The First Amendment and Religion After *Hosanna-Tabor*

by MARK W. CORDES*

Introduction

The Supreme Court's treatment of religion under the First Amendment has shifted significantly in the past quarter century. Though the Court had focused on separation for the Establishment Clause and accommodation for the Free Exercise Clause for several years, the Court has begun to increasingly shift its focus to an emphasis on neutrality. Unlike prior years when religion was viewed as either particularly threatening or needy, the Court has begun to treat religion the same as other societal influences and values—no better and no worse. Although there have been exceptions, such as with regard to religion in public schools,[1] a neutrality paradigm began to emerge as dominant when addressing religion issues.

The growing influence of neutrality in addressing religion issues can be seen with each of the principal clauses of the First Amendment. With the Establishment Clause, for example, the Court has increasingly resorted to a neutrality analysis to determine if aid to

* Professor, College of Law, Northern Illinois University; B.S., Portland State University; M.A., Fuller Theological Seminary; J.D., Willamette University; J.S.M., Stanford University.

1. The Supreme Court has been particularly vigilant in monitoring religion in public schools, striking down even minor attempts at state promotion of religion. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985). Even though government can promote other views, it is prohibited from endorsing religion. But, in two respects, the neutrality paradigm has been relevant to religion in public schools. First, government itself must be neutral towards religion in public schools, neither favoring it nor disfavoring it. Second, as will be discussed in part I, section A of this Article, government must act neutrally towards private religious speech in a school-created public forum. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 389, 392–93 (1993).

religious institutions, such as schools,[2] is constitutional. Thus, if aid flows to a religious school as part of a neutral, broad-based program that does not define recipients by reference to religion, the program is almost certainly constitutional, in stark contrast to earlier years.[3]

But it is with religious expression or exercise that the neutrality paradigm has become most apparent. On the one hand, under the Free Speech Clause, the concept of neutrality has been a powerful weapon to protect religious speech from discrimination and to ensure its existence in public debate. With its roots in the public forum jurisprudence of the 1940s and 1950s,[4] in the 1980s and 1990s the Court's emphasis on content-neutrality in regulating speech became a primary vehicle in protecting religious expression in the public forum. Thus, in a series of five major cases, four of them decided between 1991 and 2001, the Court struck down efforts to exclude religious expression from a government-created speech forum because of violations of free speech, emphasizing the need for content-neutrality in each case.[5] The Court also stated in each case that the neutral treatment of religion in such speech forums dissipated any Establishment Clause concerns that might arise.[6]

Neutrality's greatest impact, however, came with regard to the Free Exercise Clause. The Court's prior emphasis on accommodation when general laws imposed incidental but substantial burdens on religion came to an abrupt and near total end in *Employment Division v. Smith* when the Court held that the Free Exercise Clause

2. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 652–53 (2002); Agostini v. Felton, 521 U.S. 203, 234–35 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7–8 (1993); *see also* Mitchell v. Helms, 530 U.S. 793, 829 (2000) (Thomas, J., plurality opinion).

3. Prior to the 1990s, the Court frequently invalidated aid to religious schools even when part of a broad-based and neutral program. *See, e.g.*, Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 397–98 (1985); Aguilar v. Felton, 473 U.S. 402, 414 (1985); Meek v. Pittenger, 421 U.S. 349, 370–73 (1975); Levitt v. Comm. for Pub. Educ., 413 U.S. 472, 481–82 (1973).

4. *See generally* Poulos v. New Hampshire, 345 U.S. 395 (1953); Saia v. New York, 334 U.S. 558 (1948) (preaching religious message by loudspeaker); Martin v. City of Struthers, 319 U.S. 141 (1943) (distributing religious literature); Cantwell v. Connecticut, 310 U.S. 296 (1940) (soliciting money for religious purposes without approval of Secretary of Public Welfare); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distributing literature without a permit).

5. *See Good News Club*, 533 U.S. at 120; Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829–31 (1995); *Lamb's Chapel*, 508 U.S. at 393–94; Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990); Widmar v. Vincent, 454 U.S. 263, 269 (1981).

6. *See Good News Club*, 533 U.S. at 113; *Rosenberger*, 515 U.S. at 840–41; *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 248; *Widmar*, 454 U.S. at 274–75.

only required neutral treatment of religion and was only triggered when government targeted religion for unique burdens.[7] As such, *Smith* in effect rejected the Court's earlier position that the Free Exercise Clause required accommodation of religious exercise when a generally applicable law imposed an incidental but substantial burden on religion.[8]

Thus, the increasingly dominant neutrality paradigm has been used both to protect religious expression under the Free Speech Clause, but also to limit religious exercise under the Free Exercise Clause. The neutrality paradigm has been important as a means of permitting or ensuring religion's participation in America's public life. It opened the door for religious recognition in various aid programs that had been previously closed, and it has ensured that religion could not be denied participation in public forums based on perceived Establishment Clause concerns.[9] But when it comes to protecting the unique needs of religious adherents, the neutrality paradigm has been a problem. In particular, when it comes to substantial burdens incidental to general laws, neutrality offers no relief to religious adherents.

Indeed, one common undercurrent throughout all of these applications of the neutrality paradigm—whether helping or hurting religion—is that there is nothing particularly unique or significant about religion that sets it apart from other values and beliefs in America. For that reason, religion need not be excluded from broad-based and neutral aid programs, nor can it be excluded from general speech fora. With regard to free speech analysis, it simply means that religion is to be treated the same as every other view—no better and no worse. But at the same time, there is nothing special or unique about religion that requires constitutional exemptions from neutral and generally applicable laws.

The Supreme Court's decision last term in *Hosanna-Tabor Evangelical Church and School v. EEOC* marked an important departure from the neutrality paradigm. In a unanimous decision, the Court held that the Religion Clauses of the First Amendment create a ministerial exception to antidiscrimination laws, meaning that, at least for certain ministerial positions, religious organizations must be accommodated and exempted from an otherwise general and neutral

7. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 882–90 (1990).

8. *Id. But cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

9. *See, e.g.*, *Good News Club*, 533 U.S. at 113; *Rosenberger*, 515 U.S. at 829–31.

law.[10] The Court further held that the ministerial exception applied to the employee who had been dismissed after developing narcolepsy under the totality of facts of the case.[11]

On one level, the decision in *Hosanna-Tabor* was neither surprising nor expansive. The unanimous holding speaks to the unremarkable proposition that government should not tell churches who to hire or fire as their ministers. Indeed, every federal circuit had already said as much, and the Supreme Court was essentially adopting a long recognized lower court doctrine.[12] And the Court was careful to limit the holding of the case, for the time being, to the facts before it.

But make no mistake about it: *Hosanna-Tabor* is an extremely important decision, with several significant impacts.[13] Though not overturning or replacing the neutrality paradigm that has emerged in recent decades to resolve many religion-related issues, *Hosanna-Tabor* does make a significant dent in the paradigm. Most importantly, the decision places important limits on the neutrality paradigm, in particular its application to internal church matters. And in recognizing this, the Court recognized two basic principles, the implications of which stretch far beyond the immediate facts of the case.

First, the Court made clear that religion has a unique status under the Constitution, being granted protection beyond what other values and ideas might have under free speech.[14] In particular, the

10. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

11. *Id*. at 707.

12. *See, e.g.*, Rweyemanu v. Cote, 520 F.3d 198, 208 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989).

13. For initial academic commentary on *Hosanna-Tabor*, *see generally* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821 (2012); Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839 (2012); Carl H. Esbeck, *Defining Religion Down:* Hosanna-Tabor, Martinez, *and the U.S. Supreme Court*, 11 FIRST AMEND. L. REV. 1 (2012); Paul Horwitz, Colloquy Essay, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012). For criticisms of *Hosanna-Tabor*, *see generally* Caroline Mala Corbin, Colloquy Essay, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951 (2012); Mark Strasser, *Making the Anomalous Even More Anomalous: On* Hosanna-Tabor, *the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL'Y & L. 400 (2012).

14. For a recent, in-depth discussion of whether religion *should* be special under the Constitution, *see generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). After an extensive discussion, he concludes that, as a moral

Court rejected an attempt to limit a church's associational rights to those it would share with other expressive groups under the Free Speech Clause, saying that to do so would make a nullity of the Religion Clauses. Instead, the Court applied an analysis that in effect established an autonomy interest independent of, and more expansive than, that afforded to expressive associations. Moreover, the tone of the Court's opinion was one that makes religion and religious values unique under the Constitution.

Second and related to this, the Court in *Hosanna-Tabor* essentially recognized that religious institutions have a right of autonomy that frees them from certain types of government interference. Though the majority opinion did not characterize it as such, the rationales given and precedents cited all point in the direction of a special right of autonomy that religious institutions enjoy pursuant to their unique status under the Constitution. This autonomy interest does not insulate religious institutions from government regulations; far from it. But it does protect religious organizations from government interference with their core identity and function, such as doctrine, faith, mission, and governance. As such, this autonomy interest acts as a counterweight to the potential reaches of the neutrality paradigm.

This Article will discuss the potential impact of *Hosanna-Tabor*, arguing that the Court in effect recognized an autonomy interest for religious organizations that protects them from the application of anti-discrimination laws as they relate to matters of leadership, governance, and mission. Part I discusses the background of the decision, examining the emergence of the neutrality paradigm for resolving issues relating to religious rights. Part II discusses the *Hosanna-Tabor* decision. Part III briefly discusses the impact of *Hosanna-Tabor* with regard to two areas: (1) the limits it puts on *Smith*; and (2) its expansion of religious associational rights. Finally, Part IV briefly examines the scope of the ministerial exception, its application to issues of governance and membership, and how the autonomy interest intersects with the neutrality paradigm.

question, it is difficult to answer. *Id.* at 1426–27. But, he acknowledges that the Constitution itself appears to bestow a special status on religion: "As a legal matter, however, we cannot ignore the constitutional text that we have inherited. And so the idea that religion must be special is unavoidable. The text simply makes it so." *Id.* at 1426.

I. Background

As noted in the introduction, in recent years neutrality has become an increasingly important concept in resolving issues involving religion under the First Amendment. For example, the Supreme Court has increasingly relied on principles of neutrality to uphold programs that provide aid to religious schools. Thus, if government aid flows to religious groups on the same terms as to nonreligious groups, it is likely to be valid.[15] This marks a stark departure from previous cases where the focus was on whether the aid would advance religion in some meaningful way,[16] rather than whether the aid was part of a neutral program.

Part I focuses on two particularly important areas where neutrality has become important in resolving the constitutional rights of religious adherents: the use of neutrality to protect religious expression under the Free Speech Clause, and the use of neutrality to limit the protection of religious exercise under the Free Exercise Clause.

A. Religious Speech and Neutrality

Free speech doctrine has long played a central role in protecting religious liberty. Indeed, it is fair to say that religious exercise has been protected far more frequently by the Free Speech Clause than by the Free Exercise Clause. The use of the Free Speech Clause to protect religious speech finds its genesis in the public forum cases of the 1930s, 1940s, and 1950s.[17] These cases, often involving religious speech, involved the extent to which citizens can engage in expression or expressive activities in various public contexts. In doing so, these early speech cases established two important principles regarding religious speech. First, the decisions left no doubt that the protections of free speech—only then beginning to be recognized by the Court in a meaningful fashion—extended in full to a variety of religious speech activities, most of which involved proselytizing in

15. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 234–35 (1997); Zorbrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993).

16. *See generally* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Comm. for Pub. Educ., 413 U.S. 472 (1973).

17. For examples of early Supreme Court cases using free speech doctrine to protect religions expression, *see generally* Poulos v. New Hampshire, 345 U.S. 395 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

some manner.[18] Second, the Court in these early cases made it clear that speech restrictions must be content-neutral.[19] Although the Court recognized that reasonable time, place, and manner restrictions could be placed on speech,[20] restrictions could not discriminate based on content.[21]

This focus on content-neutrality, long central to free speech jurisprudence, has become particularly important to protecting religious exercise over the past few decades. Indeed, in a series of five decisions—*Widmar v. Vincent*, *Board of Education v. Mergens*, *Lamb's Chapel v. Center Moriches Union Free School District*, *Rosenberger v. Rector of the University of Virginia*, and *Good News Club v. Milford Central School*—the Court addressed essentially the same fact pattern.[22] Each case involved a public school, ranging from elementary schools to four-year universities, and in each case the school decided to create what could be viewed as a forum for speech purposes. In three of the cases, the schools created the forums for students themselves, and in two cases the schools created forums for community groups. In each case, however, the school denied forum access to religious groups for fear of violating the Establishment Clause.

In all five cases the Court ruled in favor of the religious speakers, using neutrality both to require access for religious speech and to mitigate Establishment Clause concerns. The Court held that denying religious groups access to public forums on the basis of the religious content of their speech was discriminatory and did not comply with the Court's First Amendment jurisprudence that limits

18. *See, e.g.*, *Saia*, 334 U.S. at 561 (use of loudspeaker for preaching in park); Martin v. Struthers, 319 U.S. 141, 146–47 (1943) (selling religious literature); *Lovell*, 303 U.S. at 452 (distribution of religious literature).

19. *See Saia*, 334 U.S. at 561; *Martin*, 319 U.S. at 145–47; Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940). In a slightly later case, the Court summarized the prohibition on content regulation by stating that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

20. *Saia*, 334 U.S. at 562; *Martin*, 319 U.S. at 143.

21. The requirement of content-neutrality was often reflected by the Court's striking down speech licensing schemes that gave unfettered discretion to public officials that raised the possibility of content discrimination when issuing or denying licenses. *See, e.g.*, *Cantwell*, 310 U.S. at 296; *Schneider*, 308 U.S. at 147; *Lovell*, 303 U.S. at 444.

22. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102–04 (2001); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 822–28 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386–89 (1993); Bd. of Educ. v. Mergens, 496 U.S. 226, 231–33 (1990); Widmar v. Vincent, 454 U.S. 263, 264–66 (1981).

restrictions on free speech to content-neutral restrictions.[23] The Court also dismissed any concerns about violating the Establishment Clause that might arise from including religious speech in the forum because allowing religious groups access on the same basis as other speakers would be neutral.[24] Thus, the Court used the notion of neutrality as a justification for both requiring access under its freedom of speech jurisprudence and for dismissing any potential concerns stemming from the Establishment Clause.[25]

In the first of these cases, *Widmar v. Vincent*, the Court held that a public university could not prohibit a religious group from using campus facilities if it allowed other nonreligious groups to use the facilities.[26] The Court recognized religious activities as within the protection of the Free Speech Clause, and emphasized that the First Amendment prohibited discrimination on the basis of speech content.[27] The Court specifically rejected the argument that the Establishment Clause prohibits the use of campus facilities by religious groups, noting that permitting equal access to such groups did not confer the State's imprimatur.[28] As long as the forum had a secular purpose, providing equal access did not violate the Establishment Clause; in fact, the Free Speech Clause mandates such access.

In the next three cases, *Westside Board of Education v. Mergens*, *Lamb's Chapel v. Center Moriches Union Free School District*, *and Rosenberger v. Rector and Visitors of the University of Virginia*, the Court extended the principles of *Widmar* to high school settings, and it continued to focus on neutrality as a key constitutional concept.[29] In *Mergens* the Court upheld the "Equal Access Act," a congressional statute that, in effect, extended the protections of *Widmar* to high

23. *See Good News Club*, 533 U.S. at 120; *Rosenberger*, 515 U.S. at 829–31; *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 269.

24. *See Good News Club*, 533 U.S. at 120; *Rosenberger*, 515 U.S. at 829–31; *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 253; *Widmar*, 454 U.S. at 269.

25. *See Good News Club*, 533 U.S. at 113, 120; *Rosenberger*, 515 U.S. at 829–31, 840–41; *Lamb's Chapel*, 508 U.S. at 393–95; *Mergens*, 496 U.S. at 248, 253; *Widmar*, 454 U.S. at 269, 274–75.

26. *Widmar*, 454 U.S. at 263.

27. *Id*. at 269.

28. *Lamb's Chapel*, 508 U.S. at 274–75.

29. *Rosenberger*, 515 U.S. at 822–28; *Lamb's Chapel*, 508 U.S. at 386–89; *Mergens*, 496 U.S. at 231–33.

school campuses.[30] A majority of the justices also stressed that neutral treatment of religious speech in the context of a broader forum did not pose Establishment Clause concerns.[31] Similarly, in *Lamb's Chapel*, the Court held that a church could not be denied the use of a public school building for a film series on child-rearing when the school was open to other outside groups.[32] As in *Widmar*, the Court stressed that content-neutrality requires that religious speech have the same access to the forum as other types of speech, and that permitting the religious group access would not violate the Establishment Clause. The Court stressed that neutral treatment of religion is constitutional.[33] Finally, in *Rosenberger*, the Court held that preventing a religious newspaper from receiving funds made available to other student publications violated the Constitution. The Court again stressed that excluding a religious message from a school-created forum violates free speech, and permitting a religious message does not violate the Establishment Clause.[34]

In the final decision, *Good News Club v. Milford Central School*, the Court again applied a neutrality analysis to protect religious speech.[35] In that case, a school district adopted regulations permitting community groups to use school facilities for several purposes, including "instruction in any branch of education, learning or the arts" and for "social, civic, and recreational meetings and entertainment events."[36] Although the school policy was interpreted to allow groups like the Boy Scouts to meet in an elementary school, the school prohibited the Good News Club to meet because of the religious nature of their meetings.[37]

30. *Mergens*, 496 U.S. at 247–52 (O'Connor, J., plurality opinion); *id*. at 260–62 (Kennedy, J., concurring).

31. No single opinion commanded a majority regarding the Establishment Clause analysis. Using an analysis similar to that in *Widmar*, Justice O'Connor's plurality opinion for four justices found no Establishment Clause violation. In doing so, she stressed that the basic message of the Act was "one of neutrality rather than endorsement; if the state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality toward religion but hostility." *Id*. at 248. Justices Kennedy and Scalia, though disagreeing with Justice O'Connor's endorsement approach, also emphasized neutrality in finding that allowing the group to meet would not violate the Establishment Clause. *Id*. at 260 (Kennedy, J., concurring).

32. *Lamb's Chapel*, 508 U.S. at 395–97.

33. *Id.* at 394–95.

34. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 830–32, 838–44 (1995).

35. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102–04 (2001).

36. *Id.* at 102.

37. *See id*. at 102–04, 108.

As in the previous cases, the Court held that excluding the religious group from a state-created public forum violated the Free Speech Clause, and permitting the group to use the facility on the same terms as other groups did not violate the Establishment Clause. This case is especially significant because of the highly sensitive nature of religion in elementary schools, where the Court has stressed the highly impressionable nature of young students and the need for the Court to be particularly vigilant in order to avoid promotion of religion in that context.[38] Despite these concerns, the Court said that exclusion of the religious message violated the group's right to free speech because the exclusion focused on the content of the message.[39] Moreover, as before, the Court stressed the importance of neutrality in emphasizing Establishment Clause issues, stating that "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not threaten it," the school "face[d] an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[40]

These five cases reflect the important role that the Free Speech Clause plays in protecting religious exercise, and, in particular, the role that the neutrality paradigm plays in that protection. Although the Free Speech Clause has long been an important vehicle for protecting religious exercise, these cases involved deliberate efforts to silence the religious voice in certain public contexts. In consistently rejecting these attempts, the principle of neutrality emerged as a double duty vehicle to protect religious speech.[41] First, neutrality required that religious speech be given the same protection as any other speech; and, second, it mitigated any Establishment Clause issues that might exist.[42]

The growing reliance on neutrality as a vehicle for protecting religious speech has been of major importance, ensuring that individuals and groups expressing religious values and perspectives have full access to the public square. As such, the neutrality mandate of the free speech doctrine has become, and will no doubt remain, a

38. *See* Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment clause in elementary and secondary schools.").

39. *Good News Club*, 533 U.S. at 111–12.

40. *Id.* at 114.

41. *See, e.g.*, Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 830–32 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993).

42. *See, e.g.*, *Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 838–44.

powerful force to ensure religion a place in the public square and within public debate. The free speech emphasis on neutrality views religion as a full coparticipant in America's public life, to be received on the same terms as any other value system. This recognition of religion's role in America's public life is a particularly important one, especially as a response to those who would seek to privatize faith.

But as important as this is, it potentially comes with a cost. The underlying premise of an emphasis on the neutrality paradigm to ensure religion full participation in America's public forum is that religion is not different in kind from other value systems. Religious speech is to be given the same protection as other speech—no better and no worse. In other words, there is nothing unique or special about religion.

Neutrality works well for religion when it is being discriminated against, as was the case in the public forum cases discussed in this section. Neutrality works less well, though, when it seeks special accommodation. Indeed, at the same time the Court used neutrality to protect religious speech in the public forum, neutrality also emerged as a powerful concept under the Free Exercise Clause, but with the opposite result; rather than strengthening protection under the Free Exercise Clause, it came close to eliminating it. The next subsection will examine this development, first briefly discussing the Court's earlier free exercise jurisprudence and then examining the emergence of a neutrality standard in *Employment Division v. Smith*.[43]

B. Neutrality and the Demise of Free Exercise

Prior to 1963, the Supreme Court gave little independent substance to the Free Exercise Clause as a source of protection for religious freedom. Although the Court had frequently protected religious exercise, that protection was usually grounded in other constitutional guarantees, most notably the right to free speech.[44] On

43. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

44. *See generally* Saia v. New York, 334 U.S. 558 (1948) (preaching religious message by loudspeaker); Martin v. City of Struthers, 319 U.S. 141 (1943) (distributing leaflets advertising a religious meeting); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distributing religious literature). *See generally* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983) (discussing Court's reliance on the Free Speech Clause as a means of protecting religious exercise).

its own, free exercise had not been successfully invoked to protect religious speech.[45]

That dramatically changed in *Sherbert v. Verner*, where the Court for the first time gave an expanded reading to the protections provided by the Free Exercise Clause.[46] In *Sherbert*, the Court reviewed a South Carolina statute that denied unemployment benefits to a Seventh-Day Adventist who refused to work on Saturdays because of her religious beliefs.[47] In finding the denial of benefits unconstitutional, the Court employed a two-step analysis for resolving free exercise questions. First, a court must determine whether the government is in fact infringing upon the claimant's free exercise rights.[48] Second, if such infringement has occurred, the state must justify the infringement by demonstrating both a compelling state interest, and a narrowly tailored approach.[49] Applying this test, the Court held that Ms. Sherbert's free exercise rights were violated. The majority opinion held that Ms. Sherbert's inability to obtain unemployment benefits placed a substantial burden on her free exercise of religion,[50] and that the state failed to demonstrate a compelling interest in not granting an exemption.[51]

The free exercise analysis established in *Sherbert* was significant in several respects. First, it made clear that even a general and neutral law may trigger heightened scrutiny if the law, as applied to a particular person, imposes a significant burden on religious exercise. Second, in applying strict scrutiny, the Court's analysis indicated that the issue in the case was not the importance of the overall state

45. *See generally* Braunfeld v. Brown, 366 U.S. 599 (1991) (upholding Sunday-closing laws against assertion that they violated the free exercise of those whose religion required that they not work on other days); Prince v. Massachusetts, 321 U.S. 158 (1944) (Free Exercise Clause did not preclude applying child-labor law to children distributing religious literature); Reynolds v. United States, 98 U.S. 145 (1878) (upholding law prohibiting polygamy even as applied to those whose religion required the practice). One notable exception to the above was the Court's decision in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952), where the Court essentially held that the First Amendment gives churches the right to pick their own clergy. The specific issue in that case was the right of two competing Russian Orthodox churches to use a cathedral in New York City, which ultimately turned on who was properly the archbishop. *Kedroff* is discussed in section I, C, *infra*.

46. Sherbert v. Verner, 374 U.S. 398 (1963).

47. *Id.* at 400–02.

48. *Id.* at 403.

49. *Id.* at 406.

50. *Id.* at 403–04.

51. *Id.* at 407–09.

program, including the requirement that the claimant be willing to work on Saturdays, but whether the state must grant an exemption from such a requirement to those with religious burdens. The effect was to require exemptions for religious adherents whose beliefs would be substantially burdened by the law—the very thing the Court had at one time characterized as unworkable.[52]

The free exercise analysis established in *Sherbert* was reinforced in another major case, *Wisconsin v. Yoder*.[53] In *Yoder*, the Court held that Wisconsin's compulsory education law, which mandated education until age sixteen, violated the Amish religious belief of ending formal education at the eighth grade level.[54] The Court applied essentially the same two-step analysis from *Sherbert*, first asking if the compulsory education law imposed a substantial burden on religion, and, if so, whether the state had a compelling interest to support the law as applied to the Amish.[55] After an extensive discussion of the Amish religion, the Court concluded that the law imposed a substantial burden on the Amish,[56] and that the state did not have a compelling interest in denying the Amish an exemption.[57]

The essence of the *Sherbert/Yoder* analysis, which governed free exercise jurisprudence for nearly three decades, turned on whether a law imposed a substantial, albeit incidental, burden on religion. If so, then the state had to show a compelling interest in denying an exemption to the religion.[58] As the Court explicitly stated in *Yoder*, this two-step analysis applied even if the law was neutral and did not target religion.[59] Indeed, the challenged laws in both *Sherbert* and *Yoder* were neutral and generally applied. Over the course of nearly three decades the Court applied this analytical framework in a number of cases, at times invalidating laws that unjustifiably infringed

52. *See generally* Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds*, the Court addressed whether a federal law making polygamy a crime violated the free exercise rights of Mormons, whose religion at the time mandated polygamy as a practice. The Court said no, drawing a distinction between practices that can be restricted, and beliefs that cannot. To permit exemptions from general laws, as requested in the case, would "permit every citizen to become a law unto himself," leading to chaos. *Id.* at 166–67.

53. Wisconsin v. Yoder, 406 U.S. 205, 215, 229 (1972).

54. *Id.* at 214–15.

55. *Id.* at 214.

56. *Id.* at 218.

57. *See id.* at 221, 234.

58. *See Yoder*, 406 U.S. at 221; Sherbert v. Verner, 374 U.S. 398, 407–09 (1963).

59. *Yoder*, 406 U.S. at 220.

on free exercise rights,[60] but at other times finding a sufficient compelling interest to deny an exemption.[61]

This all radically changed in the Court's seminal 1990 decision, *Employment Division v. Smith*.[62] In *Smith*, the two respondents were dismissed from their jobs after ingesting peyote for sacramental purposes at their Native American Church. Oregon law made the use of peyote for any purpose, including religious purposes, a crime and a legitimate basis for dismissal and subsequent denial of unemployment benefits.[63] The respondents argued that criminalizing the use of peyote in religious sacraments violated their free exercise rights.[64] Thus, the case required the Court to decide whether the religious use of peyote could be criminalized under Oregon's general criminal prohibition of that drug.[65]

The Court, in a 6-3 decision, held that the respondents' free exercise rights were not violated; but, it did so in a way that fundamentally changed the nature of free exercise analysis. In an opinion by Justice Antonin Scalia, the Court began by stating that although the Free Exercise Clause prohibits any restriction on what a person believes or professes to believe, it does not necessarily protect against all regulation of physical acts that accompany those religious beliefs.[66] The Court stated that a government regulation that only targets physical acts of a religious nature would likely be unconstitutional,[67] but that was not the situation in this case. Rather, the law before it was neutral and generally applicable to everyone.[68] Any burden on religion was incidental.[69]

The Court conceded that it was possible to read the Free Exercise Clause as applying to such situations, but said it was not the only way to understand the clause, and such a reading was not

60. *See generally* Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Emp't Securing Div., 450 U.S. 707 (1981).

61. *See generally* United States v. Lee, 455 U.S. 252 (1982).

62. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

63. *Id.* at 874.

64. *Id.*

65. *Id.* at 874–75.

66. *Id.* at 877.

67. *Id.* ("It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.").

68. *Id.* at 878.

69. *Id.*

supported by precedent.[70] Instead, the Court held that neutral and generally applicable laws that impose a substantial but incidental burden on religious exercise do not require heightened scrutiny under the Free Exercise Clause.[71] Rather, heightened scrutiny is only required when a law specifically targets religious practices for regulation.[72] Since Oregon's law prohibiting peyote use was neutral and generally applicable, the respondents did not have a free exercise claim.[73]

The Court stated that its analysis was consistent with prior cases that did not require exemptions for religious activities under generally applicable laws.[74] It stated that the only instances where it had held that the First Amendment prohibited application of a neutral, generally applicable law to religious practice did not involve the Free Exercise Clause alone, but "hybrid" situations where the Free Exercise Clause had been invoked in conjunction with another constitutional guarantee.[75] It was on that basis that the Court distinguished *Yoder*, holding that the decision was not solely based on free exercise grounds, but also on substantive due process grounds.[76] It also reasoned that unemployment cases like *Sherbert* are unique by nature, as they require individualized government assessments and hardship exemptions, and in such situations "religious hardships" must be allowed.[77] The Court, however, held that those are limited exceptions to the general principle that the application of neutral, generally applicable laws to religious conduct does not trigger heightened scrutiny; anything else would result in societal anarchy.[78]

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70. *Id.*

71. *Id.* at 878–79.

72. *See id*. at 878.

73. *Id*. at 890.

74. *See id*. at 878–79.

75. *Id*. at 881–82. The Court specifically cited a number of free speech cases involving religious speech. *See generally* W. Va. Bd. of Educ. v. Barnett, 319 U.S. 624 (1943) (invalidating mandatory pledge of allegiance state law challenged by Jehovah's Witnesses); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating solicitation tax as applied to distribution of religious material); Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating licensing scheme involving religious and charitable solicitations of money).

76. *Smith*, 494 U.S. at 881–82.

77. *See id.* at 883–84 (stating that "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without a compelling reason").

78. *See id*. at 888 ("Any society adopting such a system would be courting anarchy . . . .")

Despite its efforts to distinguish *Yoder*, *Sherbert*, and other free exercise cases, it was clear that the majority in *Smith* substantially changed, and greatly restricted, prior free exercise doctrine—a point emphasized by both Justice O'Connor's concurring opinion and the dissenting opinions.[79] Unless a claimant fits into one of the two narrow exceptions recognized by the Court, there is no free exercise right implicated by burdens imposed by neutral and generally applicable laws. Instead, any accommodation of unique burdens on religious exercise must occur at the political level—a point made by the majority.[80] The Free Exercise Clause itself is limited to those rare instances where the government intentionally targets religion with unique burdens or prohibitions.[81] The neutral treatment of religion, even if it incidentally imposes significant burdens on religious exercise, does not violate the Free Exercise Clause.

In a sense, the *Smith* Court's paramount focus on neutrality in free exercise analysis was the mirror image of what was occurring with religious rights under free speech and the Establishment Clause. In all three arenas, the Court made neutrality the central benchmark of constitutionality, but with markedly different impacts on religious freedom. Whereas the focus on neutrality under free speech and the Establishment Clause enhanced religious exercise, the focus on neutrality under the Free Exercise Clause diminished it.

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79. The majority opinion drew sharp criticism from Justice O'Connor, who concurred in the judgment, but strongly disagreed with what she saw as a reworking of free exercise analysis. She would have applied the *Sherbert/Yoder* analysis, but said the state had a compelling interest in not granting an exemption from its drug laws. *See Smith*, 494 U.S. at 891–907 (O'Connor, J., concurring). Justices Blackman, Brennan, and Marshall joined the part of O'Connor's opinion criticizing the Court's new free exercise analysis, but dissented to the holding, stating the state did not have a compelling interest in not granting an exemption to the respondents. *See Smith*, 494 U.S. at 907–21 (Blackman, J., dissenting). Commentators have been overwhelmingly critical of the *Smith* decision and its free exercise analysis. *See, e.g.*, Vincent Martin Bonventre, *The Fall of Free Exercise: From "No Law" to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1411–15 (2007); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001); Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991). For a defense of *Smith*, *see generally* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

80. Justice Scalia's majority made this point, and suggested that societies like ours which value religious freedom are likely to accommodate religious burdens through appropriate statutory exemptions from otherwise neutral, generally applicable laws. *Smith*, 494 U.S. at 890.

81. For an example of such an instance, *see generally* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1992).

C. Free Exercise and Church Autonomy

Smith undoubtedly reflected a major retreat of significant protection under the Free Exercise Clause. Yet *Smith* and the cases leading up to it involved religious exercise in the context of broader societal obligations. They did not address interferences with core church functions and church governance per se.

In a limited number of cases, however, the Supreme Court established the principle that courts should not interfere with internal church matters. In an early case, *Watson v. Jones*, the Court declined to resolve a property dispute between antislavery and proslavery factions of a church.[82] Noting that the General Assembly of the Presbyterian Church had determined that the property belonged to the antislavery faction, the Court declined to address the matter, since the appropriate religious authority had already resolved it.[83] It stated that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . ."[84] Although not grounding its decision in the Constitution as such, the Court stated that its holding was based upon a "broad and sound view of the relations of church and state under our system of laws."[85]

Similarly, in two more recent cases, the Court recognized that the Constitution gives churches the right to pick their clergy. In *Kedroff v. Saint Nicholas Cathedral*, the issue was the right of two competing Russian Orthodox churches to use a cathedral in New York City, which ultimately turned on who constituted the proper archbishop.[86] A group of North American churches, which had split from the Supreme Church Authority in Moscow, had elected one archbishop, while the head patriarch of the church in Moscow had appointed another.[87] The New York Court of Appeals ruled in favor of the North American churches, relying on a New York law that required the election by North American churches to be authoritative.[88]

82. Watson v. Jones, 80 U.S. 679 (1872).

83. *Id.* at 718–20.

84. *Id.* at 727.

85. *Id.*

86. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 96–97 (1952).

87. *See id.* at 100–05.

88. *Id.* at 97.

The Supreme Court reversed, holding that the New York law was unconstitutional. The Court stated that the disagreement over the right to the cathedral was "strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America."[89] After a review of the record, the Court found no schism over faith or doctrine between the North American churches and the Russian Orthodox Church that might have created a new hierarchy.[90] Thus, the Russian church remained the final ecclesiastical authority, and the state of New York violated the free exercise of religion by interfering with a church's right to appoint its religious leadership.

Similarly, in *Serbian Eastern Orthodox Diocese v. Milivojevich*,[91] the Court again affirmed that the state was constitutionally prohibited from interfering with a church's internal ecclesiastical governance matters. In this case, the Holy Synod of the Serbian Orthodox Church had removed the Bishop of the American-Canadian Diocese of the Church and then reorganized the diocese. The removed bishop sued in state court, challenging his removal. The Illinois Supreme Court ultimately held that the removal proceedings violated the Church's own regulations and the removal was thus invalid.[92]

The United States Supreme Court reversed, holding that the decision of the Illinois court unduly interfered with internal governance of the church and violated the First Amendment.[93] The Court emphasized that under the First Amendment, courts have no authority to substitute their own inquiry into church polity for that of the relevant church governing body.[94] It further stated:

> For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but accept such decisions as binding on them, in their

89. *Id.* at 115.

90. *Id*. at 120.

91. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

92. *See id*. at 697–98.

93. *See id*. at 698.

94. *Id.* at 708.

> application to the religious issues of doctrine or polity before them.[95]

These three cases—*Watson*, *Kedroff*, and *Milivojevich*—established a strong principle against state interference with issues of internal religious affairs, especially in regards to leadership and governance. But, none of them concerned the application of broad and general laws to church matters. Instead, they involved legislative and judicial efforts to intervene in resolving specific church disputes. In such circumstances, the Court made it clear that the government had no right to interfere; instead, the resolution of such disputes should be left to the highest relevant religious authority.

Prior to *Hosanna-Tabor*, the Court had not addressed the application of broader laws, such as antidiscrimination laws, that might conflict with matters of a church's internal governance. The United States Courts of Appeals and other lower courts, however, have been addressing such concerns for several decades.[96] The next section will briefly discuss the ministerial exception that emerged from those cases.

D. The Ministerial Exception in the Lower Courts

Title VII of the Civil Rights Act of 1964, together with comparable state legislation, prohibits employment discrimination on a number of grounds, including race, religion, gender, and national origin;[97] the Americans with Disabilities Act prohibits discrimination on the basis of disability.[98] Each of these statutes might potentially apply to religious institutions' employment decisions. Title VII does carve out one limited exception for religious institutions, permitting them to make discriminatory employment decisions on the grounds of religion.[99] This was obviously necessary to ensure an institution's doctrinal integrity.[100] But, the statutory exemption expands no further than that, making religious institutions potentially vulnerable for other types of employment discrimination.

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95. *Id.* at 709.

96. *Id.* at 710.

97. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a) (2013).

98. 42 U.S.C. § 12101 *et. seq.* (2013).

99. *See* 42 U.S.C. § 2000e–1(a) (2013).

100. *See* Little v. Wuerl, 929 F.2d 944, 947–49 (3d Cir. 1991) (not allowing a religious institution to discriminate on religious grounds would pose substantial problems under the Religion Clauses).

In this context, the Federal Courts of Appeal, along with other lower courts, have recognized a "ministerial exception" to employment antidiscrimination laws grounded in the First Amendment. Namely, antidiscrimination laws are not applied to employees functioning in a "ministerial" capacity in religious institutions.[101] This exception was first recognized by the Fifth Circuit Court of Appeals in the 1972 case of *McClure v. Salvation Army*.[102] In this case, a female officer of the Salvation Army claimed sex discrimination under Title VII, alleging that she was discriminated against in compensation and benefits because of her gender.[103]

The Fifth Circuit began by noting that Title VII's statutory exemption for religious institutions did not apply because the exemption is limited only to discrimination on the basis of religion.[104] The court then examined whether the Constitution itself necessitates a broader exemption, at least for a church and its ministers, that would protect against other types of discrimination claims. Noting that the relationship between an organized church and its ministers is its lifeblood,[105] it then reviewed *Watson*, *Kedroff*, and several other decisions supporting church autonomy over religious matters. Quoting *Kedroff*, the court stated that the "common thread" through these opinions was that "there exists 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[106]

On that basis the *McClure* court stated that the application of Title VII "to the employment relationship existing between . . . a

101. For an extended discussion and defense of the ministerial exception recognized by the lower courts, *see* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011). *See also* Joanne C. Brant, "*Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275 (1994). For a criticism of exempting religious employers, *see* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption From Anti-discrimination Law*, 75 FORDHAM L. REV. 1965 (2007); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 53–56 (2010); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996).

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

103. *See id*. at 555.

104. *Id*. at 558.

105. *Id*.

106. *Id.* at 560 (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[107] Though not labeling it a ministerial exception, it essentially recognized that the First Amendment prohibits government interference with the employment relationship between a religious institution and its ministers, even as to claims of discrimination. To hold otherwise "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[108]

Other federal circuits have recognized this "ministerial exception,"[109] and so have a number of state courts.[110] However, it was yet to be recognized by the Supreme Court. Further, there was some uncertainty on how the Court's increasing emphasis on neutrality, especially after *Smith*, would affect its analysis in determining whether religious bodies should be exempt from neutral and generally applicable employment discrimination laws.[111] It was in that setting that the Court decided *Hosanna-Tabor*.

II. *Hosanna-Tabor*

A. Facts

Hosanna-Tabor Evangelical Lutheran Church operated, as part of its mission, a small Christian school for kindergarten through eighth grade. The church and school were part of the Missouri Synod denomination.[112] As set out by the Synod, teachers at its school are of

107. *McClure*, 460 F.2d at 560.

108. *Id.*

109. *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007); Werft v. Desert Sw. Annual Conf., 377 F.3d 1099, 1100–04 (9th Cir. 2004); Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999); Bell v. Presbyterian Church, 126 F.3d 328, 332–33 (4th Cir. 1997); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994); Weissman v. Congregation Sharre Emeth, 38 F.3d 1038, 1039 (8th Cir. 1994); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 329 (3d Cir. 1993); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989).

110. *See, e.g.*, Catholic Charities of Sacramento, Inc., v. Super. Ct., 32 Cal. 4th 527, 543–44 (2004); Williams v. Episcopal Diocese, 436 Mass. 574, 577 (2002); Egan v. Hamline United Methodist Church, 679 N.W.2d 350, 354 (Minn. App. 2004); Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483, 486 (Mich. App. 2008).

111. *See* Brant, *supra* note 101, at 300–02 (discussing tension between the ministerial exception recognized by lower courts and *Smith*).

112. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 699 (2012).

two types: "called" or "lay." Called teachers are required to complete a "colloquy" program at a Lutheran institution, requiring completion of courses, passing an examination, and endorsement by the Synod. A called teacher receives the title of "Minister of Religion, Commissioned." In contrast, lay teachers are not required to have special training and are appointed by the school board.[113]

In 1999, Cheryl Perich was initially hired by Hosanna-Tabor school as a lay teacher. That same school year, she finished her colloquy and became a called teacher, making her a commissioned minister of the school. She initially taught kindergarten at Hosanna-Tabor school, and later fourth grade. She primarily taught secular subjects, such as math, science, language, and art, but also taught a religion class four days a week and led the students in devotional exercises and prayer each day. She also attended weekly chapel services for the school, and twice a year led the service.[114]

Perich became ill with narcolepsy in June of 2004 and began the 2004-05 school year on disability leave. In late January 2005, she told the school she was ready to return to work, but the school informed her it had already hired a lay teacher to fill Perich's position and that it did not believe she was ready to return. A few days later, the congregation voted to offer Perich a "peaceful release" from her call, offering to partially cover her health insurance costs if she would resign as a called teacher. She refused, stating that her doctor found her fit to return to work. After a series of disagreements, including Perich's statement that she "intended to assert her legal rights," the school board eventually fired Perich.[115] She then filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging her termination violated the Americans with Disabilities Act. The EEOC then filed suit against the church, alleging that Perich had been terminated because she threatened to file a lawsuit under the Americans with Disabilities Act.[116]

The District Court granted summary judgment for Hosanna-Tabor, holding that the lawsuit was barred by the ministerial exception.[117] The Court of Appeals reversed, holding that the ministerial exception did not apply. The court acknowledged the

113. *Id*. at 699–700.

114. *Id*. at 700.

115. *Id.*

116. *See id*. at 701.

117. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008).

existence of the exception in appropriate circumstances, but rejected its application under the facts of the case for two reasons. First, it stated that Perich's duties as a called teacher were essentially the same as a lay teacher. Second, the court emphasized that Perich spent most of her time teaching secular subjects, and thus religious duties played only a small part of her job.[118]

B. United States Supreme Court Analysis

The United States Supreme Court, in a unanimous decision, reversed the Sixth Circuit, recognizing a ministerial exception grounded in the Free Exercise Clause and holding that it applied to the facts of the case.[119] In doing so, the Court grounded the ministerial exception in both the Free Exercise and Establishment Clauses, stating that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[120] At the same time, however, the majority opinion was written quite narrowly in identifying the types of employees that come within the ministerial exception. Thus, though unequivocal in its pronouncement that the Constitution bars government interference with a religious group's decisions regarding its ministers, it purposely avoided pronouncing the extent of the exception.[121]

The Court began its analysis, as it often does with the Religion Clauses, by resort to history.[122] Beginning with the Magna Carta, which guaranteed that "the English church shall be free and shall have its rights and its liberties unimpaired," including the right to free elections,[123] the Court discussed the church's ongoing struggle with the Crown in both England and the colonies regarding ecclesiastical appointments. Noting that it was "against this background that the

118. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 779–80 (6th Cir. 2010).

119. *See Hosanna-Tabor*, 132 S. Ct. at 707.

120. *Id.* at 702.

121. *See id.* at 707. As the Court began its discussion of whether Perich qualified for the ministerial exception, it stated:

> We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

Id.

122. *See* McConnell, *supra* note 13, at 827–32 (discussing the Court's frequent resort to history when analyzing the Religion Clauses and its use of it in *Hosanna-Tabor*).

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

First Amendment was adopted," the Court said that both Religion Clauses were designed "so that the Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[124] The Court then showed how this basic principle of government not interfering with ecclesiastical appointments was also reflected in the actions of James Madison, the "leading architect of the Religion Clauses," who both as Secretary of State[125] and later as President[126] clearly stated that the Constitution prohibited government interference with the appointment of religious leaders. The Court also discussed how the noninterference principle was affirmed, albeit indirectly, in its decisions in *Watson v. Jones*,[127] *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*,[128] and *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich.*[129] The Court said these decisions established that government must defer to the decisions of the established church authorities on matters relating to the organizations' internal discipline and government.[130]

The Court in *Hosanna-Tabor* then proceeded to the crux of the matter: whether the Constitution recognizes a ministerial exception to antidiscrimination laws. Noting that the federal circuit courts had previously recognized such an exemption in the First Amendment,[131] the Court agreed, grounding it in both the Free Exercise and the Establishment Clauses. The Court stated:

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124. *Id*. at 703. The Court stated: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id*.

125. As Secretary of State to Thomas Jefferson, the Catholic Bishop of the United States sought Madison's advice on who should be appointed to oversee the Catholic Church in the new territory acquired by the Louisiana Purchase. Madison's response was that the selection of church leaders was "entirely ecclesiastical," preventing the government from offering advice on the appointment. *See id.*

126. As President, Madison vetoed a bill passed by Congress incorporating the Episcopal Church in what was then part of the District of Columbia. Stating that such a bill would violate the Establishment Clause, Madison noted that the bill went so far as "comprehending even the election and removal of ministers." *Id*. at 703.

127. Watson v. Jones, 80 U.S. 679 (1872).

128. Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94 (1952).

129. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

130. *See Milivojevich*, 426 U.S. at 724–25; *Kedroff*, 344 U.S. at 119; *Watson*, 80 U.S. at 727.

131. *Hosanna-Tabor*, 132 S. Ct. at 705.

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's rights to shape its own faith and mission through its appointments.[132]

The Court then proceeded to reject two arguments advanced by the EEOC. First, the EEOC had argued that religious groups could seek protection against discrimination claims by asserting their right to expressive association under the Free Speech Clause, thus negating the need for a special rule grounded in the Religion Clauses. The Court disagreed, saying that the EEOC's position would apply the same analysis to religious and secular groups, a position the Court characterized as "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[133]

Second, the Court also rejected the argument that its decision in *Smith* precluded recognition of a ministerial exception. Although acknowledging that the prohibition on retaliation was a "valid and neutral law of general applicability," as in *Smith*, it drew a fundamental distinction between a church's selection of ministers and a religious adherent's ingestion of peyote. In particular, the Court stated that *Smith* involved the regulation of "outward physical acts," whereas the present case involved "government interference with an internal church decision that affects the faith and mission of the church itself."[134] Thus, the Court seemed to carve out a significant exception to the *Smith* analysis—one involving internal governance matters relevant to a religious organization's mission.

Finally, after finding a ministerial exception in the First Amendment, the Court proceeded to determine whether the newly recognized ministerial exception applied to the facts of the case,

132. *Id.* at 706.

133. *Id.*

134. *Id.* at 706–07.

holding that it did.[135] The Court declined to establish a clear test for determining when an employee qualifies for the exception, instead stating that in this first case, it was enough to recognize that the exception covered Perich under the totality of her circumstances.[136] In doing so, the Court emphasized four factors. First, it noted that the church gave Perich the title of minister.[137] Second, her "title as minister reflected a significant degree of training followed by a formal process of commissioning." This included taking a large number of college-level courses in theology and ministry, endorsement of the local Synod, and passing an oral examination by faculty at a local Lutheran college.[138] Third, Perich held herself out as a minister in a number of ways, including claiming a housing allowance on her taxes available only to ministers.[139] And finally, Perich's job, though primarily involving secular subjects, also included occasional religious duties such as teaching religion, leading chapel twice a year, and leading devotions in her class each morning.[140] Taken as a whole, the Court said Perich qualified for the ministerial exception.[141]

The Court then said the court of appeals made three errors in concluding Perich did not qualify for the ministerial exception. First was not considering the title of 'minister' relevant to ministerial exception analysis;[142] second was giving too much weight to the fact that lay teachers performed some religious duties if commissioned ministers were unavailable;[143] and third, the lower court put too much emphasis on Perich's performance of secular duties as the dominant part of her work.[144] Although the Supreme Court noted that the amount of time an employee spends on secular work is relevant, it

135. *Id*. at 707.

136. *Id.*

137. *Id.* Among other things, the church's call to Perich included issuing her a diploma with the title, "Minister of Religion, Commissioned." The church also periodically reviewed her "skills of ministry" and "ministerial responsibilities" and provided her with "continuing education as a professional person in the ministry of the Gospel." *Id.*

138. *Id.*

139. *Id*. at 707–08.

140. *Id.*

141. The Court stated: "In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perish was a minister covered by the ministerial exception." *Id.* at 708.

142. *Id*.

143. *Id*.

144. *Id*. at 708–09.

said the issue cannot be determined by a stopwatch, but must be considered in light of all the factors discussed.[145]

In sum, the majority opinion recognized that religious organizations have a constitutional right, grounded in both the Free Exercise and Establishment Clauses, to be free from governmental interference with their core governance functions.[146] The Court was careful not to elaborate on the scope of the right, nor the ministerial exception, but for the time being said the ministerial exception clearly applied to those in Perich's situation. Recognition of this "noninterference" principle, however, clearly had ramifications stretching well beyond the facts of this case.

C. The Alito Concurrence

Justice Samuel Alito wrote a concurrence, joined by Justice Elena Kagan, in which he articulated a more functional approach to the ministerial exception that focused on the actual duties of an employee, rather than on the title itself.[147] His concurrence began by emphasizing the critical role that religious independence plays in our constitutional structure. Characterizing the issue largely as one of religious autonomy, he said that religious groups "must be free to determine who is qualified to serve in positions of substantial religious importance"—a point he made repeatedly.[148]

Justice Alito then proceeded to discuss specifically the need for a functional approach to applying the ministerial exception. Although acknowledging that a formal title is a relevant consideration, he stated it was "neither necessary nor sufficient."[149] He noted that most religions do not use the term "minister" and many reject formal ordination.[150] Thus, to place too great an emphasis on formal titles would inevitably favor some religions over others.

Justice Alito then argued that a functional approach to the ministerial exception, focusing on actual duties performed, was the proper approach. He noted that this was essentially the approach

145. *Id*. at 709.

146. *Id*. at 706.

147. *Id*. at 711–16 (Alito, J., concurring). Justice Thomas also wrote a very short concurrence, stressing the importance of the ministerial exception and saying that courts should "defer to a religious organization's good faith understanding of who qualifies as its minister." *Id*. at 710–11 (Thomas, J., concurring).

148. *See id.* at 712.

149. *Id.* at 713–14.

150. *Id*. at 713.

taken by the federal circuits that had addressed the issue, none of which made the existence of a title or ordination dispositive.[151] Justice Alito then stated that use of a functional approach in the case before it clearly led to Perich qualifying for the ministerial exception. In particular, he noted that Perich played a "substantial role in conveying the Church's message and carrying out its mission," noting that she taught religion to some extent, led students in daily devotions, led students in prayer three times a day, and on occasion helped with chapel services.[152] Although Alito acknowledged that a purely secular teacher would not qualify for the exception, he said that the teaching of some secular subjects did not disqualify Perich.[153] What was important was that Perich was an "instrument of her church's religious message" and a leader of worship activities, and therefore "Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office."[154]

In most respects Justice Alito's concurrence is quite consistent with the majority opinion, but it seeks to more clearly sharpen the focus of the inquiry. The majority opinion emphasized Perich's religious duties and functions while giving substantial importance to her title of "minister." Justice Alito, however, advocated for a more functional approach while nevertheless acknowledging that a title might be of some relevance. Justice Alito's concurrence focuses on the actual duties performed and how those duties relate to the central concerns of "conveying the Church's message and carrying out its mission,"[155] and less on titles as such.

III. The Religion Clauses After *Hosanna-Tabor*

Hosanna-Tabor is an extremely significant decision, if not necessarily a surprising one. At one level it recognized the ministerial exception already adopted by the federal circuits—certainly an important step in itself. But more fundamentally, and at its core, *Hosanna-Tabor* recognized a realm of autonomy for religious institutions free of government interference.[156] This autonomy

151. *Id.* at 714.

152. *Id.* at 714–15 (internal quotations omitted).

153. *Id.* at 715.

154. *Id.*

155. *Id.* at 714.

156. *See* Esbeck, *supra* note 13, at 10 (*Hosanna-Tabor* is "more than just the ministerial exception. It is now a leading case for church autonomy, meaning *internal church decisions affecting faith or mission*." (emphasis in original)); McConnell, *supra* note

includes and reaches beyond the ministerial exception, potentially touching upon broader issues of governance, polity, and mission. As such, it represents an important counterpoint to the emphasis on neutrality in more recent free exercise jurisprudence.

Just as importantly, *Hosanna-Tabor* clearly affirmed the unique constitutional status enjoyed by religion. The Court could not have been clearer: Religion is not just another worldview or value system, to be treated no better and no worse than other ideas. Instead, the Religion Clauses establish a unique constitutional status for religion,[157] in which religion enjoys certain protections and freedom from government interference not enjoyed by other beliefs or groups.

This is not completely new. As noted by the Court, the *Watson*, *Kedroff*, and *Milivojevich* decisions had recognized a degree of autonomy from government interference.[158] But those were more unique circumstances, not involving generally applicable laws and decided well before the Court's increased focus on the neutrality standard. In general, it is fair to say that the unique constitutional status of religion had been lost in recent years, largely replaced by an emphasis on equal, neutral treatment. That has not been all bad—helping to ensure religion has a voice in the larger pubic square, rather than being privatized and marginalized. But that came at a cost: de-emphasizing religion's unique status and making it vulnerable to society's demands.

But the Court's decision in *Hosanna-Tabor* in no uncertain terms highlights the unique status religion enjoys under the Constitution, and in doing so places important limits on the neutrality paradigm. The decision does not replace or overturn the neutrality standard for most purposes; indeed, neutrality will likely continue to govern in those contexts in which it had before. But *Hosanna-Tabor* makes it clear that there are limits to the Court's emphasis on neutrality, and that at some point another paradigm—one of autonomy—takes over.

Part III of this article will explore the potential boundaries of neutrality and autonomy in regulating churches. Before doing that, however, this article will briefly look at two aspects of the Court's decision in *Hosanna-Tabor* relative to religious exercise. First, it will examine *Hosanna-Tabor*'s effect on the *Smith* neutrality standard for free exercise analysis. Second, it will examine how *Hosanna-Tabor*

13, at 835–36 (*Hosanna-Tabor* "suggest[s] a shift in Religion Clause jurisprudence from a focus on individual believers to a focus on the autonomy of religious institutions.").

157. *Hosanna Tabor*, 132 S. Ct. at 704–05.

158. *Id.*

might impact religious associational rights beyond that afforded by the Free Speech Clause.

A. Limiting *Smith*

Undoubtedly, one of the most important dimensions of *Hosanna-Tabor* is to limit the reach of *Employment Division v. Smith.*[159] The growth of antidiscrimination laws, together with the *Smith* decision, potentially put religious institutions in a precarious position.[160] Unlike the state interferences with religion addressed in *Watson*, *Kedroff*, and *Milivojevich*, antidiscrimination laws are not aimed specifically at religion and are broadly applicable. And *Smith*, of course, declared that neutral, generally applicable laws do not trigger free exercise protection. That declaration created the possibility that the Free Exercise Clause would offer little help against antidiscrimination laws, the Court's prior cases notwithstanding. Churches and other religious associations could still assert their associational rights under the Free Speech Clause, as had been suggested by some, but that seemed a dubious basis for protection.

By establishing a noninterference principle, and grounding it in the Religion Clauses, the Court made clear that *Smith* is not the be-all and end-all of free exercise analysis, but only part of the picture. In particular, *Smith* is altogether inapplicable when neutral and generally applicable laws interfere with internal governance of religious institutions.[161] In such cases the noninterference principle, grounded in both the Free Exercise and Establishment Clauses, takes over. This is no insignificant matter since it sends a clear message that notwithstanding *Smith*, free exercise protection retains some meaningful vitality.

To be sure, *Hosanna-Tabor* did not negate *Smith* nor significantly limit its reach. Although the boundaries between the two decisions are yet to be fully explored, it seems apparent that *Hosanna-Tabor*'s noninterference principle is limited to the internal workings of religious institutions. For that reason, the autonomy right recognized in *Hosanna-Tabor* is a corporate right and not an

159. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

160. *See* McConnell, *supra* note 13, at 821–22 (noting tension *Smith* posed to "the question of clergy hiring").

161. *See Hosanna-Tabor*, 132 S. Ct. at 707.

individual one.[162] Indeed, in discussing the constitutional concerns giving rise to the ministerial exception, the Court consistently used terms such as "religious groups" and "religious organizations," always suggestive of a collective interest.[163] Moreover, the very nature of the right—autonomy over selection of ministers and leaders—makes sense only in an institutional context.

Similarly, the autonomy right implicit in *Hosanna-Tabor* concerns the selection of leaders relevant to the internal workings of religious institutions, specifically as it relates to doctrine, governance, and mission.[164] For that reason it would not apply to generally applicable laws relating to health, safety, or land use. Although such laws might at times burden the effectiveness of ministry and mission, they do not affect a religious organization's ability to define what that mission will be. A religious organization's right to define for itself its beliefs, doctrine, identity and mission, all of which turn on the ability to control leadership decisions, is the essence of the autonomy right recognized in *Hosanna-Tabor*.[165] For that reason most generally applicable laws not touching upon those core concerns would still be subject to the *Smith* neutrality standard.

That *Smith* continues to govern the actions of individual religious adherents, and that it will also apply to many government regulations of religious institutions themselves, does not take away from the significant, if only partial, way that *Hosanna-Tabor* limits *Smith*. At their core, religious institutions are free from government interference with their basic identity, even when such interference

162. *See* Note, *The Ministerial Exception to Title VII: The Case for A Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1782–83 (2008) (discussing how *Smith*'s focus on free exercise rights for individuals is distinct from the ministerial exception's focus on "churches as institutions"). *See also* McConnell, *supra* note 13, at 836 ("Now, however, as interpreted in *Smith* and *Hosanna-Tabor*, the Free Exercise Clause provides for greater protection to the 'faith and mission' of religious institutions than to individual acts of religious exercise."); Corbin, *supra* note 13, at 955 (observing how *Hosanna-Tabor*, when compared with *Smith*, "results in a free exercise jurisprudence that provides more protection for religious institutions than it does for religious individuals").

163. *Hosanna-Tabor*, 132 S. Ct. at 703, 705–06, 710. In discussing the constitutional concerns giving rise to the ministerial exception, the Court consistently used terms such as "religious organizations" and "religious groups," strongly suggesting it is a right held in a corporate form. *Id.* Also, the essence of the interest concerns a religious group's right to choose its ministers and leaders, which only makes sense if it is a body of believers.

164. *See* Laycock, *supra* note 13, at 856 ("The essential point is that internal church governance is constitutionally protected and is outside the domain of *Smith*.").

165. *See Hosanna-Tabor*, 132 S. Ct. at 706 (emphasizing the need for a religious organization to control its "internal governance," which is necessary in order for it to "shape its own faith and mission through its appointments").

arises from a neutral and generally applicable law. Though that makes enormous sense, both constitutionally and otherwise, the result was far from certain considering *Smith*'s rigorous neutrality emphasis.

B. Religious Associational Rights

A second significant consequence of the autonomy principle in *Hosanna-Tabor* is to recognize a type of religious associational right that is distinct from what churches, as expressive associations, are already afforded under the Free Speech Clause. The Supreme Court has long recognized a right to associate for expressive purposes,[166] which clearly includes religious institutions. To some degree this potentially insulates churches from anti-discrimination laws, as it would other expressive groups. Although the Court in *Hosanna-Tabor* acknowledged the applicability of that doctrine to churches,[167] it also made clear that the rights afforded churches and other religious institutions were not limited to those afforded other expressive associations.[168] Rather, the Free Exercise Clause provides an independent and arguably more expansive associational right to religious associations.

The right of expressive association has been recognized in a variety of contexts,[169] including as a defense to antidiscrimination laws.[170] In the first two decisions addressing the issue, *Roberts v. United States Jaycees*[171] and *Board of Directors v. Rotary Club of Duarte*,[172] the Court held that expressive associational rights did not insulate private clubs from antidiscrimination laws prohibiting gender discrimination. In finding no constitutional violation in those cases, the Court emphasized that including female members would not appear to burden the clubs' expressive rights, since there was no

166. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Roberts v. Jaycees, 468 U.S. 609 (1984); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama ex. Rel. Patterson, 357 U.S. 449 (1958).

167. *See Hosanna-Tabor*, 132 S. Ct. at 700.

168. *Id.*

169. *See, e.g.*, *Shelton*, 364 U.S. at 485 (1960) (law requiring teachers to disclose membership in groups violates right of association); Alabama *ex. rel.* Patterson, 357 U.S. at 462 (disclosing NAACP membership list violates right of association).

170. For a discussion of the right of expressive association in the context of anti-discrimination laws, *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1160–63 (3rd ed. 2006).

171. Roberts v. United States Jaycees, 468 U.S. 609, 627–28 (1984).

172. Bd. of Dirs. of Rotary Internat'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

evidence female membership would affect positions on issues the clubs might advocate.[173]

The Court's position shifted in *Boy Scouts of America v. Dale*,[174] where it held that New Jersey's anti-discrimination law prohibiting discrimination based on sexual orientation violated the expressive associational rights of the Boy Scouts, which had dismissed an openly gay scout leader.[175] In finding the law unconstitutional as applied to the Scouts,[176] the Court focused on "whether the forced inclusion of Dale as an assistant Scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[177] The Court concluded that it would, stating that Dale's presence as a leader would significantly burden the Scout's message disapproving homosexual conduct,[178] and as such, his presence interfered with the Scouts' expressive associational rights.[179]

The *Dale* decision was important because it gave significant protection to associational rights, especially in terms of membership, which did not exist in *Roberts* and *Duarte*. The difference between *Dale* and the former cases involved the perceived burden that inclusion of Dale would have on the Scouts' message. Even though *Dale* was a 5-4 decision, all nine justices agreed that inclusion of members inconsistent with a group's message would violate associational rights; the dissenters simply disagreed that any clear interference had been shown in the case.[180] As such, *Dale* established a degree of institutional autonomy that would withstand anti-

173. *See Duarte*, 481 U.S. at 548–49; *Roberts*, 468 U.S. at 627. The Court also stated in both cases that there was a compelling government interest in eliminating gender discrimination sufficient to satisfy even strict scrutiny. *See Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 623. Though not altogether clear, the Court in both cases appeared to apply strict scrutiny, but also emphasized the minimal burden the challenged law placed on associational rights.

174. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

175. *Id.* at 644–45.

176. *Id.* at 659.

177. *Id.* at 650.

178. *Id.* at 653–56.

179. *Id.* at 659.

180. The four dissenting Justices, in an opinion written by Justice Stevens, stated that "[t]he relevant question is whether the mere inclusion of the person at issue would 'impose any serious burden,' 'affect in any significant way,' or be 'a substantial restraint upon' the organization's 'shared goals,' 'basic goals,' or collective efforts to foster beliefs." *Id.* at 683 (Stevens, J., dissenting). They concluded that inclusion of Dale as an assistant scoutmaster fell far short of that standard since the Scouts had no clear set of beliefs regarding homosexuality and any views on the subject were not part of the organization's basic or shared beliefs. *Id*. at 685.

discrimination laws, though the Court was closely divided on what needed to be shown to trigger that right.

The Court in *Hosanna-Tabor* acknowledged that churches and other religious institutions qualify as expressive associations for the type of protection recognized in *Dale*.[181] The Court also made it clear that religious associations have an additional associational right—one grounded in the Religion Clauses—that is independent of any right enjoyed as expressive association under the Free Speech Clause. Characterizing the First Amendment as giving "special solicitude to the rights of religious organizations,"[182] what might be loosely labeled "religious associational rights," provides a degree of autonomy beyond that provided for expressive associations.

The most obvious distinction between the expressive associational right recognized in *Dale* and the religious associational right implicitly recognized in *Hosanna-Tabor* is what is required to establish an infringement. Whereas the expressive associational right recognized in *Dale* is infringed when inclusion of an unwanted member would "substantially burden" a group's message,[183] there is no such requirement for infringing a religious associational right. There is no need to establish a burden on the religious group's message or beliefs, such as applying a gender discrimination law to a church that does not believe in female pastors.[184] Instead, the right is violated by undue interference with a religious association's leadership, whether it implicates beliefs or not. The defining characteristic is not an interference with the group's message, but rather an intrusion into certain decisions regarding church leadership and governance.[185]

The scope of the religious associational right implicit in *Hosanna-Tabor* is less clear. The Court was careful to limit its decision to the narrow facts of the case before it, simply holding that the Religion Clauses create a "ministerial exception" to anti-discrimination laws and that the ministerial exception applied to the

181. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

182. *See id.*

183. *See Dale*, 530 U.S. at 659.

184. The Court in *Hosanna-Tabor* clearly indicated that such a showing was not necessary. 132 S. Ct. at 706. *See also* Laycock, *supra* note 13, at 850–51 (discussing how the ministerial exception does not turn on whether the reasons for dismissal relate to a church's doctrine; rather, it is grounded in a church's right to select its ministers free of state interference, regardless of the reasons).

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

particular facts of the case.[186] The extent and reach of the ministerial exception as to other areas of church autonomy that the noninterference principle insulates from antidiscrimination laws were left unexplored. The final part of this Article will examine three of those issues.

IV. Examining the Reach of Religious Institutional Autonomy Under *Hosanna-Tabor*

Central to the Court's decision in *Hosanna-Tabor* was recognition of a religious autonomy interest that insulates religious organizations from certain interferences with their internal governance relative to their mission. It seems relatively clear that this is a right held by religious groups and institutions and not by individuals. Thus, *Hosanna-Tabor* would not provide a basis for an individual to assert autonomy rights against government regulation.[187] Moreover, it is clear that *Hosanna-Tabor* does not insulate religious institutions from all government regulations or laws. Instead, it focused on interferences with a religious organization's mission and governance posed by antidiscrimination laws. Thus, religious organizations remain subject to regulation on a number of levels.

The potential scope of the autonomy interest, however, remains unclear in several important respects. The Court in *Hosanna-Tabor* was intentionally cautious in discussing the scope of the right, noting that it was the first case to recognize the right and that it was enough to recognize that the exception applied to the facts before it.[188] In doing so, the Court was not limiting the potential reach of the ministerial exception itself, or commenting on the more fundamental concerns about religious autonomy underlying the holding. The final part of this Article will examine three issues regarding the potential scope of the religious rights recognized in *Hosanna-Tabor*: (1) the scope of the ministerial exception, both in terms of which employees it might cover and what organizations might assert it; (2) the application of the autonomy interest to nonemployees, such as lay leaders and basic membership; and (3) the contexts in which the autonomy interest might apply; specifically, when does the autonomy paradigm end and the neutrality paradigm begin?

186. *Id*. at 707.

187. *See id.* at 706.

188. *See id.* at 707.

A. The Scope of the Ministerial Exception

The first and most immediate impact of *Hosanna-Tabor* is the Supreme Court's recognition of the ministerial exception previously developed by the lower courts. As noted earlier, the importance of the decision reaches beyond that, but recognition of the exception *itself* is extremely significant. It solidifies that there are limits to what government can do in restricting churches and other religious groups in their decisions to hire and fire their ministerial leaders.

1. What Organizations are Covered?

Before examining which employees the ministerial exception might cover, the inquiry begins with what organizations can qualify for the ministerial exception to be exempt from antidiscrimination laws. The Court in *Hosanna-Tabor* did not discuss the issue as such, assuming that the church in question would qualify if the Court recognized such an exception under the First Amendment. This is not surprising since churches and other houses of worship would logically be the quintessential example of institutions with such an autonomy interest. Not only is there strong historical support for the principle that government should not interfere with the internal appointments of churches,[189] but houses of worship also represent the core practice of most faiths. It is there, more than anywhere else, that the associational dimensions of faith are experienced, and where mission and doctrine are practiced. The title and functions of ministers are also more closely aligned with, and exercised in, the context of churches and other houses of worship.

That being said, there are several aspects of *Hosanna-Tabor* that suggest a broader view of what religious institutions might qualify for the exception. First, although the school at which Perich taught was operated by and under the control of a traditional church and considered part of its ministry,[190] the actual context of the dispute, a school, fell outside the confines of a traditional church. The facts reflect that the exception can be asserted outside the limited confines of traditional church structures and activities.

Second, and more important, was the Court's careful use of language throughout the opinion, referring to the religious bodies that might assert the exception as "religious groups" and "religious

189. *See id*. at 702–04 (discussing strong historical support for government not interfering with ministerial appointments of churches).

190. *Id.*

organizations."[191] Not too much should be made of this since the Court was likely being careful, considering the diversity of religion in America and the terms used to describe even more traditional religious functions. Yet, it is significant since the language reflects the reality that religious missions occur in various organizational settings, many of which do not include worship and traditional ministerial duties. Such "groups" and "organizations" seem to be among the type of religious bodies that the Religion Clauses were designed to protect.

The core institutional concerns at the heart of *Hosanna-Tabor* are often exercised by various religious groups and organizations. These include what are commonly called "parachurch" ministries, as well as various religious schools, missions, and charitable service organizations.[192] In common among these ministries is that each has a sense of religious mission, seeking to practice their faith. Such organizations frequently have doctrine and faith statements that define their religious identity and mission.[193] While not necessarily practicing religious rites, these organizations are a vibrant part of the American landscape and, more importantly, an indispensable vehicle for many religious adherents to live out their faith in a corporate form. Thus, the same concerns at the heart of the autonomy right recognized in *Hosanna-Tabor*—that a religious body has control, free of state interference, over its doctrine, mission, and governance—apply equally to such religious organizations.

It is not surprising, then, that lower courts have applied the ministerial exception to religious organizations beyond churches and other traditional places of worship. This has included organizations

191. *See, e.g.*, *id*. at 705 ("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."); *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."); *id*. at 710 ("The interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission" is "undoubtedly important.").

192. *See* MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 534–35 (1992) (discussing significant growth of independent mission boards, without denominational affiliation, in the second half of the twentieth century).

193. For example, Intervarsity Christian Fellowship, a large non-church-affiliated religious organization that has ministries on college campuses across the country, has a doctrinal statement of faith. *See* DOCTRINAL STATEMENT OF FAITH OF INTERVARSITY CHRISTIAN FELLOWSHIP, http://www.intervarsity.org/about/our/our-doctrinal-basis (last visited Nov. 20, 2013).

such as the Salvation Army,[194] universities,[195] a religiously affiliated nursing home,[196] religious secondary schools,[197] and hospitals.[198] In doing so, courts have found that the exception applies whenever an institution's "mission is marked by clear or obvious religious characteristics."[199] In applying the exception in this way, courts have recognized the inherently religious mission of such groups and assumed that the ministerial exception applied to the same extent as to churches and denominational hierarchies. For the exception to apply, the employee in question must come within the reach of the exception, which is discussed next.

2. What Employees are Covered?

The second issue regarding the scope of the ministerial exception, and really the crux of the issue, is determining which employees should come within its reach. The Court in *Hosanna-Tabor* was reluctant to set out the full parameters of when the exception would apply. The Court noted the exception "is not limited to the head of a religious congregation,"[200] but it did not want to set out a clear test for when it applies. As the Court addressed the parameters of the exception for the first time in *Hosanna-Tabor*, it indicated it was enough to hold that the exception applied under the circumstances of the case.[201] In that respect, the Court noted that Perich had the title of minister and held herself out as such, had a type of ordination, and engaged in various religious responsibilities.[202] The Court did not state whether the exception would apply to those without formal titles or ordination, those with less expansive religious duties, and the like. Those questions could be addressed, if necessary, in subsequent decisions.

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

195. EEOC v. Catholic Univs. of Am., 83 F.3d 455, 464–65 (D.C. Cir. 1996).

196. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004).

197. EEOC v. Freemont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Geary v. Visitation of the Blessed Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993).

198. Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007); Scharon v. St. Luke's Episcopal Hosp., 929 F.2d 360 (8th Cir. 1991).

199. *See Shaliehsabou*, 363 F.3d at 310; *Hollins*, 474 F.3d at 225–26.

200. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

201. *See id.*

202. *See id.* at 707–08.

Though declining to elaborate on the complete reach of the ministerial exception, the Court did identify the rationales supporting the decision. The most fundamental rationale is the Constitution's special charge to protect religious freedom and to avoid government entanglement in religious affairs. Much of the Court's discussion in that regard focused on historical concerns about the government filling ecclesiastical offices or appointing ministers.[203] Thus, Madison's refusal to appoint bishops reflected his view that government has no right or interest in appointing or removing members of the clergy.[204]

In couching most of its language in terms of a religious group's ability to appoint its own ministers, the Court also identified concerns in interfering with that right. In particular, the Court emphasized that by appointing ministers, government interfered with a religious institution's right to self-governance and the institution's ability to shape its own faith and mission. As stated by the Court, government interference with the appointment and removal of a minister:

> [I]ntrudes on more than a mere employment decision. Such action interferes with the internal governance of the church, depriving it of control over the selection of those who will personify its beliefs. 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.[205]

Thus, the underlying concern with the ministerial exception is not interference with employment decisions per se, but interference with a religious institution's ability to shape its faith and mission.

The federal circuits and other courts had identified these same concerns in applying the ministerial exception. For example, in *McClure v. Salvation Army*, the first case to recognize a ministerial exception, the Fifth Circuit stated that the exception was necessary to ensure that religious organizations could decide for themselves, "free from state interference, matters of church government as well as those of faith and doctrine."[206]

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203. *Id.* at 703.

204. *Id.* at 703–04.

205. *Id.* at 706.

206. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (quoting Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

Therefore, it is not surprising that most lower courts have applied some type of functional test to determine the scope of the ministerial exception.[207] Although some circuits initially seemed to limit the exception to formal ministers,[208] eventually almost all circuits expanded the exception to other employees who, though not formal ministers, nevertheless were involved in ministerial-like duties. In extending the ministerial exception, some courts have applied a "primary duties" test to examine whether the employee's duties are "important to the spiritual mission" of the church or if the primary duties involve spreading faith, teaching, or participation in ritual and worship.[209] Using this functional approach, lower courts have applied the ministerial exception to a number of positions, including religious schoolteachers, youth leaders, music directors, and organists.[210]

Justice Alito's concurrence in *Hosanna-Tabor*, joined by Justice Kagan, picked up on this concern. He noted that many religions and religious bodies do not use formal ministers and do not require a process of ordination, and thus, too much of a focus on the term "minister" is under-inclusive and fails to fulfill the designs of the First Amendment.[211] He argued that the Court should instead follow the "functional" analysis used by lower courts, focusing "on the function performed by persons who work for religious bodies." As stated by Justice Alito:

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207. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007); Shaliehsabou v. Hebrew Home of Greater Wash. Inc., 363 F.3d 299,307 (4th Cir. 2004); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003); Starkman v. Evans, 198 F.3d 173, 175–76 (5th Cir. 1999); Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

208. *See Hollins*, 474 F.2d at 226 (stating that prior to that decision the Sixth Circuit had only applied the ministerial exception to ordained ministers).

209. *See, e.g.*, *Rayburn*, 772 F.2d at 1169. A few courts have used a three-part test to assess these concerns, weighing (1) whether employment decisions are largely made on religious criteria; (2) whether the employee was authorized to perform ceremonies of the church; and (3) whether the employee engaged in activities traditionally considered ecclesiastical or religious. *See Starkman*, 198 F.2d at 176–77.

210. *See* EEOC v. Catholic Univers. of Am., 83 F.3d 455, 464–65 (D.C. Cir. 1996) (Catholic nun teaching Canon law); Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483 (Mich. App. 2008) (teacher at Catholic school); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006) (church music director and organist); Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174, 1181–82 (E.D. Wis., 2001) (church music and choir director); *Starkman*, 198 F.3d at 174 (church choir director); *Shaliehsabou*, 363 F.3d at 309 (Kosher supervisor for religious institution); *Alicea-Hernandez*, 320 F.3d at 703 (communications director for Archdiocese of Chicago).

211. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring).

> The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith . . . . The "ministerial" exception should be tailored to this purpose. It 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.[212]

As the Court proceeds to refine the ministerial exemption, it makes sense to focus on employee functions, and not titles, as advocated by Justice Alito and adopted by most lower courts. There are two basic reasons for doing this. First, as suggested by Justice Alito, a focus on titles fails to recognize that many religious traditions do not have ministers or formal leaders, nor do many traditions have ordination or a comparable process for leaders.[213] Too great an emphasis on formal titles potentially discriminates among religions, and most likely against less traditional religions.

Second, and just as important, a focus on function better addresses the basic concerns giving rise to the ministerial exception in the first place: religious autonomy in the area of faith, doctrine, and mission. To be sure, those with the title of minister are likely to be integrally involved with such matters, and at a minimum, the First Amendment should require that religious institutions be free from government interference in the hiring and firing of such employees. Issues of faith, doctrine, and mission hardly end there, however, since other employees are often integrally involved with such matters. Thus, protection of religious autonomy with regard to faith, doctrine and mission needs more flexibility than a focus on titles alone would bring.

As a practical matter, a functional approach is consistent with the majority's own analysis. Although the majority emphasized Perich's title of minister and the special training she received, it also emphasized the religious nature of many of Perich's duties that would be the focus of a functional analysis.[214] Moreover, by its own

212. *Id*. at 711–12.

213. *Id.* at 711.

214. *Id*. at 708 (majority opinion) (emphasizing that "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission").

admission, the majority was deliberately cautious in *Hosanna-Tabor*, wanting to only resolve the issue on the facts before it.[215] Thus, a focus on duties rather than titles would not require a change so much as a refinement, and would be consistent with the underlying concerns voiced by the majority.

The one area, however, in which the majority's analysis appears to diverge from that of the lower courts' is with regard to what proportion of the duties must relate to a church's religious mission and beliefs, and how much may be secular. Although most lower circuits focus on function and not merely title, the majority of them require that the primary duties be religious and ministerial, and not just a limited component of the job. Indeed, many courts described the analysis as the "primary duties test," requiring that the religious duties be the primary or principal component of what the employee did.[216] It was on that basis that the Sixth Circuit held that Perich did not qualify for the "ministerial exception," stating that the religious dimensions of her job—occasionally teaching religion, leading devotions in the morning, and planning and leading chapel services twice a year—were too small in comparison to her secular duties.[217]

The Supreme Court rejected that analysis, saying the issue "is not one that can be resolved by a stopwatch."[218] The Court did not wholly discount the concern, stating that "[t]he amount of time an employee spends on particular activities is relevant in assessing an employee's status, but that factor alone cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above."[219]

This suggests that the majority's opinion was not a complete rejection of the primary duties test, but a finessing of it. At a minimum, it stands for the proposition that where an employee has the title of minister with formal training and exams involved, then the amount of time need not be primary. On the other hand, the absence of titles and ordination might require a greater proportion of time being dedicated to religious responsibilities rather than secular. In

215. *Id.* at 707.

216. *See* Shaliehsabo v. Hebrew Home of Greater Wash. Inc., 363 F.3d 299, 307 (4th Cir. 2009); Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999); EEOC v. Catholic Univ. of America, 83 F.3d 455, 463 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

217. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 778–81 (6th Cir. 2010).

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

219. *Id.*

any event, the majority opinion is clear that the ministerial exception does not necessarily require that religious responsibilities be primary in all instances. In that regard, the majority opinion can be seen as an important expansion of the ministerial exception beyond that recognized in the lower courts.[220]

B. Extending the Exception to Governance and Membership

The ministerial exception, both in the lower courts and as recognized in *Hosanna-Tabor*, concerns discrimination complaints raised by employees. In federal court, the exception is typically raised in the context of a Title VII employment discrimination claim. It is not surprising, therefore, that the Court's analysis was couched in the context of discrimination regarding employees, and the ministerial exception itself was predicated on an employment status.[221]

A separate issue raised by *Hosanna-Tabor* is the extent to which the noninterference principle established in *Hosanna-Tabor* also applies to discrimination claims raised by members, but not employees, of a religious institution. While such claims would not come under Title VII and comparable state legislation, they could conceivably fall under a state public accommodation legislation prohibiting discrimination in public accommodations. In some states, this has been construed to include membership in clubs and civic associations. The Supreme Court has decided four cases addressing whether such membership discrimination claims under state law violates free speech associational rights. In three of the cases the Court held that the First Amendment did not insulate the groups from charges of discrimination,[222] while in the fourth case, *Boy Scouts*

220. For criticisms of the lower court "primary duties" test, arguing that it does not sufficiently protect religious freedom, *see* Lund, *supra* note 101, at 65–71; Lauren N. Woleslagle, Comment, *The United States Supreme Court Sanctifies the Ministerial Exception in* Hosanna-Tabor v. EEOC *without Addressing Who is a Minister: A Blessing for Religious Freedom or is the Line Between Church and State Still Blurred?*, 50 DUQ. L. REV. 895, 913–15 (2012).

221. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 699 ("[c]ertain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise clauses of the First Amendment bar such action when the employer is a religious group and the employee is one of the group's ministers.").

222. N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

of America v. Dale, the Court stated that the application of the state statute would violate the right of association.[223]

Religious institutions frequently discriminate in terms of membership and leadership. However, there have yet to be any cases brought against them for such discrimination and little reason to believe that there will be any in the foreseeable future. Part of this is that few people want to be part of a church or other religious fellowship that would not want them. Additionally, there is likely a special sensitivity to bringing such claims against a religious group.

Nonetheless, it makes sense to briefly explore the extent to which the noninterference principle protects religious institutions in such situations, since there is certainly the possibility of such claims in the future.[224] Although claims of discrimination by non-employed members of an institution might arise in a variety of situations, there are three principal ones that should be examined. First, situations of governance involving lay leaders of a congregation, such as members of a church board or elders. Second, situations involving lay leaders of church programming, such as leaders of a particular ministry. This might include youth work or Sunday school, or a service project, such as working with the homeless. Third, situations involving church membership, which often has some minimal requirements.

1. Lay Leaders

It seems clear that the basic concerns of autonomy for religious institutions at the core of *Hosanna-Tabor* should apply to some degree to lay leaders. As stated by the Court in *Hosanna-Tabor*, the ministerial exception goes beyond "mere employment decision[s],"[225] but concerns the right of religious institutions "to shape [their] own faith and mission." While ministers and comparable employee positions are integral to shaping a religious institution's faith and mission, many, if not most, religions have lay people who are also integrally involved in shaping the institution's faith and mission. Protestant churches, for example, typically have elders or church boards who oversee the church and have duties that include establishing policy, establishing mission, and setting ministry priorities.

223. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

224. See Lund, *supra* note 101, at 25–27 (discussing the increasing insensitivity of state and local anti-discrimination laws to religious concerns in the employment context).

225. *Hosanna-Tabor*, 132 S. Ct. at 706.

Similarly, lay people are often engaged in the work of ministry of the type that lower courts have found sufficient to qualify for the ministerial exception as employees. This would include communicating the faith in settings as a teacher, youth leader, or adult education leader, participating in music, and participating in or leading service activities. These forms of lay leadership and service are expressions of religious organizations' beliefs and doctrines, and are integral to both defining and fulfilling the organizations' mission. In the words of Justice Alito, such people clearly serve as "messenger[s] or teacher[s] of [the] faith."[226]

Therefore, a strong argument can be made that lay leaders of religious organizations, both those with governance authority and those with ministry authority, should come within the autonomy interest recognized in *Hosanna-Tabor*. Such people are integral to defining and carrying out a religious institution's faith, doctrine, and mission. As stated by the Court in *Kedroff*, the First Amendment guarantees religious institutions "independence from secular control and manipulation, in short, power to decide for themselves free from state interference, matters of church government as well as . . . faith and doctrine."[227] If that is truly the case, then religious institutions must be insulated from antidiscrimination mandates when appointing lay leaders.

2. Organizational Membership

Finally, the autonomy interest inherent in *Hosanna-Tabor* should also extend to organizational membership itself, apart from any leadership or governance responsibilities a person might have. To the extent that discrimination in membership concerns religious beliefs, such as professing certain tenets of faith, churches and other religious institutions would appear to be protected by the expressive associational right recognized in *Dale*. As noted earlier, that right is infringed when the inclusion of an unwanted member "affects in a significant way the group's ability to advocate public or private viewpoints."[228] That would be the case if religious organizations were required to admit members who did not profess the organization's essential religious beliefs. The very identity of the group would thereby be threatened.

226. *Id.* at 712 (Alito, J., concurring).

227. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952).

228. *Dale*, 530 U.S. at 648.

But the religious associational right implicit in *Hosanna-Tabor* goes further than the expressive associational right of *Dale* and does not require that the inclusion of an unwanted person be contrary to the organization's message. Rather, the exception grounded in the Religion Clauses concerns the religious group's autonomy itself, recognizing an area in which government cannot intrude. Thus, in *Hosanna-Tabor* it was irrelevant whether the church had beliefs about the underlying basis for the lawsuit: disability status.[229] Once it was established that Perich qualified for the exception, it was sufficient to insulate the church from any charges of discrimination, whether they implicated the church's tenets of faith or not.

There are several reasons the autonomy interest in *Hosanna-Tabor* should also extend to membership issues, insulating religious organizations from any nondiscrimination mandate. Most basic is the recognition that the Religion Clauses establish a special sphere for religious organizations in which they are immune from certain types of government interference regarding faith and mission. The Court in *Hosanna-Tabor* stated that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission through its appointments" and the Establishment Clause prohibits the state from deciding "which individuals will minister to the faithful."[230] A religious group shapes its "faith and mission" not just through appointment of leaders, but also in deciding who will be its members. Similarly, if the state cannot decide who "will minister to the faithful," neither should it be able to decide who will constitute "the faithful," which is essentially the question of membership. Indeed, the final analysis of who can be a member of a religious group is every bit as important in shaping the group's identity as is the question of who will minister to the group.

There are also two pragmatic reasons why membership issues should fall within the autonomy interest recognized in *Hosanna-Tabor*. First is the reality that membership often determines who the

229. *See Hosanna-Tabor*, 132 S. Ct. at 706. It should be noted that although there was initially a possible (though unclear) discrimination claim based on disability status, the actual EEOC lawsuit alleged that Perich was terminated because she threatened to file a lawsuit. *See id.* at 701. Also, the Hosanna-Tabor church asserted that Perich was not terminated because of her disability, but because she threatened litigation, which violated tenets of the church's religion. *Id*. Thus, from its perspective the termination did relate to its religious beliefs. It is clear from the Court's analysis in *Hosanna-Tabor*, however, that there is an autonomy interest that insulates religious organizations form interference with their personnel decisions, whether those decisions are based on the group's tenets of faith or not. *See* Laycock, *supra* note 13, at 845, 850–51 (discussing this aspect of the case).

230. *Hosanna-Tabor*, 132 S. Ct. at 706.

ministers will be, the ultimate concern in *Hosanna-Tabor*. Although practices vary within religious traditions, the appointment of ministers and other leaders is often left in the hands of local congregations. Failure to control the membership composition might lead to failure to control the ministers.

The second pragmatic reason to extend the religious associational rights of *Hosanna-Tabor* to membership issues rather than rely on the expressive associational rights recognized in *Dale* is the precarious nature of the *Dale* holding. All nine Justices in *Dale* recognized that the right of expressive association protects against some unwanted members, but the justices disagreed on what triggers that right.[231] The five-Justice majority was deferential to the Scouts in defining what their views were and what would constitute a burden on those views.[232] However, the four dissenting justices were more probing and would limit the right to exclude members only to those instances where such inclusion would truly undercut the group's identity.[233] In the three previous cases involving expressive associational rights, the Court held that forced inclusion of an unwanted member would not violate the right.[234] Even a slight change in the Court's composition could make assertion of expressive associational rights far more difficult than it was in *Dale*, making the Religion Clauses a much more secure basis for churches and religious organizations to control their membership.

C. When Does the Right Apply?: Examining the Boundaries of Autonomy and Neutrality

The two previous subsections have argued that the core autonomy interest recognized in *Hosanna-Tabor*, which was predicated on concerns for control over a religious organization's faith, doctrine, and mission, should be read expansively in three ways. First, the ministerial exception should apply not just to those employees holding the formal title of minister, but should also apply to any employee with substantial duties relevant to the doctrine and

231. *See supra* note 181.

232. *See Dale*, 530 U.S. at 650–56.

233. *See id.* at 683–85 (Stevens, J., dissenting).

234. *See generally* N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

mission of the church, a position adopted by lower courts[235] and advocated in Justice Alito's concurrence.[236] Second, the exception should apply not only to traditional churches and houses of worship, but also to any religious organization whose primary focus is religious in nature.[237] Third, the autonomy values giving rise to the ministerial exception also suggest that religious organizations, such as churches, should have the same right to control its lay leaders and members.

A final issue is: Under what circumstances may a religious organization assert the autonomy interest at the core of *Hosanna-Tabor*. As occurred in *Hosanna-Tabor*, if government seeks to compel a religious institution to comply with antidiscrimination laws in a way that interferes with the institution's governance and mission, then the ministerial exception should apply. In such a situation, the mere existence of the religious institution exposes it to government interference with its governance and mission. The Religion Clauses mean that religious institutions, and especially church bodies, should be able to exist free from government interference with the institution's integral governance, doctrine, and mission.[238]

A different situation occurs, however, if a religious organization seeks access to a government forum and fails to conform to anti-discrimination requirements. In such a situation, government is not seeking to interfere per se with a religious group's internal affairs, but is simply setting terms for groups that wish to participate in a government program or forum. As such, the group can choose not to participate in the forum and be insulated from antidiscrimination requirements, or comply with such requirements and participate in the forum. Or, as might often be the case, remain insulated from antidiscrimination requirements for most purposes, but modify its standards for others. Whatever the case, the application of antidiscrimination laws for purposes of a forum or program would not be as problematic as it is when applying laws merely because of the religious group's existence.

This distinction between government interference with matters integral to a religious organization's governance, doctrine, and

235. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 226 (6th Cir. 2007); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985); Starkman v. Evans, 198 F.3d 173, 175 (6th Cir. 1999).

236. *Hosanna-Tabor*, 132 S. Ct. at 711–12 (Alito, J., concurring).

237. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004).

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

mission on the one hand, and that same organization seeking access to a government forum on the other hand, is seen by contrasting *Hosanna-Tabor* with the Court's decision in *Christian Legal Society v. Martinez*,[239] decided two years earlier. Both decisions involved application of antidiscrimination provisions to a religious group, with the First Amendment insulating the religious organization in *Hosanna-Tabor*, but not protecting the group in *Christian Legal Society*. Although the Christian Legal Society organization in *Christian Legal Society* enjoys the autonomy interest recognized in *Hosanna-Tabor*, the differing results turn on the context in which the anti-discrimination provisions are applied. This section will first discuss the *Christian Legal Society* decision, and then contrast it with *Hosanna-Tabor* to better understand the boundaries between the autonomy and neutrality paradigms.

1. Christian Legal Society v. Martinez

Although a strong argument can be made that religious autonomy interests should insulate any religious group from anti-discrimination requirements, the Supreme Court rejected that argument in favor of the neutrality paradigm in *Christian Legal Society v. Martinez*.[240] That case involved a policy of the University of California, Hastings College of the Law requiring recognized student groups not to discriminate on any basis in their membership and leadership eligibility.[241] The Christian Legal Society ("CLS"), which required that its members and leaders accept certain core beliefs about religion and sexual orientation, sought an exemption from the policy; it was denied. CLS sued claiming that the policy violated its "rights to free speech, expressive association, and free exercise of religion."[242]

The Supreme Court, in a 5-4 decision, rejected the organization's arguments and held Hastings' policy to be constitutional.[243] The

239. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010).

240. *Id.* at 2991–92.

241. *Id.* at 2979–80. The Court characterized the University of California, Hastings College of the Law policy as an "all-comers" policy, meaning that any "school-approved groups must 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'"

242. *Id.* at 2980–81.

243. *Id*. at 2982, 2995. For a discussion of the *Christian Legal Society* case, *see* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public*

Court began its constitutional analysis by identifying the limited-public-forum cases as the correct analytical framework, not the expressive association cases.[244] In doing so, the Court noted that unlike the expressive association cases where private groups were required to include unwanted members, in this instance there was only modest pressure to do so. The Court stated:

> [T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out.[245]

For that reason, the Court stated it would use what it labeled "the less-restrictive limited-public-forum cases" in characterizing the Hastings policy as "dangling the carrot of subsidy, not wielding the stick of prohibition."[246]

The Court then analyzed whether Hastings' nondiscrimination policy met the constitutional requirements for a limited-public-forum, concluding that it was both reasonable and viewpoint neutral. With regard to the reasonableness requirement, the Court noted that the policy furthered a number of important school policies, such as ensuring that the benefits of extracurricular activities are available to all students and encouraging tolerance and cooperation.[247] Importantly, the Court also emphasized that the antidiscrimination policy imposed a minimal burden on CLS, leaving the group a number of alternatives for its expressive activities within the school.[248] In particular, the school still allowed CLS to use school facilities for meetings and could use bulletin boards to advertise events. As a

Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action, 38 HASTINGS CONST. L.Q. 505 (2011).

244. *Id.* at 2985.

245. *Id.* at 2986 (emphasis in original).

246. *Id.*

247. *Id.* at 2989–90.

248. *Id.* at 2990.

practical matter, the group could effectively function without official recognition, a point that the Court thought was significant.[249]

The most significant factor in limited-public-forum analysis is the requirement that any restrictions be viewpoint neutral; the Court found it was met. In doing so, the Court emphasized that CLS had stipulated that Hastings had an "all-comers" policy regarding student groups, specifically agreeing that the school "requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or belief."[250] Thus, unlike previous limited-public-forum cases, such as *Widmar* and *Rosenberger* where religious viewpoints were excluded, in this case the Court stated that the forum was viewpoint neutral because it treated religious speech the same as all other speech.[251] Indeed, as noted by the Court, CLS did not seek "parity with other organizations, but a preferential exemption from Hastings' policy."[252]

For all practical purposes, the Court's decision to apply the neutrality paradigm, instead of an associational-rights focus, decided the case. As noted, that was largely based on the perception that the Hastings nondiscrimination policy did not compel CLS to include unwanted members, but simply conditioned a subsidy upon such inclusion.[253] The group was free to opt out, which left them with substantial avenues of expression, including at the school itself. And the Court almost completely ignored any Free Exercise Clause claim, relegating it to a one-paragraph footnote stating that under *Smith*, neutral and generally applicable regulations—which the Hastings policy was—did not trigger free exercise protection.[254]

Even the four dissenting justices gave scant attention to potential associational rights, arguing instead that the Hastings policy was not neutral but, in fact, discriminated against certain viewpoints.[255] The dissent did briefly note that prohibiting religious groups from

249. *Id*. at 2991–92.

250. *Id*. at 2982. Both CLS and the dissent argued that the law school policy as applied discriminated on several speech grounds, including certain views on religion and sexual orientation. *See id.* at 3001–06 (Alito, J., dissenting). But the Court emphasized that CLS had stipulated to the policy, thus rejecting the dissents arguments. *Id.* at 2982–84.

251. *Id*. at 2993.

252. *Id.* at 2978.

253. *Id*. at 2986.

254. *Id*. at 2995 n.27.

255. *Id*. at 3001–06 (Alito, J., dissenting).

discriminating on the basis of religious beliefs would interfere with the group's expressive associational rights under *Dale* since inclusion of those with different beliefs "would 'affect in a significant way the group's ability to advocate public or private viewpoints.'"[256] Nowhere in the opinion, however, did the dissent suggest that the group's free exercise rights, associational or otherwise, were in any way violated. Indeed, the dissent failed to mention the Free Exercise Clause at all.

Thus, notwithstanding the substantial disagreement among the justices over how the neutrality paradigm should be applied under the facts, none of the nine Justices thought there was a serious free exercise issue. Further, none of the Justices suggested any type of religious autonomy or associational right that might be implicated under the Religion Clauses. Yet, less than two years later, a unanimous Court in *Hosanna-Tabor* found an autonomy free exercise right was violated by a nondiscrimination requirement.[257] For that reason it is fair to assume that the religious autonomy interest recognized in *Hosanna-Tabor* is inapplicable in contexts like *Christian Legal Society*, notwithstanding the fact that inclusion of unwanted members to the CLS group involved in *Christian Legal Society* would profoundly affect the nature of the group and its mission. The next subsection will explore further how the different contexts of the two cases help determine the boundary between the neutrality and autonomy paradigms.

2. Establishing the Boundary Between Neutrality and Autonomy

In its most basic sense, *Hosanna-Tabor* involved the "ministerial exception" for employment discrimination claims under Title VII, while *Christian Legal Society* involved membership and leadership in a volunteer group. Yet, as is argued in previous sections, the core reasoning of *Hosanna-Tabor* should extend beyond its immediate facts and beyond employment decisions to include membership and leadership positions that implicate governance, doctrine, and mission. For that reason the national board and officers of the Christian Legal Society and its membership should be protected by the autonomy interest recognized in *Hosanna-Tabor.*[258]

256. *Id*. at 3012 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648).

257. *See* Ashutosh A. Bhagwat, Book Review, *Assembly Resurrected*, 92 TEX. L. REV. 351, 370–73 (2012) (discussing contrasting results in *Christian Legal Society* and *Hosanna-Tabor*, suggesting the difference was that one was treated as an associational/free speech case and the other as a religion case).

258. The CLS organization clearly qualifies as the type of religious organization protected under *Hosanna-Tabor.* The Christian Legal Society homepage on its website

The distinction between the two cases turns not on the nature of the organization, but on the context in which the interference occurs.[259] In this regard, the distinction drawn in *Christian Legal Society* on why the associational rights recognized in *Dale* did not apply is instructive. In declining to scrutinize Hastings' policy in terms of associational policy, the Court in *Christian Legal Society* emphasized two factors. First, and most important, the Court noted that whereas the law in *Dale* compelled the Boy Scouts to comply—it had no choice—in *Christian Legal Society* the group could opt out of the limited-forum and yet still continue to function relatively well as a group, though it would forgo some of the benefits provided by a limited-public forum.[260] In other words, the mere existence of the Boy Scouts subjected them to a forced inclusion of unwanted members, whereas CLS was subjected to the nondiscrimination policy only after seeking access to the limited-public-forum.

A second factor, emphasized by the Court in *Christian Legal Society* as part of its limited-public-forum analysis, was the adequacy of alternatives available to CLS and the limited burden the all-comers policy actually placed on them. According to the Court, the actual burden was modest at best, with CLS remaining able to use rooms for meetings and various forms of communication.[261] As such, CLS could opt out of the limited-public-forum, but still pursue its basic mission. This reaffirmed the first factor, that the actual burden was not that great.

Although the Court's analysis in *Christian Legal Society* was in the context of expressive associational rights, the application of those factors also seems relevant in determining when a state interferes

states: "CLS is a membership organization of Christian attorneys, judges, paralegals, law students, and other legal professionals dedicated to serving Jesus Christ through the practice of law, defense of religious freedom, and provision of legal aid to the needy." Its Mission Statement provides: "The mission of the Christian Legal Society is to inspire, encourage, and equip Christian lawyers and law students both individually and in community to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of inalienable rights to life and religious freedom." *See* CHRISTIAN LEGAL SOCIETY, http://www.clsnet.org/ (last visited Oct. 25, 2013).

259. For an insightful discussion about the clash in outcomes between *Christian Legal Society* and *Hosanna-Tabor*, *see* Esbeck, *supra* note 13. Esbeck argues that the common thread between the two cases is that they "share a narrow definition of religion," and that they "harmonize around an understanding that religion is fully protected only when exercised in private." *Id.* at 3.

260. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2986 (2010).

261. *Id.* at 2990–92.

with the type of autonomy interest recognized in *Hosanna-Tabor*. The starting point of analysis is that the autonomy principle gives religious institutions complete control in selecting and retaining its ministers, leaders, and members. In other words, personnel decisions that impact the organization's faith, doctrine, and mission are sacrosanct—government has no right to interfere in that core function.

In determining whether that right is violated, however, the inquiry should be in the degree of coercion antidiscrimination laws puts on a religious organization to give up that right of control.[262] That, in essence, is what the two factors from *Christian Legal Society* focus on. To the extent that a law requires a religious organization to comply with antidiscrimination mandates—as was the case in *Hosanna-Tabor*—the coercion is total and the law is clearly unconstitutional. In contrast, there is little coercion in situations like *Christian Legal Society* for a group that can abandon its autonomy over personnel decisions since the group can opt out of the limited forum and still effectively pursue its mission.[263]

Focusing on the coercive effect of a particular antidiscrimination mandate sufficiently protects the autonomy interest recognized in *Hosanna-Tabor* while at the same time respecting governments' interest in prohibiting discrimination. Thus, where the coercion is total or near total, the autonomy interest insulates religious organizations from government interference. This is most clearly evident with a law that requires a religious body, by its mere existence, to comply with nondiscrimination mandates, as was the case in *Hosanna-Tabor*. But, it would also clearly apply when essential government services are predicated on compliance. For example, if police and fire protection were predicated on compliance

262. Such a focus on coercion is reminiscent of the Court's pre-*Smith* free exercise jurisprudence, in which it examined the burden general state laws imposed on a particular religious adherent. Thus, the Court saw the forgoing of unemployment benefits in *Sherbert* as highly coercive, putting substantial pressure on Sabbatarians to forgo their religious beliefs. *See* Sherbert v. Verner, 374 U.S. 398, 403–04 (1963). Similarly, the school attendance in *Yoder* was highly coercive, since it mandated compliance. *See* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972). The analysis would be different, in two significant respects, however. First, the coercion analysis here would only focus on potential interference with autonomy interest in the appointment and retention of church leaders and members, whereas the pre-*Smith* free exercise analysis applied to coercive effects on any religious belief or practice. Second, the coercion to abandon beliefs in *Sherbert* and *Yoder* triggered a form of strict scrutiny, where the government action might still be justified by a compelling government interest. *See Sherbert*, 374 U.S. at 406. In contrast, there is no compelling interest analysis when the autonomy interest is infringed.

263. *Christian Legal Soc'y*, 130 S. Ct. at 2986.

with a nondiscrimination mandate, then the autonomy right would apply.[264] Similarly, if the issuance of a license, such as for a homeless shelter, were contingent on compliance with antidiscrimination requirements, it would be coercive in the case of a religious organization because the shelter would not be able to operate without the license. Although a religiously run homeless shelter can be made subject to reasonable health, safety, building, and land use requirements—just like any other homeless shelter[265]—the state cannot interfere in how the organization chooses its leadership.

On the other hand, the coercive effect is substantially less when compliance with nondiscrimination mandates is a requirement for participating in a government program that subsidizes a religious organization's mission. As mentioned above, predicating participation in a limited-public-forum on certain nondiscrimination requirements imposes only a modest burden on religion, especially under the circumstances described in *Christian Legal Society*.[266] This would also apply to a religious organization's participation in a state program that distributes funds for social services. Although forgoing the funds might place financial burdens on the organization's mission, it hardly coerces compliance with a nondiscrimination mandate. Religious organizations certainly have the right to be free of state interference with their internal affairs, but they do not necessarily have the right to government subsidies for their mission.

The above analysis simply suggests that a religious organization's ability to assert the autonomy interest recognized in *Hosanna-Tabor* turns not only on the status of an employee or lay leader, but also on the context in which an antidiscrimination mandate is imposed. To the extent that the mandate effectively precludes an organization from operating absent compliance, either because it constitutes a direct prohibition or substantially coerces compliance, then the autonomy interest can be asserted, assuming the other requirements are met. But, where coercive pressure is more modest, such as withholding a subsidy, then the autonomy interest does not apply. In

264. *See* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (discussing that if government cuts off fire and police protection, connections to sewage disposal, and other services to religious schools, it would make it difficult for the schools to operate).

265. *See* Marc-Olivier Langolis, *The Substantial Burden of Municipal Zoning: The Religious Freedom Restoration Act as a Means to Consistent Protection for Church-sponsored Homeless Shelters and Soup Kitchens*, 4 WM. & MARY BILL RTS. J. 1259, 1280–84 (1996) (discussing types of permissible restrictions on church-sponsored homeless shelters).

266. *Christian Legal Soc'y*, 130 S. Ct. at 2990–92.

such situations any antidiscrimination mandate poses little threat to a religious organization's autonomy over its internal affairs affecting doctrine, governance, and mission, since the organization can simply choose to forgo the subsidy and still pursue its mission free of government interference.

Conclusion

The Supreme Court's recent decision in *Hosanna-Tabor*, in which it recognized a "ministerial exception" under the Religion Clauses to antidiscrimination laws, marks an important, though limited, development in protecting religious rights. Prior to *Hosanna-Tabor*, the Court had increasingly resorted to a neutrality paradigm in resolving religion issues under the First Amendment. Although the focus on neutrality frequently protected religious interests, particularly under the Free Speech and Establishment Clauses, it also failed to accommodate religious interests when they were burdened under neutral laws. As such, religious interests were increasingly vulnerable to government interference from general laws, even if the laws potentially interfered with core beliefs and mission.

In *Hosanna-Tabor*, however, the Court essentially found that the Religion Clauses create a sphere of autonomy for religious organizations in which they are free from government interference, even from neutral laws. This does not insulate religious organizations from all government regulation; far from it. But, it should give religious organizations autonomy over issues that relate to governance and the formation of doctrine, faith, and mission. Thus, although the Court in *Hosanna-Tabor* was careful to limit its holding to the immediate facts of the case, the underlying concerns that religious organizations be free of government interference over matters of faith, doctrine and mission suggest a more expansive understanding of what the autonomy interest might include. In this respect, courts should apply a functional approach to the ministerial exception itself, applying it to any employee who has significant responsibilities relevant to a religious organization's faith and mission. Moreover, the exception should also include lay leaders of religious organizations and to membership issues, since both impact faith and mission.

Finally, the autonomy interest is best understood not as displacing the Court's prevailing neutrality paradigm, but as limiting it. For that reason, neutrality will still be the primary standard for determining religious speech rights and Establishment Clause issues,

as well as the basis for many Free Exercise issues. This will be true even where antidiscrimination mandates are required as part of a government-subsidized forum. But, where antidiscrimination mandates act as a direct prohibition or exert substantial coercive pressure to forgo the right to control the selection of ministers, lay leaders, and members, then the autonomy interest should insulate religious groups from such interference.

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