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## PRESS DEFINITION AND THE RELIGION ANALOGY

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In her Article, *Press Exceptionalism*,<sup>1</sup> Professor Sonja R. West urges the Court to differentiate a specially protected sub-category of “the press” from a broader, less-protected category of “occasional public commentators.” She makes compelling arguments that this protection is likely to increase the volume of important contributions to the flow of public information. Whatever benefits might be produced by this press exceptionalism, however, they are only valuable if the exceptionally protected “press” can be identified.

The model that Professor West proposes for this identification, based on the approach that the Supreme Court employed in demarcating the category of “ministers” in the 2012 *Hosanna-Tabor* case,<sup>2</sup> is an attractive one, insofar as it analogizes to another, somewhat parallel First Amendment definitional question. The who-is-a-minister inquiry illustrates that the Court need not shy away from the endeavor of defining the boundaries of a uniquely protected group merely because it is a complicated task. The inquiry also shows that the Court can elaborate upon those boundaries over time as the relevant contours naturally come before it in real-world decisions. The inquiry in *Hosanna-Tabor*, like the press-definition inquiry, arises in a First Amendment setting in which we have a goal of allowing a set of ideas or communications to develop free from governmental interference and in which the free development of those ideas depends on granting a degree of autonomy to certain institutions and the players within them. Thus, the inquiry into how we do this job in the religion context feels like a potentially fruitful place to turn for insights into how to achieve our rights-based goals related to the press.

As attractive as the *Hosanna-Tabor* approach is in the abstract, though, it falls short of offering an apt analogy for the task of defining the press. In some key ways, defining a minister in *Hosanna-Tabor* is sufficiently different from defining the press that the comparison breaks down. Most significantly, although Professor West suggests that her proposed approach is a “functional” one,<sup>3</sup> the *Hosanna-Tabor* analysis that she borrows is a four-factor test with only two factors that are truly functional in nature and two that are quite explicitly

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<sup>1</sup> 127 HARV. L. REV. 2434 (2014).

<sup>2</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

<sup>3</sup> See West, *supra* note 1, at 2454–55.

formalist, in that they rise and fall entirely on internal and external labeling rather than on any behavior, operation, or consequence of performance. Although the two truly functionalist factors that Professor West borrows may offer useful insights into which actors are behaving as the “press” for constitutional purposes, the formalist factors are, for the reasons articulated below, not only not helpful to this task, but potentially harmful. Because these key aspects of the minister-definition analysis cannot be repurposed for the press-definition setting, more work remains to be done in devising a truly functional approach for identifying actors who would qualify for Press Clause protection.

The formalist elements of *Hosanna-Tabor* are inappropriate in the press-definition setting for a number of reasons. First, at a fundamental level, the reason the Court needed to develop a definition of minister and the reason Professor West needs a definition of the press are essentially opposite. If someone is a minister under the Court’s *Hosanna-Tabor* definition, then he or she is *deprived* of the protection of Title VII,<sup>4</sup> whereas if someone is a member of the press under Professor West’s proposal, the consequence is that he or she is entitled to *additional* constitutional protection. The different incentives created in these two situations mean that recognition by others as a minister<sup>5</sup> or holding oneself out as a minister<sup>6</sup> — two primary components of the *Hosanna-Tabor* inquiry that Professor West proposes be repurposed for the press-definition inquiry<sup>7</sup> — are ill-suited to identifying speakers who are best fulfilling the unique constitutional functions of the press. When one self-identifies as a minister, one is making something like an admission against interest that heightens its credibility: there are costs to that self-identification, including not being protected by employment discrimination laws. That rubric is substantially less helpful when trying to decide the press definitional questions, where what is at stake is the gaining of a constitutional right, such that the self-identification incentives plainly run in the opposite direction. External recognition, which the *Hosanna-Tabor* analogy also suggests is useful, may work no better as a marker than self-recognition, because reliance on professional-organizations’ acknowledgement of the press to identify the press is likely to favor old media, who, for now at least, continue to control membership and educational trajectories and may skew guidelines to burden particular newcomers. Adopting the formalist labeling approach that works in *Hosanna-Tabor* thus might unfairly disadvantage non-traditional news sources that are unquestionably fulfilling the quintessential constitutional press functions. All of these

<sup>4</sup> *Hosanna-Tabor*, 132 S. Ct. at 705.

<sup>5</sup> *Id.* at 699–700, 707.

<sup>6</sup> *Id.* at 707–09.

<sup>7</sup> See West, *supra* note 1, at 2456.

differences between identifying a minister and identifying the press suggest that *Hosanna-Tabor* may not do the work that Professor West is hoping it will do on these formalist prongs of the borrowed test.

Additionally, the analogy to *Hosanna-Tabor* is unsatisfactory because in that case the Supreme Court did not decide the question of what is a religion for freedom-of-religion purposes, but rather the question of who qualifies as a minister in what was assumed to be a religion.<sup>8</sup> Thus, *Hosanna-Tabor* says very little about what will count as the press for freedom-of-press purposes; it might, at best, be relevant to the question of which employees of an organization that is assumed to be the press will count as reporters. The opinion in *Hosanna-Tabor* does not create any occasion for addressing the fundamental question of how the Court will identify the actual object of a guaranteed freedom — “religion” under one clause or “press” under the other. Tying the analysis of who will legally be considered a member of the press to an affiliation with a press organization begs the question of what is a press organization, and *Hosanna-Tabor* does not offer a framework for answering that initial, root question.

Indeed, in the free exercise context, courts have only rarely discussed that primary definitional question at all, and have tried to avoid formalistic, court-delineated definitions of religion when they have done so. It is true that the Court has appeared to emphasize self-identification by the proclaimed adherent of apparently sincere religious beliefs,<sup>9</sup> which might at first blush suggest a formalist labeling component. Importantly, though, in other contexts, the real weight of the analysis — the place where the rubber hits the road on the question of whether what that adherent believes in is, in fact, a religion for purposes of free exercise protections or anti-establishment limitations — has been the very functional question of whether those beliefs occupy a place in the life of their adherents that parallels the place filled by the orthodox belief in God in a more traditional, obvious religion.<sup>10</sup> Thus, if we model the press inquiry on how the Court may define “religion,” rather than on how the Court defines “minister in a religion,” the task-related functional questions of what the alleged member of the press is doing and how that behavior parallels the goals initially envisioned for the most obvious category of the press at the time of the founding will have a larger or potentially decisive role.

The appropriateness of the partially formalist *Hosanna-Tabor* model in the task of press definition is questionable for another, related reason, rooted in the existence of two separate religion clauses in the

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<sup>8</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

<sup>9</sup> *United States v. Ballard*, 322 U.S. 78 (1944).

<sup>10</sup> *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

First Amendment. Because there are two religion clauses tugging on each other, but only one rights-defining Press Clause, there is arguably a structural element to *Hosanna-Tabor* that is not present in the Press Clause context. The *Hosanna-Tabor* Court faced not only the argument that the ministerial exception is a group right under the Free Exercise Clause, but also the argument that because of the structural adjudicative disability created by the Establishment Clause, the government lacks the power to tell the Lutheran Church who it must hire as a minister under Lutheran theology.<sup>11</sup> While the Court in *Hosanna-Tabor* may have been constrained from adopting a purely functional inquiry by arguments that the Establishment Clause prevents the Court from undertaking an analysis that would meddle too much in church affairs,<sup>12</sup> no such constraint exists in the press context, where courts remain free to take the purer functional approach if that approach does a better job of identifying who warrants the protection, as it does.

Finally, the reasons that the First Amendment protects religion are, in at least some crucial respects, different than the reasons that the First Amendment protects the press. The free exercise of religion is protected primarily because it is a matter of personal conscience and individual self-identity.<sup>13</sup> Conversely, because the press is protected for far more functional reasons — that is, because of what the press is *doing* — a completely functional approach makes sense in the press context in ways that do not make sense in the religion context. Professor West's work highlights some excellent reasons for protecting the press, nearly all of which are rooted in specific, valuable tasks: gathering information, acting as a surrogate for and a conduit of news to the public, and serving as a check on government and the powerful. The point of giving the press special constitutional protection is to allow it to do what the Constitution wants it to be doing. Conversely, as a constitutional matter, we do not necessarily know what we want religions to be doing. Because they are protected by a freedom-of-

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<sup>11</sup> *Hosanna-Tabor*, 132 S. Ct. at 706 (“Accordinging 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.”).

<sup>12</sup> See *id.* at 715 (Alito, J., concurring) (noting that “the mere adjudication of such [functional] questions would pose grave problems for religious autonomy”).

<sup>13</sup> Certainly there are those who have argued that religion also has a more practical role of giving the adherent a positive institutional identity vis-à-vis the state. See, e.g., Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009). However, this does not diminish the obvious role that free exercise was designed to have in preserving freedom of thought and individual autonomy. See, e.g., Thomas Jefferson, *An Act for Establishing Religious Freedom*, in 12 THE STATUTES AT LARGE 84, 86 (William Waller Hening ed., 1823) (“[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”).

conscience variety of right, religions are supposed to be able to define their own purposes and practices in a way that is in tension with the very outcome-oriented reasons that the Constitution protects press freedom.

All told, while the portions of the *Hosanna-Tabor* approach that call for a task-related functional inquiry might prove useful in creating the definitional boundaries of Press Clause coverage, the fuller minister analogy is not apt in the press area. The components of that test that focus on formalist labeling — either by relying on self-identification or by giving weight to external identification — do not translate to the press context, but instead highlight the ways in which Religion Clause jurisprudence and Press Clause jurisprudence diverge. Professor West acknowledges that these formalist factors cannot themselves carry the entire weight of defining the press, and emphasizes that they would be only pieces of a larger definitional inquiry.<sup>14</sup> But their inclusion in the analysis would not be benign. A court charged with making a real-world determination of who is the “press,” and given a model containing two easy-to-apply formalist inquiries into how the relevant actor has been labeled and two harder-to-apply, more nebulous functionalist inquiries into what the relevant actor has done and how that behavior serves the constitutional goals, is likely to give excessive or even exclusive weight to formalism. Given that these formalist inquiries are unsuitable as definers outside of the religion context from which they sprang, they ought not be components of the wider press-identification model. The formalist *Hosanna-Tabor* components may be attractive to Professor West’s overall goal because they operate more effectively than the functional factors do to cabin the Press Clause’s coverage to a more limited subset of speakers; in the absence of them, it is significantly harder to restrict the population of the qualifying group. But given the inapposite nature of this half of the religion analogy, there is no place for those components in a truly functional press-identification model. Professor West’s work should therefore be seen as a helpful starting point for a larger inquiry into how a genuinely functional model of press membership might be constructed — a conversation that is worth continuing.

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<sup>14</sup> See West, *supra* note 1, at 2458 (“A look to press institutions, therefore, can begin — but must not end — the inquiry.”).