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Evelyn Doran
University of Minnesota Law School

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Commandments Before Amendments: The Ministerial Exception & How the Court Prioritizes Religious Rights Over Other Constitutional Protections

Evelyn Doran†

Introduction

In 2015, Katherine Savin began a position as a social worker at San Francisco General Hospital in San Francisco, California.[1] While employed there, she was assigned to the palliative care unit and worked closely with Father Bruce Lery, a member of the clergy.[2] During her employment, "Father Lery repeatedly and consistently engaged in sexual harassment towards [Savin] in the workplace."[3] When Savin reported Father Lery's conduct to her supervisors, the hospital took no steps to investigate or address the misconduct.[4] When Savin told her supervisors about the sexual harassment a second time, she was urged to not report the incident and told to cover up the email she sent about the conduct.[5] Eventually, the conditions of her work became unbearable, leading her to quit the job.[6] She then filed a Title VII claim for sexual harassment and retaliation.[7]

In 2018, Hans Hazen began working as a part-time pastor at United Methodist Church in Neodesha, Kansas.[8] From April to

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†. Evelyn Doran is a member of the University of Minnesota Law School's Class of 2024 and received a bachelor's degree from Gustavus Adolphus College in English, Creative Writing, Political Science, and Management in 2021. During law school, she primarily studied employment law and civil litigation, and represented employees in individual and class action suits against discrimination, retaliation, and ERISA violations. She would like to thank Professor Matthew Bodie for his support and feedback, as well as her friends, family, and mentors for their continued support throughout her law school education.

1. Savin v. City & Cnty. of S.F., No. 16-cv-05627-JST, 2017 WL 2686546, at *1 (N.D. Cal. June 22, 2017).

2. *Id.*

3. *Id.* (quoting First Amended Complaint ¶ 18, *Savin*, 2017 WL 2686546 (No. 16-cv-05627-JST)).

4. *Id.*

5. *Id.*

6. *Id.* at *2.

7. *Id.*

8. Hazen v. Great Plains Ann. Conf. of United Methodist Church, No. 21-4046-

November of 2019, Hazen was subjected to sexually inappropriate comments and nonconsensual sexual contact from William Sexton, the youth director at United Methodist Church.[9] When Hazen reported the sexual harassment to officials from United Methodist and its affiliate, the Great Plains Conference, neither entity investigated the conduct nor took any disciplinary action against Sexton.[10] On October 8, 2020, Hazen submitted a formal complaint to the district superintendent and the Great Plains Conference bishop.[11] On October 10, 2020, United Methodist and the Great Plains Conference terminated Hazen's employment.[12] Hazen then filed a Title VII claim for hostile work environment and retaliation for reporting sexual harassment.[13]

Though both suits described above originate from nearly identical facts, their outcomes are polar opposites. While Savin can state a claim based on Father Lery's sexual harassment, Hazen cannot do the same because of a split between the Ninth and Tenth Circuits.[14] The doctrine at the center of this divide is called the ministerial exception. In 2012, the Supreme Court recognized a "ministerial exception" to federal employment discrimination statutes based on the First Amendment's protection of religious freedom.[15] In 2020, the Court again addressed the exception and clarified that the determination of whether a given employee was covered by the ministerial exception could not be made based on "checklist items" but rather should be based on fact-specific inquiries into whether the employee "performed vital religious duties."[16] This decision reaffirmed an expansive and nebulous view of the exception's limits.[17] This rejection of concrete standards has created widespread confusion regarding the outer limits of the

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JWB, slip op. at *1 (D. Kan. Dec. 10, 2021).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. The circuit split over the ministerial exception's application to hostile work environment and sexual harassment claims is expressed most clearly in the differences between *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) and *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010).

15. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195–96 (2012).

16. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–67 (2020).

17. *Id.* at 2075 (Sotomayor, J., dissenting) (calling the majority's rule that the applicability of the ministerial exception is dependent on the employee's "religious function" vague and not a "legal framework").

ministerial exception. As a result, lower courts continue to struggle to define key dimensions of the exception, including what causes of action are precluded by the exception and what exactly constitutes a "minister."[18]

The questions raised by the ministerial exception show that this doctrine is flawed in two fundamental ways. First, the Court's refusal to create easily cognizable standards for when to apply the exception has led to disparate outcomes across the justice system, burdening litigants and courts as they attempt to define the exception's undefined aspects.[19] Second, the exception's vague language, in combination with the Court's evolving Religion Clause jurisprudence, has the potential to undermine other coequal constitutional rights that are asserted against religious institutions, creating tension between religious freedom and values of equity and justice.[20] To provide a full account of these shortcomings, this Note will first detail the legal backdrop of the First Amendment's Religion Clauses and the Court's interpretation thereof. It will then follow the doctrinal evolution of the ministerial exception, its history, and the legal questions it has yet to answer. Finally, this Note will highlight the inequality the exception engenders and the way such inequality is deepened by the originalism favored by the Court's conservative majority. Moreover, it will explore possible theoretical alternatives that might protect

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18. *See, e.g.*, Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (deciding whether or not the ministerial exception applies to sexual harassment and hostile work environment claims brought under Title VII); Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018) (finding that the ministerial exception barred a Title VII claim of racial discrimination); DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000 (Mass. 2021) (deciding whether a social work professor at a Christian liberal arts college was a "minister" for purposes of the ministerial exception).

19. *Hosanna-Tabor*, 565 U.S. at 196 (stating that the Court's decision only clarifies the ministerial exception as it applies to Title VII disputes where an employee alleges that they were terminated in violation of the statute and that the Court "express[es] no view on whether the exception bars other types of suits"). *Compare Bollard*, 196 F.3d 940 (holding that pursuit of sexual harassment claims under Title VII did not create the sort of entanglement between church and state that might violate the Establishment Clause), *with Skrzypczak*, 611 F.3d 1238 (holding that the ministerial exception barred plaintiff's hostile work environment claim).

20. Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y: EXPERT F. (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [https://perma.cc/LDT4-3DSS]; Samuel J. Levine, *Recent Applications of the Supreme Court's Hands-Off Approach to Religious Doctrine*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 75 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017).

the genuine interests of religious institutions without creating unnecessary ambiguity or significant incursion onto other rights. This review of the ministerial exception makes one thing clear: the ministerial exception is an example of a dangerous trend in Religion Clause jurisprudence in which the Supreme Court fails to engage in a meaningful analysis of the conflicting rights at issue, creating a hierarchy within what should be coequal constitutional rights.

I. Background

A. The Evolution of Religion Clause Jurisprudence

To understand the ministerial exception, one must first be familiar with the constitutional provisions it draws upon: the First Amendment's Religion Clauses. These clauses, the Establishment Clause and the Free Exercise Clause, guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21] The Free Exercise Clause therefore protects the individual's right to their religious beliefs, while the Establishment Clause prohibits the establishment of an official religion.[22] Until recently, modern interpretations of the First Amendment's Religion Clauses have been guided by two twentieth-century cases: *Lemon v. Kurtzman*[23] and *Employment Division v. Smith*.[24] In *Lemon*, the Court addressed whether two state programs providing funding to nonpublic schools violated the Establishment Clause by requiring schools to provide proof that the funds were used exclusively for secular purposes.[25] In finding that both programs violated the Religion Clauses, the Court held that laws challenged on Religion Clause grounds must have a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion and cannot foster excessive government entanglement with religion.[26] The Court did little in *Lemon* to clarify how to decide whether a given statute satisfies these requirements, instead noting that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[27]

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21. U.S. CONST. amend. I.

22. *Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/ [https://perma.cc/9NSQ-GT4Q].

23. 403 U.S. 602 (1971).

24. 494 U.S. 872 (1990).

25. *Lemon*, 403 U.S. at 603.

26. *Id.* at 612–13.

27. *Id.* at 614.

In this way, *Lemon* left unsettled the issue of the Religion Clauses' scope.

The Court took up the issue again in *Smith*, deciding whether the State of Oregon's determination that the religious use of peyote disqualified claimants from unemployment compensation violated the Free Exercise Clause.[28] In upholding the state's determination, the Court ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[29] The Court grounded its decision in the idea that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[30] This decision lowered the standard of review for statutes burdening the free exercise of religion, replacing the "compelling state interest" requirement in *Sherbert v. Verner*[31] with a much more permissive standard.[32]

Congress quickly reacted to the Court's new standard in *Smith*, passing the Religious Freedom Restoration Act (RFRA) in 1993.[33] RFRA rebuked the Court's ruling, finding that "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and that "governments should not substantially burden religious exercise without compelling justification."[34] Grounded in those principles, RFRA forbade any statute from "substantially burden[ing] a

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28. *Smith*, 494 U.S. at 872.

29. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

30. *Id.*

31. *Sherbert* defines this requirement by holding that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

32. Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237, 239–40 (2004) ("Thus, critics contend that the *Smith* decision withdrew the compelling interest test as the standard for adjudicating free exercise claims."); *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . .").

33. Religious Freedom Restoration Act, Pub. L. No. 103-141 (codified at 42 U.S.C. §§ 2000bb, 2000bb–1 to 2000bb–4).

34. 42 U.S.C. § 2000bb(a); *see also* Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 126 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016) (detailing the passage of RFRA, which was "[a]dopted to reject the Supreme Court's curtailment in *Employment Division v. Smith*").

person's exercise of religion even if the burden results from a rule of general applicability," except when that burden "[was] the least restrictive means of furthering [a] compelling governmental interest."[35]

RFRA's expansive protection of religious exercise was short-lived. In 1997, the Court held in *City of Boerne v. Flores* that the statute unconstitutionally limited the power of state and local governments and overstepped Congress's enforcement powers from Section Five of the Fourteenth Amendment.[36] In so holding, the Court struck down the portions of RFRA that applied to state and local governments.[37] Congress quickly responded to this curtailment, emphasizing the severability of the portions of RFRA pertaining to state and local governments by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA).[38] RLUIPA amended RFRA by removing the language concerning state and local governments, instead focusing on limiting the scope of federal statutes and regulations that may burden religious exercise.[39] The Court appeared to implicitly accept this narrower version of RFRA, upholding a lower court's use of the statute in *Gonzales v. O Centro Espirita Uniao Do Vegetal*.[40] Thus, under *Smith*, RFRA, and *Flores*, the United States judicial system applies two standards. At the state and local level, regulations burdening the free exercise of religion need only satisfy *Smith*'s rational basis review. At the federal level, regulations imposing that same burden must meet RFRA's compelling interest requirement.

This scheme of protections for religious exercise has been stretched and challenged several times in the past decade.[41] The

35. 42 U.S.C. § 2000bb-1.

36. 521 U.S. 507, 532 (1997).

37. *Id.* at 536.

38. Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803.

39. Whitney Travis, *The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1710 (2007).

40. *See* 546 U.S. 418, 439 (2006) (relying on the lower court's opinion and affirming its finding that the federal government had failed to satisfy RFRA's "compelling interest" requirement).

41. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (finding that the Colorado Civil Rights Commission's determination that the bakery discriminated against a gay couple was not neutral towards religion); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (granting in part a church's motion for a temporary restraining order and preliminary injunction to bar enforcement of New York Governor Andrew Cuomo's COVID-19 restrictions on in-person gatherings, finding that the church had a strong likelihood of success on the merits); Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (holding that the City of Philadelphia's refusal to contract with Catholic Social Services unless they agreed to

most paradigmatic example of this phenomenon may be the Court's recent decision in *Kennedy v. Bremerton*.[42] In *Kennedy*, the Court held that a high school football coach's decision to pray on the football field with students after games was protected by the Free Exercise Clause and that the school's discipline in response to his conduct violated his free exercise rights.[43] In its ruling, the Court held that "the Establishment Clause must be interpreted by "'reference to historical practices and understandings'"" that "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[44] As it reached this conclusion, the Court effectively overruled *Lemon*, stating that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[45] Thus, *Kennedy* signals a major shift in modern Religion Clause jurisprudence; the Court now seems to root its interpretation of the Free Exercise and Establishment Clauses in what it describes as their original meaning.[46]

Beyond the Court's invocation of original meaning, *Kennedy* is also noteworthy because of the way it applied *Smith*. Though the Court rejected *Lemon* outright, it did not do the same to *Smith*, instead arguing that the school district's actions were not subject to rational basis review because they were not neutral or generally applicable.[47] This approach, through which the Court avoids the issue of rational basis review and applies strict scrutiny, is mirrored in several other recent cases.[48] An instructive example of such

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certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment); 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (holding that the Religion Clauses prohibit enforcement of anti-discrimination public accommodations laws which would force the regulated individual to engage in expressive speech that violates their religious convictions). For an instructive overview of this trend, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1456 (2015).

42. 142 S. Ct. 2407 (2022).

43. *Id.* at 2416.

44. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)).

45. *Id.* at 2411.

46. Michael L. Smith, *Abandoning Original Meaning*, 36 ALBANY L. REV. 43, 72 (2023). For an instructive overview of how the Court has previously treated prayer by public school employees, see Maya Syngal McGrath, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2427 (2022).

47. *Kennedy*, 142 S. Ct. at 2422.

48. *See* W. COLE DURHAM & ROBERT SMITH, *Inapplicability of the General Rule of* Smith – *Laws Targeting Religion:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Trinity Lutheran Church of Columbia, Inc. v. Comer, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, *and* Fulton v. City of Philadelphia, *in* RELIGIOUS ORGANIZATIONS AND THE LAW § 3:11 (2d ed. 2022) (discussing the joint impact of *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which

reasoning is *Fulton v. City of Philadelphia*.[49] In *Fulton*, the City of Philadelphia said that it would not contract with Catholic Social Services (CSS) to provide foster care services because CSS's overt policy of refusing to work with same-sex couples violated a nondiscrimination provision in the city's contract with CSS as well as a public accommodations nondiscrimination ordinance.[50] The Court held that the case was not controlled by *Smith*'s rational basis review because the city's contract reserved the right to grant individual exceptions to its nondiscrimination provision and, therefore, was not a neutral rule of general applicability.[51] The majority then evaluated the claim under the compelling interest test and found that the city's proffered interests in maximizing the number of foster parents and protecting the city from liability were not served by the policy and too speculative, respectively.[52] It therefore held that the city had not shown a compelling "particular interest" in excluding CSS from the program in light of the availability of exemptions from the nondiscrimination provision.[53] In so deciding, the Court maintained *Smith* but further distanced itself from the decision.[54] As the Court continues to decide its Religion Clause cases around *Smith*, it seems to all but overrule the case, essentially subjecting future cases to the same treatment as *Lemon* by simply making *Smith*'s holding obsolete.

While *Kennedy* presents potentially the clearest departure from the Court's Religion Clause precedent, cases like *Fulton* show that this area of jurisprudence has seen several meaningful doctrinal evolutions in the past decade.[55] These instances, analyzed in isolation, each present their own analytical issues that run up against longstanding rules and norms.[56] However, the importance

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serves to distinguish when a government policy is not neutral and of general applicability).

49. 141 S. Ct. 1868 (2021).

50. *Id.* at 1874–76.

51. *Id.* at 1879.

52. *Id.* at 1882.

53. *Id.*

54. *See id.* at 1876–77.

55. *See* Garrett Epps, *The Strange Career of Free Exercise*, ATLANTIC (Apr. 4, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-strange-career-of-free-exercise/476712/ [https://perma.cc/P8KN-TNT9] (describing the changes in the Court's Free Exercise jurisprudence from *Smith* to *Hobby Lobby*); Zalman Rothschild, *"Religious Equality" is Transforming American Law*, ATLANTIC (Oct. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/10/coming-threat-gay-rights/616882/ [https://perma.cc/433H-HK68] (recounting the "potential power" of the Court's reasoning in *Masterpiece Cakeshop* and noting the potential "far-reaching implications" of applying that same reasoning in *Fulton*).

56. *E.g.*, Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do*

of their individual shortcomings is clearer when examined in the aggregate: what in isolation present as concerns of judicial solicitude and preservation of precedent in the aggregate become an overarching lack of guiding principles and a dizzying array of tests, rules, and standards.[57]

B. The Ministerial Exception: Beginnings and Supreme Court Recognition

The ministerial exception is rooted in early interpretations of the First Amendment and its Free Exercise Clause, which are themselves grounded in early understandings of religious autonomy.[58] Scholars are divided as to the history of the foundational principles of church autonomy. Much of legal academia agrees that these principles date back to the founding of the colonies and the early development of United States common law as a reaction to the entanglement of religion and government in seventeenth-century England.[59] However, it was not until 1972 that the ministerial exception as a discrete articulation of these

Religious Accommodations Burden Others?, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 332 (Susanna Mancini & Michel Rosenfeld eds., 2018) (describing how recent Religion Clause cases raise a difficult question regarding the longstanding rule that religious exemptions should not burden third parties and arguing that "accommodating Hobby Lobby at the cost of interfering with its employees' contraception coverage did indeed violate the principle against shifting burdens from religious claimants to other private citizens"); Brief for Scholars of Religious Liberty et al. as Amici Curiae Supporting Respondents at 35, Zubik v. Burwell, 578 U.S. 403 (2016), 2016 WL 675865 ("As we have explained, however, the Court has never applied the Free Exercise/RFRA version of heightened scrutiny to require the government to resort to options that would impose such burdens on third parties—especially not where, as here, such burdens would be borne only by persons of one sex.").

57. Eva Brems, *Objections to Antidiscrimination in the Name of Conscience or Religion: A Conflicting Rights Approach*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 277, 280 (Susanna Mancini & Michel Rosenfeld eds., 2018) ("Human rights-adjudicating bodies seem to address [the conflict between anti-discrimination and religious exemption] on an ad hoc basis; they have not yet come up with a coherent and consistent approach to conflicts between human rights.").

58. *See* Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. L. REV. COLLOQUY 175 (2011) (describing the longstanding tradition of separating the authorities of the church and the state); Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. L. REV. COLLOQUY 191, 192–94 (2011).

59. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990); Joseph Capobianco, *Splitting the Difference: A Bright-Line Proposal for the Ministerial Exception*, 20 GEO. J.L. & PUB. POL'Y 451, 456–59 (2022). *But see* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 988–90 (2013) (highlighting alternative histories and legal traditions that were excluded from the Court's opinion in *Hosanna-Tabor*).

principles was first expressed in *McClure v. Salvation Army*.[60] In *McClure*, the Fifth Circuit held that applying the provisions of Title VII to govern the employment relationship between the Salvation Army and its officer was unconstitutional under the principles of the ministerial exception.[61] It reasoned that such regulation "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 [F]ree [E]xercise [C]lause of the First Amendment."[62] Notably, the Fifth Circuit did not reach the issue of why McClure was a minister and therefore subject to the exception and did not consider whether other positions within the Salvation Army might not be considered ministers, instead simply holding 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.'"[63] In the forty years after *McClure* and before the Supreme Court weighed in on the ministerial exception, many state and federal courts followed the Fifth Circuit's lead, adopting the ministerial exception as an exemption from government regulation of the relationship between religious institutions and their ministers and created varying degrees of deference and non-interference.[64]

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, holding that Cheryl Perich's Americans with Disabilities Act (ADA) retaliation claim was barred by a ministerial exception rooted in the First Amendment.[65] Perich was employed by Hosanna-Tabor Evangelical Lutheran Church and School as a "called teacher," teaching math, language arts, social studies, science, gym, art, and music, as well as religion classes.[66] In 2004, Perich was diagnosed with narcolepsy, began the 2004–2005 school year on disability leave, and upon returning learned that her position had been given to another

60. 460 F.2d 553, 560 (5th Cir. 1972).

61. *Id.*

62. *Id.*

63. *Id.* (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

64. Griffin, *supra* note 59, at 982, n.6.

65. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

66. *Id.* at 177–78.

teacher.[67] Perich then filed a charge with the Equal Employment Opportunity Commission, alleging violations of the ADA.[68]

The Court concluded that Perich was a minister for purposes of the ministerial exception (and therefore did not have a cause of action) based on four relevant circumstances: first, that Perich had the title of minister; second, that she had a high degree of formal religious training; third, that she "held herself out as a minister of the Church"; and fourth, that her "job duties reflected a role in conveying the Church's message and carrying out its mission."[69] The Court limited its decision to the facts of the case at bar and did not address larger questions of what factors must be considered when determining whether an employee was a minister or whether a given cause of action was barred by the exception.[70]

Eight years later, the Court again took up the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[71] In *Our Lady of Guadalupe*, the Court considered whether two elementary school teachers at Catholic schools with job responsibilities similar to Perich's were subject to the ministerial exception even though they did not have the title of "minister" or extensive religious training.[72] The Court's opinion disposed of two suits, one by Agnes Morrissey-Berru and one by Kristen Biel.[73] Morrissey-Berru and Biel were trained as secular teachers, held degrees and licenses in education, and primarily taught secular subjects, though they also taught religion.[74] Morrissey-Berru alleged that the school's decision to not renew her contract was age discrimination in violation of the Age Discrimination in Employment Act of 1967,[75] while Biel alleged that the school failed

67. *Id.* at 178.

68. *Id.* at 179.

69. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2062 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 191–92).

70. *Hosanna-Tabor*, 565 U.S. at 196 ("We express no view on whether the [ministerial] exception bars other types of suits . . . ."); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2067 (declining to impose a "rigid formula" and asking courts to "take all relevant circumstances into account."); *see* Griffin, *supra* note 59, at 1006–16 (demonstrating the numerous questions *Hosanna-Tabor* failed to answer about the scope of the ministerial exception); Levine, *supra* note 20, at 79 ("Notwithstanding the Court's unanimous decision in *Hosanna-Tabor*, a number of questions remained unanswered. Indeed, the Court arguably achieved unanimity precisely because it restricted the scope of its analysis, avoiding some of the more complex issues that may arise in further application of the ministerial exception.").

71. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.

72. *Id.*

73. *Id.* at 2056–58.

74. *Id.*

75. *Id.* at 2058.

to renew her contract because she had requested medical leave to seek treatment for breast cancer.[76]

The Court held that both teachers were subject to the ministerial exception and, therefore, could not state a cause of action for the employment decisions they disputed.[77] In its holding, the Court further affirmed that it did not want to establish criteria that could be used as "checklist items to be assessed and weighed against each other in every case" and instead "called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception."[78] Moreover, the Court again did not specify what suits are subject to the ministerial exception.[79]

C. The Exception's Interpretation Since Our Lady of Guadalupe

Lower courts and legal scholars have been unable to uniformly interpret the ministerial exception based on *Hosanna-Tabor* and *Our Lady of Guadalupe*, often reaching conflicting conclusions about the exception's scope.[80] Many of the discrepancies revolve around whether a type of claim is barred by the exception. Determining whether a given cause of action is subject to the ministerial exception requires answering a crucial question: what exactly qualifies as interference with the "internal governance of the church"[81] or the sort of government entanglement in religious matters envisioned in the Religion Clauses, *Hosanna-Tabor*, and *Our Lady of Guadalupe*?[82] This issue is best embodied in the divide

76. *Id.* at 2059.

77. *Id.* at 2069.

78. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2067.

79. *But see id.* at 2072–73 (Sotomayor, J., dissenting) (stating that the exception applies to employment discrimination suits).

80. *See, e.g.*, cases cited *supra* note 18.

81. *Hosanna-Tabor*, 565 U.S. at 188; *see* Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 249, 250–51 (2019) (discussing whether the ministerial exception extends to claims of sexual harassment based on hostile work environments).

82. Brandenburg v. Greek Orthodox Archdiocese of N. Am., No. 20-CV-3809, 2021 WL 2206486, at *4 (S.D.N.Y. June 1, 2021) ("But neither the Supreme Court nor the Second Circuit has decided whether the exception bars hostile work environment claims that do not involve challenges to tangible employment actions, and the other Circuits are divided on the question."); *cf.* Fratello v. Archdiocese of N.Y., 863 F.3d 190, 202–03 (2d Cir. 2017) (stating that "those properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them" and specifically referencing internal decisions regarding hiring & firing of religious leaders); *see*

between the Ninth and Tenth Circuits regarding the application of the ministerial exception to Title VII cases alleging sexual harassment or hostile work environment claims. Though the cases that most clearly articulate this split both predate *Hosanna-Tabor* and *Our Lady of Guadalupe*,[83] the split remains in the wake of those decisions.[84]

In the Ninth Circuit case that continues to guide this question, *Bollard v. California Province of the Society of Jesus*, the court found that the ministerial exception did not apply to claims alleging sexual harassment or hostile work environment because such claims did not target an employment decision made in the relationship between a church and its minister.[85] The court held, rather, that such claims are too attenuated from the principles animating the Free Exercise Clause, because they focus on disciplinary inaction, and the employer seeks exemption merely because the target of the inaction is a minister.[86]

The Tenth Circuit's decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa* represents the other side of this circuit split.[87] In *Skrzypczak*, the court found that the plaintiff's Title VII hostile work environment claim was barred by the ministerial exception.[88] The court rooted its decision in the idea that opening churches up to Title VII liability may lead them to make decisions about what kinds of ministers to hire based on whether a given minister might lower the likelihood that the church is sued, rather than religious objectives.[89] Though both *Bollard* and *Skrzypczak* were decided before *Hosanna-Tabor* and *Our Lady of Guadalupe*, both decisions still bind their respective circuits.[90] It seems that the Court's

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Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of* Bostock, U. ILL. L. REV. ONLINE 26 (Apr. 5, 2022), https://illinoislawreview.org/online/making-sense-of-the-ministerial-exception-in-the-era-of-bostock/ [https://perma.cc/G67X-BKSX] (proposing a clearer, synthesized definition of when an employee performs a "religious function" and is therefore subject to the ministerial exception).

83. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999); Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010).

84. *See, e.g.*, Savin v. City & Cnty. of S.F., No. 16-cv-05627-JST, 2017 WL 2686546, *1 (N.D. Cal. June 22, 2017); Hazen v. Great Plains Ann. Conf. of United Methodist Church, No. 21-4046-JWB, slip op. at *1 (D. Kan. Dec. 10, 2021).

85. *Bollard*, 196 F.3d at 947.

86. *Id.*

87. *Skrzypczak*, 611 F.3d at 1245.

88. *Id.*

89. *Id.*

90. Morgan Nelson, *Discussing* Demkovich*: An Analysis of Why and How the Supreme Court Should Reconsider the Expansion of the Ministerial Exception*, 54

definition of the ministerial exception has done little to provide lower courts with greater guidance on the exception's limits or correct arguably erroneous interpretations.[91]

This open question is made all the more important because of the shifting nature of the Court's Religion Clause jurisprudence. While the exception, as articulated in 2020, insulates religious employers from suits brought by ministers when such actions would "threaten[] the [institution's] independence in a way that the First Amendment does not allow,"[92] the Court's interpretation of the Free Exercise Clause has shifted since then, expanding its definition of what is protected by that provision.[93] The most worrying overarching theme that the Court has recently drawn upon is its interpretation of historical understandings of religious liberty. In its accounts of the legal tradition surrounding the Religion Clauses, the Court presents a single perspective and routinely rejects other interpretations of such history, often leaving out vital context for the practices it calls upon.[94] By grounding its decisions in this type of reasoning, the Court opens itself up to questions of legitimacy and judicial solicitude, the degree of certainty litigants can have in the application of precedent, and the potential policy goals or strategic moves that may be guiding its decisions.[95]

Many members of the legal community have noted the potential issues with these unanswered questions. First, several scholars have argued that the undefined dimensions of the exception create an undue burden on religious institutions and their employees as they attempt to discern how a court might choose

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TEX. TECH L. REV. 825, 836–40 (2022) (describing the circuit split on the issue of the ministerial exception's application to Title VII sexual harassment and hostile work environment claims and noting that the split continues to exist after the Supreme Court's ministerial exception cases).

91. Lupu & Tuttle, *supra* note 81, at 302.

92. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

93. *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 2020–2021 ACS SUP. CT. REV., https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-radical-uncertainty-of-free-exercise-principles-a-comment-on-fulton-v-city-of-philadelphia/ [https://perma.cc/9N5F-ZNR7].

94. *See id.* (describing the flaws in Justice Alito's description of the history of free exercise principles in *Fulton v. City of Philadelphia*).

95. *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020) (arguing that much of the Court's unanimity in cases deciding Establishment Clause principles is attributable to the practice of enabling conservative justices to reach their goals and further arguing that this practice is a flawed strategic decision because it will likely lead to an expectation of further concessions, not increased cooperation).

whether or not to apply the exception in their case.[96] Second, others have noted the deference the ministerial exception tends to give to religious employers, how such deference stands to undermine the rights and interests of employees, and the issue this creates in an already imbalanced relationship.[97] Finally, others still have analyzed the ministerial exception within the larger context of the Court's shifting Free Exercise jurisprudence, noting its place within the broader judicial trend of greater corporate religious liberty[98] and evolving notions of originalism[99] and critiquing the Court's proffered reasoning in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[100]

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96. Capobianco, *supra* note 59, at 468 ("Current tests are too imprecise and therefore harm one or both interests to an intolerable extent."); Charlotte Garden, *Ministerial Employees and Discrimination Without Remedy*, 97 IND. L.J. 1007, 1015 (2022) ("[T]he ministerial exception allows employers to mislead their employees about their rights at the recruitment and hiring stages, and then to invoke the ministerial exemption if the employee sues."); Richard C. Osborne III, *A Country Divided: Refining the Ministerial Exception to Balance America's Diversity*, 34 REGENT U. L. REV. 607, 610 (2022) ("In *Our Lady of Guadalupe*, the Supreme Court doubled down on an untenable approach. The result is a current approach that is overbroad, unworkable, and confusing.").

97. Griffin, *supra* note 59, at 981 ("The Court mistakenly protected religious institutions' religious freedom at the expense of their religious employees."); Garden, *supra* note 96, at 1018–21 (describing the ministerial exception's long-term consequences for employees who may now find themselves without legal remedy).

98. *E.g.*, Zöe Robinson, Hosanna-Tabor *after* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 173 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016) (contextualizing the ministerial exception within the Court's larger Free Exercise Clause project, specifically its treatment of the free exercise rights of corporate entities like Hobby Lobby, which challenged the Affordable Care Act's requirement that employer-sponsored healthcare plans cover contraceptive healthcare).

99. *E.g.*, Griffin, *supra* note 59, at 988; *see, e.g.*, Berg et al., *supra* note 58, at 177. *See also*, Lupu & Tuttle, *supra* note 93 (describing the flaws in Justice Alito's description of the history of free exercise in *Fulton v. City of Philadelphia*).

100. Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. L. REV. COLLOQUY 951, 951 (2012) ("Indeed, the irony of the *Hosanna-Tabor* case is that trying to discern whether the schoolteacher was a minister entangled the Court in religious doctrine more than simply adjudicating her retaliation claim would have."); Thomas F. Farr, *The Ministerial Exception: An Inquiry into the Status of Religious Freedom in the United States and Abroad*, *in* RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 25, 31 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2018) (arguing that the Court's decision in *Hosanna-Tabor* actually undermines the First Amendment rights it purports to protect); Griffin, *supra* note 59, at 984 ("When *Hosanna-Tabor* and the earlier ministerial exception cases are reviewed in detail, it becomes apparent that the numerous justifications for the exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law."); Schwartzman & Tebbe, *supra* note 95.

II. Analysis: The Dangers of the Ministerial Exception

Synthesizing recent academic commentary and judicial decisions on the ministerial exception and related free exercise and anti-establishment principles makes several things clear. First, the Supreme Court's failure to meaningfully define the scope and applicability of the ministerial exception makes it more difficult to litigate suits against religious employers, burdening litigants and courts alike. Second, the exception is one example of a dangerous overarching trend in which courts continue to promote religious liberty to the detriment of other coequal constitutional rights. Third, that trend is likely to gain greater support from the Supreme Court in coming years as its decision in *Kennedy* shifts the Overton window for policies regarding religious liberty. Fourth, this trend is not the only path forward for protecting the interests of religious institutions—other frameworks for understanding conflicts of rights as well as theories of freedom of conscience may provide viable alternatives.

A. The Impact of the Ministerial Exception's Ambiguity on Potential Suits Against Religious Employers

As religious liberty jurisprudence has evolved over the past fifty years, courts have routinely supported carve-outs and exemptions for religious institutions from otherwise generally applicable statutory schemes.[101] In supporting their decisions, courts have drawn upon many different rationale, theories, and methods of interpretation, creating a vast array of rules, tests, and guiding principles.[102] The wide diversity of judicial reasoning (and judicial outcomes) that result when questions of religious liberty are raised points to one major issue: the lack of clarity from the Supreme Court.

In its recent holdings on the ministerial exception, religious liberty, and the scope of the Religion Clauses, the Court has prioritized fact-specific determinations, often noting that its decision in a given matter is limited to the case at bar and leaving open closely-related questions and issues.[103] When the Court so limits its reasoning and refuses to provide generally applicable principles that might be of use to lower courts, it complicates the

101. Sepper, *supra* note 41, at 1456.

102. Osborne, *supra* note 96, at 625; Smith, *supra* note 46 (manuscript at 38).

103. *E.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

adjudication of claims of religious liberty.[104] This phenomenon is observable in the adjudication and outcome of cases where religious employers invoke the ministerial exception. Courts remain divided on multiple fronts and continue to spend time and resources answering questions as to the exception's application to jurisdictional issues, different causes of action, and specific job descriptions.[105] The fact that such issues must be continuously litigated burdens the judicial system and makes it more difficult for courts to quickly and fairly resolve cases on their merits.[106] As a result, courts are wading through unclear or ill-defined changes in jurisprudence, leading to inconsistent results across jurisdictions.[107] What is more, these disparate outcomes among substantially similar legal questions across different circuit courts highlight one of the pressing issues with the Court's treatment of the ministerial exception. As long as the Court fails to provide concrete, cognizable standards by which lower courts may uniformly apply the ministerial exception, the exception's application will continue to result in unequal outcomes, needlessly harming litigants when they pursue justice in some jurisdictions rather than others.

Moreover, as many scholars point out, the reasoning by which the Court purports to reach its holding often leaves ample room for critique.[108] Chief among these concerns is that the exception's reasoning is, at its core, contradictory.[109] While the exception is rooted in the notion that the government cannot interfere in matters of religious concern, it itself commits this very sin by requiring courts to judge whether a given employee performs vital religious duties.[110] Though this inquiry could be made less intrusive by specifically limiting it to members of the clergy or ordained ministers, courts have not taken that approach, instead turning

104. *See* Robinson, *supra* note 98, at 174.

105. *See* Osborne, *supra* note 96, at 609; Lupu & Tuttle, *supra* note 81, at 250–51.

106. Osborne, *supra* note 96, at 610.

107. Morgan & Piatt, *supra* note 82.

108. Corbin, *supra* note 100; Farr, *supra* note 100, at 31 (arguing that the Court's decision in *Hosanna-Tabor* actually undermines the First Amendment rights it purports to protect); Griffin, *supra* note 59, at 984 ("When *Hosanna-Tabor* and the earlier ministerial exception cases are reviewed in detail, it becomes apparent that the numerous justifications for the exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law.").

109. Justin E. Lewis, *What's in a Church? Refocusing Analysis under the Ministerial Exception on the Role and Nature of Religious Institutions*, 18 DARTMOUTH L.J. 104, 127 (2020).

110. *Id.*

"theological cartwheels to transform elementary and secondary school teachers, university and seminary professors, school principals . . . and musicians into ministers."[111] This approach stands to continue, as it has been endorsed by *Hosanna-Tabor* and *Our Lady of Guadalupe*.[112] As courts are asked to evaluate whether an employee performed vital religious duties, they are forced to make value judgments about what duties are most meaningful for that determination (an evaluation that inherently requires entanglement in religious doctrine) and in so doing reach various conclusions, resulting in the disparate outcomes described above.

Others view the shortcomings of the ministerial exception from an entirely different angle, arguing that it betrays its own bias by failing to limit the exception to church decisions grounded in religious doctrine.[113] The circuit split over whether to apply the ministerial exception to sexual harassment and hostile work environment claims is at the forefront of this issue. The Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* do not clarify whether the exception extends beyond tangible employment actions, leaving the area to be decided by the individual circuits.

In *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit reached this question, defining the ministerial exception as a restriction that "provide[s] important protections to churches that seek to choose their representatives free from government interference and according to the dictates of faith and conscience."[114] In construing the ministerial exception in this way, the Ninth Circuit limited its scope to only those choices for which a church could provide "a religious justification."[115] More importantly, the court found that the church's argument for applying the ministerial exception in this case (which alleged sexual harassment, hostile work environment, and constructive discharge claims) failed because the conduct alleged by the plaintiff on the part of the church was not a decision at all.[116] Rather, the plaintiff merely alleged that the church had failed to intervene when he reported the harassment, and in the courts view "it stray[ed] too far from the rationale of the Free Exercise Clause to extend constitutional protection to this sort of disciplinary inaction simply because a

111. Griffin, *supra* note 59, at 1007.

112. *Hosanna-Tabor*, 565 U.S. at 192–93; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–67 (2020).

113. Griffin, *supra* note 59, at 998.

114. 196 F.3d 940, 945 (9th Cir. 1999).

115. *Id.* at 947.

116. *Id.*

minister is the target as well as the agent of the harassing activity."[117] In this way, the Ninth Circuit's conception of the ministerial exception is more true to its underlying principles than the Supreme Court's precedent. By acknowledging that the exception is meant to protect *decisions* that are grounded in religious justification, the Ninth Circuit recognizes the valid Free Exercise interests that may be curtailed by the regulation of some employment actions, while also combatting the weaponization of those interests in circumstances in which they should not be applied.

The other side of this circuit split is represented by *Skrzypczak v. Roman Catholic Diocese of Tulsa*.[118] The plaintiff in *Skrzypczak* filed suit against her former employer after her termination, alleging violations of Title VII, the Age Discrimination in Employment Act, and the Equal Pay Act, including gender discrimination, age discrimination, and hostile work environment claims.[119] In responding to the hostile work environment claim, the court held:

> [W]e are not inclined to agree with the Ninth Circuit's reasoning that a hostile work environment claim brought by a minister does not implicate a church's spiritual functions. Rather, we believe that allowing such a claim may, as Judge Trott stated in his dissent from *Elvig*, "involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy."[120]

To support its finding, the court pointed to cases which found that requiring churches to respond to hostile work environment claims would lead them to employ ministers who would lower their exposure to liability rather than those who would "best 'further [their] religious objectives'" and would thereby impermissibly regulate their employment decisions.[121] The circuit split is therefore rooted in one central question: what type of employment decision (or lack thereof) is protected by the ministerial exception? Is it, as the Ninth Circuit holds, limited to "active" decisions, rather than

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117. *Id.*

118. 611 F.3d 1238 (10th Cir. 2010).

119. *Id.* at 1241. The individual adverse employment actions alleged in support of Skrzypczak's age and gender discrimination claims more clearly fall within the scope of the ministerial exception's prohibition on regulation of employment decisions by religious institutions, so my analysis of this case will focus on the court's treatment of her hostile work environment claim.

120. *Id.* at 1245 (quoting Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 976 (9th Cir. 2004) (Trott, J., dissenting)).

121. *Id.* at 1245 (quoting Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 803–04 (9th Cir. 2005) (order denying petition for rehearing) (Kleinfield, J., dissenting)).

disciplinary inaction, or as the Tenth Circuit holds, inclusive of decisions regarding whether to discipline ministers that harass their coworkers? These questions make clear the exception's shortcomings by laying bare the discrepancies it leaves unanswered.

B. The Court's Creation of Superior Rights

Concerns regarding the principles underlying the Court's treatment of the ministerial exception are further vindicated by the Court's approach to claims of religious freedom when they conflict with other constitutionally protected rights. While it is inevitable that coequal rights will run up against one another,[122] the way the Court chooses to resolve conflicts of rights, both in terms of which rights are vindicated in the end and the reasoning necessary to reach that conclusion, may help us understand the Court's fundamental principles and values.[123] While scholars have observed and critiqued the Court's seemingly dichotomous treatment of civil rights claims in the realms of race and religion on an aggregate level,[124] the ministerial exception presents an even clearer example of the Court's failure to adequately scrutinize conflicts of rights, as it puts two competing constitutional rights in direct opposition of one another.[125] Thus, understanding the principles animating the exception, their role in undermining coequal rights in relation to religious liberty, and the way those principles are applied in cases invoking the ministerial exception are all crucial steps in conducting a complete inventory of how the Court uses the ministerial exception to favor claims of religious liberty.

The theoretical shortcomings inherent in the Court's conception of the ministerial exception are best understood when removed from their context. At the center of the ministerial

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122. Brems, *supra* note 57, at 279 ("When cultural resistance to the adoption of nondiscriminatory attitudes and practices is rooted in a religious or nonreligious belief system, this may result in the mobilization of legal arguments . . . [s]uch legal arguments typically include human rights arguments . . . and on the prohibition of discrimination on grounds of religion.").

123. David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1632 (2022) ("[A] critical comparative analysis of race and religion jurisprudence uncovers new aspects of the ways in which the Court engages in what Reggie Oh has recently called the 'racial superordination' of whiteness in the American racial hierarchy.").

124. *Id.* at 1632; Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 19 (2022).

125. *See* Bartrum, *supra* note 58, at 191 ("[T]he exception guards a highly contested border between two fundamental constitutional values—equal protection and religious liberty . . . .").

exception is a singular notion: that the Constitution's guarantee of religious liberty must be protected at all costs, even when it means undermining the Constitution's guarantee of equal protection under the law.[126] Thus, the exception necessarily prioritizes protecting religion over protecting other aspects of social life, such as race, gender, or sexuality.[127] This special treatment of religious liberty compared to other constitutionally guaranteed rights is not unique to the ministerial exception. Rather, we can observe it on an aggregate level through a process of critical comparative analysis, also known as "doctrinal intersectionality."[128] By observing that the Court has routinely emphasized the importance of protecting religious freedom while undermining protections from racial discrimination, we may conclude the following:

> [T]he Court has come to conclude in the religion context that the devaluing of religion, a constitutionally special aspect of social experience, is an affront to constitutionally required dimensions of equality and that an assertive approach, the "most favored nation" approach, is necessary to protect this equality. If the Court was interested in the consistent application of constitutional principles of equality, one would expect the Court to apply a similar approach to racial equality. The fact that the Court is not only *not* doing so but seems poised to push its jurisprudence in these two contexts conceptually further and further apart from each other is telling.[129]

The principles described above are only exacerbated when applied to the ministerial exception. As scholars have observed, "[In *Hosanna-Tabor*], the Court held that the protection afforded [to religious employers] is *absolute*. That is, the Court did not undertake any balancing of the competing interests, instead holding that the institutional interest in decisions involving internal affairs was so strong that balancing was unnecessary."[130] This is an even clearer and more troubling articulation of the value judgments identified through doctrinal intersectionality. When comparing the Court's treatment of race in one case with its treatment of religion in another, the implications are merely that the Court is more likely to protect religion and less likely to protect race. When that comparison is brought into stark opposition, as it

126. Simson, *supra* note 123, at 1632.

127. *Id.*

128. *Id.*

129. Simson, *supra* note 123, at 1662. *See also*, Litman, *supra* note 124, at 41 ("In religious discrimination cases, by contrast, the Court does not even require evidence that religious groups face greater burdens under the law than nonreligious groups.").

130. Robinson, *supra* note 98, at 190–91.

is in the case of the ministerial exception to Title VII suits, the logical end of this reasoning comes into sharp focus.

The Second Circuit's decision in *Rweyemamu v. Cote* serves as an instructive example of this problem.[131] In *Rweyemamu*, the court held that a Black minister's Title VII suit for race discrimination based on the church's failure to promote him, its preference for his white peers, and his ultimate dismissal was barred by the ministerial exception.[132] In its holding, the court found that deciding whether the church's proffered reason for his termination was actually pretext for racial discrimination would create an "impermissible entanglement with religious doctrine."[133] The court's decision does not reflect a balancing of the interests at stake, as it does not consider the constitutional rights protected by the Title VII claim and instead creates a total exemption for the church in order to protect its interest in religious liberty.[134] As courts continue to insulate religious institutions from suits brought by ministers under Title VII, they create a hierarchy within what should be coequal constitutional rights, with religion prevailing and guaranteed protections against discrimination left unfulfilled. Not only is this detrimental to the rights of individuals employed by religious institutions, but it also fails to properly address what should be a meaningful consideration: the proper means by which to adjudicate conflicts of rights.

C. Protecting Religious Liberty Through a Conflict of Rights Analysis

The most critical failure of the ministerial exception is its absolute nature: once an employer establishes that it is a religious institution, that the plaintiff is its minister, and that the employment action at issue concerns the relationship between the religious institution and its minister, the exception cannot be rebuffed.[135] Such a framework fails to consider the rights of individuals employed by religious institutions, instead ending its analysis once the court is satisfied that the defendant has stated a valid claim of religious liberty.[136] This approach may be a viable response to a statute that interferes with religious liberty and is not itself grounded in a constitutional right, as "[f]undamental rights

131. 520 F.3d 198 (2d Cir. 2008).
132. *Id.* at 209.
133. *Id.*
134. *Id.* at 207.
135. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).
136. Capobianco, *supra* note 59, at 454.

normally function as 'trumps': even though most fundamental rights are not absolute, they have priority over other claims."[137] It is unavailing, however, when the state action at issue is itself protecting a fundamental right.[138] In that situation, courts cannot simply find that one type of right always defeats the other. Rather, they must engage in a "conflicts of rights" analysis.[139] This framework prioritizes procedural fairness by focusing on taking each rights-based claim seriously, finding that "it is important for decision makers to show genuine respect and care for all stakeholders" by "carefully assess[ing] the merits of each position . . . [allowing] all voices to be expressed, and . . . [making] people feel that their concerns are taken seriously, and that sincere efforts are being undertaken to address them."[140]

While the current approach to adjudicating conflicts of rights "seem[s] to address such cases on an ad hoc basis" and without "a coherent and consistent approach," fair adjudication of conscience claims (like those of religious liberty) against antidiscrimination provisions requires "devoting adequate attention to both the conscience-based claim and the antidiscrimination claim . . . carefully assessing the merits of each, and . . . clearly motivating the outcome on the basis of that assessment."[141] Doing so not only serves litigants by guaranteeing a more thoroughly considered disposition, but it also serves the judiciary by fostering decisions that are more likely to be accepted as legitimate by stakeholders.[142] This added benefit is crucial in the context of the Supreme Court's Religion Clause jurisprudence, as it faces growing skepticism regarding the substantive reasoning animating its decisions, as well as accusations of value-based adjudication.[143]

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137. Eva Brems, *Introduction*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 1, 2 (Eva Brems ed., 2008).

138. *Id.* ("[I]n cases of a conflict between fundamental rights, the 'trump' aspect is no longer relevant, and any solution of the conflict risks being perceived as arbitrary.").

139. Brems, *supra* note 57, at 280.

140. *Id.* at 282.

141. *Id.* at 280.

142. *Id.* at 281 ("[A]s a factor determining the perception of the legitimacy of the institution concerned, the perception of procedural fairness (was the case dealt with in a fair manner?) is more significant than the perception of distributive fairness (was the outcome of the case fair?).").

143. Patricia Tevington, *Growing Share of Americans See the Supreme Court as 'Friendly' Toward Religion*, PEW RSCH. CTR. (Nov. 30, 2022), https://www.pewresearch.org/short-reads/2022/11/30/growing-share-of-americans-see-the-supreme-court-as-friendly-toward-religion/ [https://perma.cc/UZ5H-EHF2] ("A vast majority of Americans (83%) say Supreme Court justices should not bring their own religious views into how they decide cases, and 44% say the justices have

The central feature of the conflicts of rights approach is the way it names and evaluates the merits supporting each rights-based claim and conceptualizes how those merits must be weighed against one another.[144] Though it is not explicitly labeled as a conflicts of rights approach, the framework suggested by Kent Greenawalt may also prove useful in developing a means by which to evaluate rights in conflict. In his work, which specifically addresses claims of conscience as a reason for exemption from a legal requirement, Greenawalt proposes that each claim warrants several questions, including:

> (1) what counts as a relevant claim of conscience?; (2) should an exemption be limited to religious conscience or extended to all claims of conscience?; (3) must such claims be sincere, and how may sincerity be determined?; (4) must the claimant's relation to the action to which she objects be close or is peripheral involvement sufficient?; (5) what, if any, considerations should outweigh claims of conscience that ordinarily would warrant acceptance?; (6) should standards of exemption be cast in general or specific terms?[145]

By casting the issue this way, Greenawalt gets to the heart of one of the key issues in evaluating conflicting rights. While a defendant invoking the ministerial exception argues that the plaintiff's suit threatens to intrude on a fundamental, constitutionally guaranteed right, there may be (and indeed often are) times when such an argument is ultimately unfounded.[146] While the validity of a claim of religious liberty under the ministerial exception is currently only vetted when the court determines whether the plaintiff is a minister,[147] the burden to successfully establish a defense which leaves the plaintiff without any recourse for what may be itself a violation of a coequal right must be greater.[148] A religious employer has a clear incentive to argue that its right to religious liberty is implicated in a given suit even when such argument may be disingenuous. If it is successful, it is effectively protected from nearly any possible regulation of the employment relationship and in so doing saves itself the trouble of

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been doing this too much in recent decisions.").

144. Brems, *supra* note 57, at 282.

145. Kent Greenawalt, *Religious Toleration and Claims of Conscience*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 3, 6 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016).

146. *See, e.g.*, Puri v. Khalsa, 844 F.3d 1152 (9th Cir. 2017) (finding that based on the pleadings, the plaintiffs' claims were not barred by the ministerial exception).

147. *See id.*

148. Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 31 (Eva Brems ed., 2008).

ensuring compliance with said regulations, as well as the cost of litigation if the employee were to allege that the institution violated the regulations. Thus, there is a likelihood that religious employers will manufacture an apparent conflict of rights in order to benefit from the ministerial exception's protection.[149]

Part of the conflicts of rights analysis must therefore acknowledge that the ministerial exception may encourage defendants to fabricate a perceived intrusion on their religious liberty.[150] However, the matter of how to determine whether a religious employer's employment decisions are actually related to religious tenets and not pretextual presents a clear problem. While this question may be somewhat easy to answer at its farthest edges,[151] it quickly becomes incredibly thorny and threatens to force courts to weigh in on the interpretation of religious doctrines, posing a clear free exercise issue. Courts may, however, rely on established religious doctrine as "a connection to religious conviction, say that God or church teaching absolutely forbids particular behavior, can constitute one criterion to assess whether a person's sense that an act is morally wrong rises to the necessary degree of intensity and magnitude."[152] Evaluating the applicability of the ministerial exception to a given suit may be served well by this test. For example, a religious employer could be required to show that the employment decision at issue in the suit is closely connected to an established tenet of their religion, as evidenced by written teachings or previously professed convictions. Greenawalt also proposes another means of measuring sincerity that does even more to prevent judicial evaluation of religious convictions. He suggests that, rather than evaluating the claim, courts could "allow anyone to receive an exemption if that person undertakes to do what most people would regard as at least as onerous as the required act."[153] In the ministerial exception context, this might mean conditioning availability of the exception on an employer's adherence to an employment contract that provides additional protections to employees, like by requiring "for cause" termination in all instances that are not covered by the exception.

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149. Zucca, *supra* note 148, at 31; Greenawalt *supra* note 145, at 14.

150. *See* Griffin, *supra* note 59, at 14.

151. For example, in a sex discrimination case based on a Roman Catholic church's failure to allow a woman to enter the priesthood or, on the opposite end, a Black minister's hostile work environment claim based on being the target of repeated racial harassment.

152. Greenawalt, *supra* note 145, at 14.

153. *Id.*

Beyond the apparent or pretextual invocations of the ministerial exception, several serious conflicts of rights issues still remain. Even if the religious employer is pursuing application of the exception to protect their credible claims of religious liberty, the fundamental rights of the employee are still at stake. Thus, the exception as it stands is untenable. This reality is reflected in Greenawalt's assumption that "[n]o one thinks claims of conscience to perform otherwise required acts should always be absolute."[154] Rather, the ministerial exception should be subject to a "process of comparative evaluation," in which three dimensions must be considered: (1) the gravity of the denial of rights implicated by the exemption; (2) the degree of inconvenience to those impacted by the exemption; and (3) whether "the very message sent by acknowledging the claims is unacceptable, that people broadly need to understand that certain actions (or refusals to act) simply should not be tolerated."[155] The first and third categories identified here are clearly implicated by the ministerial exception. As is discussed above, the ministerial exception can have devastating consequences for the rights of employees and, moreover, may run afoul of foundational moral principles, such as intolerance for racism and bigotry. Because of how well these questions address some of the exception's most glaring shortcomings, this framework may be useful for identifying when the exception has gone too far.

Professors Nelson Tebbe, Micah Schwartzman, and Richard Schragger present yet another alternative method for protecting both religious liberty and the rights that such liberty threatens. Tebbe, Schwartzman, and Schragger point to the Court's precedent on the burdens created by religious accommodation, noting that "[t]he rule against third-party harm, as it has come to be known, holds that the government cannot accommodate religious citizens if that means harming other private citizens."[156] Rooting their framework in this principle, Tebbe, Schwartzman, and Schragger argue that Title VII's undue hardship framework, under which employers are not required "to accommodate religious employees

154. Greenawalt, *supra* note 145, at 16. It should be noted that this point may be contestable, given the Court's current articulation of the ministerial exception, which creates an absolute right within the relationship between a religious institution and its ministers.

155. *Id.*

156. Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985); *Lee*, 455 U.S. at 261.

where doing so would impose 'undue hardship' on the employer," may present an attractive means by which to mitigate harm to third-parties without prohibiting all religious accommodations.[157]

In this solution, a religious exemption is impermissible if it would require third parties "to bear more than a *de minimis* cost" to accommodate the exemption.[158] The key determination, therefore, is what burden to a third-party created by a religious employer's use of the ministerial exception reaches the level of *de minimis* cost. In discerning where that line might be drawn, Tebbe, Schwartzman, and Schragger provide examples of when courts have (and have not) found that a religious accommodation to an employee (per Title VII) poses an undue hardship.[159] One such example is *Trans World Airlines v. Hardison*.[160] In *Hardison*, the Court held that an employer was not obligated to accommodate its employee's religiously-based inability to work on Saturdays because "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others."[161] This interpretation easily maps onto the ministerial exception. Here, rather than being concerned with the burdens borne by the employer, we ask whether the proposed accommodation "relieve[s] serious burdens on religion but impose[s] slight costs on others."[162] This would account for the ministerial exception's greatest shortcoming and provide a more measured approach to claims of religious liberty.

III. Conclusion

Given the numerous shortcomings identified above, one thing is clear: the ministerial exception is an infeasible standard by which to protect religious institutions. That is not to say, however, that

157. *Id.* at 217.

158. *Id.* at 221 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

159. *Id.* at 220–28.

160. 432 U.S. 63 (1977). Note, however, that *Hardison* was substantially abrogated by the Court's decision in *Groff v. DeJoy*, 143 S. Ct. 646 (2023), which held that employers must provide reasonable religious accommodations unless such accommodations would result in substantially increased costs. While this means that the "*de minimis* cost" standard no longer controls Title VII religious accommodations, it is still a useful standard for considering the posited theoretical framework.

161. Tebbe, Schwartzman & Schragger, *supra* note 156, at 221 (alteration in original).

162. *Id.* at 228.

those institutions should not be protected at all. Rather, their constitutionally guaranteed interests in religious liberty should be vindicated, but the question of how best to achieve that goal is complicated by the impact it may have on the coequal constitutional rights of others. The Court's current approach to addressing this issue does nothing to account for the rights of those impacted by the ministerial exception, instead creating a blanket exemption without qualification for any religious employer's relationship with its "minister." In so doing, the Court has failed litigants on two fronts. First, it has created a rule that is susceptible to many different interpretations, leaving lower courts puzzled and resulting in inconsistent judicial outcomes. Second, it has effectively created a hierarchy within what should be equal rights, prioritizing the Religion Clauses' protection of religious institutions and undermining the equal protection rights of their employees. While some may argue that this is simply the unfortunate reality of religious liberty, many scholars have proposed viable alternatives to the ministerial exception.[163] In the future, activists and litigants should give greater consideration to these alternatives, reframing the conversation around religious liberty and reminding the Court that there are many paths forward.

163. *E.g.*, Corbin, *supra* note 100, at 970.