
LEADING CASES

I. CONSTITUTIONAL LAW

A. First Amendment

1. *Freedom of Religion — Ministerial Exception.* — For forty years, lower federal courts have held that employment discrimination laws are subject to a “ministerial exception,” grounded in the First Amendment, which prevents the application of those laws to certain employment disputes between religious organizations and their “ministers.”¹ Last Term, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,² the Supreme Court for the first time recognized the ministerial exception and held that it barred a disability retaliation claim against a private religious school by a teacher whose duties included religious instruction.³ In recognizing the First Amendment foundation of the ministerial exception, the Court had to explain why the exception was not foreclosed by *Employment Division v. Smith*,⁴ which held that neutral laws of general applicability, such as employment discrimination laws, are not susceptible to free exercise challenges.⁵ The Court did so by drawing an unconvincing distinction between the facts of the two cases, a distinction that might have the unintended effect of complicating free exercise doctrine. The Court should instead have explained that because the ministerial exception is required by both the Free Exercise *and* Establishment Clauses, *Smith*, which dealt only with free exercise, could not foreclose the recognition of the exception. The Court could successfully have used this distinction without either breathing new life into the controversial doctrine of “hybrid rights” or further complicating free exercise doctrine.

Hosanna-Tabor, a member congregation of the Lutheran Church–Missouri Synod, ran a private K–8 school offering a “Christ-centered education” in Redford, Michigan.⁶ Hosanna-Tabor’s teachers were either “called” — that is, “called to their vocation by God through a congregation” — or “lay.”⁷ Whereas lay teachers were not required to

¹ See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972). Both the case law and this comment use “minister” in a broad, nondenominational sense that encompasses, for example, Jewish rabbis and Muslim imams.

² 132 S. Ct. 694 (2012).

³ *Id.* at 710.

⁴ 494 U.S. 872 (1990).

⁵ See *id.* at 885.

⁶ *Hosanna-Tabor*, 132 S. Ct. at 699 (quoting *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008)) (internal quotation marks omitted).

⁷ *Id.*

have any particular religious education and were hired only for yearly terms, called teachers completed a lengthy course of theological study, received the title “Minister of Religion, Commissioned,” and served open-ended terms rescindable only for cause.⁸ Respondent Cheryl Perich worked at Hosanna-Tabor as a called teacher from 2000 to 2004. In addition to the full range of secular subjects, Perich “taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service,” which she herself led roughly twice a year.⁹

In June 2004, however, Perich became ill and was forced to begin the next school year on disability leave.¹⁰ By January 2005, convinced that Perich would not be able to return in the foreseeable future and having hired a permanent substitute for the remainder of the year, the school board recommended to the congregation that Perich receive a “peaceful release” from her call: in exchange for her resignation, the congregation would pay a portion of Perich’s health insurance premiums for the rest of the year.¹¹ The congregation approved the release, but Perich, who had in fact received her doctor’s clearance to return to work, refused to resign.¹² After a confrontation at the school, the principal warned Perich that she would likely be fired, and Perich in turn said she would assert her legal rights if she and the school were unable to reach an agreement.¹³ In March, the chairman of the school board advised Perich that the board would seek her termination at the next congregation meeting because of her “insubordination and disruptive behavior” and her “threat[] to take legal action.”¹⁴ On April 10, the congregation voted to rescind Perich’s call, thereby terminating her employment at the school.¹⁵

In May 2005, Perich filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC).¹⁶ The EEOC ultimately filed suit against Hosanna-Tabor in federal district court, alleging that the church had violated the antiretaliation provision of the Americans with Disabilities Act¹⁷ (ADA) by firing Perich in

⁸ *Id.* at 699–700.

⁹ *Id.* at 700.

¹⁰ *Id.*

¹¹ *Id.* (quoting Joint Appendix at 186, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553)) (internal quotation marks omitted).

¹² *Id.*

¹³ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 774 (6th Cir. 2010).

¹⁴ *Hosanna-Tabor*, 132 S. Ct. at 700 (quoting Joint Appendix, *supra* note 11, at 55) (internal quotation marks omitted).

¹⁵ *Id.*

¹⁶ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 886 (E.D. Mich. 2008).

¹⁷ 42 U.S.C. § 12101 (2006).

response to her threat of legal action.¹⁸ Perich intervened, adding a state law retaliation claim.¹⁹ Hosanna-Tabor sought summary judgment in the district court on the ground that the suit was barred by the “ministerial exception,”²⁰ a judicially developed, First Amendment–based exception to antidiscrimination law.²¹ The district court, noting that the parties did not dispute Hosanna-Tabor’s status as a religious institution, agreed that the ministerial exception would bar the suit if Perich, though not ordained, qualified as a minister within the meaning of the exception.²² In holding that Perich did indeed qualify as a minister, the district court placed significant weight on Perich’s title (“commissioned minister”), the employment benefits attached to her position, and the absence of any indication that the school was simply trying to avoid liability after the fact.²³ The district court therefore granted summary judgment to Hosanna-Tabor.²⁴ Perich and the EEOC appealed.

The Sixth Circuit vacated and remanded.²⁵ The court acknowledged the general validity of the ministerial exception but held that Perich was not a minister.²⁶ The court of appeals said that the district court had not properly assessed whether Perich’s “primary duties” were religious in nature and had given too much weight to her title.²⁷ The court of appeals noted that the vast majority of Perich’s time in the classroom was devoted to teaching secular subjects; spending a relatively small amount of time leading religious activities did “not make her primary function religious.”²⁸ Moreover, both called and lay teachers had exactly the same classroom duties, including leading religious activities and instruction; thus, a finding that Perich was a minister

¹⁸ *Hosanna-Tabor*, 582 F. Supp. 2d at 886; see also 42 U.S.C. § 12203(a) (2006) (prohibiting retaliation against employees who oppose practices made unlawful by the ADA).

¹⁹ *Hosanna-Tabor*, 582 F. Supp. 2d at 886.

²⁰ *Id.*

²¹ The ministerial exception is distinct from a statutory exception in the ADA that permits a religious organization to “giv[e] preference in employment to individuals of a particular religion” and to “require that all applicants and employees conform to the religious tenets of such organization.” 42 U.S.C. § 12113(d) (2006). Whereas this provision and other similar statutory exceptions to antidiscrimination laws apply to all employees but exempt only discrimination on the basis of religion, the ministerial exception applies only to those employees deemed “ministers” but covers any kind of discrimination. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 n.1 (6th Cir. 2010) (White, J., concurring).

²² *Hosanna-Tabor*, 582 F. Supp. 2d at 887.

²³ See *id.* at 891 (“Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began.”); see also *id.* at 887 n.2.

²⁴ *Id.* at 892.

²⁵ *Hosanna-Tabor*, 597 F.3d at 782. Judge Clay wrote the opinion for the panel and was joined by Judge Guy. Judge White wrote a separate concurrence.

²⁶ *Id.* at 781.

²⁷ *Id.*

²⁸ *Id.* at 780.

would compel the illogical conclusion that Hosanna-Tabor’s lay teachers were also ministers, even though the latter were not even required to be Lutheran.²⁹

The Supreme Court reversed.³⁰ Writing for a unanimous Court, Chief Justice Roberts began his analysis with a history of the First Amendment’s Religion Clauses as a response to government control of ecclesiastical appointments.³¹ He then reviewed the Court’s decisions in a series of church property dispute cases, which as a group “confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”³² Having laid this foundation, the Chief Justice then turned to employment discrimination and expressed the Supreme Court’s first recognition of the ministerial exception developed by the lower courts.³³ To require a religious institution to retain an unwanted minister, or to punish it for not doing so, he explained, is forbidden by both the Free Exercise Clause, “which protects a religious group’s right to shape its own faith and mission through its appointments,” and the Establishment Clause, “which prohibits government involvement in such ecclesiastical decisions.”³⁴ Contrary to the suggestion of Perich and the EEOC, the Chief Justice said that this freedom from government interference is not grounded in the First Amendment’s implicit right to freedom of expressive association; instead, it stems directly from the Religion Clauses.³⁵

Chief Justice Roberts then responded to the contention that the Court’s 1990 decision in *Employment Division v. Smith* foreclosed the recognition of a broad ministerial exception.³⁶ In upholding an Oregon statute that criminalized peyote use, even as part of a religious rite, the *Smith* Court said that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”³⁷ Although Chief Justice Roberts acknowledged that the ADA is such a neutral law of general applicability, he found *Smith* distinguishable: whereas “*Smith* involved government regulation of only outward physical acts,” *Hosanna-Tabor* concerned “government interference with an

²⁹ See *id.* at 781; see also *id.* at 784 (White, J., concurring) (“The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling.”).

³⁰ *Hosanna-Tabor*, 132 S. Ct. at 710.

³¹ *Id.* at 702–04.

³² *Id.* at 704.

³³ *Id.* at 705–06.

³⁴ *Id.* at 706.

³⁵ See *id.*

³⁶ *Id.* at 706–07.

³⁷ *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

internal church decision that affects the faith and mission of the church itself.”³⁸ *Smith* thus did not preclude the ministerial exception.³⁹

Chief Justice Roberts then proceeded to examine “whether the exception applie[d] in this case.”⁴⁰ He expressed the Court’s reluctance “to adopt a rigid formula for deciding when an employee qualifies as a minister,” but said that the exception at least “cover[ed] Perich, given all the circumstances of her employment.”⁴¹ The relevant circumstances included her formal position and the lengthy religious training that made her eligible for that position, her own references to her service in the “teaching ministry,” and her role in teaching the Lutheran faith to the children in her classes.⁴² In analyzing the same facts, the Sixth Circuit had erroneously given no weight to Perich’s title of “commissioned minister” and too much weight to the fact that lay and called teachers had the same religious duties and to the amount of time Perich spent teaching secular subjects.⁴³

The Chief Justice then addressed the suggestion that Hosanna-Tabor’s stated basis for firing Perich was pretextual.⁴⁴ Hosanna-Tabor had claimed that it fired Perich when she threatened to take legal action because she thereby violated the Lutheran precept that “fellow believers generally should not sue one another in secular courts — and never over religious matters.”⁴⁵ According to Chief Justice Roberts, the claim that this reason was pretextual “misse[d] the point of the ministerial exception,” which does not cover only those firings undertaken for religious reasons.⁴⁶ “The exception instead ensures that the authority to select and control who will minister to the faithful — a matter ‘strictly ecclesiastical’ — is the church’s alone.”⁴⁷ The Chief Justice similarly dismissed a “parade of horrors” forecast by Perich and the EEOC, noting both that the ministerial exception had already existed in the lower courts for forty years without incident and that the present decision was narrow, addressing only a minister’s employment discrimination challenge to “her church’s decision to fire her.”⁴⁸

³⁸ *Hosanna-Tabor*, 132 S. Ct. at 707.

³⁹ *See id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 707–08.

⁴³ *See id.* at 708–09. The Court expressly declined to address whether lay teachers would fall within the ministerial exception. *Id.* at 708.

⁴⁴ *Id.* at 709.

⁴⁵ Brief for the Petitioner at 54, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

⁴⁶ *Hosanna-Tabor*, 132 S. Ct. at 709.

⁴⁷ *Id.* (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox*, 344 U.S. 94, 119 (1952)) (citation omitted).

⁴⁸ *Id.* at 710 (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”).

Justice Thomas wrote a short concurrence to express his view that the Religion Clauses require courts to defer to religious groups' good faith understandings of which employees qualify as ministers.⁴⁹ Justice Alito, joined by Justice Kagan, wrote a lengthier concurrence in which he cautioned that, given the religious diversity of America, titles like "minister" and the concept of ordination ought not weigh too heavily in the determination of which employees fall under the ministerial exception.⁵⁰ The exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."⁵¹ Regardless of what portion of her time she spent teaching secular subjects, Perich still fell within this description.⁵² Finally, Justice Alito said that adjudicating Perich's pretext claim would entail an impermissible inquiry into "what the accused church really believes, and how important that belief is to the church's overall mission."⁵³

In light of the longstanding unanimity of the lower federal courts that a ministerial exception to employment discrimination laws exists, commentators understandably believed that the decision in *Hosanna-Tabor* would focus primarily on the scope of the exception and the test for determining whether an employee was covered, not on the fundamental constitutionality of the exception.⁵⁴ Nevertheless, there remained the question of how the Court would reconcile the ministerial exception with its divisive 1990 decision in *Employment Division v. Smith*. Employment discrimination laws like Title VII⁵⁵ and the ADA are "neutral, generally applicable law[s],"⁵⁶ and so, "[u]nder *Smith*, one might think that there should be no ministerial exception at all."⁵⁷ Indeed, critics of the ministerial exception repeatedly cited the 1990 decision as a likely doctrinal impediment,⁵⁸ and even supporters realized some effort was required to square the exception with *Smith*.⁵⁹ But in

⁴⁹ See *id.* at 710–11 (Thomas, J., concurring).

⁵⁰ *Id.* at 711 (Alito, J., concurring).

⁵¹ *Id.* at 712.

⁵² See *id.* at 714–15.

⁵³ *Id.* at 715.

⁵⁴ See, e.g., Lyle Denniston, *Argument Preview: Faith, Teaching, and the Constitution*, SCOTUSBLOG (Sept. 30, 2011, 7:11 PM), <http://www.scotusblog.com/?p=128439>.

⁵⁵ 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. IV 2011).

⁵⁶ *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990).

⁵⁷ Jack M. Balkin, *The "Absolute" Ministerial Exception*, BALKINIZATION (Jan. 13, 2012, 8:49 AM), <http://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html>.

⁵⁸ See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1983 (2007); Benton C. Martin, Comment, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 *EMORY L.J.* 1297, 1301–02 (2010).

⁵⁹ See, e.g., Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 *N.C. L. REV.* 1, 57–60 (2011); Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 *HARV. L. REV.* 1776, 1781–83 (2008).

fact, once it determined that the ministerial exception is required by both the Free Exercise Clause and the Establishment Clause, the Court had an obvious basis for distinction: *Smith* dealt exclusively with free exercise challenges. Instead of relying on this difference, the Court drew an untenable distinction between the facts of *Hosanna-Tabor* and *Smith* — a distinction that may have the unfortunate side effect of implying a new and ambiguous exception to *Smith*'s free exercise holding. Had the Court simply emphasized that the Establishment Clause alone would require the ministerial exception, it could have reconciled the cases' holdings without complication.

Hosanna-Tabor's attempt to reconcile *Smith* and the ministerial exception is contained in a single paragraph that hinges on a distinction between two categories: "only outward physical acts" (*Smith*), and "internal church decision[s] that affect[] the faith and mission of the church itself" (*Hosanna-Tabor*).⁶⁰ Several commentators have been puzzled by this analysis,⁶¹ and rightly so. First, could not *Hosanna-Tabor* also be characterized as dealing only with outward physical acts? *Hosanna-Tabor* wished to be able to fire Perich; though perhaps not as intuitively physical as ingesting peyote, firing an employee is at bottom a physical act.⁶² And it is arguably more "outward" than ingesting peyote, since by definition it involves one party acting on another.⁶³ Perich and the EEOC in turn did not seek to make *Hosanna-Tabor* change its beliefs or profess anything it did not believe; they sought to make *Hosanna-Tabor* pay damages⁶⁴ — also, at least on its face, an outward physical act. One might argue that *Smith*'s examples of "physical acts"⁶⁵ indicate that the term comprehends only a limited range of conduct that does not include firing an employee, but the *Hosanna-Tabor* Court never indicated that it was using the term in any sense other than its everyday meaning. A better

⁶⁰ *Hosanna-Tabor*, 132 S. Ct. at 707.

⁶¹ See, e.g., Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. (forthcoming 2013) (manuscript at 16–17), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026046; Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), <http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html>. Even Professor Michael McConnell, a staunch supporter of the decision, has noted that "[t]he Court's analysis raises many questions." Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 834 (2012).

⁶² See Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 855 (2012) ("[D]ischarging a minister can be described as conduct, and even, less idiomatically, as a physical act."). Professor Laycock was counsel of record for *Hosanna-Tabor*.

⁶³ McConnell poses a series of questions that illustrate the uncertain purport of the Court's language: "What are 'outward physical acts'? Are some acts 'inward'? Are some acts not 'physical'? How broad is the term 'acts'?" McConnell, *supra* note 61, at 834.

⁶⁴ See *Hosanna-Tabor*, 132 S. Ct. at 709.

⁶⁵ The *Smith* Court listed "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

argument is that although firing an employee (or paying the monetary equivalent of reinstatement) is an outward physical act, perhaps, indirectly, it is something more as well. Because a minister's words and actions will likely shape the beliefs of a congregation, to influence the selection of a minister is to influence intangible faith. Viewed in this light, *Hosanna-Tabor* may not concern "only outward physical acts."

But to say that *Hosanna-Tabor* does not fall into the Court's first category because physical acts can shape faith compels one to ask why *Smith* falls outside the Court's second category. Peyote use is a physical act, but it surely shapes the faith of those who believe the plant "can and does work miracles."⁶⁶ Indeed, peyote use is integral to the rituals and belief system of the Native American Church (of which the *Smith* petitioners were members).⁶⁷ Why then was the criminalization of sacramental peyote at issue in *Smith* not "government interference with an internal church decision that affects the faith and mission of the church itself"?⁶⁸ Perhaps "internal church decision" is limited to personnel or governance decisions and would not cover the decision to worship in a particular fashion — but the Court only obliquely suggested such a limitation.⁶⁹ Even with this limitation, "internal church decision" would still encompass situations apparently governed by *Smith*, as Professor Michael Dorf illustrates with a hypothetical: "Suppose that a sect of the Native American Church selected its ministers by a ceremony in which novices, in order to be ordained, must ingest peyote. Could participants in that ceremony be imprisoned . . . [?]"⁷⁰ In short, if *Hosanna-Tabor* is about more than mere physical acts in some relevant sense, it is hard to see why *Smith* is not as well.

The Court's unconvincing distinction between the cases may have the unfortunate consequence of further complicating free exercise doctrine. *Hosanna-Tabor* can be read as implying a new exception to *Smith* for free exercise claims that involve conduct comprising not simply "outward physical acts" but rather "internal . . . decision[s] that affect[] the faith and mission" of the religious organization. Though the distinction is elusive, or perhaps simply illusory, free exercise litigants will surely try to use it. A recent article criticizing the tax provi-

⁶⁶ OMER C. STEWART, PEYOTE RELIGION 331 (1987).

⁶⁷ See *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in the judgment).

⁶⁸ *Hosanna-Tabor*, 132 S. Ct. at 707; see also Griffin, *supra* note 61 (manuscript at 16).

⁶⁹ The Court quoted *Smith's* declaration that the First Amendment prohibits the government from "lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Hosanna-Tabor*, 132 S. Ct. at 707 (alteration in original) (quoting *Smith*, 494 U.S. at 877) (internal quotation marks omitted). Notably, the church property dispute cases from which *Smith* derived this proposition did *not* involve neutral laws of general applicability. See Brief of Amici Curiae Law and Religion Professors in Support of Respondents at 21–25, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

⁷⁰ Dorf, *supra* note 61.

sion that prohibits tax-exempt churches from campaigning on behalf of political candidates illustrates the point.⁷¹ The author argues both that *Hosanna-Tabor* “carves out an exception to *Smith*’s general rule,” and that sermons endorsing political candidates are not outward physical acts but rather “quintessentially conduct that is internal to the church and that ‘affects the faith and mission of the church itself.’”⁷² This characterization intuitively seems dubious, but because *Hosanna-Tabor*’s two categories are “fuzzy” at best,⁷³ it is not clearly wrong. *Hosanna-Tabor* thus invites free exercise litigants to seek an exception to *Smith* but does not provide a workable framework for determining whether the facts of a case merit an exception.

This unfortunate consequence could have been avoided had the Court relied on a more straightforward distinction between *Smith* and *Hosanna-Tabor*: whereas *Smith* dealt exclusively with a free exercise challenge, *Hosanna-Tabor* held that both the Free Exercise Clause and the Establishment Clause require the ministerial exception.⁷⁴ Admittedly, it is somewhat unclear whether the *Hosanna-Tabor* Court meant that each of the two Religion Clauses independently requires the exception or that the two clauses acting as a unified whole require it.⁷⁵ But either interpretation renders the case distinguishable from *Smith*, which said nothing about the Establishment Clause.

The latter interpretation — “the Religion Clauses” as a unity⁷⁶ — arguably creates the easiest means of distinguishing *Smith*, because *Smith* itself drew a doctrinal line between cases involving only the Free Exercise Clause and cases involving “the Free Exercise Clause in conjunction with other constitutional protections.”⁷⁷ But a possible drawback to this interpretation is that it would appear to invoke the hybrid-rights doctrine, under which a free exercise claim that on its own would fail under *Smith* may survive if joined with a claim of

⁷¹ See Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237 (2012).

⁷² *Id.* at 281 (quoting *Hosanna-Tabor*, 132 S. Ct. at 707).

⁷³ Dorf, *supra* note 61.

⁷⁴ See *Hosanna-Tabor*, 132 S. Ct. at 702.

⁷⁵ At one point, the Court said government imposition of an unwanted minister “infringes the Free Exercise Clause” and “also violates the Establishment Clause,” *id.* at 706 (emphasis added), phrasing that suggests the former interpretation. Throughout the remainder of the opinion, however, the Court referred to “the Religion Clauses,” *see, e.g., id.* at 709 (noting “the Church’s freedom under the Religion Clauses to select its own ministers”), suggesting the latter interpretation.

⁷⁶ Cf. Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 256 (1986) (“In effect, the free exercise clause and the establishment clause should be read and applied as a single conceptual unit, a single constitutional restriction on government.”).

⁷⁷ *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990).

some other constitutional violation.⁷⁸ This doctrine has been widely criticized by courts and academics.⁷⁹ The Supreme Court itself has made only one oblique reference to hybrid rights since *Smith*,⁸⁰ which might indicate dissatisfaction with the doctrine.

But the *Hosanna-Tabor* Court need not have pushed further into the hybrid-rights thicket if it had clearly stated that each of the two Religion Clauses independently requires the ministerial exception. There is significant judicial and academic support for the proposition that the Establishment Clause is an independent basis for the exception,⁸¹ and if the Court in fact meant to endorse that view, then *Smith*'s holding, which says nothing about establishment, obviously does not foreclose recognition of the ministerial exception. Granted, this approach would leave uncertain how, consistent with *Smith*, the Free Exercise Clause alone could support the ministerial exception, as *Hosanna-Tabor* suggests it would.⁸² But even as actually written, *Hosanna-Tabor* does not convincingly answer that question; emphasizing the role of the Establishment Clause at least provides a clear basis for reconciling the two cases' holdings. Moreover, relying on the Establishment Clause would have obviated the discussion of "physical acts" versus "internal decisions," which, as noted above, implies a new and ambiguous exception to *Smith*.

Hosanna-Tabor most obviously has ramifications for employment discrimination law, and as the concurrences suggest, there will surely be future battles over what test to use in determining whether an employee is a "minister" within the meaning of the exception. But as a result of its analysis of *Smith*, the decision may also have the unintended consequence of further complicating free exercise litigation. The prospect of litigants' making strained characterizations of conduct as "only physical acts" or "internal decisions affecting faith" — and of courts' trying to sort between the two in a principled fashion — makes one hope the Court will clarify or disavow this aspect of *Hosanna-Tabor*.

⁷⁸ See *id.* at 881–82; see also *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 702–04 (9th Cir. 1999) (explaining the origins and contours of the doctrine), *vacated en banc on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

⁷⁹ See, e.g., *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990).

⁸⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 513–14 (1997). Justice Souter also criticized the doctrine in a concurrence. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring in part and concurring in the judgment).

⁸¹ See, e.g., *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999); Lund, *supra* note 59, at 58–59; Note, *supra* note 59, at 1783–84. But see Corbin, *supra* note 58, at 2004–28 (arguing that the Establishment Clause does not require the ministerial exception).

⁸² See *Hosanna-Tabor*, 132 S. Ct. at 706.