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## Who is a Minister? Originalist Deference Expands the Ministerial Exception

Jared C. Huber  
*University of Notre Dame Law School*

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## NOTE

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# WHO IS A MINISTER? ORIGINALIST DEFERENCE EXPANDS THE MINISTERIAL EXCEPTION

*Jared C. Huber* \*

### INTRODUCTION

The ministerial exception is a doctrine born out of the Religion Clauses of the First Amendment that shields many religious institutions' employment decisions from review. While the ministerial exception does not extend to all employment decisions by, or employees of, religious institutions, it does confer broad—and absolute—protection. While less controversy surrounds whether the Constitution shields religious institutions' employment decisions to at least some extent, much more debate surrounds the exception's scope, and perhaps most critically, which employees fall under it. In other words, *who* is a “minister” for purposes of the ministerial exception?

The Court has twice ruled on the ministerial exception: first in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*<sup>1</sup> and then in *Our Lady of Guadalupe School v. Morrissey-Berru*.<sup>2</sup> The majority in each easily found the employees to be “ministers” falling under the exception. But they fell far short of defining who is a “minister.”<sup>3</sup> Instead, the majority in *Hosanna-Tabor* identified considerations that led it to

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\* J.D. Candidate, University of Notre Dame Law School, 2024; B.A. in Political Science & Mass Communications, Purdue University, 2021. Thank you to Prof. Nicole Garnett for helping inspire and advise my interest in the intersection of originalism and freedom of religion. In particular, I am deeply grateful to Mary Mancusi, my fiancée, for her encouragement, unwavering love, and valuable feedback. Further thanks go to my friends and fellow editors of the *Notre Dame Law Review* for their support and edits. All errors are my own. *Soli Deo gloria.*

1 565 U.S. 171 (2012).

2 140 S. Ct. 2049 (2020).

3 See *Our Lady of Guadalupe*, 140 S. Ct. at 2067; *Hosanna-Tabor*, 565 U.S. at 190 (declining “to adopt a rigid formula for deciding when an employee qualifies as a minister”).

define the employee as a minister.<sup>4</sup> In *Our Lady of Guadalupe*, the Court explained that what matters is what an employee *does* and somewhat clarified the considerations *Hosanna-Tabor* identified.<sup>5</sup> Justice Thomas concurred in each case, joined by Justice Gorsuch in *Our Lady of Guadalupe*.<sup>6</sup> In both, Justice Thomas agreed that the First Amendment held a ministerial exception but explained that courts should not be in the business of deciding who is a minister.<sup>7</sup> Instead, the religious institution should decide, and the courts should defer to the institution's good-faith judgment.<sup>8</sup>

Answering this question necessarily involves examining the views at the Founding about who could receive ministerial exception protections. The Court has increasingly swung toward answering constitutional questions on originalist grounds. Originalism seeks to explain what the original meaning of the Constitution was when ratified.<sup>9</sup> But committed originalists must contest both with many nonoriginalist precedents that the Court has enshrined in American constitutional jurisprudence and with modern political considerations that can be in tension with a constrained approach to the text, history, and structure of the Constitution. Originalism not only has to struggle against a government all too content to push the bounds of its authority but also with divining the original meaning of the Constitution.<sup>10</sup>

In light of these challenges, none has undertaken an originalist analysis of who is a minister for purposes of the ministerial exception. Neither *Hosanna-Tabor* nor *Our Lady of Guadalupe* justifies its analysis on originalist grounds, nor do the concurrences provide a full-bodied originalist explanation for their deference to religious institutions. Considering the consequence of defining who is a minister, the

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4 See *Hosanna-Tabor*, 565 U.S. at 192; *infra* notes 69–72 and accompanying text (identifying that (1), the employee has a formal title conferring ministerial status; (2), the title reflects ministerial substance; (3), the employee uses the title; and (4), the employee has important religious functions).

5 *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

6 *Id.* at 2069 (Thomas, J., joined by Gorsuch, J., concurring); *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

7 See *Our Lady of Guadalupe*, 140 S. Ct. at 2069–71 (Thomas, J., concurring); *Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring).

8 *Our Lady of Guadalupe*, 140 S. Ct. at 2069–70 (Thomas, J., concurring); *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

9 See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1317 (2006) (defining originalism as the theory “that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning”).

10 See David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 970–71 (2008) (describing the difficulty and impracticability of ascertaining the true original meaning of constitutional provisions). See generally Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021).

Court's growing thirst for originalist groundings, and the void in the current scholarship connecting the unanswered question with an originalist answer, an analysis answering the question on originalist grounds is due.

This Note will attempt to do so—it will examine the original meaning and historical background of the First Amendment to determine if Justice Thomas's deference or the majorities' analyses are most warranted on originalist grounds. Part I will look at the contours of the current ministerial exception and how the Court delineated them in *Hosanna-Tabor* and *Our Lady of Guadalupe*. Part II will examine in further detail the competing definitions of "minister." Part III will study the history that informed the First Amendment and will demonstrate how the idea of the separation of spheres of authority is incorporated into the history, structure, and text of the First Amendment. Finally, Part IV will briefly attempt to respond to some of the policy concerns a deferential approach engenders in light of how committed originalists weigh policy considerations against constitutional prose. In the end, good-faith deference to religious institutions in determining who qualifies as a minister adheres most to the original understanding of the First Amendment.

## I. BACKGROUND

The ministerial exception is a doctrine that bars claims against religious institutions arising from adverse actions in employment relationships.<sup>11</sup> Often, the exception protects against discrimination claims when a claimant is fired from employment at a religious institution. However, the exception may apply to any adverse or discriminatory employment action taken by the religious institution. The exception functions as a bar, preventing agencies or courts from "reviewing or second-guessing religious organizations' employment decisions regarding religious 'ministers.'"<sup>12</sup> Once the religious employer successfully invokes the ministerial exception, neither the government nor the judiciary may counter the religious institution's action. Only two

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11 See *Hosanna-Tabor*, 565 U.S. at 188 ("[T]he Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception." (footnote omitted)); B. Jessie Hill, *Kingdom Without End? The Inevitable Expansion of Religious Sovereignty Claims*, 20 LEWIS & CLARK L. REV. 1177, 1178 (2017) ("[T]he ministerial exception, which is grounded in both the Free Exercise Clause and the Establishment Clause of the First Amendment, allows at least some religious institutions to avoid employment discrimination claims by its ministers.").

12 JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 327 (5th ed. 2022).

hurdles need to be scaled to invoke the exception. First, the religious organization claims the exception.<sup>13</sup> And second, the court decides if the employee served as a “minister” for the exception. If the court finds the employee was a minister, then the exception applies. The ministerial exception allows a religious institution full freedom to choose who shall “shape its own faith and mission”<sup>14</sup> and “guide it on its way”<sup>15</sup> without the government depriving a religious institution “of control over the selection of those who will personify its beliefs.”<sup>16</sup> To further understand the ministerial exception and its “broad strokes” it is necessary to examine in more detail the two cases, *Hosanna-Tabor* and *Our Lady of Guadalupe*, where the Court enshrined the ministerial exception as a matter of constitutional law.<sup>17</sup> The ministerial exception had long been applied in the lower courts.<sup>18</sup> But in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court first confirmed the existence of a “ministerial exception grounded in the Religion Clauses of the First Amendment.”<sup>19</sup>

In *Hosanna*, Cheryl Perich, a teacher at Hosanna-Tabor Evangelical Lutheran Church and School, went on disability leave for a school year due to a narcolepsy diagnosis.<sup>20</sup> Perich notified the school during

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13 The Court in *Hosanna-Tabor* attempted to resolve lower-court disagreement about whether the exception was a jurisdictional bar or an affirmative defense. It concluded “the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.” *Hosanna-Tabor*, 565 U.S. at 195 n.4. Because it functions as an affirmative defense, religious institutions have to invoke the protection, and if they fail to do so, then the protection would not be available. “The ministerial exception . . . typically must be asserted in a party’s responsive pleading, and is akin to a government official’s defense of qualified immunity.” George L. Blum, Annotation, *Application of First Amendment’s “Ministerial Exception” or “Ecclesiastical Exception” to Federal Civil Rights Claims*, 41 A.L.R. Fed. 2d 445, § 3 (2009). But see Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 118 (2009) (“The ministerial exemption is not just a legal defense to an employment discrimination action; it is a recognition by the courts that they lack the jurisdiction to examine these claims.”). Despite the Court’s attempt to wave away the dispute in a footnote, the controversy continues about the jurisdictional nature of the ministerial exception and church autonomy claims in general. See Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471, 478–85 (2022).

14 *Hosanna-Tabor*, 565 U.S. at 188.

15 *Id.* at 196.

16 *Id.* at 188.

17 See Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After Hosanna-Tabor*, 68 SMU L. REV. 1123, 1127 (2015).

18 See *Hosanna-Tabor*, 565 U.S. at 188 (“The Courts of Appeals . . . have had extensive experience with this issue. . . . [T]he Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment, that precludes application of [Title VII and other employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers.”); *id.* at 188 n.2 (citing a host of lower-court ministerial exception cases).

19 *Id.* at 190.

20 See *id.* at 178.

the middle of the school year that she could return to work, but the school had already filled her position for the remainder of that year.<sup>21</sup> Even after the church's congregation voted to release Perich from her position with a portion of her health insurance premiums paid, Perich refused to agree and presented herself at school to teach the first day she was medically cleared, refusing to leave when asked.<sup>22</sup> The school notified Perich that the church's congregation would review her insubordinate actions.<sup>23</sup> The congregation voted two months later to revoke Perich's "call" for her insubordination, disruptive behavior, and the damage her legal threats wrought on their employment relationship.<sup>24</sup> The EEOC brought suit against Hosanna-Tabor, arguing the church revoked Perich's "call" and retaliatorily fired her because she had threatened a lawsuit against Hosanna-Tabor for state law and Americans with Disabilities Act violations.<sup>25</sup> Hosanna-Tabor invoked the ministerial exception, claiming Perich was a minister.<sup>26</sup>

The "call" the congregation revoked was a recognition from a specific Lutheran congregation that one had received a vocation from God.<sup>27</sup> To be a "called" teacher, a teacher usually had to study theology, obtain a synod district endorsement, and pass an oral examination.<sup>28</sup> A "called" teacher held the title "Minister of Religion, Commissioned."<sup>29</sup> As a called teacher, Perich taught a variety of secular subjects and a religion class four days a week.<sup>30</sup> She led students in prayer and devotions, attended chapel, and occasionally led chapel services.<sup>31</sup>

The Court unanimously found Perich to be a minister and that Hosanna-Tabor was entitled to invoke the ministerial exception's protection.<sup>32</sup> In so doing, the Court affirmed the ministerial exception's existence and explained it is rooted in both of the Religion Clauses.<sup>33</sup> The Court undertook a historical survey beginning with the Magna Carta in 1215 to trace the path of religious autonomy in choosing

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21 *Id.*

22 *See id.* at 178–79.

23 *See id.* at 179.

24 *See id.*

25 *See* 42 U.S.C. § 12101 (2018); *Hosanna-Tabor*, 565 U.S. at 180.

26 *Hosanna-Tabor*, 565 U.S. at 180.

27 *See id.* at 177; WITTE ET AL., *supra* note 12, at 327.

28 *See Hosanna-Tabor*, 565 U.S. at 177.

29 *Id.*

30 *Id.* at 178.

31 *See id.*

32 *See* WITTE ET AL., *supra* note 12, at 328; *Hosanna-Tabor*, 565 U.S. at 190.

33 *Hosanna-Tabor*, 565 U.S. at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

ministers.<sup>34</sup> The Court explicitly disclaimed that its decision was based on a general freedom of association.<sup>35</sup> Rather, religion is special. Finding for Hosanna-Tabor on freedom of association principles would have been “hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”<sup>36</sup> The Court could not “accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”<sup>37</sup> The Court recognized that religious associations are protected beyond secular associations because the Constitution prohibits laws that respect a religious establishment or burden free exercise. The government cannot affirmatively establish a minister nor curtail a religious institution’s free exercise by inhibiting or influencing its free selection of one.<sup>38</sup> A religious group not only has free rein over who can be its true ministers, but the Court even foreswore examination of whether the group removed a minister for religious, rather than “pretextual,”<sup>39</sup> reasons.<sup>40</sup>

The Court reaffirmed its ministerial exception doctrine in *Our Lady of Guadalupe School v. Morrissey-Berru*.<sup>41</sup> *Our Lady of Guadalupe* merges two different discrimination suits from teachers at Catholic schools.<sup>42</sup> Morrissey-Berru worked at a Catholic school in Los Angeles.<sup>43</sup> She taught both secular and religious subjects and underwent

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34 See *id.* at 182–87.

35 *Id.* at 189 (“According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right ‘implicit’ in the First Amendment. . . . We find this position untenable.” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))).

36 *Id.*

37 *Id.* The Court did not explicitly tie together how an original understanding of the First Amendment at the time of ratification would lead to this conclusion. But it did invoke the purposes of the First Amendment and the historical background it arose from to at least infer that those purposes, as understood by the history at the time, can only be properly accomplished through a ministerial exception. See *id.* at 182–85.

38 See *id.* at 188–89 (“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 to 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.”).

39 *Id.* at 194.

40 *Id.* at 194–95 (The suggestion that Hosanna-Tabor’s reason for firing Perich was pretextual “misses the point of the ministerial exception. 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. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.”).

41 140 S. Ct. 2049 (2020).

42 WITTE ET AL., *supra* note 12, at 330.

43 *Our Lady of Guadalupe*, 140 S. Ct. at 2056.

religious education to do so.<sup>44</sup> Morrissey-Berru's contract included specific language stipulating that all her duties were to be guided by the school's Catholic mission.<sup>45</sup> In addition to teaching Catholicism each day, Morrissey-Berru produced the school's annual passion play, prepared students for Mass, prayed with students, and was reviewed for her adherence to the school's mission to infuse religion throughout all subjects.<sup>46</sup> The school decided to move Morrissey-Berru to part-time status before allowing her contract to expire the following year.<sup>47</sup> Morrissey-Berru filed suit for age discrimination because she believed the school discriminated against her as it replaced her with a younger teacher.<sup>48</sup> The school invoked the ministerial exception and responded that its decision resulted from Morrissey-Berru's performance alone.<sup>49</sup>

In the second *Our Lady of Guadalupe* case, Kristen Biel served as a teacher at a Catholic school in Los Angeles.<sup>50</sup> Biel's employment circumstances looked similar to Morrissey-Berru's.<sup>51</sup> "[S]he taught all subjects, including religion."<sup>52</sup> Biel's contract required her to align her teaching with the school's Catholic mission and to personally exemplify Catholic values.<sup>53</sup> She worshiped with students, prepared them for Mass, and prayed with them daily.<sup>54</sup> The school required Biel to teach religion for 200 minutes a week, covering the doctrines, sacraments, social teachings, morality, saints, and prayers of the Catholic Church.<sup>55</sup> After a year of teaching, the school did not renew Biel's contract.<sup>56</sup> Biel sued, claiming the school did not renew because she sought a medical leave of absence to treat her breast cancer.<sup>57</sup> The school responded that she failed to follow the curriculum or control her classroom and invoked the ministerial exception.<sup>58</sup>

The Court ruled 7–2 in the schools' favor.<sup>59</sup> Again, the Court argued that the First Amendment enshrined religious institutions' right

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44 *See id.*

45 *Id.*

46 *See id.* at 2057.

47 *Id.* at 2057–58.

48 *See id.* at 2058.

49 *See id.*

50 *Id.*

51 *See* WITTE ET AL., *supra* note 12, at 330 (demonstrating all the similarities between Morrissey-Berru's and Biel's employment).

52 *Our Lady of Guadalupe*, 140 S. Ct. at 2058.

53 *See id.* at 2058–59.

54 *See id.* at 2059.

55 *Id.*

56 *Id.*

57 *Id.*

58 *See id.*

59 WITTE ET AL., *supra* note 12, at 331.



to decide their internal government, faith, doctrine, and ministers.<sup>60</sup> Critical to that freedom is barring “any attempt by government to dictate *or even to influence* such matters” for doing so “would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.”<sup>61</sup> The Court explained that independence over matters of “faith and doctrine”<sup>62</sup> does not provide immunity from secular laws—it only bars secular influence in internal management decisions deemed essential to the institution’s mission.<sup>63</sup> After repeating the precedential analysis in *Hosanna-Tabor*, the Court again rooted the ministerial exception in the First Amendment’s purpose of withholding from the government the power to appoint religious offices.<sup>64</sup>

Together, *Hosanna-Tabor* and *Our Lady of Guadalupe* expounded the Court’s ministerial exception doctrine. They left many questions unanswered though.<sup>65</sup> Most important to this analysis, the Court refused to clearly explain which employees are ministers and which are not. The next Part examines what factors the majority referenced in each case and how the concurrences in *Hosanna-Tabor* and *Our Lady of Guadalupe* comport with an original understanding of the Constitution better than the majority’s analysis in both cases.

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60 See *Our Lady of Guadalupe*, 140 S. Ct. at 2060; .

61 *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (emphasis added).

62 *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012)).

63 *Id.* at 2060.

64 See *id.* at 2061 (“In addition to these precedents, we looked to the ‘background’ against which ‘the First Amendment was adopted.’ . . . [T]he Crown [had] the power to fill high ‘religious offices’ and to control the exercise of religion in other ways, and we explained that the founding generation sought to prevent a repetition of these practices in our country.” (quoting *Hosanna-Tabor*, 565 U.S. at 183)). Professor Rick Garnett describes the appointment of religious offices as the “paradigm case” the Founders designed the Establishment Clause to resist. Interview with Richard W. Garnett, Professor of L., Notre Dame L. Sch., in Notre Dame, Ind. (Nov. 14, 2022) (on file with author).

65 See WITTE ET AL., *supra* note 12, at 332. The Court left unresolved what kinds of claims beyond employment discrimination are covered, whether the exception extended beyond churches and elementary schools to other institutions, and how it related to *Employment Division v. Smith*, 494 U.S. 872 (1990), aside from the Court’s fainthearted attempt to distinguish *Smith* as only governing “outward physical acts.” See *Hosanna-Tabor*, 565 U.S. at 190 (“*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.”); WITTE ET AL., *supra* note 12, at 332.

## II. WHO IS A MINISTER?

### A. Hosanna-Tabor's Answer

The Court in *Hosanna-Tabor* disavowed any attempt to define a minister for the ministerial exception. It found itself “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It [was] enough for [it] to conclude, in [its] first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”<sup>66</sup> In so doing, the Court failed to fulfill expectations of what *Hosanna-Tabor* would clarify about the ministerial exception.<sup>67</sup> The Court instead analyzed several factors of Perich’s employment that prompted it to conclude she was a minister.<sup>68</sup> It adopted no specific test, but the factors it used inform how the Court parses ministerial status.

The Court described four “considerations,” forming a loose-fitting test.<sup>69</sup> First, the employee has a formal title conferring ministerial status. Second, the title reflects some sort of ministerial “substance.” Third, the employee uses the title. And fourth, the employee has “important religious functions” he or she performs for the institution.<sup>70</sup> But these considerations do not constitute an exhaustive or even necessary list.<sup>71</sup> Even in this bare-bones provision, however, the Court provided a bit of guidance. A ministerial title alone is insufficient to be a minister.<sup>72</sup> Nor is a simple analysis of how much time an

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66 *Hosanna-Tabor*, 565 U.S. at 190.

67 See Murray, *supra* note 17, at 1128 (“[T]he most significant aspect of the decision is what it did not say.”); Summer E. Allen, Note, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, 40 PEPP. L. REV. 645, 688 (2013) (“The aspect of the Court’s decision that had been eagerly anticipated—the aspect that had garnered national attention—was the Court’s explication of a rule defining the boundaries of a ministerial position under the exception.”).

68 See *Hosanna-Tabor*, 565 U.S. at 191–92.

69 *Id.* at 192.

70 See *id.* (“In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”).

71 Elsewhere in the majority opinion, the Court provided two other descriptions of a minister: someone in whose hands the members of a religious group put their faith and persons selected to personify the religion’s beliefs. See *id.* at 188; Jeremy Weese, Comment, *The (Un)Holy Shield: Rethinking the Ministerial Exception*, 67 UCLA L. REV. 1320, 1365 (2020). These additional descriptors do not seem to have weighed as heavily as the first four considerations the majority notes.

72 *Hosanna-Tabor*, 565 U.S. at 193 (“[S]uch a title, by itself, does not automatically ensure coverage, . . . [but it] is surely relevant . . .”).

employee spends doing religious versus secular duties dispositive.<sup>73</sup> Instead, the existence of secular duties, even substantial ones, does not prohibit the conferral of ministerial status.<sup>74</sup> Above all, the minister must have a “role in conveying the Church’s message and carrying out its mission.”<sup>75</sup> Even though a court has the final say on who is a minister and who is not, the majority opinion adopts a “spirit of deference to religious entities.”<sup>76</sup> This deference—while not absolute—“cloak[s]” the unavoidable subjectivity in judicial hands that the ministerial analysis fosters.<sup>77</sup>

In the end, the overarching test that proceeds from *Hosanna-Tabor* consists of an amorphous list of four considerations informed by how the Court applied them to Perich. But what other considerations may be at play, how the considerations interact, and how other facts could alter the considerations all receive sparse exposition by the Court.

### B. Our Lady of Guadalupe’s Answer

The Court did not narrow the definition of a minister in *Our Lady of Guadalupe* but rather reiterated *Hosanna-Tabor*’s considerations<sup>78</sup> and introduced more vagueness by saying “a variety of factors may be important.”<sup>79</sup> The Court underscored *Hosanna-Tabor*’s redline against “imposing any ‘rigid formula.’”<sup>80</sup> Perhaps the leading clarification of *Our Lady of Guadalupe* was a shift to a more function-, or duty-based analysis.<sup>81</sup> The Court attempted to use amorphous factors to

73 See *id.* at 193–94 (“The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee’s status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.”).

74 See *id.*

75 *Id.* at 192. Murray explains that this seeming consideration can cut toward both a broader definition of minister and a narrower one. See Murray, *supra* note 17, at 1130. First, it could broaden who could be a minister by including a range of activities that convey the message and carry out the mission—even far beyond church walls. See *id.* Or it could narrow it by cabining it to religious organizations that actively convey the message and carry out the mission, barring it from any religious institution that does not do both of those things. See *id.*

76 Murray, *supra* note 17, at 1129.

77 See *id.*

78 See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062–63 (2020).

79 *Id.* at 2063.

80 *Id.* at 2067 (quoting *Hosanna-Tabor*, 565 U.S. at 190).

81 See *Our Lady of Guadalupe*, 140 S. Ct. at 2055 (“The religious education and formation of students is the very reason for the existence of most private religious schools . . . . Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions . . . .”); Patrick Hornbeck, *A Nun, a*

distinguish resolving the ministerial-definition question from resolving any controversies over religious doctrines.<sup>82</sup> Essentially, the majority seemed content deeply entangling itself in defining a minister if it could assert it was doing so without having to decide religious questions. The majority provided further explanations of the considerations and how they help courts avoid deciding religious questions.<sup>83</sup> It rejected a title-based definition, pointing to the difficulty of using titles alone to find equivalent positions across religions.<sup>84</sup> If titles alone sufficed, it would “constitute impermissible discrimination” against some religions.<sup>85</sup> “[C]ourts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail.”<sup>86</sup> Religious “traditions with formal organizational structures” would be privileged.<sup>87</sup> Likewise, religious training would be instructive but would not be sufficient.<sup>88</sup> The Court’s explanation of *Hosanna-Tabor*’s considerations in *Our Lady of Guadalupe* reveals they are important—or unimportant—in defining a minister. But in the end, the Court made clear what matters: it “is what an employee does.”<sup>89</sup>

### C. Justice Thomas and Justice Gorsuch’s Answer

Justice Thomas did not buy the majorities’ attempt to toe the line between entanglement in deciding who is a minister and claims of avoiding entanglement in religious questions.<sup>90</sup> He concurred in

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*Synagogue Janitor, and a Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception*, 70 BUFF. L. REV. 695, 713 (2022).

82 See *Our Lady of Guadalupe*, 140 S. Ct. at 2063 n.10 (“In considering the circumstances of any given case, courts must take care to avoid ‘resolving underlying controversies over religious doctrine.’” (quoting *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969))).

83 Even in doing so, however, the Court was quick to note that its “recognition of the significance of those factors in *Perich*’s case [does] not mean that they must be met—or even that they are necessarily important—in all other cases.” *Id.* at 2063.

84 See *id.* at 2063–64 (“Take the question of the title ‘minister.’ Simply giving an employee the title of ‘minister’ is not enough to justify the exception. And by the same token, since many religious traditions do not use the title ‘minister,’ it cannot be a necessary requirement.”).

85 *Id.* at 2064.

86 *Id.*

87 *Id.*

88 See *id.* (“[I]nsisting in every case on rigid academic requirements could have a distorting effect. . . . [T]hese circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases.”).

89 *Id.*

90 See *id.* at 2071 (Thomas, J., concurring) (“But, when it comes to the autonomy of religious organizations in our ministerial-exception cases, these concerns of entanglement

*Hosanna-Tabor* and *Our Lady of Guadalupe* to highlight issues with the majority's analysis in both.<sup>91</sup> Justice Gorsuch joined Justice Thomas's *Guadalupe* concurrence.<sup>92</sup> In *Hosanna-Tabor*, Justice Thomas agreed with the Court's opinion in the brunt of its reasoning. He wrote separately to highlight his view that courts should defer to a religious organization's good-faith understanding of who is a minister and who is not.<sup>93</sup> While he did not detail his approach, he provided some broad reasons why he thought the Constitution requires deference to the institution. To Justice Thomas, a minister is "charged with carrying out the organizations' religious missions."<sup>94</sup> If courts had the right to override who the religious institution says is a minister, he explains, the right to "choose its ministers would be hollow."<sup>95</sup> The definition necessarily involves "theological tenets" because a minister shapes an institution's faith and mission.<sup>96</sup> American religious diversity bars adopting a "rigid" rule that the majority also avoids.<sup>97</sup> Even more dangerous is that if courts have this override power, the very uncertainty the majorities' considerations foster will prompt risk-averse institutions to shapeshift "beliefs and practices" to conform to "prevailing secular understanding."<sup>98</sup> The Religion Clauses are violated when a loose list of

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have not prevented the Court from weighing in on the theological questions of which positions qualify as 'ministerial.'").

91 See *Our Lady of Guadalupe*, 140 S. Ct. at 2069 (Thomas, J., concurring); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring).

92 *Our Lady of Guadalupe*, 140 S. Ct. at 2069 (Thomas, J., joined by Gorsuch, J., concurring).

93 *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("I write separately to note that, in my view, the Religion Clauses require civil courts to . . . defer to a religious organization's good-faith understanding of who qualifies as its minister.").

94 *Our Lady of Guadalupe*, 140 S. Ct. at 2071 (Thomas, J., concurring).

95 *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

96 See *id.* "The only way to know whether the ministerial exception has been triggered is for a court to adjudge, in the words of the *Our Lady of Guadalupe* majority, 'what an employee does' is religious enough." Timothy J. Tracey, *Deal, No Deal: Bostock, Our Lady of Guadalupe, and the Fate of Religious Hiring Rights at the U.S. Supreme Court*, 19 AVE MARIA L. REV. 105, 136–37 (2021) (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2064).

97 *Hosanna-Tabor*, 565 U.S. at 190; see *id.* at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some.").

98 See *id.* at 197 (Thomas, J., concurring) ("[U]ncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding. '[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious.'" (citation omitted) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987))). This uncertainty "leaves religious employers—newly living under a threat of liability for sexual orientation and gender identity discrimination—

considerations exercises veto power over the theologically based decisions of a religious organization.<sup>99</sup>

Justice Thomas concludes in *Our Lady* that the only way to traverse these tightropes is to “defer to these groups’ good-faith understandings of which individuals are charged with carrying out the organizations’ religious missions.”<sup>100</sup> In *Our Lady*, he expands his reasoning, highlighting that it is impossible to define a minister without resorting to theological inquiries.<sup>101</sup> Religious institutions use ministers to advance their “religious missions.”<sup>102</sup> How, Justice Thomas asks, can courts answer who is doing so without delving into at least some theological elements? He answers that they cannot without entangling themselves in deciding religious questions. The Court should go “to great lengths to avoid governmental ‘entanglement’ with religion, particularly in its Establishment Clause cases.”<sup>103</sup> Thus, any judicial role in determining who is a minister beyond deferring to the religious institution is too entangling and intrudes on religious institutions’ authority.

Whose answer most comports with an originalist view of the Constitution lurks behind what each side thought of how best to answer who is a minister. The next Part examines the probative history of the First Amendment, its text, and how its foundational ideals were applied near and after ratification.

### III. WHICH ANSWER MORE ADHERES TO THE ORIGINAL UNDERSTANDING?

Originalism aims to understand the meaning of the Constitution at the time of ratification.<sup>104</sup> Often this means attempting to find what the meaning of a provision would have been in the eyes of a reasonable member of the public at the time of ratification.<sup>105</sup> But it can also mean

in a precarious position. They simply cannot be confident that, even though they sincerely believe an employee serves a ministerial function, a court will reach the same conclusion.” Tracey, *supra* note 96, at 137.

99 See *Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring).

100 *Our Lady of Guadalupe*, 140 S. Ct. at 2071 (Thomas, J., concurring).

101 See *id.* (“[C]oncerns of entanglement have not prevented the Court from weighing in on the theological questions of which positions qualify as ‘ministerial.’”).

102 See *id.*

103 *Id.* at 2070 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

104 See *supra* note 9 and accompanying text. The Fixation Thesis stipulates that the meaning of constitutional text is “fixed” at the time of framing and ratification and that no additional meaning has been conferred on constitutional text since that time—only elucidations of that meaning. See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

105 See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609–10 (2004) (“[T]he new originalism is focused less on the concrete intentions of individual

attempting to find the intent of those writing and enacting the Constitution.<sup>106</sup> Although there are many flavors of originalism,<sup>107</sup> the original public meaning camp has generally carried the day for now.<sup>108</sup> Because the intent of the Framers and the historical background they and the public would have been familiar with at the time inform how the public would have understood the text. Thus, these factors are important considerations to those who adhere to original public meaning originalism. Indeed, they should be embraced because of their role in adding color and context to what the public thought it was doing when it transferred its authority to the government of the Constitution.<sup>109</sup> This Part focuses on what the public would have understood the First Amendment to require and prohibit through the historical background of the time, the intents of the Framers, and how the First Amendment and its informing ideals were applied near and soon after its ratification.

*A. The First Amendment's History, Text, and Early Application Require Civil Authorities to Abstain from Religious Institutions' Sphere of Authority*

The history that informed the Framers' and the public's understanding of the First Amendment supports the separation of the two

drafters of constitutional text than on the public meaning of the text that was adopted. . . . It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals.”).

106 See *id.* at 603 (describing older originalist views as emphasizing the “subjective intentions of the founders” and how this view often spoke “in terms of attempting ‘to understand the Constitution according to the intention of those who conceived it’” (quoting Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 756 (1987))).

107 See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 32–38 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing the many variations among originalist scholars).

108 See Whittington, *supra* note 105, at 607–12 (describing the original public meaning view as a facet of the new originalism that arose after the passing away of the old originalism). James Madison seems to expound this view himself when he encouraged those interpreting the clauses to look to the text and “the sense attached to it by the people in their respective State Conventions where it [received] *all the authority* which it possesses.” Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A at 447, 447–48 (Max Farrand ed., 1911).

109 Professor Alicea articulates a theory of popular sovereignty to explain why originalism is morally justified as an interpretive theory. If the Constitution is a transfer of sovereignty from the people to the federal government, it is most appropriate to use originalism so we can understand exactly what sovereignty or governing authority they understood themselves to be transferring. See J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 43–45 (2022).

spheres of authority: religious and civil.<sup>110</sup> Western legal history has long recognized the differentiation between religious institutional jurisdiction and governmental jurisdiction.<sup>111</sup> Despite numerous historical instances of the powers merging, overlapping, conflicting, and melding, a thread of thought that “the spiritual and temporal powers” must “remain separate in function” persisted.<sup>112</sup> This thread of “differentiation between the institutions of church and state” is woven into the American constitutional tradition.<sup>113</sup> Despite established churches appearing in the colonies and early America,<sup>114</sup> preratification history exemplifies the separate-spheres-of-authority concept that informed the Framers’ thoughts and the public’s understanding of the First Amendment.<sup>115</sup>

The Puritans, refugees from government intrusion in the religious sphere of authority, believed the two spheres of authority should

110 Abraham Kuyper expounded the spheres-of-authority analogy in his scholarship. Although a Dutch theologian and politician of the late nineteenth and early twentieth centuries, see Horwitz, *supra* note 13, at 83, Kuyper’s spheres-of-authority concept clearly appears in early American constitutional history, informing the separation between the church and the state preratification and after the First Amendment was ratified. See *id.* at 91–106 (“The roots of sphere sovereignty thus arguably lie deep in a historical tradition that predated and encompassed the American experiment in religious liberty.” *Id.* at 100.).

111 See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1392 (“[S]ince the fourth century Western civilization has presupposed that there are not one but two sovereigns. . . . [E]ach is noncompetent to perform the tasks of the other.”); Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 507 (2006–2007) (“Certainly, the idea of a distinction between the church and the political authorities, between what Calvin called the ‘spiritual kingdom’ and the ‘political kingdom,’ . . . between the City of God and the City of Man, is much older than the American Constitution . . . .”); Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8 (“After the collapse of imperial Rome . . . standard legal thinking in Western Europe was based on the theory of Two Kingdoms—the idea that God created two different forms of authority, . . . spiritual and temporal, sacred and secular, church and state.”).

112 See John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1878 (2003) (reviewing DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); and PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)).

113 Brief for Professor Eugene Volokh et al. as Amici Curiae Supporting Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-553). *Hosanna-Tabor* recognized that this thread of separate spheres is enshrined in both the Establishment and Free Exercise Clauses. See *Hosanna-Tabor*, 565 U.S. at 181.

114 See Esbeck, *supra* note 111, at 1414–16 (describing various examples of the often-close relationship between religious and state matters in early American colonial history).

115 See WITTE ET AL., *supra* note 12, at 9 (“The American founders did not create their experiment in religious freedom out of nothing. The principles of religious freedom outlined in the First Amendment were a part and product of nearly two centuries of colonial experience, and nearly two millennia of European thought and legal practice.”).



remain separate.<sup>116</sup> They adopted rules oriented toward upholding this separation—barring clergy and government officials from holding each other’s offices, among other rules.<sup>117</sup> Permitting the interference of one in the affairs of the other “would confound those Jurisdictions, which Christ hath made distinct.”<sup>118</sup> The preamble to the Laws and Liberties of Massachusetts Bay in 1648 declared, “[O]ur churches and civil state have been planted, and grown up (like two twins),’ and to conflate the two would lead to the ‘misery (if not ruin) of both.’”<sup>119</sup> The Puritans viewed the two spheres as springing from the same fount of authority—Christ—even though they believed the spheres were separate.<sup>120</sup> This view enabled, even required, close cooperation between the two. Over time, the Puritan views of close cooperation between distinctly separate spheres expanded into more expansive, tolerant rights to religious liberty, inspiring John Adams to enshrine them in the 1780 Massachusetts Constitution.<sup>121</sup>

The idea of differentiation between government and religious authority continued as the pre-Constitution American religious experiment continued apace. But it grew even stronger than the Puritans’ conception of separation.<sup>122</sup> Following the First Great Awakening, Evangelicals’ conceptions of religious liberty and separation of

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116 See *id.* at 37–39. Professor John Witte has linked Kuyper’s sphere sovereignty with Puritan conceptions of the church and state holding separate authority. See Horwitz, *supra* note 13, at 101 (citing JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 152, 205, 324 (2007)). This linkage helps illustrate how ideals that informed the First Amendment are appropriately described by Abraham Kuyper’s illustration of separate spheres of authority.

117 WITTE ET AL., *supra* note 12, at 38.

118 *Id.* (quoting T.H. BREEN, *THE CHARACTER OF THE GOOD RULER: A STUDY OF PURITAN POLITICAL IDEAS IN NEW ENGLAND, 1630–1730*, at 42 n.24 (1970)).

119 Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 159 (2011) (alteration in original) (quoting *THE LAWS AND LIBERTIES OF MASSACHUSETTS A2* (Max Farrand ed., Cambridge, Harvard Univ. Press photo. reprt. 1929) (1648)).

120 See WITTE ET AL., *supra* note 12, at 38.

121 See *id.* at 40–42.

122 See *id.* at 43 (“Evangelicals, however, went beyond the Puritans—and battled with them in the New England states—both in their definition of the rights of religious individuals and groups, and also in their insistence on a fuller separation of the institutions of church and state.”). Arguably, the Puritans’ ideas about church and state separation were most institutionalized in the Framers’ and public’s minds as they wrote and ratified the Constitution. See *id.* (noting Evangelicals had less opportunity to institutionalize their views compared to the Puritans). However, that is not to say that other religious or even secular groups’ ideas about the separate spheres of authority did not hold sway in the Framers’ and public’s minds as they wrote and ratified the First Amendment. See *id.* at 35–58. Indeed, the Evangelicals were among the most fervent proponents of the Religion Clauses being included in the Constitution. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990).

authority gained influence.<sup>123</sup> Unlike the Puritans, Evangelicals were even wary of coordination—they wanted to keep the authority spheres so separate that *any* mixing was disfavored.<sup>124</sup> Evangelicals sought full church autonomy because, in their view, the church was the only rightful governor of its sphere.<sup>125</sup> No other influence was allowed. The separate spheres meant they “sought to free all religion from the fetters of the law and to relieve all churches from the restrictions of the state.”<sup>126</sup> The blend of Puritan and Evangelical thought on the spheres of authority informed the Framers and the public at the same time as other, less religious influences.<sup>127</sup> James Madison expounded his understanding of the separate spheres of authority in his oft-invoked *Memorial and Remonstrance Against Religious Assessments*: “[I]n matters of Religion, no man’s right is abridged by the institution of Civil Society[;] Religion is wholly exempt from its cognizance.”<sup>128</sup>

The American history and tradition that went into the Constitution fashioned “a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government.”<sup>129</sup> Professor Esbeck summarized the American tradition of viewing the two as holding power only over their respective spheres of authority: “[T]he civil state had no legal authority, and its courts thus had no subject matter jurisdiction over those topics that were inherently religious and thus within the sole province of the church. . . . [T]he new American settlement envisioned a free church and a limited state.”<sup>130</sup> This new American

123 See WITTE ET AL., *supra* note 12, at 43.

124 See *id.* at 44.

125 See *id.* at 45.

126 *Id.* at 46.

127 See McConnell, *supra* note 122, at 1449. In their book, Professors Witte, Nichols, and Garnett expand on the nonreligious, more philosophical influences that informed the crafting of the First Amendment. See WITTE ET AL., *supra* note 12, at 46–57. For example, John Locke and the Enlightenment thinkers held a similar jurisdictional view. In Locke’s view, “The proper division between the realms of government and religion comes down to this: ‘all the power of civil government . . . is confined to the care of the things of this world, and hath nothing to do with the world to come . . . .’” McConnell, *supra* note 122, at 1432 (quoting JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), *reprinted in* 6 THE WORKS OF JOHN LOCKE I, 12–13 (photo. reprinted 1963) (London et al., Thomas Tegg et al. new ed. 1823)).

128 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION app. 6, at 161 (2003); see also McConnell, *supra* note 122, at 1453 (“Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society.”).

129 Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 523 (2007).

130 Esbeck, *supra* note 111, at 1396.

settlement gave birth to the First Amendment, enshrining “a recognition . . . that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.”<sup>131</sup>

The text of the First Amendment reflects these influences. The First Amendment bars government interference in the exercise or establishment of religion. The Religion Clauses read, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>132</sup> The First Amendment holds “two separate disempowerments” of the government over religion that work in tandem.<sup>133</sup> While the right to free exercise recognizes an individual right the government should not be able to easily overcome, the Establishment Clause confers no such individual right.<sup>134</sup> The textual difference between the Establishment Clause, barring laws “respecting an establishment of religion,” and the Free Exercise Clause, barring laws “prohibiting the free exercise” of religion, reveals their differences in function.<sup>135</sup> The Establishment Clause sets up a jurisdictional bar in a “discrete zone of activity.”<sup>136</sup> The Free Exercise Clause bars government intrusion on an individual right. The Establishment Clause structurally separates “the authority of government and the authority of organized religion” by setting up a jurisdictional bar in a discrete zone of activity.<sup>137</sup> The structural separation enshrined brings effect to the separate-spheres-of-authority concept that influenced the Framers and was salient to the ratifying public.

The influential ideas of structural separation apparent in the history behind the First Amendment and discernable in its text included a prohibition on government involvement in one of the paradigm cases of established religion: the appointment of religious officials. Before the First Amendment, the background principles of the separate spheres of authority struggled against commonplace church

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131 *Id.* at 1589.

132 U.S. CONST. amend. I.

133 See Carl H. Esbeck, *An Extended Essay on Church Autonomy*, 22 FEDERALIST SOC'Y REV. 244, 267 (2021).

134 See *id.*; see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in judgment) (“The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion . . .”).

135 U.S. CONST. amend. I; Esbeck, *supra* note 133, at 267.

136 Esbeck, *supra* note 133, at 267.

137 *Id.* It is important to remember, as Professor Esbeck acknowledges, that this is an *institutional* separation of power, not a full separation of law and religion. “While the institutions of church and government can be separated, religion and politics cannot. Such a disjunction would rob believers and the organizations they form of the right enjoyed by all others.” *Id.* at 268.

establishments.<sup>138</sup> The Framers wrote, and the public ratified, the First Amendment while aware of and influenced by this struggle.

One of the key features of establishments that faced resistance during this time was the state's influence over clergy and church officials.<sup>139</sup> State establishments of religion understood that the "power to appoint and remove ministers and other church officials is the power to control the church."<sup>140</sup> So, attempting to bring to fruition the concept of separate spheres of authority, the forces struggling against church establishments resisted their cornerstone characteristic: the appointment of religious officials.<sup>141</sup> The Massachusetts Constitution of 1780, authored by John Adams, expressly recognized the different spheres by prohibiting state interference in the choosing of clergy and religious teachers.<sup>142</sup> New Hampshire, Connecticut, and later Maine all adopted similar provisions as Massachusetts's, despite having established churches at times.<sup>143</sup> As established churches generally waned, the Massachusetts framers "recognized ministerial employment decisions to be a matter of exclusively ecclesiastical, as opposed to civil, concern."<sup>144</sup> Other states generally followed the trend. Instead of carving out a proto-ministerial exception like the New England state constitutions, Virginia struck a blow against establishment and religious

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138 See Esbeck, *supra* note 111, at 1457–97 (describing the general path of disestablishment in early America); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003) ("During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant.").

139 See McConnell, *supra* note 138, at 2136–44 (identifying the appointments of bishops and clergy as hallmarks of an establishment of religion and government control over religion).

140 *Id.* at 2136.

141 Professor Richard Garnett calls the state appointment of religious officials one of the "paradigm cases" that the Establishment Clause was designed to resist. See *supra* note 64.

142 See MASS. CONST. of 1780 pt. 1, art. III; Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2016 (2007); Horwitz, *supra* note 13, at 102.

143 See Dunlap, *supra* note 142, at 2016–17 ("Nor were Adams and the Massachusetts framers alone in believing that religious liberty necessitated such specific protection of the church-minister relationship. Connecticut, Maine, and New Hampshire included similar provisions in their state constitutions." *Id.* at 216.). State constitutions, especially ones influenced by the same individuals who influenced the Constitution and Bill of Rights, are helpful sources of evidence in divining the original understanding of the Constitution. See McConnell, *supra* note 122, at 1456 ("These state constitutions provide the most direct evidence of the original understanding . . . . The wording of the state provisions thus casts light on the meaning of the first amendment.").

144 Dunlap, *supra* note 142, at 2016.

appointments in 1776<sup>145</sup> before outright ending its established church in 1786 at the behest of Madison and Jefferson.<sup>146</sup> In this historical light, these state constitutional provisions and generalized, gradual disestablishments “reflect the Founders’ views of church-state relations and comport with one of the primary rationales for the adoption of the Religion Clauses.”<sup>147</sup> The Framers wrote and the public ratified the Religion Clauses at a time of discontentment with established churches and particularly the control the state wielded over religion by influencing religious appointments in established churches.<sup>148</sup> The Religion Clauses, while not written to explicitly bar state-established churches, did bar any federal involvement in the appointment of religious officials as the concept of separate spheres of authority which influenced the Framers and ratifying public came to fruition in the First Amendment’s text.<sup>149</sup>

The history immediately before and after the First Amendment demonstrates that the First Amendment barred any federal government involvement in the influence over or appointment of religious officials.<sup>150</sup> Benjamin Franklin, when asked by the Vatican to facilitate an agreement with Congress to establish an American bishopric, elucidated the increasing understanding that the fledgling American government held no jurisdiction over church affairs. He said it would be “absolutely useless to send [the proposal] to the congress, which . . . *can not* . . . intervene in the ecclesiastical affairs of any sect.”<sup>151</sup> When

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145 The Virginia Declaration of Rights was enacted in 1776. After its enactment, the “persecution of Baptist and other preachers” from state influence in defining ministers ended. See McConnell, *supra* note 138, at 2120, 2119–20.

146 See *id.* at 2120. Jefferson and Madison’s work here should be informative of their views and intents when they were framing the First Amendment’s Religion Clauses. Their work in Virginia strongly informs the original meaning of the Religion Clauses because “[n]o other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison.” McConnell, *supra* note 122, at 1455. The Supreme Court itself has recognized the outsized influence of Madison. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012) (calling him “the leading architect of the religion clauses of the First Amendment” (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011))).

147 Dunlap, *supra* note 142, at 2019.

148 See *Hosanna-Tabor*, 565 U.S. at 184 (“[T]he Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have *no role* in filling ecclesiastical offices.” (emphasis added)).

149 See Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church–State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 181 (2011) (“In rejecting a national establishment of religion, Americans necessarily rejected a *role* for the federal government to choose church leaders. The First Amendment confirms this rejection, as do early practices and policies.” (emphasis added)).

150 See *id.*

151 *Id.* (emphasis added) (quoting 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 478 (1950)).

the proposal reached Congress, it agreed and responded that the Pope could appoint whomever he wished because church appointment issues were “without the jurisdiction and powers of Congress, who have *no authority* to permit or refuse” the appointment.<sup>152</sup>

Some of the first applications of the Religion Clauses arose from issues following the Louisiana Purchase. In 1806, the first Catholic bishop in the United States<sup>153</sup> asked Secretary of State Madison and President Jefferson for an opinion about filling the bishopric over the Louisiana Purchase. Instead of offering the views of the new American government, President Jefferson and Secretary of State Madison showed that the First Amendment bars civil influence over religious institutions’ sphere of authority. They explained that the “selection of church ‘*functionaries*’ was an ‘*entirely ecclesiastical*’ matter left to the Church[.]”<sup>154</sup> Madison continued, writing that it was the “scrupulous policy of the Constitution” to bar “political interference” in religious affairs.<sup>155</sup> Soon after, the territorial governor of the region involved himself in a church-control dispute resulting in federal officials closing the church. President Jefferson chided the officials in a letter to Secretary of State Madison. He wrote that federal officers should not be involved at all in “matters of church polity nor the supervision and discipline of clergy.”<sup>156</sup> An order of sisters in New Orleans wrote to President Jefferson concerned about how the new American government of the Louisiana Territory may influence their school for orphaned girls. Jefferson alleviated their concerns and explained that the Constitution and First Amendment specifically “are a sure guaranty to you . . . that your Institution will be permitted to govern itself according to its own voluntary rules *without interference* from the civil authority.”<sup>157</sup> This scrupulous unwillingness to have civil authority interfere in religious institutions’ sphere of authority continued beyond

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152 Esbeck, *supra* note 133, at 271 (emphasis added) (quoting 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 368 (Gaillard Hunt ed., 1928)). Despite this event occurring before the ratification of the Constitution and First Amendment, it illustrates how the separate spheres of authority were already manifesting in the American government and should “inform how we read the later legal text.” *Id.* at 271 n.263.

153 This was the same bishop chosen by the Pope after the Continental Congress explained it had no jurisdiction to comment on who should be selected for the bishopric. *See id.* at 271.

154 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012) (emphasis added) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), in 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 63, 63 (1909))

155 *Id.* (quoting Letter from James Madison to Bishop Carroll, *supra* note 154, at 63).

156 *See* Esbeck, *supra* note 133, at 271.

157 *See* Berg et al., *supra* note 149, at 182 (emphasis omitted in part) (quoting 1 STOKES, *supra* note 151, at 678).

questions arising from the Louisiana Purchase. As the *Hosanna-Tabor* Court noted, President James Madison vetoed a proposal to incorporate an Episcopal church in the District of Columbia.<sup>158</sup> The Religion Clauses prohibited him from incorporating the church because the bill would possibly permit the “election and removal of the Minister” of the church.<sup>159</sup>

These episodes elucidate the meaning of the First Amendment because they reveal how its Framers understood the First Amendment’s background principles and the text itself to apply. Their actions prove they wrote the First Amendment to hold religious institutions and civil authorities to their respective spheres of authority. Little in the history, text, or practices before and after ratification supports the idea that the Amendment allowed civil jurisdiction in religious spheres of authority. Rather, these sources attest that a “corrupting coalition” of civil government and religious authority “will be best guarded [against] by an *entire abstinence* [sic] of the [government] from interference in any way whatever.”<sup>160</sup>

*B. The First Amendment’s Separate Spheres of Authority Require the Government to Defer to Religious Institutions’ Good-Faith Claims of Who Is a Minister*

The history behind the First Amendment and its application following ratification substantiate that the Framers’ intent and the public’s understanding was that it separated civil and religious authority. By separating the spheres, the First Amendment barred civil influence over the selection of religious officials. This prohibition, combined with how it was applied following ratification and judicial avoidance of entanglement in religious questions, demonstrates that the proposal to defer to religious institutions’ good-faith claims about who is a minister is the approach that best comports with the original understanding of the First Amendment.

Permitting courts to override a religious institution’s claim of exactly who advances the mission and message of that religion amounts to government entanglement in a religious institution’s sphere of authority. Entanglement doctrine has faced criticism because it is a

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158 *Hosanna-Tabor*, 565 U.S. at 184–85.

159 *Id.* at 185 (emphasis omitted) (quoting 22 ANNALS OF CONG. 983 (1811)).

160 Letter from James Madison to Reverend Adams (1832), in 9 THE WRITINGS OF JAMES MADISON 484, 487 (Gaillard Hunt ed., 1910) (emphasis added). Madison not only believed that government should not, “but actually *may not* usurp ecclesiastical functions.” Dunlap, *supra* note 142, at 2022 (emphasis added).

prong of the abandoned *Lemon v. Kurtzman*<sup>161</sup> test.<sup>162</sup> But, as Professor Stephanie Barclay argues, there are situations where a court could apply an entanglement analysis following the history and text of the First Amendment.<sup>163</sup> This is especially true if, as discussed above, the First Amendment enshrines jurisdictional lines between civil and religious institutional authority.<sup>164</sup> Some of the areas where impermissible entanglements are historically defensible are when the government seeks control over “church doctrine, governance, and personnel”<sup>165</sup> or generalized interference with the “autonomy and religious integrity of institutions.”<sup>166</sup> Unlike some of the Court’s entanglement precedents, historical entanglement does not prevent all cooperation between government and religion.<sup>167</sup> But as an original matter, the government may not breach the divide to exert control outside its authority sphere. Doing so would entangle it in areas outside its purview. Entanglement like this would violate the jurisdictional divide instituted in the First Amendment.

Examining the early application of the First Amendment points toward deference as the more originalist approach. When the Continental Congress denied the Vatican’s request to provide input on who should fill Catholic offices in post-Revolution America, it denied *full* jurisdiction.<sup>168</sup> It did not entangle itself in defining some offices as ministerial and others not ministerial. Rather, it recognized the selection and definition of church officials fell outside the civil sphere of authority. Following the First Amendment, President Jefferson claimed no authority to define church offices when the bishop asked for advice on appointing church officials over the Louisiana Territory.<sup>169</sup> The filling—and by necessity defining—of church offices was an “entirely ecclesiastical” matter.<sup>170</sup> All “political interference” was barred.<sup>171</sup> Jefferson and Madison did not recognize that some political

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161 403 U.S. 602 (1971). The Court recognized the abandonment of the *Lemon* test in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022).

162 See Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1701 (2020) (recognizing that the *Lemon* test has been criticized as ahistorical but questioning whether discarding the entanglement prong too would be “throwing the baby out with the bathwater”).

163 See *id.* at 1720–22.

164 See *supra* Section III.A.

165 See Barclay, *supra* note 162, at 1721 (citing McConnell, *supra* note 138, at 2131).

166 See *id.*

167 See *id.* at 1722–24 (identifying school-funding entanglement cases as “further afield” from entanglement’s “historical justifications,” *id.* at 1722).

168 See *supra* notes 151–52 and accompanying text.

169 See *supra* notes 153–54 and accompanying text.

170 See *supra* note 154 and accompanying text.

171 See *supra* note 155 and accompanying text.



interference in defining the offices that could be subject to civil interference was permissible. *All* interference, even definitional, was barred. Of course, the offices in question in both historical examples were offices that few would contest were ministerial. But the more fundamental point is that if the authority is separated as the history and text indicate, who has the right to decide what is ministerial and what is not must also be separated. President Jefferson hinted at this view when he assured the Ursuline sisters in New Orleans that the American government would not interfere in their internal affairs.<sup>172</sup> He assured them the First Amendment allowed them to govern themselves without any interference.<sup>173</sup> They were to decide how individuals involved with their orphanage advanced the mission and message of Catholicism, not the state. Their sphere of authority held the full power to decide. Thus, the government deferred. No particular ministerial offices were discussed or defined, nor were lines drawn between areas where civil authority may interfere and where it may not.

Yet this entangling, definitional line drawing is what *Hosanna-Tabor* and *Our Lady of Guadalupe* require. The majorities decided against the deference approach. In its place, they “saddled courts with the task of sussing out whether a given employee of a religious organization is carrying out religious functions of sufficient ‘quality and quantity’ to qualify for the ministerial exception.”<sup>174</sup> *Hosanna-Tabor* declined to lay down a “rigid” test precisely because no single test can fit all religious institutions and roles.<sup>175</sup> But it did say that a minister can have a role in carrying out the mission and conveying the message of a religious institution.<sup>176</sup> Because of that, a court cannot avoid jumping into the religious sphere of authority to assess the religious questions inherent in whether they carry out the mission or convey the message.<sup>177</sup> Instead of letting a religious institution decide if and how the

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172 See *supra* note 157 and accompanying text.

173 See *supra* note 157 and accompanying text..

174 Tracey, *supra* note 96, at 136 (quoting Ira C. Lupu & Robert W. Tuttle, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, TAKE CARE (July 8, 2020), <https://takecareblog.com/blog/the-2020-ministerial-exception-cases-a-clarification-not-a-revolution> [<https://perma.cc/JC7T-R8GW>]).

175 See *supra* note 66 and accompanying text.

176 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012).

177 See Maxine D. Goodman, *Courts’ Failure to Use Religion Experts to Decide Difficult Fact Questions Concerning Who Is a Minister for the Ministerial Exception: A Holy Mess*, 72 BAYLOR L. REV. 1, 13 (2020) (“[C]ourts struggle because the fact issues concerning who is a minister are complex and nuanced, not lending themselves to easy, clear-cut answers. And, judges themselves must serve as experts on religion in these cases, choosing whether a function is secular or religious.”); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 59 (2002) (explaining that resolution by state

employee advances their message and mission, a court has to “second-guess church determinations . . . thus entangling church and state” authority spheres.<sup>178</sup> This entanglement in the church’s authority requires a court to judge religious questions on at least some level, to see if its judgment comports with the claims of the religious institution regarding the employee’s ministerial role, and to override the institution if it does not. Justice Alito’s more functional-focused approach in *Our Lady of Guadalupe* fares no better. It requires courts to judge “whether the employee plays an important role in worship or spreading the faith.”<sup>179</sup> Assessing that requirement unavoidably requires a court to judge whether an employee’s functions are “religious enough.”<sup>180</sup> Justice Alito himself recognized in his *Hosanna-Tabor* concurrence that having courts decide important religious questions comes “dangerously close” to impermissible entanglement.<sup>181</sup> But this is exactly what a functional test demands.<sup>182</sup> Demanding courts decide theologically laden questions like ministerial definitions not only transgresses the separated authorities but burdens courts with questions they are ill-equipped to answer.<sup>183</sup> Judicial defining of a minister empowers courts to override a religious institution’s determinations of who best conveys its message and carries out its mission—indirectly shaping the future

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agents of disputes “on matters of theological significance transgresses the state’s temporal jurisdiction”).

178 Joseph Capobianco, Note, *Splitting the Difference: A Bright-Line Proposal for the Ministerial Exception*, 20 GEO. J.L. & PUB. POL’Y 451, 471 (2022).

179 *Id.* (quoting Katherine Hinkle, Case Note, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 337 (2013)). “The very nature of the question—is this person a ‘minister’?—invites courts to become entangled with theological and doctrinal issues beyond their institutional competence.” Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951, 966 (2012).

180 Tracey, *supra* note 96, at 137.

181 See Capobianco, *supra* note 178, at 471–72, 471 n.204 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 205–06 (2012) (Alito, J., concurring)) (explaining how Justice Alito’s rejection of a religious-motivation examination into why an employee was fired because it required courts to assess religious questions is quite similar to what a function-focused test for who a minister is would require).

182 See *The Supreme Court, 2019 Term—Leading Cases*, 134 HARV. L. REV. 410, 466–67 (2020); Capobianco, *supra* note 178, at 471–72, 471 n.204.

183 James Madison strongly opposed any civil involvement in deciding religious questions. He “believed that civil government should not abridge this ‘barrier’ by establishing a religion because, simply, the idea that the ‘Civil Magistrate is a competent Judge of Religious Truth’ could only be seen as ‘an arrogant pretension falsified by the contradictory opinions of Rulers in all ages.’” Dunlap, *supra* note 142, at 2022 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in JAMES MADISON: WRITINGS 29, 32 (Jack N. Rakove ed., 1999)).

of that religion.<sup>184</sup> This definitional power is truly the power to “define the church itself.”<sup>185</sup> Such interference outside the civil sphere of authority does not comport with the First Amendment’s original understanding or early application. “[P]ermitt[ing] the judiciary to define what is ‘truly’ religious would subject the scope” of religious authority “to the limits tolerated by the state. That, to be certain, was precisely what Madison rejected . . . .”<sup>186</sup>

Good-faith deference to religious institutions’ claims of who is a minister adheres more closely to the First Amendment’s original understanding. It does not contradict the First Amendment by demanding courts exercise jurisdiction or entangle themselves outside their sphere of authority. Justice Thomas believes that the power to define is the power to control.<sup>187</sup> This exercise of control bleeds civil authority into religious purviews. But the deference view ensures the spheres stay separate. It allows the religious institution to make determinations in its sphere and relay its determinations to the civil authority. This deference “is justified in light of the institutional or Kuyperian value of church autonomy” enshrined in the First Amendment’s text and history.<sup>188</sup> Deference avoids the entanglement issues barred by the First Amendment<sup>189</sup> by maintaining separate authorities, preventing civil override of religious institutions’ answers to religious questions, and not demanding courts adjudicate religious questions they are ill-equipped to decide. The court’s sole role is to decide if the religious institution is genuine in its determination of who conveys its message and carries out its mission.<sup>190</sup> Much like an uninformed car owner does not interfere in his mechanic’s sphere of expertise by diving under the hood himself, the First Amendment bars a court from interfering in a

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184 See 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, 1391 (1981) (“When the state interferes with the . . . allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future.”).

185 Dunlap, *supra* note 142, at 2032 (“The power to define what is and what is not a ministerial position within a church—and, hence, what is central to the church—is the power to define the church itself.”).

186 *Id.* at 2033–34.

187 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring) (“A religious organization’s right to choose its ministers would be hollow, however, if secular courts could second-guess the organization’s sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.”).

188 See Horwitz, *supra* note 13, at 120; *supra* note 110 and accompanying text.

189 See Capobianco, *supra* note 178, at 474.

190 See *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (qualifying proposed approach by saying only “good-faith” understandings of who is a minister should be deferred to).

religious institution's sphere of expertise by deciding who is a minister for itself. But much like an uninformed car owner takes steps to ensure his mechanic is not being dishonest, a court should only defer to "good-faith" claims from the religious institution. Because "[w]hat qualifies as 'ministerial' is an inherently theological question,"<sup>191</sup> deference to those best able to judge those theological questions respects the lines drawn by the First Amendment and restrains courts from the usurpation of religious spheres of authority.

#### IV. IS DEFERENCE TOO EXTREME?

Originalism's critics often charge that strict adherence to the discernable meaning of the Constitution at the time of ratification will result in far too extreme outcomes.<sup>192</sup> Even among originalists at times, few seem willing to unblinkingly adhere to the text and history without at least glancing at how erroneous precedents, modern circumstances, or future considerations may affect them.<sup>193</sup> Differing viewpoints on the issue caused Justice Scalia<sup>194</sup> to famously note the difference between him and Justice Thomas: "I am an originalist. I am not a nut."<sup>195</sup> Originalism, however, seeks to confine governmental exercises of power to their set bounds without restraining the government's *proper* exercise of power.<sup>196</sup> The Constitution never imagined the judiciary as a policy-making branch and thus could not assess whether its outcomes were "extreme" or not. In today's jurisprudence, the proper exercise

191 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring).

192 See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 192 (2008). For an example of liberal consternation at the Court's recent Term and its slow turn toward increasingly originalist opinions, see Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court> [<https://perma.cc/9DQK-YZER>]. Supreme Court pundit Mark Joseph Stern is also a perennial favorite for manic critiques of originalist views. See, e.g., Mark Joseph Stern, *The Conservative Movement's Favorite Legal Theory Is Rooted in Racism*, SLATE (Apr. 6, 2021, 3:25 PM), <https://slate.com/news-and-politics/2021/04/originalism-racist-roots-brown-segregation.html> [<https://perma.cc/KAC3-2ZTR>].

193 See Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 41 (2011) ("Originalism is too committed to the democratically enacted constitutional text and too oriented to preserving decisions made in the past. For those who like judges to have more flexibility to make decisions about what constitutional rules should govern today and in the future, originalism will always seem too confining.").

194 Justice Scalia, unlike Justice Thomas, was a self-described "faint-hearted originalist." See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

195 See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1931 (2017) (quoting MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 163 (2013) (quoting Justice Scalia)).

196 See Whittington, *supra* note 193, at 38–39.

of judicial power may seem extreme at times because all branches have incrementally eroded original Constitutional bindings. Originalism need not recklessly overthrow any precedent holding a whiff of error, but it also should not permit clearly erroneous seizures of undue power to march on.<sup>197</sup> Restoration to the morally justified bindings<sup>198</sup> of the government should not be seen as extreme. Instead, walking down a road of rudderless judicial interpretation should instill more revulsion.

Instituting the comprehensive church autonomy present in the First Amendment can attract this sort of trepidation.<sup>199</sup> As an offshoot of a robust church autonomy approach, deference to a religious institution's determination of who is a "minister" can be criticized as allowing a far-too-broad ministerial exemption. Opponents of the deferential approach charge that it "gives religious organizations broad freedom to violate the law; all they have to do is invoke ministerial status in order to win their lawsuits."<sup>200</sup> They argue that if religious employers invoke the exception and define "minister," it gives them "functional immunity against antidiscrimination suits" and "eviscerates the compelling interests" of the government.<sup>201</sup> This deference would be particularly impactful in close cases<sup>202</sup> and may risk letting the "exception . . . swallow the rule."<sup>203</sup> Thus, deference in defining a minister is "a bridge too far."<sup>204</sup>

These concerns are overstated. Justices Thomas and Gorsuch are not blind to the probability that deference will expand the availability of the ministerial exception. It surely will.<sup>205</sup> Yet they are careful to

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197 For a discussion of how the judiciary can implement originalist theory without causing detrimental outcomes through agenda control, avoidance, and rules of adjudication, see Barrett, *supra* note 195, at 1929–33.

198 See generally Alicea, *supra* note 109.

199 See Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 133 (2009) (citing Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 266 (2009)) (observing that Professor Doug Laycock believes general church autonomy theories can "cover[] far too much to be credible"). See generally Hill, *supra* note 11.

200 Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1009 (2013).

201 Capobianco, *supra* note 178, at 475 (describing the issues with a deferential approach to who is a minister).

202 See *id.*

203 See Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of Bostock*, 2022 U. ILL. L. REV. ONLINE 26, 38.

204 Weese, *supra* note 71, at 1366 n.257.

205 Although a deferential approach incorporates a risk of abuse by religious groups, this risk must be accepted, because the First Amendment prohibits civil courts from second-guessing a religious group's answers to religious questions, and any application of the term 'minister' in the ministerial exception context will involve a religious question.

maintain that a religious institution's claims of ministerial status should be evaluated for good faith or sincerity. This alone moderates deference's severity. Courts regularly adjudicate the sincerity of religious beliefs,<sup>206</sup> and doing so is not always a constitutional concern.<sup>207</sup> What courts have to be conscientious to avoid is attributing insincerity to the implausibility of a belief.<sup>208</sup> Because courts are much more attuned to judging sincerity than deciding religious questions, adding ministerial claims "could avoid difficult and reductive line-drawing exercises and leave courts with the familiar task of judging truthfulness."<sup>209</sup> Based on courts' experience judging sincerity in other contexts, they are "reasonably well equipped to stop attempts to game the exception."<sup>210</sup>

Critics fear that religious institutions would automatically claim that all of their employees are ministerial and completely avoid any liability to antidiscrimination laws. While deference would expand the scope of the ministerial exception, there is little reason to believe the courts would regard blanket claims of ministerial status as sincere. Even under a deference test, religious institutions would still have to prove sincerity beyond a preponderance of the evidence.<sup>211</sup> Deference only applies to a religious institution's determinations of ministerial status and does not automatically apply to whether a court finds their determinations to be genuine. Of all institutions, religious institutions are least likely to abuse a deferential test. Their "legal and moral obligations to tell the truth must be relied on to settle this concern" at least in part.<sup>212</sup>

The mere existence of a deferential approach does not guarantee a religious institution will take advantage of it either. Professor Horwitz explains that religious institutions would still have many options besides invoking a deferential exception that may be more appealing.<sup>213</sup> For example, institutions that oppose discrimination may provide an internal dispute resolution process, have a religious conviction that victims of discrimination should be made whole, or even not

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Allison H. Pope, Note, "Of Substantial Religious Importance": A Case for a Deferential Approach to the Ministerial Exception, 95 NOTRE DAME L. REV. 2145, 2171 (2020).

206 See Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017); *The Supreme Court, 2019 Term—Leading Cases*, *supra* note 182, at 469 ("[J]udgments of religious sincerity are commonplace in areas like draft exemptions, prison accommodations, and Religious Freedom Restoration Act claims.").

207 *The Supreme Court, 2019 Term—Leading Cases*, *supra* note 182, at 468.

208 See Chapman, *supra* note 206, at 1191.

209 *The Supreme Court, 2019 Term—Leading Cases*, *supra* note 182, at 469.

210 *Id.*

211 *See id.*

212 Pope, *supra* note 205, at 2171.

213 See Horwitz, *supra* note 119, at 165.

invoke the exception for fear of the laity's loss of confidence in the institution's leadership.<sup>214</sup> "Reasons of deep religious conscience, as well as practical concerns about the reaction of members, might lead a church to give claimants substantial rights, even in the absence of any judicial process."<sup>215</sup> Deference to a religious institution's determinations of who is a minister, grounded in a First Amendment separation of authority and repulsion to entanglement in religious questions, would be moderated by a sincerity analysis common in other contexts. While deference would likely expand the exception, there is little reason to believe it would result in the parade of horrors that critics fear and critics of originalism brand as extreme.

Indeed, the benefits of deferring and keeping the authority spheres separate outweigh whatever concerns arise from the exception becoming too expansive. Deference to religious institutions' determinations of who conveys their message and furthers their mission provides much-needed clarity to judicial adjudications of the ministerial exception. Under the majority's airy factors, a religious institution has little way of knowing which of its employees would meet the exception and which would not.<sup>216</sup> Indeed, lower courts "still struggle with an eminently theological question of church ministry."<sup>217</sup> Such uncertainty may cause them to err on the side of caution and potentially adjust how they understand the furtherance of their religion or message to do so. This was one of Justice Thomas's concerns with how the majority evaluated ministerial status.<sup>218</sup> But because the deference approach would allow the religious institutions to parse the theological questions themselves, they can have clarity on who is a minister and who is not—for they decide.

Even if the Court were to institute a clearer and more administrable test for who is a minister, deference will always provide the most clarity to courts and religious institutions. The United States is a very religiously diverse country, and deference will help respect that diversity. Because of the religious diversity, "the Court will never find a single objective test, beyond a broad definition, for who is subject to the

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214 *See id.*

215 *Id.*

216 *See Tracey, supra* note 96, at 137 ("[T]he Court's fixation on the employee's actions, rather than the religious employer's views, creates unacceptable uncertainty.").

217 Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J. C.R. & C.L. 47, 68 (2013) (quoting Griffin, *supra* note 200, at 1010).

218 *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 197 (2012) (Thomas, J., concurring) ("Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding.").

ministerial exception.”<sup>219</sup> Attempts to craft a bright-line test “risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.”<sup>220</sup> Adherence to an originalist view of the First Amendment by deferring to religious institutions on questions inside their sphere of authority allows for judicial administrability and gives room to the diverse American religious landscape to operate without concern for how a court will view its beliefs. Deference “would place the doctrine [of the ministerial exception] on a firmer and clearer footing than the current approach.”<sup>221</sup>

### CONCLUSION

The majority in both *Hosanna-Tabor* and *Our Lady of Guadalupe* avoided articulating a test for who was a minister. Instead, they provided considerations in *Hosanna-Tabor* that evolved into a more functional inquiry in *Our Lady of Guadalupe*. The concurrences in both explained that deference to a religious institution’s good-faith determinations of who is a minister was the right approach. However, they did not give a comprehensive originalist explanation for their views. The question remained whether the majorities or the concurrences followed an original understanding of the First Amendment.

An examination of the history influencing the First Amendment, its text, and its early application reveals that the deferential approach to defining a minister for the exception most adheres to the original understanding of the First Amendment. The separation of the spheres of civil and religious authority marks American history leading up to ratification. After ratification, the enshrining of separate spheres of authority appears in the early application of the First Amendment. The First Amendment’s separation of authority prevents government entanglement in deciding religious questions it is ill-equipped to decide.

The majorities in *Hosanna-Tabor* and *Our Lady of Guadalupe* demand a judicial definition of who is a minister and entangle the Court in the religious question of who best conveys the message and carries out the mission of a religious institution. But deference to religious institutions bars civil usurpation in the religious sphere and prevents impermissible entanglement. In so doing, it respects the separation of authority enshrined in the First Amendment and adheres to the Framers’ and the public’s understanding of the First Amendment at ratification.

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219 *The Supreme Court, 2019 Term—Leading Cases*, *supra* note 182, at 465.

220 *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

221 Horwitz, *supra* note 13, at 120.



Instituting the approach closer to the original understanding of the First Amendment will likely not result in the extreme outcomes critics fear. Allowing a robust sincerity analysis of ministerial status determinations religious institutions make within their sphere of authority will filter out disingenuous claims of ministerial status without entangling courts in religious questions. Notwithstanding concerns about a deferential approach to defining a minister, the approach offers benefits including increased clarity, administrability, and allowance for religious diversity.

Perhaps the most originalist views on the ministerial exception will become the majority opinion of the Court in the future. They have in other areas. Adherents to originalism should anticipate that day because “[t]he state is precluded from interfering in church employment decisions not simply because it would be problematic, but because the church’s affairs are not the state’s affairs.”<sup>222</sup> Advancing the deferential approach to defining who is a minister accomplishes yet one more step in the ongoing quest to excavate the true, original meaning of the Constitution.

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222 *Id.* at 121.