simple: If the school had reached a decision to terminate Perich before she threatened suit in violation of Lutheran doctrine, that would be powerful evidence that her doctrinal violation was not really the issue. This inference would be confirmed by the school board's

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106. Jones v. Wolf, 443 U.S. 595, 621 (1979) (holding that courts may properly decide church property disputes on the basis of religiously neutral principles of secular law).


108. See supra notes 24-25 and accompanying text.

109. See Griffin, supra note 7, at 37-38 (arguing that breach of contract claims may be resolved by a "fairly direct inquiry" into whether the religious employer made and breached an enforceable promise) (discussing Minker v. Baltimore Annual Conference of United Methodist Ch., 894 F.2d 1354 (D.C. Cir. 1990)).

110. Cf. id. at 26 (A non-discriminatory justification that is put forward only after discriminatory allegations is strong evidence that the non-discriminatory justification is pretextual).

Professor Laycock, who represented the church in the Supreme Court, has suggested that Perich threatened legal action before the school decided to fire her. See Laycock,
unexplained rejection of the medical certification of Perich's ability to return to work, in the absence of any expertise or evidence to the contrary, as well as by the board's repeatedly expressed fears of having a narcoleptic in the classroom."

Alternatively, a court might also have found that disability discrimination or retaliation had nothing to do with Perich's termination, that it was simply the result of legally unsophisticated administrators trying to satisfy incompatible demands under the pressure of a difficult situation. Again, a court could have reached this judgment without entangling itself in religious questions or doctrine.

2. Both/And. The Court might have conceptualized the ministerial exception as either a group right or a structural limitation, both of which contain definite (though different) restrictions on the scope of their application. Like a good umpire, however, Chief Justice Roberts covered both bases, holding that the ministerial exception is simultaneously free exercise right and anti-establishment structure. "Hosanna-Tabor makes clear that the ministerial exception is a free exercise right, albeit one held by religious groups rather than individuals." Early on, the opinion reads two of its church property and office cases as protecting a religious group autonomy right. It then

Ministerial Exception, supra note 7, at 844 ("When the principal called her that afternoon, Perich announced that if she did not get her job back, she would sue the Church."). The Supreme Court and the lower courts apparently read the evidence differently, as showing that Perich threatened to sue in response to news that she was going to be fired. See Hosanna-Tabor, 132 S. Ct. at 700 (The principal “called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.”); Hosanna-Tabor, 597 F.3d at 774 (The principal “told Perich that she would likely be fired, and Perich told [the principal] that she would assert her legal rights against discrimination if they were unable to reach a compromise.”); Hosanna-Tabor, 582 F. Supp. 2d at 885 (“The principal indicated that Perich would likely be fired and Perich indicated that she would assert her legal rights against discrimination . . . .”).

In any event, whether the decision to terminate Perich came before or after her threat to take legal action is a question of secular fact that a court could have resolved without religious entanglement.

111. See supra Part II.A.2.
112. See supra Part II.A.3.
113. Hosanna-Tabor, 132 S. Ct. at 710.
114. See supra note 82 and accompanying text.
115. Hosanna-Tabor, 132 S. Ct. at 705 (“[W]e declared the law [in Kedroff] unconstitutional because it ‘directly prohibit[ed] the free exercise of an ecclesiastical right, the Church’s choice of its hierarchy.’”) (alteration in original) (quoting Kedroff, 344 U.S. at 119); see also id. at 704 (Watson v. Jones “‘radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation . . .’”) (ellipses in
straightforwardly holds that the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission through its appointments.” It rejects the Speech Clause's freedom of association as an insufficient foundation for the exception, because the First Amendment “gives special solicitude to the rights of religious organizations.” Finally, it finds that the exception “operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar,” which is consistent with conceptualization of the exception as a right that might be waived rather than a structural limitation that may not.

But Hosanna-Tabor also makes clear that the exception is a structural limitation under the Establishment Clause. The Court summarized another of its property and office decisions as having held that the state court’s inquiry “into whether the Church had followed its own procedures . . . had ‘unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals’ of the Church.” Its structural Establishment Clause holding was as straightforward as its group-rights Free Exercise Clause holding: “According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”

original) (quoting Kedroff, 344 U.S. at 116).
116. Id. at 706.
117. Id.; accord id. at 713 (Alito, J., joined by Kagan, J., concurring).
Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith . . . [A] religious body’s right to self-governance must include the ability to select, and to be selective about, those who will serve as the very “embodiment of its message” and “its voice to the faithful.” Id. (quoting Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006)).
118. Id. at 709 n.4.
119. See Michael A. Helfand, Religion’s Footnote Four: Church Autonomy as Arbitration, 97 MINN. L. REV. (forthcoming 2013) (arguing that as an affirmative defense the ministerial exception may be waived, and that this waivability enables a kind of “constitutionalized arbitration” that would permit parties to a ministerial employment dispute to agree to its resolution by a secular court); e.g., Hamilton v. Southland Christian Sch., Inc., 2012 U.S. App. LEXIS 9865 (11th Cir. May 16, 2012) (holding that defendant waived ministerial exception by failing to raise it in brief filed with court of appeals); Petschonek v. Catholic Diocese of Memphis, 2012 Tenn. App. LEXIS 330, at *17-18 (Tenn. Ct. App. May 23, 2012) (holding that defendant’s failure to raise ministerial exception at trial prevented raising its consideration on appeal).
120. Hosanna-Tabor, 132 S. Ct. at 705 (quoting Milivojevich, 426 U.S. at 720).
121. Id. at 706.
By conceptualizing the exception as both right and structure, *Hosanna-Tabor* combined the absolute disability imposed by structure with the broad applicability of group rights. The Court might have moderated the expansive impact of this amalgamation by specifying a narrow definition of "minister." Instead, the Court created a largely functional definition based on whether the purported minister performs any "important" religious duties. Churches have already pushed such functional definitions hard and far, to characterize as "ministers" church employees well outside the prototypical congregational pastor or parish priest, as indeed *Hosanna-Tabor* did before the Court. Since the responsibilities of many church employees, if not most, can be linked to church doctrine or practice, one may expect that churches will seek to apply the categorical immunity from government regulation created by *Hosanna-Tabor* to most church employment decisions.

In short, *Hosanna-Tabor*'s combination of a church autonomy right, a structural limitation, and an indeterminate definition of minister created a constitutional right on steroids: A broad, absolute, and categorical church autonomy right to be free of government interference in most

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122. See *supra* notes 67-68 and accompanying text.
123. Beyond traditional clergy, state and federal courts have characterized administrative secretaries, choir directors, communications managers, lay administrators, ministerial administrators, music teachers, organists, school teachers, school principals, university professors, organists, public relations personnel, administrators, and pastoral counselors as "ministers" unprotected by federal or state unemployment statutes or state tort or contract laws. See Corbin, *Above the Law?*, *supra* note 7, at 1976-77 & nn.61-66 (citing cases); Griffin, *supra* note 7, at 3 & n.4 (same); Wasserman, *supra* note 7, at 290 & nn.8-13 (same). But see Brady, *supra* note 7, at 1695-96 (arguing that "the courts have not strayed far from traditional clerical positions," and that "no federal court has included lay teachers at religiously affiliated schools within the ministerial exception").
124. Opening Brief for Petitioner, *supra* note 13, at *39 ("Teaching religion, leading worship, and leading prayer are religious duties regardless of who performs them."); Tr. Oral Arg., *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 4593593, at *15-16 ("[I]f you teach the doctrines of the faith, if that is per your job responsibilities . . . we think you're a minister . . . . ][I]f you teach an entire class on religion, we think you ought to be within this rule.") (counsel to petitioner); id. at *55 ("A minister is a person who holds ecclesiastical office in the church or who exercises important religious functions, most obviously, including teaching of the faith."); see also Laycock, *Ministerial Exception, supra* note 7, at 859-60.

Perich should clearly be within the ministerial exception, even though her position is not what first comes to mind when one talks about ministers. She was not the pastor of a congregation, or the assistant pastor. She did not spend full time, or even a majority of her time, on the explicitly religious portions of her work. But the religious work that she did was important: she taught the faith, she led worship, and she represented the church to her students.

*Id.*
employment decisions without a safety net of waiver or balancing even when the decision is made on a prohibited secular ground. 125

3. Reservations? The EEOC and Perich charged that construing the ministerial exception to bar pretext inquiries in ministerial employment actions “could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial.” 126 The Court purported to reserve this and other similar questions, 127 but it is difficult to see how it could craft any such exceptions to the absolute religious church autonomy right it has created. 128 At oral argument, for example, Professor Laycock invoked the government’s undoubted compelling government interest in preventing child abuse, but nevertheless concluded that the law could not protect a ministerial employee fired in retaliation for reporting to the authorities child abuse by the church. 129

Consider, not so hypothetically, 130 that a religious school teacher like Perich is terminated for cause after she reports having seen the pastor of the sponsoring congregation sexually abusing a child at the school. In response to her claim that her supposed deficiencies as teacher and model of the faith were merely a retaliatory pretext, the church may invoke the ministerial exception as a complete defense.

125. See Laycock, Church Autonomy Revisited, supra note 7, at 267 (variously describing the ministerial exception as a “per se,” “categorical,” and “absolute” rule).
126. Hosanna-Tabor, 132 S. Ct. at 710.
127. Id.
128. The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her. Today 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.

129. See Corbin, Hosanna-Tabor, supra note 7, at 962-63 (“If a church has an absolute right to select its ministers, it is not clear why the result would be different if it wished to fire a whistle-blower minister . . . .”).
If the exception were a group right, the Court could coherently hold that the group’s interest in making ministerial employment decisions free of government interference would be outweighed by the government’s obviously compelling interest in protecting children from the horrors of sexual abuse, which would be supported by a rule that protects reporting ministers from retaliatory termination. If the exception were a structural limitation under the Establishment Clause, the Court could coherently hold that a court may adjudicate whether the termination is pretextual so long as it can do so without evaluating religious doctrine. But since the exception is both, the Court can do neither.

4. Exemptions? The Court has not recognized a general free exercise right to exemption from religiously burdensome laws in more than twenty years. In Employment Division v. Smith, the Court upheld state denial of unemployment benefits to two members of the Native American Church who were discharged for violating state drug laws after ingesting peyote as part of a sacred ritual. The Court held that religiously neutral and generally applicable laws are not subject to meaningful judicial scrutiny under the Free Exercise Clause, even when they block or burden the free exercise of religion; heightened scrutiny of a religiously burdensome law is called for only if the law is not religiously neutral or generally applicable. The principal justification offered for this rule was that it relieves judges of the need to make judgments about the “centrality” of burdened religious practices or to balance the extent of free-exercise intrusions against the importance of government interests.

Because the ADA is a neutral and general law, it should not trigger a constitutionally compelled free-exercise exemption. Yet, a constitutionally compelled free-exercise exemption is precisely what the ministerial exception is—how else can one conceptualize an “exception” to the religiously neutral and generally applicable laws that would otherwise

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132. Id. at 874-75, 882, 890.
133. Id. at 882-90; accord Lukumi, 508 U.S. at 531.
134. Smith, 494 U.S. at 877-78; accord Lukumi, 508 U.S. at 531-33, 546. The Court recognized two exceptions to this general rule which have not proved to be far-reaching or otherwise significant. See Smith, 494 U.S. at 881-82 (heightened scrutiny may be called for when the burden on religious practice is combined with burdens on other constitutionally protected activity to create a “hybrid [right]”); id. at 884 (same regarding a system of “individualized government assessment” that exempts secular activities but not religious exercise from burdensome laws).
regulate ministerial employment?136 The Court gamely sought to distinguish Smith as involving government burdens on “outward physical acts,” whereas Hosanna-Tabor concerned “government interference with an internal church decision that affects the faith and mission of the church itself.”137 The Native American believers in Smith would no doubt have been interested to learn that their participation in the ritual that rested at the spiritual center of their personal faith was a mere “outward physical act” that paled in comparison to a Lutheran congregation’s “internal faith and mission.”

“Internal” church governance decisions might fall outside the ambit of Smith if they are protected by the Establishment Clause,138 which disables government from, among other things, resolving religious question for the church or otherwise interpreting religious doctrine.139 But if internal church governance decisions are also protected by the

136. Hosanna-Tabor, 132 S. Ct. at 706 (holding that the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission through its appointments”).
137. Id. at 707.

Professor Laycock has argued that the better distinction is between external manifestations of religious practice and internal church governance, the latter of which, he maintained, were never within the Smith rule. Laycock, Ministerial Exception, supra note 7, at 854, 854-56 (“Smith is about the government’s general power of regulation; Smith is not about the internal governance of churches .... [The distinction is about ‘outward physical acts’ versus ‘internal’ church decisions. The word outward is at least as important as the word physical.”); see Tr. Oral Arg., supra note 124, at *56 (“It’s not that institutions are different from individuals. It is that the institutional governance of the church is at a prior step. Smith is about whether people can act on their religious teachings after they are formulated. The selection of ministers is about the process by which those religious teachings will be formulated.”) (argument of Professor Laycock for Petitioner).

Laycock and some defenders of Hosanna-Tabor attach out-sized significance to a dictum at the beginning of Smith which, they contend, reserved the line of cases purportedly establishing a church autonomy doctrine that categorically immunizes from government regulation of or intervention in disputes over religious doctrine and other matters of “internal” governance, including ministerial appointments. See, e.g., Laycock, Ministerial Exception, supra note 7, at 854 (“[The] government can not ‘lend its power to one or the other side in controversies over religious authority’ [or dogma.]”) (quoting Smith, 494 U.S. at 877; Lund, supra note 7, at 59 (same). In support of this dictum, Smith cited Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-52 (1969); Kedroff, 344 U.S. at 95-119; and Millivojevich, 426 U.S. at 708-25. Smith, 494 U.S. at 877. However, Jones v. Wolf was decided in 1979, after all of these decisions, and Jones expressly permits a court to decide such disputes—and thus by definition to lend its power to one side or the other—so long as it does so on the basis of neutral principles of secular law. 443 U.S. 595, 602-03 (1979). Smith’s approval of these cases, therefore, can constitute a “reservation” or “preservation” of categorically protected church autonomy rights only if one first begs the question whether that is what these cases really stand for, and then further ignores the later effect of Jones.

139. See supra text accompanying note 115.
Free Exercise Clause, as indeed the Court insists, one cannot blink the fact that Hosanna-Tabor has resurrected the constitutionally compelled exemption doctrine interred by Smith, and has done so to afford the faith more protection than the faithful. Church members still possess no right to relief from incidental burdens that government imposes on their religious practices, whereas religious groups are now wholly exempt from the protections that federal and state employment laws afford an employee, so long as they can credibly assert that an employee has "important" religious responsibilities or "represents the faith."

It is hard to justify this dramatically differential treatment within the current doctrinal confines of the Free Exercise Clause, especially in a country that has long prioritized individual over group rights.

When the pile up of this jurisprudential train wreck is cleared away, three things remain: (i) constitutional endorsement of a broad zone of categorical religious-group immunity from liability under federal and state employment laws, a zone that conceptually prevents government intervention, even to protect ministerial employees from retaliation for reporting child abuse, sexual harassment, or other tortious or criminal activity; (ii) resurrection of the constitutionally compelled exemption regime that was abandoned precisely to avoid judicial determination of the theological questions that inhere in the administration of such regimes; and (iii) endorsement of a constitutional doctrine that affords religious groups substantially more protection from government burdens than it affords religious individuals.

The ministerial exception is so broad, absolute, and inflexible that it can hardly be taken seriously. One suspects it may not be.

140. See supra text accompanying notes 122-25.
141. See Kalscheur, supra note 7, at 47-48.
142. Cf. TWA v. Hardison, 432 U.S. 63, 66 (1977) (setting easily met threshold for Title VII defense that accommodating religious practices of employee would create "undue hardship").
143. See supra Part IV.B.2.
144. See Lupu & Tuttle, Courts, Clergy, and Congregations, supra note 7, at 132 (arguing that "it seems staggeringly overbroad to characterize [the church property and office] cases as insulating the 'internal affairs' of churches from the exercise of state power [,]" because so-called internal affairs virtually always generate "negative externalities that provoke legal interest"); see also Meredith Render, Religious Practice and Sex Discrimination: An Uneasy Case for Tolerance, available at http://ssrn.com/abstract=20191-66 ("[I]n confirming that the ministerial exception is constitutionally required the Court used strikingly broad language to describe the ambit of the Religious Clause[']s protection of religious organizations' ability to select their own ministers free from government 'interference."").
V. CONCLUSION: THIN RELIGION?

In its briefing and argument of Hosanna-Tabor before the Supreme Court, Perich and the EEOC took the position that there was no ministerial exception at all, arguing instead that the freedom of association under the Speech Clause was sufficient to protect any legitimate interests of religious groups in being excused from the general constraints of anti-discrimination laws.\footnote{146} No one on the Court took this position seriously; as its opinion stated with undisguised incredulity, under the freedom-of-association position

the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.\footnote{147}

The tactical judgments of lawyers who lose 9-0 are fair game for criticism, but Perich’s and the EEOC’s position is actually more consistent with ongoing transformations of religious belief and practice in the post-modern West than is the church autonomy über-right blessed by the Court in Hosanna-Tabor. Over the last fifty years religious diversity in the United States has grown dramatically and radically. Changes in religious belief and practice (notably those associated with the so-called “spirituality” movement) make church membership look like joining a voluntary secular association—that is, something one does to satisfy personal needs and social preferences, rather than one’s response to a claim on individual conscience by an entity which represents the divine.\footnote{148} Radical pluralism makes any exemption regime difficult to

\footnote{145. Cf. Esbeck, Autonomy, supra note 7, at 13 (warning that those who “embrace” Hosanna-Tabor too “eagerly and then proceed to apply it where not intended” risk “a series of lower court opinions seeming to cut back” on the decision, “with all the attendant rhetoric about a ‘clear and present danger’ of religion unregulated and out of control”).


147. Hosanna-Tabor, 132 S. Ct. at 706 (citation omitted).

148. See, e.g., Frederick Mark Gedicks, God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief, 18 WM. & MARY BILL RTS. J. 901, 907 (2010) [hereinafter Gedicks, Postmodern Beliefs] (summarizing the various ways in which contemporary religious belief has devolved from a search for transcendent and ultimate truth to a self-centered consumer market activity designed to satisfy personal preferences). See generally ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION}
administer consistently and even-handedly no matter how hard one tries, while the devolution of traditional religion from an objective representation of ultimate reality to a subjective "cafeteria choice" suggests the already belated character of thick religious group identity.

*Hosanna-Tabor* subverts individual autonomy to protect church autonomy. It affords greater free exercise protection to churches than is enjoyed by their members. It is so broad and absolute that its doctrinal limitation seems inevitable, yet its compound jurisprudential architecture is impervious to limitation. In the crowning irony, the exception does all of this to safeguard an experience of religious practice and belief that is rapidly passing away. It is fair to wonder whether the ministerial exception will outlast the churches it shields.

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149. *See Gedicks, Postmodern Belief, supra* note 148, at 909-10 (arguing that the postmodern decline of religion as a distinct activity required elimination of the exemption regime to avoid arbitrary line-drawing between religious exercise and comparable secular moral activity).

150. *Cf. id.* at 904, 913.

Postmodernity and the death of God are an insightful (if provocative) account of our current condition in the West. Our age is marked by radical dissensus about the meaning of life, the reality of the world, and virtually everything else that matters. The possibility of a universally applicable and universally accepted narrative that definitively explains the world and defines its truth and reality is no longer a live one. Neither the religion nor the secular philosophy that makes cosmic claims about absolute and universally applicable truth can fit in a world in which the notion of such a truth is no longer plausible to those who do not already believe it.

**Id.**

151. *See supra* Part III.B.


