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Should the Ministerial Exception Apply to Functions, Not Persons?

ABSTRACT. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court confirmed what the lower courts had been saying for some time: the First Amendment prohibits the application of the employment discrimination laws to the relationship between a church and its ministers. Despite *Hosanna-Tabor*'s significance, however, the so-called ministerial exception remains in flux. For one thing, it is still unclear who will be deemed a "minister" for purposes of the doctrine. The answer to that foundational question may be more complicated than it appears. Thus far, courts and commentators have assumed that ministerial status is binary; a given employee either is a minister (in which case the First Amendment completely bars her suit) or she is not (in which case her suit proceeds like any other). That way of thinking may make sense for the easy cases, but it fits uneasily with the wide range of positions that have been labeled ministerial by the lower courts. This Note accordingly suggests an alternative framework that more closely tracks the functional considerations that underlie the ministerial exception. In short, it argues that a revised exception—one that applies to ministerial functions, not ministerial persons—better strikes the balance between antidiscrimination values and religious liberty that the First Amendment requires.

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INTRODUCTION

Last year, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court held that the First Amendment bars ministers from suing their religious employers under the employment discrimination laws.[1] Applying these laws to the ministerial employment relationship, the Court reasoned, would impermissibly infringe upon churches' freedom to select their representatives and control their internal affairs. The Court thus adopted the conclusion, widespread in the courts of appeals, that the First Amendment requires a "ministerial exception." In Chief Justice Roberts's words:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.[2]

The Chief Justice's conclusion remains controversial,[3] but this Note does not challenge its basic thrust—that the government cannot interfere in a church's selection of those who will carry out its religious mission. Rather, it considers whether *Hosanna-Tabor*, and the ministerial exception cases more generally, can fit into a refined analytical framework that better strikes the balance that the Supreme Court (rightly or wrongly) thinks the First Amendment requires.

The gist of my proposal is this: *Hosanna-Tabor* seems to treat the threshold question whether an employee is a minister—an inquiry that I call the *ministerial determination*—as an all-or-nothing proposition. A given plaintiff either is a minister, in which case the Constitution wholly bars her lawsuit, or she is not, in which case her suit proceeds like any other. That way of framing the inquiry might be plausible for the ministerial exception's core cases: ministers, rabbis, imams, and other "pastors of congregations who are the

1. 132 S. Ct. 694 (2012).

2. *Id.* at 710.

3. For some recent criticisms, see Frederick Mark Gedicks, *Ironies of* Hosanna-Tabor, 64 MERCER L. REV. (forthcoming 2013); and Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. (forthcoming 2013). *See generally* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 4 n.6 (2011) (collecting pre-*Hosanna-Tabor* scholarship critical of the ministerial exception).

most obvious referent for 'minister.'"[4] The ministerial exception has come to apply to a much wider set of employees than paradigmatic ministers, however,[5] and here an all-or-nothing framework is less compelling. After all, courts generally agree that, in these latter cases, the ministerial determination turns not on the formalistic fact that a given employee *is* a minister, but on the functional fact that she *acts* ministerially. Yet how one acts, as opposed to what one is, is not necessarily all-or-nothing. Indeed, because the same employee may act ministerially in one context and nonministerially in another, it might be more appropriate to conceptualize the ministerial exception as a partial bar instead of a total one.

Put another way, in at least some cases, it might make sense to think of the ministerial exception as protecting a church's relationship with, and control over, particular functions, not particular persons. On this view, the exception would continue to foreclose those aspects of an employment discrimination suit that implicate an employee's religious job functions. But it would permit the same employees to proceed with a lawsuit that is cabined to their secular capacities.

Although Walter Dellinger, who argued *Hosanna-Tabor* on behalf of the respondent, has hinted in this direction, no court or commentator, to my knowledge, has proposed this sort of framework.[6] That is unfortunate. A ministerial exception that focuses on religious functions, not religious persons, could enable courts to further society's "undoubtedly important" interest in enforcing antidiscrimination laws while still fully vindicating the religious

4. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 848 (2012).

5. *See id.* ("The results are not entirely uniform, but all the circuits agree that the rule is not confined to pastors of congregations.").

6. After the oral argument in *Hosanna-Tabor*, Dellinger remarked at the Federalist Society's National Lawyers Convention that a priest serving as a basketball coach in a church league might merit reinstatement of or compensation for those coaching duties if the church dismissed him as a minister for illegal reasons. *See Religious Liberties: The Ministerial Exception Case:* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, FEDERALIST SOC'Y 49:35 (Nov. 11, 2011), http://www.fed-soc.org/publications/detail/the-ministerial-exception-case-hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-event-audiovideo. Moreover, Dellinger's brief can be read to suggest a similar distinction between status and function, although the idea appeared in the Proceedings Below section and was not developed in the Argument. *See* Brief for Respondent Cheryl Perich at 15, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 3380507 at *15 (noting that Perich "did not seek reinstitution of her religious status," only of her teaching duties).

rights protected by the First Amendment.[7] This Note offers a justification for that approach.

I. THE MINISTERIAL EXCEPTION AFTER *HOSANNA-TABOR*

The ministerial exception emerged in 1972, when the Fifth Circuit held that a Salvation Army minister could not sue her employer under Title VII of the Civil Rights Act.[8] Ministers, the Fifth Circuit explained, are a church's "lifeblood," "the chief instrument by which the church seeks to fulfill its purpose."[9] Applying antidiscrimination laws to the ministerial relationship thus threatened the church's control over "matters of a singular ecclesiastical concern," and also risked entangling the courts in religious disputes, "produc[ing] . . . the very opposite of that separation of church and [s]tate contemplated by the First Amendment."[10] Faced with these two worries, the court invoked the doctrine of constitutional avoidance to conclude that Congress did not intend to bring ministers within the scope of Title VII.[11]

This conclusion gained widespread approval. In the following years, every circuit court that faced the question similarly refused to extend the antidiscrimination laws to cover the employment relationship between a church and its ministers.[12] As the doctrine developed, however, its "ministerial" adjective proved to be something of a misnomer. The First Amendment, courts held, protected churches' freedom to hire and fire a much broader range of employees than just paradigmatic ministers.[13]

These decisions made it necessary to find principles to determine whether a given religious employee would be covered by the exception or not. Approaches varied by circuit, but most converged on a so-called primary duties test, which asked whether an employee's "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or

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

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

9. *Id.* at 558-59.

10. *Id.* at 560.

11. *Id.* at 560-61.

12. *See Hosanna-Tabor*, 132 S. Ct. at 705 n.2 (collecting cases).

13. *See* Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) ("[T]he ministers exception is better termed the 'internal affairs' doctrine; 'ministers exception' is too narrow . . . .") (citation omitted).

supervision or participation in religious ritual and worship."[14] In the words of one court, "Our inquiry . . . focuses on the 'function of the position' at issue and not on categorical notions of who is or is not a 'minister.'"[15] Other circuits looked to factors like formal religious training or religious job qualifications in addition to job function.[16] Still others made the ministerial determination on a loosely structured, case-by-case basis.[17] Whatever their precise test, however, courts began to apply the ministerial exception to a variety of employees who were not formally ordained and whose duties might not strike the casual observer as particularly ministerial: a university professor of canon law,[18] a church music director,[19] a press secretary,[20] and so forth.

After percolating for forty years, the ministerial exception finally reached the Supreme Court in *Hosanna-Tabor*.[21] The case involved a teacher, Cheryl Perich, who worked at a Lutheran elementary school. Perich claimed that the school discriminated against her after she was diagnosed with narcolepsy.[22] When she threatened to sue, she was fired, and the Equal Employment Opportunity Commission brought a retaliation claim on her behalf. The church claimed that it terminated Perich because she violated its religious tenet that adherents should resolve all disputes within the church, but it also sought to apply the ministerial exception to bar Perich from invoking the employment discrimination laws (here, the Americans with Disabilities Act) in the first place.[23]

14. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)). A helpful discussion of the test can be found in Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776 (2008).

15. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) (quoting *Rayburn*, 772 F.2d at 1168) (emphasis added).

16. *E.g.*, Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999). Note, however, that the difference between this test and the primary duties test may not have been all that great in practice; the *Starkman* court felt that the functional prong of its test was "probably [the] most important." *Id.*

17. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243-44 (10th Cir. 2010).

18. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996).

19. *Starkman*, 198 F.3d at 177.

20. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003).

21. 132 S. Ct. 694 (2012).

22. *Id.* at 700.

23. *Id.* at 701.

Perich's suit posed a genuinely tricky case in terms of the ministerial determination. On the one hand, from a functional perspective, her job looked predominantly secular. Parochial teachers at the Hosanna-Tabor school spent most of the day teaching secular subjects like English and music. She also taught a religion class for about forty minutes a day, led her class in short prayers three times a day, and organized chapel services a few times a year.[24] Outside of these activities, Perich stated that, although she was free to "bring God . . . into the classroom" when teaching secular subjects, she hardly ever did so.

On the other hand, Perich's formal status had definite religious overtones. Hosanna-Tabor employed two classes of teachers: called teachers, who had to complete a course of religious study and receive the endorsement of the local Lutheran synod, and contract teachers, who were hired when called teachers were not available.[25] Perich initially worked as a contract teacher before receiving her religious credentials—her diploma designated her a "Minister of Religion"—and receiving her call. As a called teacher she enjoyed open-ended tenure and received beneficial tax treatment. However, the legal import of these factors was disputed, because the contract teachers—who did not need religious training, or even to be Lutheran—performed exactly the same duties at the school as the called teachers.[26]

The court of appeals had applied a primary duties analysis below. Instead of treating Perich's title as determinative, it noted that almost ninety percent of a called teacher's day was devoted to teaching secular subjects, and it underscored that the contract teachers and called teachers were functionally identical. Hence, the court concluded, Perich's primary duties were not religious, and so she was not a minister for the purposes of the ministerial exception.[27]

The Supreme Court unanimously reversed.[28] Although the Court was sure that Perich was a minister, however, the rationale behind its determination was remarkably vague. Instead of a categorical rule, the Court offered up only a hodgepodge of factors—Perich's title ("Minister of Religion"), the substance that title reflected, her use of the title, and her religious duties—without explaining how these elements should be weighed or whether they were

24. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

25. *Id.*

26. *Id.* at 772.

27. *Id.* at 779-81.

28. *Hosanna-Tabor*, 132 S. Ct. at 694.

exhaustive.[29] "We are reluctant," Chief Justice Roberts admitted, "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."[30]

In addition, the Court pointed out three specific ways in which the court of appeals had erred. First, the lower court failed to treat Perich's title as relevant, although the Court agreed that it should not be dispositive. Second, it placed too much emphasis on the fact that lay teachers performed the same religious duties as their called counterparts, especially because the Church used lay teachers only when called teachers were not available. Third, the court of appeals wrongly focused on the relative amount of time Perich spent engaged in religious versus secular activities. "The issue before us," Chief Justice Roberts wrote, "is not one that can be resolved by a stopwatch."[31]

Two concurrences offered more detailed approaches to the ministerial determination. Justice Alito, joined by Justice Kagan, proposed that the definition of "minister" be tailored to the exception's purpose: permitting churches to freely engage in "key religious activities" like worship or communicating to the faithful.[32] Given the diversity of religious practice, Justice Alito argued, "it would be a mistake if the term 'minister' . . . were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies."[33]

Justice Thomas, by contrast, would have largely dispensed with any independent analysis of Perich's status at all. He felt that any judicial attempt to give substance to the term "minister" would inevitably exert pressure on religious institutions, who might feel compelled to "conform [their] beliefs and practices . . . to the prevailing secular understanding."[34] The only way to truly protect religious autonomy was to let churches determine ministerial status in the first instance. Accordingly, Justice Thomas would have deferred to the

29. *Id.* at 708.

30. *Id.* at 707-08.

31. *Id.* at 709.

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

33. *Id.* Justice Alito's test seems of a piece with the primary duties test, although for him the employee's religious duties did not have to be "primary," only "important" or "substantial." *See id.* at 715 ("What matters is that respondent played an *important* role as an instrument of her church's religious message and as a leader of its worship activities." (emphasis added)).

34. *Id.* at 711 (Thomas, J., concurring).

"religious organization's good-faith understanding of who qualifies as its minister."[35]

Hosanna-Tabor put the Supreme Court's imprimatur on the ministerial exception, doubtless an important victory for proponents of religious liberty. As the preceding discussion underscores, however, it hardly clarified how and why the exception would apply to individual, concrete cases.[36] The Court's failure to propound a reasoned framework for the ministerial determination suggests that the law is in more flux than a cursory look at the opinion indicates.[37] Indeed, the decision practically invites discussion about the best way to put its underlying principles into practice.

II. AN ALTERNATIVE APPROACH TO MINISTERIAL STATUS

In that spirit, consider the following hypothetical: A church hires two siblings, John and Jane, to work as janitors in its facilities department. Six months into their tenure, the church asks Jane if she would consider playing the church organ for twenty hours a week, continuing as janitor part-time. She accepts. As organist, Jane regularly performs at church services under the supervision of the local pastor, but for the other twenty hours she continues to perform the same duties as her brother. Six more months pass, until the church suddenly fires both John and Jane on the same day and in an identical manner. Based on some overheard comments and circumstantial evidence, the siblings come to believe they were both fired on account of their race. After filing the appropriate notices with the EEOC, they sue.

What result? Under existing law, Jane will very likely be treated as a minister and will be constitutionally barred from challenging her dismissal in

35. *Id.* at 710.

36. This was a problem that commentators were quick to recognize. *E.g.*, Mark Strasser, *Making the Anomalous Even More Anomalous: On* Hosanna-Tabor*, the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL'Y & L. 1, 47 (2012) ("By listing all of these factors without assigning weights to them, the Court practically guarantees that cases involving relevantly similar plaintiffs will be decided differently in the future."); Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html ("[T]he majority opinion is quite vague on the contours of the ministerial exception it recognizes.").

37. *Cf.* Jack Balkin, *The "Absolute" Ministerial Exception*, BALKINIZATION (Jan. 13, 2012, 8:59 AM), http://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html (arguing that the unanimity in *Hosanna-Tabor* disguises several fault lines that will emerge in the coming years).

court.[38] John, on the other hand, will almost certainly be allowed to proceed with his lawsuit.[39]

Such an outcome strikes me as deeply unintuitive, in the following sense: it leads to entirely disparate treatment of two people who are, in important ways, similarly situated and similarly harmed. John's lawsuit goes forward because holding a church accountable for wrongful discrimination against a janitor does not "depriv[e] the church of control over the selection of those who will personify its beliefs."[40] But by hypothesis, Jane spends half of her day performing *exactly the same* duties as John. She sues under exactly the same statute, alleges exactly the same motivation for her termination, and seeks exactly the same remedies. Nevertheless, the ministerial exception bars her entire lawsuit, including that aspect that is conceptually identical to her brother's.

This disparity between siblings is a corollary to the unstated assumption that an employee suing the church must be characterized as either lay or ministerial for purposes of the exception, but not both. John and Jane receive wholly dissimilar treatment even though they are partially similarly situated because Jane (by virtue of her organ playing) simply *is* a minister, and ministers cannot sue their employers—full stop. Call this the *unitary approach* to the ministerial determination.

This kind of essentialism perhaps makes sense in the core ministerial exception cases. But it is not so clear that the unitary framework fits the circumstances of employees like Jane. As Justice Alito pointed out in his *Hosanna-Tabor* concurrence, in most cases where the ministerial determination is actually contested, the crux of the dispute will not be about status (i.e., whether a given employee is or is not a minister). Rather, it will be about function (i.e., whether an employee acts or does not act ministerially).[41] And from a functional perspective, the rigid classification demanded by the unitary approach is much harder to justify.

38. *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) (holding that a suit by a church organist against his employer was barred by the ministerial exception); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988) (same). None of the three approaches advanced in *Hosanna-Tabor* would seem to alter this analysis.

39. *See* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 795 (9th Cir. 2005) (Kozinski, J., concurring in the denial of rehearing en banc) (noting that a church janitor could bring a harassment claim where a minister could not); *see also Tomic*, 442 F.3d at 1039 (concluding that, absent bona fide religious duties, suits by janitors are not barred by the ministerial exception); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) (same).

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

41. *See id.* at 711 (Alito, J., concurring).

Consider that, as one of the ministerial exception's defenders has noted, usually "[t]he religious significance of a position is a continuous variable, not a dichotomous one—whether someone is a minister is less of a 'yes/no' question and more of a 'how much' question."[42] Indeed, Jane acts very much the minister when she is playing the organ before a roomful of congregants, not so when she is working alongside her brother in her janitor's cap. Given the facts as I have described them, it seems odd to say Jane "is" or "is not" a minister, at least in the same sense that a priest or a rabbi is. Instead, I think it is more accurate to say she is somewhere in between; rather than one or the other, she is both.

This basic insight—that the same employee can function ministerially at one moment, but nonministerially the next—suggests an alternative framework for the ministerial determination that I call the *blended approach*. Unlike the unitary approach, the blended approach avoids the problem of characterizing a religious employee as wholly lay or wholly ecclesiastical by treating ministerial status as just one aspect of the bond between a church and its employee (albeit a very important one). Even though the ministerial aspect may be more or less salient depending on the circumstances, it need not fully describe the employment relationship. When the employee is performing secular functions, she may stand in a very different relationship with the church, to which the concerns that drive the ministerial exception apply weakly, if at all.

Some may object that applying the blended approach to core ministers—the "most obvious referent[s]" referred to in the Introduction[43]—is misguided. Many of these religious leaders, after all, are not ministerial because of what they do; their day-to-day activities may very well be predominantly logistical or managerial.[44] Instead, they are ministerial because of who they are; namely, representatives selected to head their congregations. Such "leaders and spokespersons for the faith" concededly occupy a special role in "each faith community's continuing vision."[45] Indeed, the Supreme Court's pre-*Hosanna-Tabor* cases on religious autonomy showed special concern

42. Lund, *supra* note 3, at 64.

43. *See supra* note 4 and accompanying text.

44. *Cf.* Michael W. McConnell, Op-Ed, *Washington Wants a Say over Your Minister*, WALL ST. J., Oct. 5, 2011, http://online.wsj.com/article/SB10001424052970204138204576603221206193838.html ("Every church officer—even the pope—performs at least some nonreligious administrative duties.").

45. Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1809.

toward government interference with matters of church leadership.[46] One way to alleviate this concern may be to reframe the blended approach as a two-step inquiry. First, the court asks whether the employee is a minister as a formal matter, relying on objective indicia like ordination and religious leadership. If she is, the ministerial exception applies wholesale, and the court should dismiss the case. But if not, the court proceeds to a functional analysis. Importantly, however, in this second step the court does not quit once it identifies a religious function (or whatever quantum of religious functions is thought necessary to transubstantiate a secular employee into a ministerial one). Instead, it considers whether it is possible to characterize the employee's complaint solely in secular terms.

Cashing out the blended approach in practice requires a great deal more work, to be sure. What is really needed is a satisfactory way to disaggregate an employee's secular functions from her religious ones, and to do so in a way that preserves a meaningful legal claim. This should be relatively straightforward where the employee is seeking a purely monetary remedy. Return to the example of Jane: she earned some portion of her salary for her janitorial work, and it is easy enough to calculate this secular portion based on market rates, or with reference to other janitors hired by the church. If the court found that the church had terminated Jane for an unlawful reason, it would order the church to pay only that portion of front or back pay attributable to her work as a janitor. Importantly, the church would face no liability whatsoever for back pay related to Jane's duties as an organist.[47] From the perspective of the blended approach, such a remedy would not "operate as a penalty . . . for terminating an unwanted minister"[48] because Jane was not a minister (or, more accurately, was not acting ministerially) in that aspect of her job. Any "penalty" the church suffered would be functionally indistinguishable from the penalty imposed for wrongfully terminating a pure janitor, like Jane's brother, John.

If Jane is seeking reinstatement, on the other hand, matters are more complicated. Even under the blended approach, a court could not constitutionally order the church to allow Jane to continue playing the organ; the ministerial exception applies to these duties with full force. If Jane cannot

46. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929).

47. This approach accords with courts' broad, flexible powers to remedy unlawful discrimination to the greatest extent possible. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976) ("[F]ederal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole *insofar as possible* the victims of racial discrimination in hiring." (emphasis added)).

48. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

be reinstated to that portion of her job, does it make sense to speak of reinstatement at all? One possibility is that Jane could be restored solely to her janitorial duties.[49] This presents obvious problems, however. In the first place, hiring and firing decisions are usually made at the level of the individual employee, not the individual function. The church might have decided to employ Jane as a part-time minister, part-time organist precisely because it cannot afford, or does not wish, to hire separate employees to perform each function. Partial reinstatement could thus be a significant economic burden on the church.

In addition to economic burdens, the possibility of reinstatement raises its own associational concerns. In the words of one scholar, "court-ordered reinstatement . . . would require the religious entity to tolerate not just a member, but a minister or other core employee, whom the church feels obliged to expel from its circle."[50] Of course, if Jane only resumed her janitorial duties, the church would not have to tolerate her as "a minister or other core employee." It would merely have to tolerate her as it would tolerate any other nonministerial worker who, but for the employment laws, it would prefer not to affiliate with. Still, the fact that Jane previously performed spiritually important duties makes it uncomfortable at best to force the church to readmit her to its circle. For these reasons, partial reinstatement will probably always raise thorny questions, and will probably be foreclosed even on a blended approach.[51]

All this assumes, of course, that Jane has actually shown that the church relied on an illegitimate reason for its employment decision.[52] Most likely, the employer will respond by claiming that it acted for a legitimate reason. In church-employee disputes, this reason will often be religious; indeed, Title VII permits religious institutions to discriminate against employees on the basis of religion.[53] (Churches still remain liable for adverse employment actions taken

49. *Cf.* Barnes v. Bosley, 828 F.2d 1253, 1259 (8th Cir. 1987) ("[A]n employer may comply with an order to reinstate a wrongfully discharged employee whose former position is no longer available by reinstating the employee in a comparable or substantially similar position.").

50. Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 119 (2009) (internal quotation marks and alterations omitted).

51. In addition, courts frequently refuse to reinstate terminated employees where the workplace relationship has deteriorated beyond repair. *See, e.g.*, Palasota v. Haggar Clothing Co., 499 F.3d 474, 489-90 (5th Cir. 2007). That rationale is only enhanced by the constitutional concerns in the religious employer context.

52. *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2010-12 (2007) (providing a procedural overview of Title VII claims).

53. *See* 42 U.S.C. § 2000e-1(a) (2006).

on account of other unlawful factors like race or gender—hence the need for a constitutional doctrine like the ministerial exception.) Resolving disputed motive questions without wading into religious territory is a difficult task, although there are reasons to think that secular courts can muddle through.[54] In any event, the important point for these purposes is that religious employees should not be treated differently, with respect to their secular functions, than purely secular employees. True, *Hosanna-Tabor* made clear that the ministerial exception applies regardless of the real reason behind an adverse employment action.[55] But where the exception does *not* apply, Jane should get the same opportunity as John to prove pretext. Ultimately, as the Supreme Court has itself observed, the government "violates no constitutional rights by merely investigating the circumstances of [a religious employee's termination], if only to ascertain whether the ascribed religious-based reason was in fact the reason for discharge."[56]

Outside of hypotheticals, it will admittedly be the rare employee who, like Jane, performs two starkly different functions for her church. Yet I think real world cases are amenable to a blended approach, too. These disputes are intensely fact bound, so generalization is difficult, but we can at least sketch out some possibilities. Take Cheryl Perich as an example. Recall that Perich was only seeking monetary remedies, not reinstatement.[57] Even so, the Court thought that awarding these remedies "would operate as a penalty on the Church for terminating an unwanted minister . . . . Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved Perich of her position, and it is precisely such a ruling that is barred by the ministerial exception."[58] As I have argued, however, a court does not necessarily penalize a

54. *Compare* Corbin, *supra* note 52, at 2013-28 (suggesting that the risk that courts will substitute their judgment on religious matters is low), *with* Patrick J. Shiltz & Douglas Laycock, *Employment in Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 527, 544-49 (James A. Serritella et al. eds., 2006) (arguing that secular courts are ill suited to resolve these sorts of disputes). Title VII suits may also proceed on a mixed-motive theory, alleging that the church acted for impermissible reasons "even though other [permissible] factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2006). I suspect that constitutional concerns would preclude mixed-motive liability even under the blended approach, although I do not attempt to fully explore that question here.

55. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) ("The . . . suggest[ion] that Hosanna-Tabor's asserted religious reason for firing Perich . . . was pretextual . . . misses the point of the ministerial exception.").

56. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

57. *See* Brief for Respondent Cheryl Perich, *supra* note 6, at 15.

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

church for terminating a minister merely because the employee who is suing exercised some ministerial duties. On the blended approach, one must ask the further question whether the alleged violation and corresponding relief necessarily implicate the ministerial aspect of the relationship.

Cheryl Perich probably looked very ministerial indeed when she was sermonizing at chapel services twice a year. But she looked much less so during those hours of the day when she was "teaching secular subjects, using secular textbooks, without incorporating religion into the secular material."[59] Following Jane's example, a court might try to partition her day into these secular and ministerial components (roughly 90/10)[60] and award relief only for the harm she suffered for the latter. This outcome might seem to run headlong into Chief Justice Roberts's admonition that ministerial status cannot "be resolved by a stopwatch."[61] But while this rule may make sense in the unitary framework, it is out of place in the blended approach; *when* an employee acts ministerially is as important as *whether* they do.[62]

The formal indicia of Perich's ministry raise a further wrinkle. Her call required religious training, gave her access to special benefits, and marked her as part of a spiritual community. Surely, even on a blended view, it would be wrong not to recognize her status. Yet while it may be true that Perich's call supplemented her preexisting relationship with Hosanna-Tabor, it did not supplant it (particularly because, from a functional perspective, Perich's duties did not change at all).[63] The fact that Perich is different from a contract teacher in some respects does not mean that the church should be free to discriminate

59. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

60. *See id.* at 772 ("In all, activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.").

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

62. Tax law provides a useful analogue here. In *United States v. American Bar Endowment*, 477 U.S. 105, 117 (1986), the Supreme Court held that "[a] taxpayer may . . . claim a deduction for the difference between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the 'dual character' of a purchase and a contribution." Apportioning back pay between Perich's lay and ministerial functions tracks the same intuition. She is, so to speak, a "dual character" employee; the church has "purchased" her (secular, market-value labor) but also engaged her (religious, non-market) services. The church should not be wholly immunized from liability with respect to the former just because it has a legitimate claim to autonomy over the latter.

63. In this sense, the blended approach treats functional equivalence just as the Court demanded—as relevant to, though not dispositive of, the ministerial determination. *See Hosanna-Tabor*, 132 S. Ct. at 708 ("[T]hough relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when . . . they did so only because commissioned ministers were unavailable.").

against her in other respects. That, at least, is the motivation behind the blended approach.[64]

For another example, consider a recent ministerial exception case in the Seventh Circuit, *Schleicher v. Salvation Army*.[65] *Schleicher* involved a suit brought by two ministers who managed the Salvation Army's Adult Rehabilitation Center in Indianapolis, alleging that their approximately $150 weekly allowance violated federal minimum wage laws. An evidentiary hearing by the trial court determined that the Schleichers were responsible for twenty-one "Essential Duties/Responsibilities," including annual budgeting, supervising the acquisition of products, supervising upgrades and maintenance of property, and managing warehouse activities. When the Salvation Army refused to hire lay staff members because no money was available, moreover, the Schleichers were expected to take over the duties that the lay staff would have performed.[66]

The court held that the ministerial exception barred the plaintiffs' suit.[67] It emphasized that "[t]he function of the Salvation Army ministers who administer the Adult Rehabilitation Centers is not to wait on customers . . . or manage one or more of the stores on a day to day basis; it is to manage a religious complex that includes thrift shops."[68] Again, the blended approach would suggest a different outcome. A number of the Schleichers' responsibilities directly involved church administration, and it might well have interfered with the Salvation Army's First Amendment rights to require them to pay a minimum wage for those duties. But others—particularly those that were normally performed by lay employees—were purely secular. Indeed, lay employees, when performing those same duties, concededly qualified for the

64. In criticizing Walter Dellinger's remarks to the Federalist Society, *see supra* note 6, Douglas Laycock pointed out that treating Perich as a contract teacher would significantly reduce her damages in a second way. Unlike called teachers, contract teachers were hired on annual contracts and could be dismissed at the end of the school year. Thus, Perich would be unable to claim damages past her current year of employment. *See Religious Liberties: The Ministerial Exception Case*, *supra* note 6, at 1:04. That is certainly true, but it does not undermine my point. A called teacher should not be able to get more compensation for wrongful termination than a contract teacher, but by the same token, nor should she receive less.

65. 518 F.3d 472 (7th Cir. 2008).

66. *See* Brief and Required Short Appendix of Plaintiff-Appellants at 4, *Schleicher*, 518 F.3d 472 (No. 07-1333), 2007 WL 1766552.

67. *Schleicher*, 518 F.3d at 478. I should note that the court treated the exception as "a rule of interpretation, not a constitutional rule." *Id.* at 475. That gloss is no longer viable after *Hosanna-Tabor*, but the substance of the court's analysis did not turn on this distinction.

68. *Id.* at 477.

minimum wage.[69] Insofar as the Schleichers' claim could be reframed to cover only the time they spent performing these latter duties, their suit should have been allowed to proceed.

III. SQUARING THE BLENDED APPROACH WITH THE FIRST AMENDMENT

Some number of church employees—not all, but some—may be able to bring discrimination claims that can be partially accommodated under the blended approach, but that would be wholly barred under the unitary one. In the words of the Ninth Circuit, "the scope of the ministerial exception . . . is limited to what is *necessary* to comply with the First Amendment."[70] Each time such an employee loses or is dissuaded from litigating because of a unitary exception, therefore, the legal system will have needlessly sacrificed the "undoubtedly important"[71] enforcement of employment discrimination statutes without any corresponding benefit in terms of religious freedom.

One immediate objection is worth pausing to consider: churches, we might think, hire, fire, and relate to individual persons, not individual functions. Applying the ministerial exception piecemeal thus makes a hash of the church-minister relationship. It is myopic reductionism, the kind that misses the forest for the trees. This argument has rhetorical appeal, but it overstates the problem. The blended approach does not demand that one view an employment relationship *solely* in terms of its constituent functions. It requires only that, for constitutional purposes, the scope of church immunity should track the functional concerns that underlie the ministerial exception in the first place.

This objection also ignores other domains in which employment law distinguishes between the various functions performed by individual employees. The Americans with Disabilities Act (ADA), for instance, limits coverage to discrimination against a "qualified individual," a term it defines to mean "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires."[72] Administrative regulations list multiple

69. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (applying the Fair Labor Standards Act to associates of a nonprofit religious organization).

70. Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999) (emphasis added).

71. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

72. 42 U.S.C. § 12111(8) (2006) (emphasis added).

factors that can inform a finding that a particular function is essential, such as the employer's judgment or the amount of time spent performing the function.[73] The ADA plainly contemplates an employment relationship that is more fine-grained than the unitary approach I described above. Indeed, among the reasonable accommodations the statute may require an employer to take is "job restructuring."[74] None of this is to assert that Title VII lawsuits by ministers incorporate reasonable accommodation requirements from the ADA, of course. But the example does highlight that the concept of an employment relationship is more mutable, and less unitary, than it may seem at first glance.

Admittedly, no court has yet suggested a blended approach to the ministerial exception, and those that have skirted the edges do not seem positively inclined. For instance, Justice Alito argued in *Hosanna-Tabor* that "[w]hile a purely secular teacher would not qualify for the 'ministerial' exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones."[75] Similarly, faced with a claim by a chaplain at a church hospital, the Eighth Circuit reasoned, "It is without consequence that [the plaintiff] also may have performed many secular duties. She was not a secular employee who happened to perform some religious duties; she was a spiritual employee who also performed some secular duties."[76]

I do not see these conclusory objections as fatal, however. My claim is not that the blended approach is fully consistent with every bit of existing law, only that it is a better way to accommodate the important interests at stake. In any event, one must engage much more seriously with the principles animating the ministerial exception than these excerpts do before rejecting the proposal. It may be that there is more room for accommodation than first appears.

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73. *See* 29 C.F.R. § 1630.2(n) (2012).

74. 42 U.S.C. § 12111(9)(B).

75. *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito, J., concurring).

76. Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362 (8th Cir. 1991). In another case, the Ninth Circuit considered an employment claim by a seminarian whose training included a stint as a janitor. It barred the claim because his

> employment was not part seminarian, part secular—it was all part of his seminary training, for which he was paid a comprehensive weekly wage. That some of his duties may have encompassed secular activities is of no consequence. A church may well assign secular duties to an aspiring member of the clergy, either to promote a spiritual value . . . or to promote its religious mission in some material way. The ministerial exception applies notwithstanding the assignment of some secular responsibilities.

Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1293 (9th Cir. 2010) (en banc).

The Supreme Court adopted the ministerial exception because "[r]equiring 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 . . . depriv[es] the church of control over the selection of those who will personify its beliefs."[77] It is therefore important to emphasize that the blended approach does not directly infringe on this control. Because the church is immune from liability whenever it acts with respect to its employees' religious functions, the blended approach leaves religious groups completely free to decide for themselves "who will *preach* their beliefs, *teach* their faith, and *carry out* their mission."[78] A church can take away Perich's call or replace the Schleichers with other administrators for a religious reason, a nonreligious reason, or no reason at all. It remains the case that "the authority to select and control who will minister to the faithful . . . is the church's alone."[79]

Of course, government regulation can and does affect the way that churches behave even when it does not mandate or prohibit behavior directly. But the government imposes myriad restrictions on religious institutions consistent with the Constitution. "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws" do not violate the First Amendment, even though they undeniably impose costs on churches that might wish to structure their internal affairs in a manner prohibited by these laws.[80] Nor are churches exempt from employment laws in general:

> The First Amendment protects a church's right to hire, fire, promote, and assign duties to its ministers as it sees fit not because churches are exempt from all employment regulations . . . but rather because judicial review of those particular employment actions would interfere with rights guaranteed by the First Amendment.[81]

It is not enough, therefore, simply to object that a blended exception would have *some* inhibiting effect on churches. It will—just as antidiscrimination laws applied to nonministerial employees will have an effect. Instead, the central question must be whether these indirect pressures are so great as to be incompatible with the principles underlying the ministerial exception. I think

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

78. *Id.* at 710 (emphasis added).

79. *Id.* at 709.

80. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

81. Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 792-93 (9th Cir. 2005) (W. Fletcher, J., concurring in the denial of rehearing en banc).

there are three main sources of concern here, but on examination none of them are dispositive.

First, one might worry that the blended approach will unacceptably chill a church's freedom to select and terminate its ministers. Currently, a church that wishes to terminate a ministerial employee faces only minimal litigation risk.[82] A blended exception raises that risk by permitting some ministerial employees to sue in their secular capacities. Faced with potentially significant costs to defend against this lawsuit, however, the church may simply decide not to fire the employee in the first place. Indeed, the Supreme Court has previously recognized that "[f]ear of potential liability [for employment discrimination] might affect the way an organization carried out what it understood to be its religious mission."[83]

However, as one court of appeals judge has convincingly explained, the possibility that a church will be chilled in its hiring or firing decisions is not itself a reason to mandate constitutional immunity from suit: "Suits by . . . non-ministerial employees resting on generally applicable law are just as likely (if not more likely . . .) to affect the incentives to hire, fire and supervise ministers as suits by clergy."[84] For example, a church that wants to hire a minister with a known proclivity for making sexist remarks runs the risk that one of its nonministerial employees will bring a sexual harassment suit. The result may be that the church decides to hire someone else—someone who it would not have chosen if it did not face the risk of being sued—but no one would say that the outcome violates the First Amendment.[85]

82. But not zero litigation risk. The Supreme Court made clear in *Hosanna-Tabor* that the ministerial exception functioned as a defense on the merits, not a jurisdictional bar. *Hosanna-Tabor*, 132 S. Ct. at 709 n.4. Thus, churches looking to fire ministers still face some nonnegligible uncertainty over legal costs related to what Howard Wasserman calls "jurisdictional discovery." Howard M. Wasserman, Essay, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 314 (2012), http://www.pennumbra.com/essays/02-2012/Wasserman.pdf.

83. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987); *see also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) ("There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.").

84. *Elvig*, 397 F.3d at 795 (Kozinski, J., concurring in the denial of rehearing en banc).

85. Indeed, the *Hosanna-Tabor* Court expressly declined to decide whether ministerial employees themselves could bring "actions . . . alleging . . . tortious conduct by their religious employers" so long as the gravamen of the complaint was not rooted in the antidiscrimination laws. 132 S. Ct. at 710. For more on this point, see Mark L. Movsesian,

Second, one may find it awkward to force the church to litigate an employment discrimination claim cabined to an employee's secular function, since the lawsuit may taint the church's decision with respect to the employee's religious role, too. That is, even though a court judgment would only purport to remedy discrimination an employee suffered in her secular capacity, it would probably signal that the church acted for illegitimate reasons with respect to the employee's religious duties, too. A church can protect itself from this insinuation by limiting its employment actions to religious functions; so long as it does not act against its employees in their secular capacities, the blended approach will have nothing to say about the decision. More importantly, though, the church has no constitutional right to prevent third parties from making inferences about its true motives in making employment decisions. Whether or not churches receive legal immunity for discrimination against ministers, they are important members of our polity, and their actions ought to be subject to public criticism.[86]

Finally, one might think that a blended approach deprives the church of control over its internal affairs because once an employee performs ministerial duties, all of her actions become expressively affiliated with the church itself. If the church has lost confidence in the minister, for whatever reason, it cannot be forced to maintain an employment relationship. At most, though, this worry might bar reinstatement under the blended approach, as I have already discussed. I do not see how the expressive harm to the church is any different if it must pay a wrongfully terminated janitor than if it must pay a proportionate amount to a wrongfully terminated janitor who also performed ministerial functions.

Besides these particular concerns, I suspect my argument will elicit a more generalized skepticism that, even if the blended approach can be harmonized with *Hosanna-Tabor* and the other religious autonomy cases, the game may simply not be worth the candle. Asking courts to get involved in this area is asking for trouble; what is needed are clear, bright lines and high walls between church and state.[87] The criticism assumes the current unitary

Clergy Libel Suits and the Limits of Hosanna-Tabor, CENTER FOR L. & RELIGION F. (Sept. 24, 2012), http://clrforum.org/2012/09/24/clergy-libel-suits-and-the-limits-of-hosanna-tabor.

86. For a thoughtful take on a church's responsibilities separate and apart from the question of legal liability, see Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012).

87. *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Spaces Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 962-63, 970 (1985) (arguing that, for religion and other constitutional domains, "[c]lear, clean—and quite possibly overinclusive—rules are the price of a secure culture of religious freedom"). This sort of view, I think, fairly represents Justice Thomas's position in *Hosanna-Tabor*.

approach fares better on this criterion, a point that I think is far from obvious.[88] In part because the law surrounding the ministerial determination remains so hazy after *Hosanna-Tabor*, the unitary approach has not yet proved a model of clarity.[89] Moreover, with the possible exception of Justice Thomas's deferential test, a court making the ministerial determination must have some extrinsic definition of a minister in mind, guaranteeing at least some entanglement with religious questions.[90]

More fundamentally, under the unitary approach, the judge makes an overarching inquiry into the totality of the employee's job functions. Under the blended approach, the judge performs the same type of inquiry, just at a more fine-grained level of analysis. The only difference between the two approaches is the level of generality at which one applies the ministerial test. I see no reason why asking the court to make multiple functional determinations should be any more problematic than asking it to make one global functional determination, especially since both assessments are made on the very same set of facts. In the end, as many have observed, the ministerial determination virtually guarantees that courts will have to confront hard classification problems no matter what framework they apply.[91]

In fact, the added complexity on the front end of the blended approach may lead to more coherent and uniform rulings on the back end, since courts do not have to make an all-or-nothing determination about liability in cases that are genuinely difficult to resolve.[92] Along these lines, if a judge is required to make one overarching ministerial determination, then in close cases we might worry that she will err, if only unconsciously, to avoid what she believes is an unjust outcome. A judge who puts a high premium on antidiscrimination rights may

88. *Cf.* Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?*, 33 CARDOZO L. REV. 1633, 1676 (2012) ("As [the] division of opinions [in *Hosanna-Tabor*] indicates, determining who is a 'minister' for purposes of the constitutionally compelled 'ministerial exemption' will enmesh churches and the courts . . . at the boundaries of the ministerial exception.").

89. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 176 (5th Cir. 2012).

90. Even under Justice Thomas's view, one would need to determine what it means for a church to be "sincere" in its belief that an employee is a minister. *See id.* at 175.

91. *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (noting that the ministerial exception "necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church").

92. This calls to mind Judge Gesell's pragmatic suggestion in an early ministerial exception case that courts should "allow the law to evolve in this difficult area case-by-case," because "absolutes . . . [may not] withstand the test of time or be considered appropriate under all circumstances." Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1362 (D.C. Cir. 1990) (Gesell, J., concurring).

go out of her way to find that a unitary ministerial exception does not apply; a judge who zealously guards religious freedom will tend to break the tie in favor of the exception.[93] As a descriptive matter, it is not obvious to me which tendency will be more pronounced, but in both cases the result will be less predictability and less uniformity, to the detriment of plaintiffs and defendants alike. The blended approach, by contrast, gives judges the doctrinal leeway to reach an appropriately nuanced outcome.

Functional analyses like the one I am proposing are also hardly unknown in constitutional law. Contemporary immunities doctrine, for instance, is not only functional in emphasis but also determines immunity at the level of the individual function. The Supreme Court has held that a prosecutor has absolute immunity for actions taken in her quasi-judicial capacity,[94] but the same prosecutor loses that immunity when she directs a police investigation,[95] testifies as a witness in a warrant application,[96] or makes out-of-court statements to the media.[97] Similarly, while the President generally has immunity from civil suit for actions he performs in office, he can be sued for actions he takes in his purely private capacity.[98] As the Court explains, "immunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'"[99] The same type of analysis can be seen in other First Amendment contexts, as well—for instance, the Free Speech and Press Clauses.[100] Even though functional tests can sometimes "require[]

93. *Cf.* William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1421 (1981) (arguing that modifying the exclusionary rule "will make it less tempting for judges to bend fourth amendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police").

94. Imbler v. Pachtman, 424 U.S. 409, 420, 424 (1976).

95. Kalina v. Fletcher, 522 U.S. 118, 126 (1997) (citing Buckley v. Fitzsimmons, 509 U.S. 259, 273-74 (1993)).

96. *Id.* at 130-31.

97. *Fitzsimmons*, 509 U.S. at 277.

98. Clinton v. Jones, 520 U.S. 681, 694-95 (1997); *cf.* Gravel v. United States, 408 U.S. 606, 625 (1972) (applying a similar functional approach to the immunity for congressmen and their aides provided by the Speech and Debate Clause).

99. *Jones*, 520 U.S. at 695 (quoting Forrester v. White, 484 U.S. 219, 229-30 (1988)).

100. *See* Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006) (holding that public employees' speech rights are limited when speaking in their role as an employee, but not when "speaking *as citizens* about matters of public concern" (emphasis added)); Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45, 51-54 (2006) (describing functional approaches to the Press Clause of the First Amendment).

the drawing of difficult and subtle distinctions,"[101] courts have managed to make these other doctrines workable. A blended approach should fare no worse.

In any event, it is one thing to argue that courts have difficulty conducting functional inquiries, and another to conclude that the Constitution demands a unitary exception for ministerial employees. Consider, in this regard, Justice Brennan's opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[102] That case challenged Title VII's exemption for religious institutions that discriminate on account of religion.[103] The respondent argued that the statutory exemption was unconstitutional because it permitted religious discrimination by churches with respect to nonreligious as well as religious jobs. In rejecting the challenge, Justice Brennan wrote:

> [I]deally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular. This is because the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community's self-definition.[104]

He went on to note that "[w]hat makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident," especially in the nonprofit context, and concluded that Congress could respond to this difficulty by choosing to exempt nonprofit church activities from the prohibition on religious discrimination categorically.[105]

So too here. Ideally, religious organizations should be able to discriminate against ministers only with respect to their religious functions, so that a determination should be made in each case whether an employee is acting ministerially or not. If religious institutions are to be exempted from antidiscrimination laws when the employee performs ministerial functions in any capacity, that determination should come from Congress as a matter of statutory policy, not the Supreme Court as constitutional principle.

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101. *Fitzsimmons*, 509 U.S. at 290 (Kennedy, J., concurring in part and dissenting in part).

102. 483 U.S. 327 (1987).

103. *Id.* at 331. The exemption is codified at 42 U.S.C. § 2000e-1(a) (2006).

104. *Amos*, 483 U.S. at 343 (Brennan, J., concurring).

105. *Id.*

CONCLUSION

Cases like *Hosanna-Tabor* are so vexing because they pit two principles that lie at the core of our shared political and cultural tradition against each other. Where these principles directly clash, the Court may be right that the First Amendment has struck the balance for us. Yet a blended framework reveals that these principles are not always as conflicted as they may seem at first. As judges strive in the employment context to "[r]ender . . . unto Caesar the things which are Caesar's, and unto God the things that are God's,"[106] they should consider whether the two parties can sometimes be, in effect, joint owners. In such instances, a unitary ministerial exception may be a very blunt tool for rendering each their due.

106. *Matthew* 22:21 (King James).