

HOSANNA-TABOR AND SUPREME COURT PRECEDENT: AN ANALYSIS OF THE MINISTERIAL EXCEPTION IN THE CONTEXT OF THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS DOCTRINE

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INTRODUCTION

The United States Supreme Court's review of the decision of the United States Court of Appeals for the Sixth Circuit in the case of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*¹ could lead to a major development in the Court's Religion Clause jurisprudence.² On one level, *Hosanna-Tabor* presents important questions regarding the interrelationship between employment discrimination laws and the constitutional rights of religious organizations. The narrow issue at the center of the case is the "ministerial exception," a doctrine that precludes courts from adjudicating discrimination claims arising out of disputes between religious institutions and their ministerial employees.³ This Essay suggests, however, that the real significance of *Hosanna-Tabor* goes beyond the Court's application of the ministerial exception to the particular facts of the case. This Essay looks at the ministerial exception through the broader prism of the Supreme Court's "hands-off" approach to religious

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¹ 131 S. Ct. 1783 (2011) (granting petition for writ of certiorari for the Sixth Circuit's decision in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010) (link)).

² See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .") (link).

³ See, e.g., *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 345-47 (5th Cir. 1999) (link); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996) (link).

doctrine, which prohibits judicial inquiry into a wide range of questions relating to religious practice and belief.⁴

Although a number of courts have adopted and applied the ministerial exception, both the constitutional basis for this principle and its scope are less than clear.⁵ Through a close reading of the opinion of the United States Court of Appeals for the Sixth Circuit, this Essay suggests that the outcome in *Hosanna-Tabor* turns on an analysis of the ministerial exception within the broader context of a hands-off approach to religion.⁶ Indeed, in an opinion written by Judge Richard Posner, the United States Court of Appeals for the Seventh Circuit drew an explicit connection between the two doctrines, referring to “[t]he ministerial exception, and the hands-off approach more generally”⁷ Likewise, in looking at *Hosanna-Tabor*, this Essay aims to explore and relate the constitutional concerns underlying both the ministerial exception and the Supreme Court’s hands-off approach. Specifically, this Essay argues that the Sixth Circuit opinion is inconsistent with Supreme Court precedent, running afoul of the Court’s hands-off approach by relying on analysis of either the Free Exercise Clause, the Establishment Clause, or both, that requires judicial interpretation of religious doctrine.

Therefore, the Essay concludes that the Supreme Court will have a number of options available for deciding *Hosanna-Tabor*. Most narrowly, the Court may limit its response to a review of the reasoning and ruling set forth in the Sixth Circuit opinion, deciding that because the Sixth Circuit’s analysis contradicts Supreme Court precedent, the Sixth Circuit’s holding should be reversed. Alternatively, widening the scope of review, the Supreme Court may use *Hosanna-Tabor* to address, for the first time, the broader issue of the ministerial exception, providing guidance and direction for deciding future employment disputes involving religious organizations.

Yet, this Essay encourages the Court to take a more ambitious and more dramatic step, viewing *Hosanna-Tabor* as an opportunity to rethink the hands-off approach to questions of religious practice and belief. In the past, scholars and courts have encountered difficulty in attempting to

⁴ See Nat’l Spiritual Assembly of Baha’is of U.S. Under Hereditary Guardianship, Inc. v. Nat’l Spiritual Assembly of Baha’is of U.S., Inc., 628 F.3d 837, 846 n.2 (7th Cir. 2010) (link); Samuel J. Levine, *The Supreme Court’s Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793, 795 (2009) (link).

⁵ See, e.g., Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 526–27 (2007); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 855–56 (2009) (link).

⁶ See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006) (referring to “[t]he ministerial exception, and the hands-off approach more generally”) (link).

⁷ *Id.*

understand and apply elements of the Court's hands-off doctrine.⁸ The Sixth Circuit's lack of clarity and consistency in *Hosanna-Tabor* may stand as illustration of some of these difficulties. Thus, *Hosanna-Tabor* may provide a particularly valuable opportunity for the Supreme Court to return to—and possibly rethink, reconsider, and reformulate—the current hands-off approach to religious doctrine.

I. A BRIEF SUMMARY OF *HOSANNA-TABOR*

A. Background

Although the Sixth Circuit opinion provides considerable background details, some of which appear to be in contention among the parties, a brief summary of the facts may be helpful. In 1999, Hosanna-Tabor Church, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS), hired Cheryl Perich to teach at a school it operates in Redford, Michigan.⁹ Perich taught at the school for several years under the title of “commissioned minister” of the LCMS.¹⁰ When Perich became ill in 2004, she agreed to the recommendation of Hosanna-Tabor's administrators that she take disability leave for the following school year.¹¹ For over two months, beginning on December 16, 2004, Perich and the school engaged in a variety of disputes regarding her medical condition and the status of her future employment at the school.¹² Perich reported for work on February 22, 2005 after receiving clearance from her doctor. However, the school informed Perich that her employment would likely be terminated. Perich threatened to file a disability discrimination suit in response.¹³ On March 19, 2005, Hosanna-Tabor informed Perich that its Board of Directors would consider rescinding her call to teach due to insubordination and disruptive behavior and stated that she had damaged her relationship with Hosanna-Tabor “beyond repair” by “threatening to take legal action.”¹⁴

Two days later, Perich's lawyer formally informed Hosanna-Tabor's lawyer of the possibility that Perich would file a discrimination charge.¹⁵ On April 11, 2005, Hosanna-Tabor terminated Perich pursuant to a vote of the congregation.¹⁶ Perich responded by filing a charge of discrimination and retaliation with the Equal Employment Opportunity Commission

⁸ See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1846 (1998); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 86 (1997).

⁹ EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010).

¹⁰ See *id.*

¹¹ *Id.* at 773.

¹² See *id.* at 773–74.

¹³ *Id.* at 774.

¹⁴ *Id.*

¹⁵ *Id.* at 775.

¹⁶ *Id.*

(EEOC), and the EEOC subsequently filed a complaint against Hosanna-Tabor for retaliation in violation of the Americans with Disabilities Act of 1990 (ADA).¹⁷ When the case came before the United States District Court for the Eastern District of Michigan, the court granted Hosanna-Tabor's motion for summary judgment on the grounds that the ministerial exception to the ADA barred the court from inquiring into Perich's retaliation claim.¹⁸ Perich and the EEOC then appealed to the Sixth Circuit.

Hosanna-Tabor argued that in submitting her claim outside an internal church forum, Perich violated church doctrine, demonstrating that she was not qualified to continue to function as a minister within the church and resulting in her dismissal.¹⁹ Perich countered that neither the school's employment manuals nor the correspondence between her and Hosanna-Tabor referenced church doctrine or the procedure for internal dispute resolution.²⁰ Therefore, in Perich's view, Hosanna-Tabor's actions were not taken pursuant to religious doctrine.²¹

The Sixth Circuit reversed the district court's decision, primarily on the grounds that "the district court erred in its legal conclusion classifying Perich as a ministerial employee."²² The Sixth Circuit found that "Perich's primary function was teaching secular subjects, not 'spreading the faith . . .'"²³ and her "extra religious training . . . did not affect the duties she performed in the classroom on a daily basis."²⁴ Therefore, the court held, Perich did not qualify as a ministerial employee for the purposes of applying the ministerial exception to her dispute with Hosanna-Tabor.

B. *The Sixth Circuit Opinion*

The Sixth Circuit's decision, reversing the district court, turns entirely on the court's interpretation of the contours of the ministerial exception and its application to the facts of the case. Yet, the Sixth Circuit's discussion of the constitutional basis for the ministerial exception relies on seemingly imprecise and unspecific constitutional analysis, raising questions about the strength of the court's assessment. The Sixth Circuit's analysis opened with the broad and arguably vague assertion that "[t]he ministerial exception is rooted in the First Amendment's guarantees of religious freedom."²⁵ The court then divided this section of the opinion into two

¹⁷ 42 U.S.C. §§ 12117(a), 12203(a) (2006) (link).

¹⁸ *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008), *rev'd*, 597 F.3d 769 (6th Cir. 2010) (link).

¹⁹ *See Hosanna-Tabor*, 597 F.3d at 774, 781.

²⁰ *See id.* at 782.

²¹ *See id.*

²² *Id.* at 780.

²³ *Id.* (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (link)).

²⁴ *Id.*

²⁵ *Id.* at 777.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

subsections, each offering a theory to explain the rationale behind the rule that courts are precluded from adjudicating claims between churches and their ministerial employees.

In the first subsection, entitled “Interference in Church Governance,” the court stated that the ministerial exception “precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution’s constitutional right to be free from judicial interference in the selection of those employees.”²⁶ The court identified neither a constitutional provision nor a Supreme Court case that articulates such a “constitutional right” of religious institutions. Instead, in apparent support for this asserted right, the court merely appended a reference to a Supreme Court case, *Serbian Eastern Orthodox Diocese v. Milivojevich*.²⁷ The reference to *Milivojevich*, which follows the similarly vague signal, “[s]ee generally,”²⁸ includes neither a pin cite nor a parenthetical, and is offered without any further context or comment. Although *Milivojevich* may very well have some bearing on the issue of judicial interference in church governance, the opinion leaves it to the reader to determine the relationship, if any, between *Milivojevich* and the ministerial exception. Indeed, the Supreme Court has not yet recognized the ministerial exception in *Milovejevich* or any other case.

The second subsection in this section of the Sixth Circuit opinion begins with the heading, “Interpretation of Church Doctrine.”²⁹ Here again, the court’s constitutional analysis remains vague, offering the declaration that “the ministerial exception is also motivated by the concern ‘that secular authorities would be involved in evaluating or interpreting religious doctrine.’”³⁰

The lack of specificity in both of the court’s theories is telling. The court does not identify a textual basis for the ministerial exception in either the Free Exercise Clause or the Establishment Clause. Instead, the court alludes to a “constitutional right” for a religious institution to be free from judicial interference and to a “concern” over courts’ interpretations of religious doctrine.³¹ The Sixth Circuit’s failure to support these assertions with a direct citation to Supreme Court precedent raises further questions about the soundness of the ministerial exception’s doctrinal basis.

²⁶ *Id.* (quoting *Hollins*, 474 F.3d at 225).

²⁷ 426 U.S. 696 (1976) (link).

²⁸ *Hosanna-Tabor*, 597 F.3d at 777.

²⁹ *Id.* at 781.

³⁰ *Id.* (quoting *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006)).

³¹ *Id.* at 777, 781.

II. THE MINISTERIAL EXCEPTION, THE RELIGION CLAUSES, AND SUPREME COURT PRECEDENT: OPEN QUESTIONS ABOUT *HOSANNA-TABOR*

A careful consideration of the Sixth Circuit opinion in *Hosanna-Tabor* requires a more precise analysis of the constitutional basis for the ministerial exception. However, to the extent that the Sixth Circuit implicitly intended to rely on the Supreme Court's interpretation of either the Free Exercise Clause or the Establishment Clause, the court's reasoning in *Hosanna-Tabor* appears to contradict Supreme Court jurisprudence in both of these areas. Specifically, in relying on judicial interpretation of religious doctrine, the Sixth Circuit opinion is inconsistent with Supreme Court's hands-off approach to questions of religious practice and belief.

A. *The Free Exercise Clause*

Although the Sixth Circuit opinion did not include an express citation to the Free Exercise Clause, the court may have been alluding to free exercise protections through its reference to a religious institution's "constitutional right to be free from judicial interference in the selection of [ministerial] employees."³² If so, however, the court's application of free exercise rights in *Hosanna-Tabor* seems inconsistent with basic elements of the Supreme Court's free exercise jurisprudence.

As a threshold matter, current free exercise doctrine may exclude application of the ministerial exception to employment discrimination claims. In the landmark 1990 case *Employment Division v. Smith*, the Supreme Court held that a law that is facially neutral and generally applicable does not run afoul of free exercise protections, even if the law places a burden on a religious practice.³³ In *Hosanna-Tabor*, Perich claimed that the school violated her employment rights pursuant to the ADA, a facially neutral and generally applicable law.³⁴ Therefore, under *Smith*, even if enforcement of the ADA would interfere with the school's ability to select its ministerial employees, arguably burdening its religious exercise, the school would not have a free exercise claim in the context of the requirements of the ADA. The contours of the ministerial exception would simply not extend to provide a defense against a violation of a generally applicable law.³⁵

Alternatively, some courts have held that the ministerial exception survived the *Smith* decision,³⁶ and therefore, the school may have a free exercise claim against the application of the ADA to disputes regarding its

³² *Id.* at 777 (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)).

³³ 494 U.S. 872, 879 (1990) (link).

³⁴ See *Hosanna-Tabor*, 597 F.3d at 776–77.

³⁵ See, e.g., *Black v. Snyder*, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (link).

³⁶ See, e.g., *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 348–49 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–63 (D.C. Cir. 1996).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

ministerial employees. Nevertheless, putting aside possible concerns over *Smith*, the Sixth Circuit's analysis in *Hosanna-Tabor* appears to conflict with other aspects of Supreme Court precedent. Specifically—and somewhat ironically—in an ostensible effort to apply a hands-off approach to judicial interference in religious practice, the Sixth Circuit's analysis instead contradicts other elements of the Supreme Court's hands-off approach to interpreting religious doctrine in free exercise cases.

In the 1981 case, *Thomas v. Review Board*, the Supreme Court considered the free exercise claim of a Jehovah's Witness, Eddie Thomas, who quit his job on the ground that his religion prohibited him from working on the production of armaments.³⁷ Thomas argued that the state's subsequent denial of his unemployment benefits violated his constitutional right to the free exercise of religion.³⁸ The Indiana Supreme Court rejected his claim, in part because it found that his decision to quit was based on his "personal philosophical choice" rather than religious belief.³⁹

The Supreme Court reversed, rejecting the methodology the Indiana court used in its determination that Thomas's objection to working on armaments did not qualify as free exercise of religion.⁴⁰ The Court observed that "[t]he Indiana court . . . appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable."⁴¹ In contrast, the Supreme Court emphasized the need for judges to maintain a hands-off approach in addressing matters of internal religious dispute.⁴²

With respect to the dispute between Thomas and another Jehovah's Witness, the Court noted that "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed"⁴³ In these scenarios, the Court insisted, "the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."⁴⁴ Declaring that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect," the Court concluded that "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."⁴⁵

³⁷ *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981) (link).

³⁸ *See id.* at 711–12.

³⁹ *Id.* at 712–13.

⁴⁰ *See id.* at 716.

⁴¹ *Id.* at 715.

⁴² *See id.* at 716.

⁴³ *Id.* at 715.

⁴⁴ *Id.*

⁴⁵ *Id.* at 715–16.

As in *Thomas*, the outcome in *Hosanna-Tabor* may turn, in part, on the appropriate judicial response to an intrafaith dispute central to the religious claim in the case. One of the key points of contention between the parties in *Hosanna-Tabor* is whether Perich's primary duties as a teacher at the school were religious or secular in nature.⁴⁶ As a matter of interpreting its own religious doctrine, the school characterized Perich's duties as spiritual in nature while Perich advocated a different view of her position, pointing to what she saw as the largely secular nature of her duties.⁴⁷ According to the Sixth Circuit, the resolution of this crucial question would determine whether Perich's employment status qualified for the ministerial exception.⁴⁸

Nevertheless, rather than resolving the argument between *Hosanna-Tabor* and Perich regarding the nature of her employment, the district court applied a hands-off approach to the intrafaith dispute.⁴⁹ As it explained at length:

The separation of church and state in the United States has made federal courts inept when it comes to religious issues; the inquiry into the value of an employee in furthering a religious institution's sectarian mission is no different. The lack of clarity in federal court cases regarding elementary school teachers should not hinder churches from valuing teachers as important spiritual leaders and deciding who will fill those positions as ministerial employees, subject, of course, to inappropriate uses of the title "minister" as subterfuge. For these reasons, it seems prudent in this case to trust *Hosanna-Tabor's* characterization of its own employee in the months and years *preceding* the events that led to litigation. Because *Hosanna-Tabor* considered Perich a "commissioned minister" and the facts surrounding Perich's employment in a religious school with a sectarian mission support this characterization, the Court concludes that Perich was a ministerial employee. If, on these circumstances, the Court were to conclude otherwise, it would risk "infring[ing] upon [*Hosanna-Tabor's*] right to choose its spiritual leaders."

⁴⁶ See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010).

⁴⁷ See *id.* at 780–81.

⁴⁸ See *id.* at 778.

⁴⁹ See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881 (E.D. Mich. 2008), *rev'd*, 597 F.3d 769 (6th Cir. 2010).

Because Perich was a ministerial employee of Hosanna-Tabor, this Court can inquire no further into her claims of retaliation. Under the circumstances, “the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.”⁵⁰

Although the district court did not cite *Thomas*, its reasoning followed a similar approach to intrafaith disputes over religious doctrine. Because the district court understood the ministerial exception to be grounded in the free exercise rights of a religious institution, the court declined to conduct an “inquiry into the value of an employee in furthering a religious institution’s sectarian mission”⁵¹ Rather, as in *Thomas*, the court took a hands-off approach to the question of religious doctrine, accepting the religious adherent’s assertion that the conduct at issue constituted an element of the free exercise of religion. Accordingly, the court found it “prudent in this case to trust Hosanna-Tabor’s characterization of its own employee”⁵² In fact, without a direct citation, the district court’s conclusion echoes the Court’s language in *Thomas*, referring to “these sensitive areas” of doctrinal determination that remain outside judicial competence.⁵³

In contrast, the Sixth Circuit’s analysis in *Hosanna-Tabor* seems to conflict with the hands-off approach prescribed by the Supreme Court in *Thomas*. Engaging in the kind of inquiry that the district court in *Hosanna-Tabor*—and the Supreme Court in *Thomas*—considered improper, the Sixth Circuit rejected the school’s characterization of Perich’s role. Instead, the court reached its own conclusion that Perich’s duties were not sufficiently spiritual in nature to qualify her position for the ministerial exception.⁵⁴

To justify its reversal of the district court’s findings, the Sixth Circuit asserted that “the district court relied largely on the fact that Hosanna-Tabor gave Perich the title of commissioned minister and held her out to the world as a minister by bestowing this title upon her.”⁵⁵ As the appellate court noted, according to some courts, the mere title of minister is insufficient to demonstrate that an employee’s position is, in fact, spiritual in nature and

⁵⁰ *Id.* at 891–92 (citations omitted).

⁵¹ *Id.* at 891.

⁵² *Id.* at 892.

⁵³ *Id.*

⁵⁴ See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 780–81 (6th Cir. 2010).

⁵⁵ *Id.* at 780.

therefore subject to the ministerial exception.⁵⁶ However, the Sixth Circuit failed to acknowledge that the district court expressly rejected “inappropriate uses of the title ‘minister’ as subterfuge” for the purpose of improperly applying the ministerial exception to a non-ministerial employee.⁵⁷ Contrary to the Sixth Circuit’s assertion—and consistent with Supreme Court precedent in *Thomas*—the district court relied not on the title granted by the school, but on *Hosanna-Tabor*’s doctrinal understanding of Perich’s role as a teacher.⁵⁸

Indeed, as the Sixth Circuit acknowledged, *Hosanna-Tabor* “characterizes its staff members as ‘fine Christian role models,’” serving, in the school’s view, an important religious function.⁵⁹ Moreover, in a footnote, the court quotes *Hosanna-Tabor*’s citation to Perich’s own statement that “the educational ministry is special because the teacher can bring God into every subject.”⁶⁰ Yet, rather than accepting *Hosanna-Tabor*’s characterization—or Perich’s characterization, for that matter—of the spiritual value of the classroom teacher, the Sixth Circuit imposed its own formalistic standard, finding that “only twice did Perich bring religion into otherwise secular subjects.”⁶¹ The opinion failed to recognize, however, the variety of ways in which, from its own perspective, a religious institution may look to teachers of all subjects to bring God into the classroom.⁶² In short, contrary to the Supreme Court’s hands-off approach in *Thomas*, the Sixth Circuit seemed willing to substitute its own understanding of religious doctrine for that of the religious adherent whose free exercise rights it is adjudicating.⁶³

Notably, near the close of the subsection of the opinion concerned with judicial interference in church governance, the Sixth Circuit emphasized that the “intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their

⁵⁶ *Id.* at 780–81 (citing *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) (link)).

⁵⁷ *Hosanna-Tabor*, 582 F. Supp. 2d at 891–92.

⁵⁸ *See id.*

⁵⁹ *Hosanna-Tabor*, 597 F.3d at 780.

⁶⁰ *Id.* at 780 n.8 (quotation marks omitted).

⁶¹ *Id.*

⁶² *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. (forthcoming 2011) (manuscript at 59–60), available at <http://ssrn.com/abstract=1883657> (describing various ways in which teachers in religious schools may be expected to integrate religion into every subject) (link).

The Sixth Circuit’s failure to appreciate the perspective of the religious school in this case mirrors some of the Supreme Court’s failures to understand the perspectives of religious minorities. *See* Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996).

⁶³ *See* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988) (“[T]he dissent’s approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.”).

own religious interpretations.”⁶⁴ Ironically, in rejecting *Hosanna-Tabor*’s characterization of the spiritual value and religious significance of Perich’s position, the Sixth Circuit refused to allow a religious organization to adhere to its own religious interpretations.

Of course, in deciding *Hosanna-Tabor*, the Supreme Court has the option to reconsider and revise the hands-off approach to permit the kind of judicial interpretation of religious doctrine that served as the basis for the Sixth Circuit holding. In fact, courts and scholars have encountered some difficulty understanding and applying the Court’s hands-off approach,⁶⁵ suggesting the need for the Court to clarify its rulings in this area. Nevertheless, the Sixth Circuit’s analysis contradicts the current state of the hands-off approach. Therefore, absent a substantial overruling by the Supreme Court of its own precedent, the Sixth Circuit opinion should likely be reversed.

B. *The Establishment Clause/Church Property Cases*

As an alternative—or perhaps as a complement—to a free exercise analysis, other parts of Sixth Circuit opinion suggest that its allusion to “the First Amendment’s guarantees of religious freedom” that lie at the “root[]” of the ministerial exception⁶⁶ may refer to religious freedoms protected by the Establishment Clause. Again, however, the Sixth Circuit’s analysis requires judicial interpretation of religious doctrine, contradicting the Supreme Court’s hands-off approach in Establishment Clause cases as well.

Following the subsection in the *Hosanna-Tabor* opinion that focuses on governmental interference in church governance, a less extensive subsection refers to an “addition[al] . . . concern ‘that secular authorities would be involved in evaluating or interpreting religious doctrine.’”⁶⁷ Although, as *Thomas* illustrates, concerns over judicial interpretation of religious doctrine apply to free exercise cases as well, though these concerns are more commonly associated with the Establishment Clause. Therefore, in raising this issue in the context of *Hosanna-Tabor*, the Sixth Circuit quite possibly locates the ministerial exception within the protections of the Establishment Clause. Nevertheless, given the absence of an express reference to the Establishment Clause in *Hosanna-Tabor*, it may be necessary to examine the court’s opinion more carefully in an effort to identify the precise constitutional basis and nature of the constitutional “concern” over judicial evaluation of religious doctrine.

In articulating this concern, the court relies on and quotes from the opinions of two other circuit courts that have applied the ministerial

⁶⁴ *Hosanna-Tabor*, 597 F.3d at 781.

⁶⁵ See Greenawalt, *supra* note 8; Levine, *supra* note 8.

⁶⁶ *Hosanna-Tabor*, 597 F.3d at 777.

⁶⁷ *Id.* at 781.

exception, the Seventh Circuit and the Fifth Circuit.⁶⁸ Accordingly, it may be helpful to look at the reasoning underlying each of these cases to better understand the constitutional basis for the court's analysis of the ministerial exception in *Hosanna-Tabor*.

In the first case cited, *Tomic v. Catholic Diocese of Peoria*, Judge Richard Posner, writing for the Seventh Circuit, identified two "First Amendment concerns with assuming jurisdiction in ecclesiastical cases."⁶⁹ Both of these concerns seemingly parallel the concerns the Sixth Circuit raised in *Hosanna-Tabor*:

The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance . . . even if the alleged discrimination were purely nondoctrinal. This second aspect of the internal-affairs doctrine is called the "ministerial exception" to the exercise of federal jurisdiction.⁷⁰

Upon close examination, however, Judge Posner's analysis may not serve to clarify the Sixth Circuit's reasoning in *Hosanna-Tabor*. First, unlike the Sixth Circuit, Judge Posner tied the ministerial exception specifically to the concern over judicial intrusion into church governance, which he expressly distinguished as "independent" from the proposition that courts should not interpret religious doctrine.⁷¹ Thus, as a basic matter, Judge Posner's conception of the ministerial exception appears to differ from that of the Sixth Circuit, which identifies opposition to judicial determination of church doctrine as a motivating factor for the ministerial exception.⁷²

Second, like the Sixth Circuit, Judge Posner referred to vague "First Amendment concerns" and only briefly cited Supreme Court precedent in support of a prohibition on judicial interpretation of religious doctrine.⁷³ Ultimately, notwithstanding a somewhat more extensive discussion and more citations to Supreme Court cases, the Seventh Circuit likewise did not delineate the constitutional grounds for the ministerial exception in a

⁶⁸ See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

⁶⁹ 442 F.3d at 1039 (alteration omitted).

⁷⁰ *Id.* (citation and quotation marks omitted).

⁷¹ *Id.*

⁷² See *Hosanna-Tabor*, 597 F.3d at 781.

⁷³ *Tomic*, 442 F.3d at 1037–39.

manner that would provide insight into the Sixth Circuit's constitutional analysis in *Hosanna-Tabor*.

A more helpful analysis may be found in the other case cited in *Hosanna-Tabor*. In *Combs v. Central Texas Annual Conference of United Methodist Church*, following an extensive free exercise discussion, the Fifth Circuit added: "Having a civil court determine the merits of canon law scholarship would be in violent opposition to the constitutional principle of the separation of church and state."⁷⁴ Although the court did not cite the Establishment Clause, the reliance on the separation of church and state suggests that this concern is grounded in the Establishment Clause.

Moreover, the court in *Combs* cited *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,⁷⁵ a case involving a church property dispute, for the proposition that "civil courts are not permitted to determine ecclesiastical questions."⁷⁶ The reliance on *Presbyterian Church* is significant, as the Fifth Circuit's analysis thereby drew a parallel between the ministerial exception and church property cases. While *Hosanna-Tabor* will provide the first opportunity for the Supreme Court to consider the ministerial exception, church property cases have formed the building blocks of the Court's hands-off approach to religious doctrine.⁷⁷ Therefore, to the extent that church property cases play a significant role underlying both circuit court approaches to the ministerial exception and the Supreme Court's hands-off approach, perhaps the Sixth Circuit's analysis of the ministerial exception in *Hosanna-Tabor* is best evaluated through a closer look at the Supreme Court's hands-off approach in church property cases.

Presbyterian Church, the case cited in the Fifth Circuit's analysis of the ministerial exception, involved yet another intrafaith dispute: two local churches withdrew from a national church contending that the national church violated the organization's constitution and departed from church doctrine.⁷⁸ The Georgia state courts held that the national church's control over the property depended on its adherence to doctrine as it existed at the time of the local church's affiliation.⁷⁹ Here too, the Supreme Court forcefully rejected an approach that required courts to interpret and apply religious doctrine:

First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and

⁷⁴ *Combs*, 173 F.3d at 350.

⁷⁵ 393 U.S. 440 (1969) (link).

⁷⁶ *Combs*, 173 F.3d at 350.

⁷⁷ See Greenawalt, *supra* note 8, at 1856; Levine, *supra* note 8, at 88–90.

⁷⁸ See *Presbyterian Church*, 393 U.S. at 442.

⁷⁹ See *id.* at 443–44.

practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. . . . The Georgia courts have violated the command of the First Amendment [T]he departure-from-doctrine element . . . requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role To reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine.⁸⁰

Notwithstanding the Supreme Court’s unequivocal declarations in *Presbyterian Church* and other church property cases that the First Amendment prohibits courts from interpreting and determining religious doctrine, the Court’s opinions are less committal regarding the precise textual or doctrinal grounds for this constitutional principle. As Kent Greenawalt observed in commenting on *Presbyterian Church*: “Without distinguishing the effect of the two religion clauses, the Court considered their joint operation to preclude states from using a departure-from-doctrine standard.”⁸¹ However, as Greenawalt and others have further noted, a meaningful analysis and application of the Court’s church property cases requires a determination of the precise constitutional basis for the Court’s holdings.⁸² After all, although the Court does not distinguish between the two Religion Clauses in these cases, as a doctrinal and conceptual matter, a Free Exercise Clause analysis of church property disputes differs substantially from an Establishment Clause analysis.

For his part, Greenawalt has analyzed the Supreme Court’s hands-off approach in church property cases primarily under the *Lemon* test for the Establishment Clause.⁸³ In particular, Greenawalt has suggested that the “entanglement worry” of the *Lemon* test “fits very well with a strong ‘hands-off approach;’ courts should not become adjudicators of religious

⁸⁰ *Id.* at 449–51.

⁸¹ Greenawalt, *supra* note 8, at 1857.

⁸² See *id.*; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

⁸³ See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (link).

matters.⁷⁸⁴ Under this interpretation of the Establishment Clause, courts are prohibited from deciding cases that would entangle them in matters of church doctrine and governance. Accordingly, just as the Supreme Court has taken a hands-off approach to disputes over the ownership of church property, the Sixth Circuit applied the ministerial exception in *Hosanna-Tabor* to maintain a hands-off approach to a dispute over the appointment and dismissal of ministers.

Still, viewing the ministerial exception within the broader context of a general prohibition on judicial entanglement in religious matters would raise questions about the Sixth Circuit's analysis in *Hosanna-Tabor*. Under the Supreme Court's hands-off approach, judges may not engage in an inquiry that would require investigation, interpretation, and determination of church doctrine. The church property cases are one illustration of the Court's attempts to place limitations on the judiciary's role in litigation that arises out of intrafaith disputes over matters of religion. Similarly, the hands-off approach would seem to preclude judicial involvement in intrachurch disputes over the employment of ministers, including doctrinal disputes between a religious employer and a ministerial employee.

However, in *Hosanna-Tabor* the Sixth Circuit did, in fact, engage in the kind of religious interpretation prohibited under the hands-off approach. According to *Hosanna-Tabor*, Perich violated church doctrine that required her to submit her claim to an internal church forum for dispute resolution.⁸⁵ *Hosanna-Tabor* further contended that Perich's failure to follow church doctrine demonstrated that she was not qualified to continue to function as a minister within the church, resulting in her dismissal.⁸⁶ Perich countered that the LCMS personnel manual and the Governing Manual for Lutheran Schools "clearly contemplate that teachers are protected by employment discrimination and contract laws."⁸⁷ Moreover, Perich noted that the correspondence between her and *Hosanna-Tabor* did not reference church doctrine or the procedure for internal dispute resolution.⁸⁸ Therefore, in Perich's view, *Hosanna-Tabor*'s actions were not taken pursuant to religious doctrine.⁸⁹

The conflicting arguments between *Hosanna-Tabor* and Perich revolved squarely around the parties' conflicting interpretations of Lutheran church doctrine. Therefore, judicial resolution of these arguments would require a determination of the correct interpretation of church doctrine. However, pursuant to Supreme Court precedent in cases of intrafaith church

⁸⁴ Greenawalt, *supra* note 8, at 1905–06; accord Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1914 (2011).

⁸⁵ See *EEOC v. Hosanna-Tabor Evangelical Church & Sch.*, 597 F.3d 769, 774 (6th Cir. 2010).

⁸⁶ *See id.*

⁸⁷ *Id.* at 782.

⁸⁸ *See id.*

⁸⁹ *See id.*

properly disputes, a court would be precluded from adjudicating these questions in favor of either interpretation. Applying the Supreme Court's hands-off approach to the dispute in *Hosanna-Tabor*, a court would have no authority to reject Hosanna-Tabor's interpretation of its own religious doctrine, and therefore, no grounds for ruling in favor of Perich's discrimination claim. Nevertheless, the Sixth Circuit endorsed Perich's interpretation, faulting Hosanna-Tabor for "attempt[ing] to reframe the underlying dispute . . . to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution."⁹⁰ By its very nature, the court's characterization and repudiation of Hosanna-Tabor's argument is premised on the court's determination that Perich, and not Hosanna-Tabor, has correctly interpreted church doctrine.

The Sixth Circuit offered no explanation as to why its approach would not violate Supreme Court precedent, or why its analysis would not contradict the Sixth Circuit's own articulation of one of the concerns underlying the ministerial exception: "that secular authorities would be involved in evaluating or interpreting religious doctrine."⁹¹ Ultimately, in rejecting the applicability of the ministerial exception and the hands-off approach to the dispute between Hosanna-Tabor and Perich, the Sixth Circuit appears to have rejected the underlying basis for both the ministerial exception and the broader hands-off approach to matters of religious doctrine.

CONCLUSION

The pending Supreme Court consideration of *Hosanna-Tabor* has brought about much anticipation among scholars, practitioners, and religious organizations. The case has engendered both scholarship and amicus briefs addressing and advocating both sides of the dispute. In Rick Garnett's opinion, *Hosanna-Tabor* will be "among the most important religious-freedom decisions of the last 30 years."⁹²

The Supreme Court will have a number of options available when it selects a methodology for deciding *Hosanna-Tabor*. On one level, the Court may choose to take a narrow view of the case, limiting its review to the analysis and ruling set forth in the Sixth Circuit opinion. Under this option, the Court may conclude that the Sixth Circuit's analysis contradicted basic elements of the Supreme Court's hands-off approach to religious doctrine, and therefore, the Sixth Circuit's holding should be reversed. As detailed at length in this Essay, whether the Sixth Circuit was relying on Free Exercise or Establishment Clause principles, its application

⁹⁰ *Id.* at 781.

⁹¹ *Id.*

⁹² Rick Garnett, *One of the Most Important Religious Freedom Cases in Years?*, MIRROR OF JUSTICE, Nov. 2, 2010, <http://mirrorofjustice.blogspot.com/mirrorofjustice/2010/11/one-of-the-most-important-religious-freedom-cases-in-years.html> (link).

of the ministerial exception to the dispute between *Hosanna-Tabor* and *Perich* included modes of inquiry that are inconsistent with the Supreme Court's hands-off approach.

Alternatively, for the first time, the Supreme Court may address the broader issue of the ministerial exception. As a judicially created doctrine with constitutional implications, the ministerial exception has been the source of substantial controversy and confusion among courts and scholars alike. Accordingly, the ministerial exception would seem to be a particularly suitable doctrine for the Supreme Court to take on directly. A Supreme Court decision confronting complex issues revolving around the basis, scope, and contours of the ministerial exception would provide courts across the country with sorely needed guidance and direction.

Finally, and most ambitiously, perhaps the Supreme Court will see *Hosanna-Tabor* as an opportunity to rethink the hands-off approach to questions of religious practice and belief. Both scholars and courts have encountered difficulty attempting to understand and apply elements of the Court's hands-off doctrine.⁹³ The Sixth Circuit's lack of clarity and consistency in *Hosanna-Tabor* may stand as an example of some of the substantive drawbacks to the Supreme Court's current approach.

Policy concerns over the Court's hands-off approach may be even more significant. There are certainly strong reasons underlying the general principle that courts should be reluctant to engage in the interpretation and determination of religious questions. However, the Supreme Court's broad articulation and application of this principle preclude courts from adjudicating a wide range of disputes, at times impeding the effective administration of justice.⁹⁴

This concern may manifest itself in Free Exercise challenges, in which a court's unwillingness to carefully analyze religious questions may result in decisions that are too deferential to the religious adherent or—more likely—the government.⁹⁵ Likewise, in some Establishment Clause cases, a court's failure to examine the religious character of a practice or symbol may prevent an appropriate and careful balancing of the interests of nonestablishment with those of acceptable accommodation, resulting in improper governmental endorsement of religion or inadequate acceptance of appropriate forms of public expression.⁹⁶

⁹³ See Greenawalt, *supra* note 8, at 1846.

⁹⁴ See Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005); Levine, *supra* note 8.

⁹⁵ See Greenawalt, *supra* note 8, at 1906 (the "major basis for the decision [in *Employment Division v. Smith*] is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption." (footnote omitted)); Levine, *supra* note 8, at 88 ("[T]he Court's decision in *Employment Division v. Smith* was, in part, a result of the Court's increasing reluctance to decide questions involving religious interpretation.").

⁹⁶ See Levine, *supra* note 8.

Finally, in cases of intrafaith disputes, such as church property cases and *Hosanna-Tabor*, a court's refusal to look into the asserted religious grounds for a religious organization's decisions may grant too much deference to powerful institutions. In these cases, less powerful groups and individuals may find themselves bereft of legal recourse for otherwise meritorious legal claims. Thus, *Hosanna-Tabor* may provide a particularly valuable opportunity for the Supreme Court to return to—and possibly rethink, reconsider, and reformulate—its hands-off approach to religious doctrine.