REFLECTIONS ON *HOSANNA-TABOR*

MICHAEL W. MCCONNELL*

The unanimity and the smooth, no-heavy-lifting style of Chief Justice John Roberts's opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[1] might give the impression that it was not a difficult case under past doctrine. Not so. For more than twenty years after the Court's decision in *Employment Division v. Smith*[2]—known as the "peyote case"—lower courts and academic observers had been wondering how to deal with the question of clergy hiring.[3] It is intuitively obvious to anyone with an understanding of American constitutional values that the Roman Catholic Church (and others including Orthodox Judaism, Eastern Orthodoxy, Islam, and many conservative Protestant denominations) must have a right to hire as clergy only men, just as other religious tradi-

* Michael W. McConnell is the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and Senior Fellow at the Hoover Institution. He previously served as Circuit Judge on the United States Court of Appeals for the Tenth Circuit. He filed an amicus brief in *Hosanna-Tabor* on behalf of The Evangelical Covenant Church, Evangelical Lutheran Church in America, General Conference of Seventh-Day Adventists, General Council on Finance and Administration of the United Methodist Church, Inc., General Synod of the United Church of Christ, Rev. Gradye Parsons, Stated Clerks of the General Assembly of the Presbyterian Church (U.S.A.), and Salvation Army National Corporation. Paul Harold provided research assistance.

This Essay was adapted from remarks given during a panel discussion at the 2011 Federalist Society National Lawyers Convention held in November 2011 in Washington, D.C. For an audio and video recording of the complete panel, please visit The Federalist Society's website. *Religious Liberties: The Ministerial Exception Case:* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, FEDERALIST SOC'Y (Nov. 11, 2011), http://www.fed-soc.org/publications/detail/the-ministerial-exception-case-hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-event-audiovideo.

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

2. 494 U.S. 872 (1990).

3. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1142 (1990) (discussing how *Smith*, if taken to its logical extreme, would permit Title VII to apply to churches when they refuse to hire female priests, even contrary to church doctrine).

tions may enforce other requirements seemingly at odds with secular law. Surely the separation of church and state protects the ability of religious groups to decide for themselves who should serve as their priest, pastor, or imam. Any other answer would generate a constitutional crisis. Yet Title VII and many state equivalents prohibit sex discrimination in employment,[4] and there is no statutory exception for religious employers.

Hosanna-Tabor did not involve the all-male clergy. It involved the dismissal of a minister whose primary duties were as a primary school teacher, allegedly in retaliation for asserting rights under the Americans with Disabilities Act.[5] But the underlying principle was the same. The questions presented were, first, whether the employment discrimination laws may constitutionally be applied to the hiring or firing of ministers, and second, how to define the reach of the ministerial exemption if it exists.[6]

The private plaintiff and the federal Equal Employment Opportunity Commission (EEOC) relied heavily on *Smith*.[7] In *Smith* the Supreme Court ruled that Oregon's ban on sacramental peyote use was valid under the Free Exercise Clause of the First Amendment.[8] More generally, the Court held that the Free Exercise Clause, the most natural source for a right of churches to hire or fire ministers without governmental interference, does not apply to neutral laws of general applicability.[9] The two challengers to Oregon's ban, both members of the Native American Church, had lost their jobs after ingesting peyote for

4. Title VII permits sex discrimination if sex is a bona fide occupational qualification (BFOQ). 42 U.S.C. § 2000e-2(e)(1) (2006). Some state equivalents do not. *See, e.g.*, ARK. CODE ANN. § 16-123-101 et seq. (2012); D.C. CODE § 2-1401 et seq. (2012); WYO. STAT. ANN. § 27-9-105 (2012). The burden of establishing a BFOQ is onerous, with the burden on the employer to justify its practice. *See, e.g.*, Everson v. Mich. Dept. of Corr., 391 F.3d 737, 747–49 (6th Cir. 2004). It is almost as unthinkable that a church would be required to justify an all-male clergy rule to secular authorities as it is that the rule would be categorically illegal. The point is not just which side prevails in this inquiry, but that it is not the legitimate business of the state to decide what the qualifications are for the ministry.

5. 132 S. Ct. at 700–01.

6. *See id.* at 699, 706–07.

7. *See, e.g.*, Brief for the Federal Respondent at 21–29, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553); Brief for Respondent Cheryl Perich at 42–49, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

8. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

9. *Id.* at 879–80.

sacramental purposes at a ceremony of their Church and were deemed ineligible for unemployment compensation because they had been discharged for work-related "misconduct."[10] On these facts, the Supreme Court declined to declare Oregon's prohibition impermissible, rejecting the claim that the Free Exercise Clause mandates religious exemptions from—and thus, gives protection against—neutral laws of general applicability.[11] Although the Court said otherwise, most observers regarded this holding as departing from earlier cases, notably *Sherbert v. Verner*[12] and *Wisconsin v. Yoder*.[13]

As a longtime critic of the *Smith* decision,[14] I would have preferred that the Court modify or overrule that decision, which would open up a straightforward way to reach the correct result in *Hosanna-Tabor*. It is evident, however, that the Supreme Court is too deeply invested in *Smith* to entertain the possibility of reconsideration.

I. REACHING THE RIGHT RESULT: ALTERNATIVE DOCTRINAL AVENUES

To lawyers working on *Hosanna-Tabor* before briefing and argument, there appeared to be three plausible doctrinal paths to reaching a decision in favor of the church without contradicting the holding of *Smith*. First, the Court could hold that the First Amendment's Establishment Clause, rather than the Free Exercise Clause, protects the right of churches to decide who would serve as their clergy. The Establishment Clause has never been interpreted to exempt neutral laws of general applicability, so it was available as a doctrinal hook to support the argument that churches can choose their clergy without

10. *Id*. at 874.

11. *Id*. at 879, 882.

12. 374 U.S. 398, 399–402 (1963) (holding that workers who lose their employment because of religiously grounded work conflicts are entitled to unemployment compensation even though workers who lose their employment for other personal reasons are not).

13. 406 U.S. 205, 220 (1972) (holding that Amish families are not required to send their children to school beyond the eighth grade, explaining that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion").

14. *See* McConnell, *supra* note 3.

limitation of secular laws. Deciding *Hosanna-Tabor* on the basis of the Establishment Clause also would allow the Court to distinguish *Hosanna-Tabor* from *Smith*, which the Court decided as a Free Exercise Clause case.[15]

Looking solely at Supreme Court precedent, however, the Establishment Clause would appear to be an unlikely avenue for upholding a religious exemption from the antidiscrimination laws.[16] Under the *Lemon* test, the Establishment Clause is primarily used to strike down laws involving governmental endorsement of religious symbols or messages, coercion or encouragement of religious practices, aid to religion, or government discrimination in favor of some religions over others.[17] It had never been used to strike down a law merely because it intruded too deeply into the autonomy of religious organizations. To be sure, the "effects" prong of the *Lemon* test spoke of "advanc[ing] nor inhibit[ing] religion,"[18] but every actual case was one of advancement. Inhibition of religion was left to the Free Exercise Clause, which, as we have already seen, does not protect against neutral laws of general applicability.

The second plausible doctrinal path was to locate the right of churches to decide who would serve as clergy within the exception, recognized in *Smith*, for actions that are based not on a general rule but on "individualized governmental assessment of the reasons for the relevant conduct."[19] The Court in *Smith* held that an "individualized government assessment," particularly as it pertained to employment compensation claims, still was subject to scrutiny under the Free Exercise Clause of the First Amendment.[20] The Court recognized this doctrinal wrinkle as a way to avoid overruling its holding in *Sherbert v. Verner*. In *Sherbert* a worker was fired for refusing to work on Saturday, which was her Sabbath.[21] The Court held that the state could not constitutionally deny unemployment benefits

15. *Smith*, 494 U.S. at 874.

16. *See id.* at 879, 881–82.

17. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859–65 (2005); Wallace v. Jaffree, 472 U.S. 38, 55–61 (1985).

18. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

19. *Smith*, 494 U.S. at 884.

20. *See id*.

21. *See* 374 U.S. 398, 399 (1963).

because the standard for eligibility—whether the worker refused "suitable" available work for "good cause"—hinged on an individualized assessment of the particular circumstances.[22]

The "individualized assessment" exception seems to apply in *Hosanna-Tabor* and other ministerial exemption cases. In almost every disparate-treatment employment discrimination case, the employer asserts a justification for its action, and the plaintiff-employee challenges that justification on the ground that it is pretextual.[23] In the secular cases involving pretext claims under Title VII, courts look at such things as: Is the employer being consistent? Did it treat other employees the same way? Did it apply this rule across the board? Does the rule make very much sense? Is it supported by any actual evidence?[24] As a result, almost every one of these cases ends up being decided on the basis of an individuated determination of whether the adverse employment action in the case was actually justified under the particular facts. It follows that *Hosanna-Tabor* could fit within this exception to *Smith*.

The third plausible doctrinal path was to ground the right in the freedom of association, which is the freedom to associate with others for expressive activity, including speech or religious exercise.[25] The Supreme Court refers to "freedom of association" even though those words do not appear in the First Amendment. Professor John Inazu persuasively argues that freedom of association is derived from freedom of assembly,[26] but the Court appears to derive the right as one "implicit" in the freedom of speech.[27]

---

22. *Id.* at 401–02; *see also, e.g.*, Rader v. Johnston, 924 F. Supp. 1540, 1552 n.24 (D. Neb. 1996).

23. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

24. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 255–58 (1989); Griggs v. Duke Power Co., 401 U.S. 424, 431–33 (1971); McDonald-Cuba v. Santa Fe Protective Servs., 644 F.3d 1096, 1102–05 (10th Cir. 2011); Crowe v. ADT Sec. Servs., 649 F.3d 1189, 1195–98 (10th Cir. 2011).

25. *See* Hurley v. Irish Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 580–81 (1995); Roberts v. U.S. Jaycees, 468 U.S. 609, 622–23 (1984); NAACP v. Alabama, 357 U.S. 449, 460–62 (1958).

26. *See generally* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

27. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (freedom of association is a "right 'implicit' in the First Amendment" (quoting *Roberts*, 468 U.S. at 622)).

As freedom of assembly was understood and applied by the Framers in the 1790s, the right included not only the freedom to gather together on a miscellaneous basis but also the ability to gather together deliberately with a group of one's own choosing.[28] In the 1790s, Democratic Republican clubs were highly unpopular with Federalists, and many Federalists believed that the government had the right to either censure or shut down these clubs because they were self-selected—that is, the Democratic Republican clubs chose their own members, which the Federalists viewed as a seditious activity.[29] The verdict of history has been that the Federalists were wrong and that the right of assembly includes the right of deliberately self-selected organizations.[30] Individuals have a right to gather with people of their own choosing, with their own speakers, and with their own leadership.[31]

The leading case for the freedom of association is *Boy Scouts of America v. Dale*,[32] which held that Boy Scout troops have a constitutional right to exclude open homosexuals from scoutmaster positions.[33] If the Boy Scouts have the right to control who are going to be scoutmasters, it follows that the Lutheran Church likewise has the right to decide who its ministers will be. The problem with this theory, however, is that a group may exclude members or leaders only when it can show that its criterion for exclusion is directly related to the group's expressive purpose.[34] This requirement opens the door for plaintiffs to engage in wide-ranging discovery regarding the church's beliefs and practices, and for the courts to second-guess the church's decisions. For example, many Christians believe that the gender of the minister has no logical relation to the message of the

28. *See* Brief for the International Mission Board of the Southern Baptist Convention et al. as Amici Curiae in Support of Petitioner at 8–10, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) [hereinafter Brief for Int'l Mission Board].

29. *Id.* at 13–20.

30. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 984 (2011).

31. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 459–61 (1958); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

32. 530 U.S. 640 (2000). The author of this Essay represented the successful petitioner in *Dale*.

33. *Id.* at 644.

34. Roberts v. U.S. Jaycees, 468 U.S. 609, 626–29 (1984).

gospel. Whether or not they are right, the government should play no role in making that decision.

It also bears mention that freedom of association proved a weak protection in the previous freedom of religious association case to reach the Court, *Christian Legal Society v. Martinez*.[35] Without much discussion or explanation, the Court in *CLS* effectively reduced the freedom of association claim to nothing broader than the freedom of speech and reduced freedom of speech within a campus speech forum to mere reasonableness review. It would be startling for the Court to hold, as it did in *CLS*, that a university Christian group can be denied the right to meet on campus if it insists that its leaders be Christians and then hold, under the same doctrinal rubric two years later, that all religious organizations have a constitutional right to decide who their leaders will be. This inconsistency would not seem so glaring, however, if the cases proceed under different clauses of the First Amendment.

II. THE IMPORTANCE OF HISTORY

The Religion Clauses of the First Amendment have long been interpreted in light of their history. Indeed, with the possible exception of the Second Amendment,[36] there is no area of constitutional law where the Court has invoked founding-era history in support of its doctrine more frequently. Justice William J. Brennan, for example, stated in *School District of Abington Township v. Schempp* that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[37] History plays an especially important role in constitutional interpretation when, as here, formal doctrine seems to have strayed from the fundamental values of the constitutional provision. If current constructions of free exercise and nonestablishment do not provide a clear basis for uphold-

35. *See* 130 S. Ct. 2971, 2985, 2987–89 (2010). The author of this Essay represented the losing petitioners in *CLS*.

36. *See, e.g.*, Dist. of Columbia v. Heller, 554 U.S. 570, 579–636 (2008); *id.* at 640–65 (Stevens, J., dissenting).

37. 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

ing a church's exclusive right to select its own clergy, it is time to look back and seek guidance from history.

Accordingly, the briefs in favor of the petitioner in *Hosanna-Tabor* focused particularly on history. The most important theme of the briefs was that government control over clergy selection was a central aspect of the establishment of religion under the British system, and thus the decision to disallow establishment of religion in the new republic meant, among other things, that the government would have no such power.[38] Although modern Establishment Clause cases have focused on whether the challenged law or policy "advances religion," the actual historic decision to disestablish religion was focused more on freeing religious institutions and the religious life of the people from government control than on any other single incident of establishment. English laws made the monarch the supreme governor of the church, with authority to name the prelates of the Church,[39] and gave Parliament power to determine the articles of faith and modes of worship in the church.[40] Significantly, the central statutory framework of the established church, the Uniformity Acts, barred from the ministry any person who did not conform to these requirements.[41] Every minister had to take an oath of loyalty to the monarch.[42] In the colonies, the royal governors exercised the power to license and dismiss ministers of the establishment church.[43] By enacting the First Amendment, our Founders ensured that these practices would not take place here. As the Baptists of Ashfield, Massachusetts said in a 1768 petition: "if we may not settle and support a minister agreeable to our own consciences, where is liberty of conscience?"[44]

---

38. *See, e.g.*, Brief Amici Curiae of Professor Eugene Volokh et al. at 1014, Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 695 (2012) (No.10-553); Brief for Int'l Mission Board, *supra* note 28, at 2531; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003).

39. *McConnell*, *supra* note 38, at 2112 (citing Supremacy Act, 1534, 26 Hen. 8, c.1 (Eng.)).

40. *Id.* at 2113 (citing Act of Uniformity, 1559, 1 Eliz., c.2; Act of Uniformity, 1662, 14 Car. 2, c.4).

41. *Id.*

42. *Id.* at 2116, 2126.

43. *Id.* at 2118.

44. STANLEY GRENZ, ISAAC BACKUS—PURITAN AND BAPTIST 172 (1983).

To give a flavor of the historical argument, I will discuss three pieces of history, never before cited to the Supreme Court, which confirm that the ministerial exception is deeply rooted in our constitutional tradition.

First. The original Bill of Rights did not apply to the acts of state governments. The Establishment Clause thus prevented establishment of religion at the federal level, but it left in place the various forms of establishment that existed in roughly half of the states at the time of ratification.[45] It was not until incorporation through the Fourteenth Amendment that state establishments became unconstitutional under federal law. Disestablishment occurred on a state-by-state basis through adoption of state constitutional amendments—Massachusetts being the last to dismantle its localized establishment in 1833.[46] Interestingly, each of the states that first maintained an establishment and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—adopted at the same time an express provision that all "religious societies" have the "exclusive" right to choose their own ministers.[47] This history of disestablishment is persuasive evidence that the freedom of all religious institutions to choose their clergy, free of government interference, was understood to be part and parcel of disestablishment.[48]

---

45. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134–92, 210 (1986).

46. *Id.* at 164.

47. *See, e.g.*, CONN. CONST. of 1818, art. VII, § 1 ("[E]ach and every [religious] society or denomination" has the "power and authority to support and maintain the ministers or teachers of their respective denominations . . . ."); ME. CONST. of 1820, art. I, § 3 ("[A]ll religious societies . . . shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."); MASS. CONST. of 1780, amend. XI (1833) ("[T]he several religious societies of this commonwealth . . . shall ever have the right to elect their pastors or religious teachers . . . ."); N.H. CONST. of 1784, pt. I, art. VI ("[R]eligious societies, shall at all times have the exclusive right of electing their own public teachers . . . .").

48. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1848–93 (2009). The founding generation considered state interference in the selection of ministers unacceptable. *See, e.g.*, Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 660–61 (Boyd ed., 1950) (reasoning that if "the State provides a Support for Preachers of the Gospel," the State would gain the right to "judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach").

Second. The first official invocation of the First Amendment Religion Clauses in connection with an official action took place in the wake of the Louisiana Purchase. As a consequence of the Purchase, New Orleans, a predominantly Roman Catholic city, became part of the United States. When the Americans took over, the Bishopric in New Orleans was vacant.[49] Twenty-four of the twenty-seven priests in New Orleans were so frightened by the city's incorporation into an English-speaking Protestant nation that they fled.[50] The Archbishop with nominal ecclesiastical authority over New Orleans was seated in Santo Domingo and refused to exercise any authority over the New Orleans Bishopric upon the city's incorporation into the United States.[51] Accordingly, the duty fell upon Baltimore's Bishop John Carroll, the first Roman Catholic Bishop of the United States, to name the new head of the Church in New Orleans.[52] Pursuant to prevailing European practice at the time, in which governments were given some degree of authority over the naming of the head of the church within each region,[53] Carroll wrote to Secretary of State James Madison to consult with him about the appointment.[54] In his response to Carroll, Madison wrote that, the "selection of [religious] functionaries . . . is entirely ecclesiastical"[55] and that the government should have nothing to do with such selections.[56] He declined even to express an opinion on whom Carroll should select.[57]

Third. In the wake of adoption of the Fourteenth Amendment in 1868, Congress debated a series of statutes enforcing its pro-

---

49. JOHN GILMARY SHEA, LIFE AND TIMES OF THE MOST REV. JOHN CARROLL, BISHOP AND FIRST ARCHBISHOP OF BALTIMORE 590–91 (1888). For a detailed account, see Michael W. McConnell, *Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case*, *in* FIRST AMENDMENT STORIES 39 (Richard Garnett & Andrew Koppelman eds., 2011).

50. McConnell, *supra* note 49, at 39.

51. *Id.* at 47.

52. Shea, *supra* note 49, at 591–92.

53. *See id.* at 592.

54. *Id.* at 591–93.

55. Madison's use of the broad term "functionaries," rather than the more narrowly applicable terms "bishop" or "priest," further suggests that Madison intended his statement to apply beyond the particular controversy at hand.

56. Letter from James Madison to John Carroll (Nov. 20, 1806), *in* 20 THE RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63, 63 (1909).

57. *See id.*

visions. These included reenactment of the Civil Rights Act of 1866[58] and passage of the Force Act addressing the depredations of the Ku Klux Klan.[59] These debates are important for our purposes because the arguments members of Congress offered—and the laws themselves—often are the best evidence of the original meaning of the Fourteenth Amendment, and it is the Fourteenth Amendment that applies the Free Exercise and Establishment Clauses to the States.

The last of this series of statutes was the Civil Rights Act of 1875.[60] As originally proposed, the bill forbade discrimination in quasi-public institutions such as places of public accommodation: inns, railroads, steamboats, theaters, and (most controversially) public schools.[61] Senator Sumner, the sponsor of the bill, proposed extending the nondiscrimination requirement to churches as well.[62] This proposal set off a debate about the constitutional rights of churches. Although Senators Sumner and Sherman defended the constitutionality of applying the discrimination laws to churches,[63] every other senator who spoke on the subject denounced this idea.[64] So in arguing that churches have the right to discriminate,[65] many of the senators ex-

58. Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

59. Force Act, ch. 114, 16 Stat. 140 (1870).

60. Civil Rights Act, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

61. CONG. GLOBE, 42d Cong., 2d Sess. 244 (1872); *see also* Michael McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 459–64 (1995).

62. CONG. GLOBE, 42d Cong., 2d Sess. 823 (1872).

63. *See, e.g.*, *id.* at 823–26, 843. Their views, however, did not prevail, and even Senator Sherman ultimately voted to drop the reference to churches. *See id.* at 897.

64. *See, e.g.*, *id.* at 826–27, 897–99.

65. Senator Matthew Carpenter of Wisconsin explained that the Act's application to churches was "in violation of the spirit of the Constitution in that it disregards the opinions and the motives of those who framed the Constitution, and is in conflict with what they believed they had secured." *Id.* at 759. Citing the debates in the Constitutional Convention and the Federalist Papers, Carpenter argued that "they who framed the Constitution of the United States intended to, and thought they had, carefully excluded the whole subject of religion from Federal control or interference." *Id.* He argued, moreover, that the Religion Clauses were not directed solely "against the establishment of a particular faith to the prejudice or exclusion of others," but also barred certain laws that apply "equally upon all and compel[] all to observe its precepts." *Id.* Still other Senators objected to the provision on religious liberty grounds without explicitly invoking the Constitution. *See id.* at 897 ("I will not vote to put the first law upon the statute-book

pressed their opposition in terms of the First Amendment Religion Clauses using examples such as Japanese churches that limit their services to Japanese, African-American churches that limit their pulpits to former slaves, and so forth.[66] One Senator, Oliver Morton of Indiana, put it this way:

> People have a right to say how they will worship, what they will worship, and with whom they will worship; and, if they have a right to say how they will worship, and with whom they will worship, then under the Constitution of the United States you cannot pass this provision with regard to churches.[67]

In the end, the Senate removed churches from coverage under the bill.[68]

This debate and legislative decision shows that the authors and early enforcers of the Fourteenth Amendment—the vehicle for incorporating the Religion Clauses against the States—believed that discrimination laws cannot be applied to religious institutions. Although their debates did not specifically focus on the selection of leaders, constitutional protection for ministerial selection would logically follow from that principle.

III. THE COURT'S DECISION

The Supreme Court did not take any of the three paths outlined in Part I. It squarely rejected reliance on freedom of association, commenting that this "is a right enjoyed by religious and secular groups alike," which would imply "that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First

---

of the United States that interferes with religion. I would not . . . punish men for shutting the doors of their churches against any persons whom for any reason whatever they do not want to come into them; nor would I compel them to open or close their doors."); *id.* at 897–98 (similar).

66. *Id.* at 847 ("Now, the Japanese, in California, see proper to make nationality, we will suppose, a part of their religion, and to exclude all who do not belong to their people from their worship; or, the Huguenots of South Carolina might form a religious society, and one of their regulations be that no one should be a member unless a descendant of the Huguenots . . . .").

67. *Id.* at 898.

68. *Id.* at 898–99.

Amendment itself, which gives special solicitude to the rights of religious organizations."[69] The Court did not mention the "individualized decisionmaking" theory, probably because it was not raised by any of the parties; it was raised only in one paragraph of one amicus brief.[70] Nor did the Court shift from the Free Exercise Clause to the Establishment Clause as the basis for its analysis.

Rather than taking any of the three doctrinal paths outlined here, the Court rested its decision on *both* free exercise *and* establishment, stating:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[71]

This reasoning could have major ramifications. This case was the first time the Court used the Establishment Clause to protect religious organizations or activities from intrusive regulation. Earlier Establishment Clause cases involved government aid to religion,[72] government compulsion of religious activity,[73] government endorsement of religion,[74] or government favoritism among religions.[75] The "entanglement" prong in theory protected religious institutions against some forms of intrusive regulation, but before *Hosanna-Tabor* this occurred almost only in the context of statutes providing financial aid to their secular operations, necessitating monitoring and surveillance to ensure that the aid was not diverted to the organ-

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

70. *See* Brief for the Evangelical Covenant Church et al. as Amici Curiae in Support of Petitioner at 33–34, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553). This brief was written by the author of this Essay.

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

72. *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 759 (1973); Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).

73. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 580 (1992); Engel v. Vitale, 370 U.S. 421, 422 (1962).

74. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 850 (2005); Van Orden v. Perry, 545 U.S. 677, 681 (2005).

75. *See* Larson v. Valente, 456 U.S. 228, 230 (1982).

ization's religious mission.[76] *Hosanna-Tabor* is the first real indication in a Court opinion that the separation between church and state is a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental "advancement" of religion.

No one can tell from the opinion how broadly this Establishment Clause principle might extend. But at least one scholar, Professor Carl Esbeck, has suggested a number of contexts in which the Establishment Clause should serve as a shield against intrusive governmental regulation.[77] His work might serve as a jumping-off point for further development of the idea.

The Court's coequal reliance on the Free Exercise Clause has similar implications for doctrinal change. As already noted, the broad rule in *Smith*, the peyote case, seemed to foreclose free exercise protection in *Hosanna-Tabor*. The Court even admitted "[i]t is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability."[78] Why, then, did the *Smith* rule not govern? The Court provided this answer: "[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[79] That answer is the entirety of the Court's treatment of *Smith*.

The Court's analysis raises many questions. Future litigants will want to know: What are "outward physical acts"? Are some acts "inward"? Are some acts not "physical"? How broad is the term "acts"? Are there any religiously motivated acts by individuals, as opposed to religious organizations, that qualify

---

76. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 418–19 (1985) (Powell, J., concurring), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); *Lemon*, 403 U.S. at 613. Exceptions might include *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 844–45 (1995), in which the Court invoked the idea of entanglement as a reason not to require speech within a forum to be secular.

77. Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 350–52 (1984).

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

79. *Id.*

for protection because they are not outward or physical? Future litigants also will want to know: What is "an internal church decision that affects the faith and mission of the church itself"? "Internal" presumably means that the action affects only the church, its members, its employees, and others who voluntarily associate with it. That distinction makes sense, though there may be cases on the boundary. But what is meant by the qualifier, "affects the faith and mission of the church itself"? Are there internal church decisions that do not affect "the faith and mission of the church itself"? If so, who would get to decide what they are? Later in the opinion, the Court rejects the idea that the ministerial exception applies only when the church articulates a religious reason for its action: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."[80] This suggests that churches have a right to make at least some internal decisions for reasons other than "faith and mission." The Court concludes by "express[ing] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[81] This is a commendable example of judicial minimalism; the Court decides this case, and states a general principle, but does not try to work out all its implications in advance, in the abstract. But it does create uncertainty.

For example, what implications does *Hosanna-Tabor* have for the current controversy over the federal government's decision to require religious employers that provide health insurance for their employees to include contraceptive services, including sterilization and abortifacient drugs, free of cost?[82] Is this an "internal church decision"? It constitutes a mandatory term in the contract between the religious organization and its employees, which looks "internal," and it certainly affects "faith and mission." It will be interesting to see how this doctrine develops.

Taken together, the establishment and free exercise holdings of *Hosanna-Tabor* suggest a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the

80. *Id.* at 709.
81. *Id.* at 710.
82. 76 Fed. Reg. 46621 (Aug. 3, 2011).

autonomy of organized religious institutions. Although the Court never confined the protections of the Religion Clauses to natural persons, opinions gave the impression that, to the Court, religion is essentially a matter between individuals and their God (however conceived). Free exercise cases emphasized individual sincerity and rejected the idea that religious exercise must be rooted in the teachings of a faith community.[83] In some of the parochial school cases, members of the Court gave the impression they regarded the "inculcat[ion]" of church "dogma" as a threat to the freedom of individuals to form their own beliefs.[84] Now, however, as interpreted in *Smith* and *Hosanna-Tabor*, the Free Exercise Clause provides far greater protection to the "faith and mission" of religious institutions than to individual acts of religious exercise, and the Establishment Clause bars the government from interfering in "ecclesiastical" decisionmaking.[85] Perhaps it is a coincidence, but this shift in emphasis corresponds very roughly to the old divide between individualistic Protestantism and institutional Catholicism and might be the first evident fruit of the new Catholic majority on the Court. The "freedom of the church" was the first kind of religious freedom to appear in the western world,[86] but got short shrift from the Court for decades. Thanks to *Hosanna-Tabor*, it has again taken center stage.

Most of the initial reaction to *Hosanna-Tabor* was confined to its immediate context: the hiring and firing of ministers. To extend constitutional protection to these quintessentially religious decisions seemed necessary, and obviously correct. The Court's deft use of historical context from the Founding

---

83. *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); Welsh v. United States, 398 U.S. 333, 343–44 (1970) (granting conscientious objector status to an applicant whose opposition to war was highly individual in its nature).

84. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 634 (1971) (Douglas, J., dissenting).

85. 132 S. Ct. at 707.

86. *See* Stephen Douglas Smith, *Freedom of Religion or Freedom of the Church?* (San Diego Legal Studies Paper No. 11-061, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412; Richard W. Garnett, *The Freedom of the Church* (Notre Dame Legal Studies Paper No. 06-12, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916336.

and early republic lent weight to its decision. But looking forward, it may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance. It is not too much to say that the decision augurs a "new birth of freedom" for the religious communities of America.