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Paul E. McGreal

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REFORMING THE MINISTERIAL EXCEPTION

PAUL E. McGRAL

ABSTRACT

The ministerial exception is a constitutional law doctrine designed to protect the First Amendment right of religious groups to shape their community and define their beliefs. However, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the 2012 Supreme Court decision that recognized this doctrine, did so by adopting a shotgun approach to the problem: a per se rule that bars a wide variety of lawsuits by ministers against their religious employers. This categorical approach bulldozed important employment law protections for religious employees and created an irreconcilable conflict with a wide swath of constitutional doctrines that apply a more nuanced balancing test.

This Article argues that the Court should reform the ministerial exception to incorporate a constitutional balancing test. The proposed reform recognizes that the government has compelling reasons to protect ministers from abusive behavior by their employers. In addition, rules of procedure and evidence can narrowly tailor litigation to protect the constitutional interests of religious employers. Reforming the ministerial exception in this way better accommodates the competing constitutional interests of religious groups and their employees and restores order to constitutional doctrine.

* Professor of Law, Creighton University School of Law. I received helpful comments from presentations of this Article at the Loyola Chicago Constitutional Law Colloquium, and at faculty workshops at Southern Illinois University School of Law and the University of Dayton School of Law. I am grateful to Professors Victoria Haneman and Carol Knuepfler for reading and commenting on prior drafts of this Article, and for the research support that I received from Peyton Bellon, Carson Drake, Allyson Walz, and Kaitlyn Westhoff.
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THE Supreme Court’s landmark decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* established an anomalous constitutional doctrine that stripped religious employees of fundamental employment law protections. The deep flaws in that decision are illustrated by the case of Billie McClure, who was a minister called to serve in the Salvation Army Church. She forwent other employment and studied for two years at the Salvation Army Officer’s Training School to pursue her ministry. After joining the church, McClure became aware that male ministers received more generous salaries, benefits, and job assignments than female ministers. She brought this information to her supervisors, but they did nothing. And when she reported her concerns to the U.S. Equal Employment Opportunity Commission, the church terminated her employment. McClure then sued for sex discrimination under Title VII of the Civil Rights Act of 1964.

McClure’s employment circumstances left her uniquely in need of the protections provided by employment law. She had left other employment and devoted two years to learning knowledge and skills valuable to only one employer—the Salvation Army Church. This left her with little leverage and thus vulnerable to discrimination and other abusive behavior by her employer. Federal employment discrimination law is meant to protect just such an employee.

And yet, in *Hosanna–Tabor*, a unanimous Supreme Court held that ministers like McClure are absolutely barred from pursuing employment discrimination claims. The Court decided that the Religion Clauses of the First Amendment—the Free Exercise and Establishment Clauses—combine to create a “ministerial exception” that protects the autonomy of religious organizations to select their ministers. This ministerial exception establishes a per se rule that categorically bars ministers from

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2. These facts are taken from the Fifth Circuit decision in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).
3. This Article uses the word “minister” to refer to any employee who falls within the ministerial exception. Doing so is meant solely to simplify the discussion and does deny that a wide variety of religious employees come within the scope of the “ministerial exception,” or that the term’s origin and use are associated with only certain religious communities. See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063–64 (2022); Tyler B. Lindley, Comment, *Clarifying and Reframing the “Ministerial Exception,”* U. Chi. L. Rev. Online Archive (2020), https://lawreviewblog.uchicago.edu/2020/04/05/clarifying-ministerial-exception-tyler-lindley/#section1 [https://perma.cc/FCH4-LJUZ] (discussing the scope of who counts as a “minister”).
5. This Article uses the phrases “religious employer” and “religious organization” to refer to an employer entitled to the benefit of the ministerial exception. As with the question of which employees qualify as ministers, this Article does not address which religious organizations are employers protected by the ministerial exception. See EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 582 (6th Cir. 2018), *aff’d sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (funeral home was not a religious institution protected by the ministerial exception).
asserting employment discrimination claims against their employers. A court must dismiss a minister’s employment discrimination claim at the outset of litigation.

While Hosanna-Tabor was decided without concurrence or dissent, the Court’s unanimous opinion got an important precept of constitutional law “egregiously wrong.” The critical error was applying a per se rule—and not a constitutional balancing test—to a neutral, generally applicable law like Title VII. In doing so, the Court glossed over an important analytical point—the government can interfere with the selection of ministers in two very different ways, and each way warrants different constitutional treatment.

First, the government can directly select (or establish the process for selecting) a church’s minister. A per se rule is appropriate for such direct and purposeful interference with church autonomy. This is consistent with constitutional doctrines that apply a per se rule to government action that directly, purposefully interferes with a protected constitutional interest.

Second, the government can enact a neutral, generally applicable employment law (such as the federal employment discrimination statutes that apply to employers generally) that only incidentally affects the selection of church ministers. In other areas of constitutional law, such incidental burdens are generally subject to a constitutional balancing test, such as strict scrutiny, intermediate scrutiny, or rational basis review, and not a per se rule. Indeed, the Hosanna-Tabor per se rule is hopelessly at odds with the Court’s approach under the closely analogous Free

7. While Justices Clarence Thomas and Samuel Alito authored concurring opinions, they did not address whether to adopt a ministerial exception or the reasons for doing so. See id. at 196 (Thomas, J., concurring); id. at 198 (Alito, J., concurring). Instead, their concurring opinions discuss the subsidiary question of which employees fall within the ministerial exception. See id. at 196 (Thomas, J., concurring); id. at 198 (Alito, J., concurring).

8. See Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2243 (2022) (explaining that stare decisis does not prevent the Court from overruling an “egregiously wrong” constitutional precedent).

9. See infra notes 75–79 and accompanying text. Specifically, a per se rule is consistent with the Court’s approach to laws that violate the Establishment Clause. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (Establishment Clause bars government actions that bear certain historical “hallmarks” of government establishment of religion).

10. See infra note 157 and accompanying text. Specifically, a per se rule is consistent with the Court’s approach to laws that violate the Establishment Clause. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (Establishment Clause bars government actions that bear certain historical “hallmarks” of government establishment of religion).


12. For example, under the Free Exercise Clause, all current Justices agree that the government may discriminate against persons of faith if the government action is necessary to achieve a compelling government purpose. See Carson ex rel. O.C. v. Makin, 142 S. Ct. 1887, 1907 (2022) (applying strict scrutiny to a state law that excluded religious private schools from a public tuition assistance program); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) (applying strict scrutiny to a city policy that excluded a religious organization from the city’s foster care program).
Press Clause, where the Court long ago rejected a per se “editorial exception” for employment-related claims involving newspaper editors.13

This Article’s thesis is that by conflating two types of government action, and applying the same per se rule to each, the *Hosanna-Tabor* Court seriously erred and created a major, unexplained inconsistency in constitutional doctrine. The Court should fix this problem by retaining the core holding of that case—that the First Amendment protects a sphere of autonomy for religious organizations to select ministers—and abandon *Hosanna-Tabor*’s per se rule for lawsuits based on neutral, generally applicable laws. Chief Justice John Roberts, who authored the Court’s opinion in *Hosanna-Tabor*, has taken this approach of distinguishing between, on the one hand, a case’s “core holding” and, on the other hand, the “separate rule[s] fleshing out the metes and bounds of [the] core holding.”14 This Article follows his lead by proposing a constitutional balancing test as a better way to implement *Hosanna-Tabor*’s core holding.15 While constitutional law has a number of possible balancing tests, this Article uses strict scrutiny—the Court’s most stringent means-end test—to illustrate how a balancing test would work in this context.

Under strict scrutiny, a minister’s employment discrimination claim must serve a compelling government interest and be narrowly tailored to that interest.16 Here, the government has a compelling interest in preventing or providing a remedy for discrimination on a basis such as race.17 This Article explains that ministers are uniquely vulnerable to discrimination and other abuses by their religious employers, and the

13. See infra notes 97–106 and accompanying text.

15. Even defenders of the ministerial exception concede that there is some room for neutral, generally applicable government action that incidentally affects the selection of ministers. 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, 1402 (1981) (“A church’s legitimate interest in autonomy has few natural limits, but at some point that interest becomes sufficiently attenuated, and the government’s interest in regulation sufficiently strong, that neutral regulation for secular purposes becomes consistent with free exercise.”). Those commentators, though, disagree that employment laws fit within this space. Id. at 1403 (“The state has no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy.”).

16. See Brown v. Ent. Merchs. Ass’n, 564 U.S. 786, 799 (2011) (strict scrutiny requires that government action be “justified by a compelling government interest and is narrowly drawn to serve that interest”).

17. See infra Section III.A.
government has a compelling interest in protecting ministers from these harms.

Second, by incorporating evidentiary and procedural limitations, the government can narrowly tailor an employment discrimination claim to its compelling interest. Narrow tailoring requires the government to minimize the intrusion of the minister's lawsuit into the religious organization's protected interest in selecting its ministers. This Article explains that the government can tailor such lawsuits in two ways. First, by limiting the type of evidence a minister may offer to prove discrimination, a court would eliminate inquiry into a minister's religious qualifications. Second, by limiting the plaintiff's available remedies (e.g., prohibiting the reinstatement of a ministerial employee) a court will not improperly designate a church's minister. As discussed below, existing federal employment discrimination law, along with procedural and evidentiary controls, currently provide just such a narrowly tailored remedy.

This Article proceeds in five parts. Part I reviews the Hosanna-Tabor decision and identifies a critical gap in the Court's analysis: the opinion provides no justification for applying a per se rule to neutral, generally applicable laws that only incidentally affect the selection of ministers. Part II then explains that this gap is indicative of a larger discontinuity between the Hosanna-Tabor per se rule and other First Amendment doctrines. Part II concludes that the best path to harmonizing Hosanna-Tabor with constitutional doctrine generally is to apply a balancing test to a minister's legal claim based on a neutral, generally applicable law. Part III discusses a government interest that would support such legal claims, and Part IV describes how such legal claims can be tailored to serve that interest. Part IV also explains that such a lawsuit is currently available under Title VII. Part V then concludes by noting collateral issues that would arise under this Article's proposed approach.

Before turning to the analysis, one note about the scope of the discussion. This Article does not address arguments, which this author finds persuasive, that the ministerial exception is wrong as an original matter of constitutional law. Several commentators have published compelling analyses, and I commend them to the reader.18 This Article takes Hosanna-Tabor as part of the constitutional landscape, or to use

the Court’s own language, accepts the precedential value of the core holding. My project is to, first, explain how the current doctrine is unsupported by the Court’s reasoning and irreconcilable with related constitutional doctrines, and second, propose a reformed doctrine that better implements the Court’s core holding.

I. THE SUPREME COURT’S UNSUPPORTABLE MINISTERIAL EXCEPTION DOCTRINE

Part I critiques the Supreme Court’s adoption of the ministerial exception. Section A critically examines the Supreme Court’s opinion in Hosanna-Tabor that adopted the ministerial exception. The discussion shows that the decision rests on an unsupported and unsupportable premise: The Religion Clauses require a per se rule that categorically bars neutral, generally applicable government action that only incidentally affects the choice of a minister, rather than the typical constitutional law approach of applying a balancing test. Section B shows that the Court’s own church autonomy first principles do not support such a broad per se rule. And Section C then shows that the Court’s discussion of history and precedent also misses the mark.

A. The Supreme Court’s Recognition of the Ministerial Exception

The “ministerial exception” is a judge-made doctrine that was first recognized by the Fifth Circuit in McClure v. Salvation Army. The court noted that Title VII technically applied to plaintiff Billie McClure’s sex discrimination claim—she was an employee, the Salvation Army was a


20. Eight years later, in Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020), the Court applied the exception to two teachers in Catholic grade schools. The decision focused on the issue of whether the two teachers held positions that fell within the ministerial exception, and so the opinion did not alter or elaborate on the constitutional basis for the doctrine. Thus, rather than discuss the case in the text, this Article notes parallel points from the case in the footnotes. And in Gordon College v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (mem.), four Justices joined a statement respecting the denial of certiorari. Those Justices noted their concern with a lower court decision that declined to apply the ministerial exception to “a professor at a religious college who ‘did not teach religion or religious texts,’ but who was still expected to ‘integrate her Christian faith into her teaching and scholarship.’” Id. (quoting DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1002 (Mass. 2021)).

21. 460 F.2d 553 (5th Cir. 1972).
covered employer, and Title VII did not exempt religious employers from its prohibition on sex discrimination.\textsuperscript{22} Nonetheless, the Fifth Circuit held that Title VII did not apply to her claim: The ministerial exception was a complete bar to liability, and the court dismissed McClure’s Title VII claim.\textsuperscript{23}

After McClure, the lower federal courts expanded the ministerial exception in two ways. First, courts extended the doctrine beyond ministers and clergy members to cover any employee whose “primary duties include ‘teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.’”\textsuperscript{24} For example, courts applied the exception to claims by a church choir director and an elementary school teacher at a church school.\textsuperscript{25} Second, lower courts expanded the ministerial exception to cover claims under federal statutes other than Title VII. For example, courts applied the ministerial exception to claims brought under the Americans with Disabilities Act and to recover unpaid overtime wages under the Fair Labor Standards Act.\textsuperscript{26}

The Supreme Court affirmed the ministerial exception in \textit{Hosanna-Tabor}, which involved a federal disability discrimination claim by a teacher at a private religious school. The teacher had substantial religious training and was “called” to work at a school affiliated with a specific religious denomination.\textsuperscript{27} Her work involved teaching secular subjects and religious content, and she participated in religious worship services.\textsuperscript{28} While the teacher was on disability leave, the religious school took actions to replace her. When she objected and sought legal counsel, the school officially terminated her employment in part because of a religious tenet that required all disputes to be settled within the religious organization.\textsuperscript{29} The teacher then filed a claim with the U.S. Equal Employment Opportunity Commission, and the Commission brought a lawsuit against the religious school claiming discrimination based on the teacher’s disability and retaliation for asserting her rights under federal disability law.\textsuperscript{30}

\textsuperscript{22.} Id. at 556–57.
\textsuperscript{23.} Id. at 560–61.
\textsuperscript{24.} Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)) (holding ministerial exception barred an employment discrimination claim by a chaplain against a Catholic university).
\textsuperscript{25.} See EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795 (4th Cir. 2000) (Catholic elementary school music director and teacher); Starkman v. Evans, 198 F.3d 175 (5th Cir. 1999) (choir director).
\textsuperscript{26.} See Starkman, 198 F.3d at 175 (applying the ministerial exception to the Americans with Disabilities Act); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1397 (4th Cir. 1990) (applying the ministerial exception to the Fair Labor Standards Act).
\textsuperscript{27.} Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 178, 191 (2012).
\textsuperscript{28.} Id.
\textsuperscript{29.} Id. at 179.
\textsuperscript{30.} Id. at 179–80.
The teacher intervened in the lawsuit, and the religious school moved to dismiss based on the ministerial exception.

All federal courts of appeals had recognized a ministerial exception, so the main issue in the litigation was whether the exception applied to the teacher’s position. The trial court decided that the ministerial exception covered the teacher’s position and dismissed the case, and the court of appeals reached the opposite conclusion and reversed. The Supreme Court then granted certiorari to decide whether the ministerial exception exists and, if so, how it applied to this case.

Hosanna-Tabor held that the combined effect of the Free Exercise and Establishment Clauses (together, the Religion Clauses) supported the adoption of the ministerial exception. These Clauses protect a sphere of church autonomy over internal governance that includes a per se bar on any government action that “interferes” with the selection of ministers and clergy. The Court stated this rule in three places:

1. “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”
2. “The [ministerial] exception . . . ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.”
3. “Because [the plaintiff] was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.”

These three sentences establish the ministerial exception rule: Government action that “interferes” with a religious organization’s decision concerning who will serve as a minister is a per se violation of the Religion Clauses. This is because that decision belongs to the religious group

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31. Id. at 188 n.2 (collecting court of appeals decisions that had recognized the ministerial exception).
33. Hosanna-Tabor, 597 F.3d at 777.
34. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 563 U.S. 903 (2011) (mem.).
35. Hosanna-Tabor, 565 U.S. at 188–89.
36. Id. at 188; see Jack Balkin, The “Absolute” Ministerial Exception, Balkinization (Jan. 13, 2012), https://balkin.blogspot.com/2012/01/absolute-ministerial-exception.html [https://perma.cc/8ZGT-BLFY] (“One of the curious features of the Supreme Court’s version of the ministerial exception is that the rule is stated in absolute terms that eschew all attempts at balancing.”); The Irony of Hosanna-Tabor, supra note 18, at 962 (“[I]n granting blanket immunity to Hosanna-Tabor, the Court did not consider, much less balance, any countervailing interests.”); Christopher C. Lund, Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1189 (2014).
37. Hosanna-Tabor, 565 U.S. at 181 (emphasis added).
38. Id. at 194–95 (emphasis added) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119 (1952)).
39. Id. at 194 (emphasis added).
“alone,” and the Religion Clauses “bar” any government “interference.” This violation of the Religion Clauses is an affirmative defense that requires dismissal of the minister’s legal claim.\(^40\)

Importantly, this \textit{per se} rule excludes any consideration of the government interest that underlies the law invoked by the minister.\(^41\) Consequently, the government has no opportunity to justify its interference under a constitutional balancing test such as strict scrutiny, intermediate scrutiny, or rational basis review. Rather, the government interference, standing alone, violates the Religion Clauses. The remainder of this Article refers to this categorical approach as the \textit{“Hosanna-Tabor per se rule.”}

The \textit{Hosanna-Tabor per se rule} rests on a critical premise: All government action that affects the selection of a minister, whether directly or indirectly, poses the same constitutional threat. And so, the \textit{per se} rule treats equally a government decision to appoint a specific person to serve as a church’s minister and a neutral, generally applicable employment law that protects employees generally—including ministers—from discrimination based on race (e.g., the Title VII prohibition of employment discrimination). The former is government action that targets a religious group and rests on a direct government determination of religious matters. The latter is a neutral, generally applicable law enacted without regard to religious beliefs that only incidentally affects (if at all) a religious group’s decisions concerning its ministers. The \textit{Hosanna-Tabor per se rule} treats both types of government action the same. Section B discusses the principled basis for a constitutional interest in church autonomy on matters of internal governance and explains why the application of the \textit{Hosanna-Tabor per se rule} to neutral, generally applicable laws does not follow from those principles. Section C then explains why the Court’s discussion of history and precedent does not support a \textit{per se} rule for such laws.

\section*{B. \textit{Church Autonomy First Principles and the Hosanna-Tabor Per Se Rule}}

At its foundation, the ministerial exception builds on the core principle that the Religion Clauses protect an individual’s absolute right to determine their religious beliefs, and the corresponding bar on government action that treats religious views as true or false.\(^42\) As with the

\(^{40}\) \textit{Id.} at 195 n.4.

\(^{41}\) \textit{See} Balkin, \textit{supra} note 36; \textit{The Irony of Hosanna-Tabor}, \textit{supra} note 18, at 962.

\(^{42}\) \textit{See} Sherbert \textit{v. Verner}, 374 U.S. 398, 402 (1963) (recognizing “governmental regulation of religious beliefs as such”), \textit{abrogated by} Holt \textit{v. Hobbs}, 574 U.S. 352 (2015); Torcaso \textit{v. Watkins}, 367 U.S. 488, 495–96 (1961); Cantwell \textit{v. Connecticut}, 310 U.S. 296, 303 (1940) (“[T]he acceptance of any creed or the practice of any form of worship.”). The Court’s decision in \textit{Employment Division \textit{v. Smith}} summarizes the core protection of the Free Exercise Clause as follows: The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious beliefs as such.” The government may not compel affirmation of religious belief,
freedom of speech, this individual right to freedom of religious belief is aided by gathering in a religious group to discern, share, practice, and communicate commonly held religious beliefs. These exchanges and other activities within these religious groups inevitably shape the content of religious beliefs, and in some groups, individuals like ministers and clergy are selected to play roles concerning the development and communication of religious beliefs. Inevitably, the identities of the group members and those playing ministerial roles will affect the content of the group’s religious beliefs, doctrine, and practices. As the Court stated in a later case, “a wayward minister’s preaching, teaching, and counseling could contradict the church’s tenets and lead the congregation away from the faith.” It is this chain of logic that connects the identity of ministers to the core First Amendment protection of individual religious beliefs.

The Supreme Court affirmed this logic in *Hosanna-Tabor*. The Court specifically explained that the selection of ministers may affect religious doctrine, given that ministers play an essential role in the formation and teaching of religious doctrine. Specifically, a minister will “personify” a church’s beliefs when they discern and communicate church doctrine. Consequently, the selection of clergy is central to “a

punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.


43. See infra notes 117–120 and accompanying text.
44. See Laycock, *supra* note 15, at 1390.
45. Id. at 1390–92.
46. This is a tricky question that faith communities must address—that is, the fragility of religious beliefs in the face of human idiosyncrasies. For example, the Roman Catholic Church has addressed the complicated interplay among church leaders, clergy, and laypeople in the development and articulation of church doctrine. See Richard R. Gaillardetz, *By What Authority?: Foundations for Understanding Authority in the Church* 106–09 (rev. & expanded ed. 2018) (while a Roman Catholic Pope may act in a scandalous manner, the church is protected from errant teachings by such a church official); Laycock, *supra* note 15, at 1390–92; Thomas P. Rausch, *Papal Infallibility Is Often Misunderstood. Here’s What it Means—and What it Doesn’t*, *Am., The Jesuit Rev.* (Sept. 26, 2022), https://www.americamagazine.org/faith/2022/09/26/explainer-rausch-infallibility-history-243818 [https://perma.cc/BAU9-8KLV] (describing the relationship between church officials and the laity in the development of Catholic doctrine).
49. Id. at 188–89.
religious group’s right to shape its own faith and mission through its appointments, and any interference with that selection impermissibly affects the formation and teaching of religious doctrine.

So, what government actions concerning church ministers impermissibly interfere with religious doctrine? Hosanna-Tabor gives a clue when it explains that the Religion Clauses cover government actions that both directly and incidentally affect the selection of ministers:

The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.

First, the government might directly appoint or remove a minister, or establish the criteria, eligibility, or process for selecting or removing ministers. Government action that does so falls within matters traditionally prohibited by the Establishment Clause. For simplicity, I refer to this first category of government action as the direct selection of a minister.

Second, the above quote notes that the government can take action directed at a secular purpose that “interferes with” a religious group’s decision concerning the selection or retention of a minister. This interference is merely incidental because it is the product of a neutral, generally applicable law that covers both religious and non-religious actors, such as a law that prohibits race discrimination in employment. The Court analyzed such government action under the Free Exercise Clause. Incidental interference can occur in two ways.

First, a neutral, generally applicable government action might require a decision concerning religious doctrine. For example, consider a minister’s lawsuit that alleges race discrimination in termination of their employment. The religious group might counter that it terminated the minister because of their failings under religious doctrine,

50. Id.
51. Id.
52. Id. at 184 (emphasis added). While commentators have discussed whether the ministerial exception derives from the Establishment Clause, the Free Exercise Clause, or a combination of both, in this passage, the Court grounds the doctrine in both Clauses. Because this Article takes the core holding of Hosanna-Tabor as given, I do not discuss whether this conclusion is well-founded.
54. Hosanna-Tabor, 565 U.S. at 184; see Smith & Tuttle, supra note 19, at 18–19 (discussing the split basis of the ministerial exception between the Establishment and Free Exercise Clauses, and noting that four Justices seem poised to shift the doctrine more solidly to the Free Exercise Clause).
55. See Above the Law, supra note 18, at 2018–22 (noting that courts have found ways to minimize the inquiry into religious doctrines); Laycock, supra note 15, at 1400–01.
not race. The minister might then respond that the religious group’s argument is a pretext for race discrimination. To prove pretext, the minister might offer evidence to show that the religious group’s non-race reason was false—that is, that the minister was qualified under religious doctrine. To analyze this argument, a court would have to determine the content of religious doctrine, and then decide whether that doctrine justified the minister’s termination. In other words, the minister’s pretext argument would require a court to decide and apply religious doctrine.\textsuperscript{56} And anticipating such decisions, a religious group might alter its religious beliefs to avoid or mitigate legal liability.\textsuperscript{57}

Incidental interference can occur in a second way that does not involve government consideration or decision on religious doctrine. For example, as discussed at greater length below,\textsuperscript{58} federal anti-discrimination law allows lawsuits for so-called “mixed-motive” claims against employers. In these claims, the fact finder concludes both that the employer had a prohibitive motive (like race discrimination) for its employment action, and that the employer would have taken the same action even absent the prohibited motive. In the ministerial context, a court could assume that the religious group properly terminated a minister under religious doctrine, and then take evidence on whether the religious group was also motivated by racial animus. This evidence would be limited to direct or circumstantial evidence of race discrimination, such as mentions of the minister’s race in communications or employment records. The court would exclude evidence that required consideration of religious doctrine.

A mixed-motive claim, then, does not involve the government either directly or indirectly in religious doctrine. Nonetheless, some commentators argue that such claims impermissibly interfere with the selection and removal of ministers.\textsuperscript{59} For example, a religious group facing a mixed-motive claim might choose to retain a minister whom they would otherwise terminate. And retaining this minister might affect the development and teaching of church doctrine. This effect occurs without a court ever considering religious doctrine.\textsuperscript{60}

This second category of incidental government action differs in kind, and not merely degree, from the first two categories of government action because the government does not make a decision concerning

\textsuperscript{56} See, e.g., Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (applying the ministerial exception to Title VII claim of race discrimination brought by a Catholic priest), abrogated by Jusino v. Fed’n of Cath. Tchrs., Inc., 54 F.4th 95 (2d Cir. 2022).

\textsuperscript{57} See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) (“Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”).

\textsuperscript{58} See infra Section IV.B.

\textsuperscript{59} Laycock, supra note 15, at 1399–1402.

\textsuperscript{60} Id. Once one considers incidental government actions that merely influence religious doctrine, there is no logical way to decide when that influence has gone too far. See Above the Law, supra note 18, at 2014 n.334 (citing Andrew Koppelman, Should Noncommercial Associations Have an Absolute Right to Discriminate?, 67 L. & CONTEMP. PROBS. 27, 57 (2004)).
religious doctrine. And yet, Hosanna-Tabor thoughtlessly sweeps it within the per se rule. Further, as discussed in Part II, this categorical treatment is inconsistent with the logic of a variety of constitutional doctrines and should be rejected. In its place, courts should apply a constitutional balancing test to these neutral, generally applicable laws that only incidentally affect the selection of ministers.

C. History, Precedent, and Constitutional Principle in the Hosanna-Tabor Opinion

A close reading of Hosanna-Tabor shows that the Court’s reasoning does not support the application of the per se rule to neutral, generally applicable government action. First, all of the historical instances discussed by the Court involve the direct government selection of ministers.61 For example, the Court begins with a brief history of the appointment of “high officials” in the Church of England, starting with the Magna Carta in 1215.62 The Court then touches on the New World with mention of the Puritans and their desire “to elect their own ministers.”63 In the southern colonies, residents “chafed at the control exercised by the Crown and its representatives over religious offices.”64 The Court concludes this brief overview by stating that “[c]ontroversies over the selection of ministers also arose in other Colonies with Anglican establishments, including North Carolina.”65 Resting on this history, the Court concludes, “[i]t was against this background that the First Amendment was adopted.”66 Noticeably absent from this “background,” though, is any neutral, generally applicable government action that only incidentally affected the selection of ministers.67 Indeed, the Court characterizes the history as confirming that government “would have no role in filling ecclesiastical offices,”68 which describes purposeful government action.

The Court’s facile discussion of history continued in Our Lady of Guadalupe School v. Morrissey-Berru,69 the Court’s second (and most recent) case discussing the ministerial exception. In applying the per se rule to lawsuits by two teachers at Catholic grade schools, the Court reviewed the history of direct government involvement within religious education.70

62. Id. at 182.
63. Id. at 182–83 (emphasis added).
64. Id. at 183.
65. Id. (emphasis added).
66. Id.
67. In addition, as Professor Leslie Griffin has shown, there is in fact a history and tradition of lawsuits by ministers against their religious employers. See Griffin, supra note 18, at 988–90; Brief of Amici Curiae Law and Religion Professors in Support of Respondents at 11, Hosanna-Tabor, 565 U.S. 171 (No. 10-553), 2011 WL 3532698, at *11.
68. Hosanna-Tabor, 565 U.S. at 184 (emphasis added).
69. 140 S. Ct. 2049 (2020).
70. Id. at 2061–62.
For example, the Court pointed to “British law [that] . . . impose[d] religious restrictions on education,” including the content of what teachers could teach their students.\footnote{71} And in the colonies, local law prohibited teaching by certain clergy or required a government license to do so.\footnote{72} Again, all of the historical examples were of direct, purposeful government interference with religion; none addressed neutral, generally applicable government action that only incidentally affected religious teaching. While the Court’s recent turn to history and tradition in constitutional law\footnote{73} has been criticized as permitting judges to treat the historical record as a sort of Rorschach test upon which they project their personal political beliefs,\footnote{74} if that method is to retain any integrity or usefulness, the Court must provide some explanation that closes such a clear gap between historical practices and current doctrine.\footnote{75} So, our next question is whether the Court offers any justification for extending the per se rule across this conceptual chasm.

Past Supreme Court decisions offer no justification. Each case discussed in \textit{Hosanna-Tabor}, once again, addressed only the direct selection of ministers.\footnote{76} Specifically, the only two cases that applied the Religion Clauses to church disputes—\textit{Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America}\footnote{77} and \textit{Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich},\footnote{78} which both addressed disputes over church property—involved government action that directly decided which group had the legitimate claim to govern a religious community. Indeed, \textit{Hosanna-Tabor} quotes the former case as establishing that the “‘[f]reedom to select the clergy, where no improper methods of choice are proven,’ is ‘part of the free exercise of religion’ protected by the First Amendment against government interference.”\footnote{79} And so, the Court’s

\begin{itemize}
  \item \textbf{71.} \textit{Id.} at 2061.
  \item \textbf{72.} \textit{Id.} at 2061–62.
  \item \textbf{73.} \textit{See, e.g.}, N.Y. State Rifle & Pistol Ass’n \textit{v.} Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); \textit{Kennedy \textit{v.} Bremerton Sch. Dist.}, 142 S. Ct. 2407 (2022) (Establishment Clause); TransUnion LLC \textit{v.} Ramirez, 141 S. Ct. 2190 (2021) (Article III standing).
  \item \textbf{75.} \textit{Cf.} Joseph Blocher & Eric Ruben, \textit{Originalism-by-Analogy and Second Amendment Adjudication}, 133 YALE L.J. 99 (2023) (discussing the challenge for originalist jurists to find a workable standard to guide the analysis of whether a current practice is analogous to a historical precedent).
  \item \textbf{76.} \textit{Hosanna-Tabor Evangelical Lutheran Church & Sch. \textit{v.} EEOC}, 565 U.S. 171, 185–87 (2012).
  \item \textbf{77.} 344 U.S. 94, 116 (1952) (reviewing a dispute concerning church property, where the Court addressed the constitutionality of state laws that directly regulated the governance and leadership of the Russian Orthodox churches within the state).
  \item \textbf{78.} 426 U.S. 696, 707–09 (1976) (reviewing a state court decision that a church had not properly removed a bishop under the church rules).
  \item \textbf{79.} \textit{Hosanna-Tabor}, 565 U.S. at 186 (alteration in original) (quoting \textit{Kedroff}, 344 U.S. at 116).
\end{itemize}
discussion of precedent only supports the application of the per se rule to direct government selection of ministers.

Immediately following the discussion of history and precedent, *Hosanna-Tabor* provided its only argument from constitutional principle for applying the per se rule beyond direct government selection of ministers. In a single paragraph, after noting that it had never addressed the ministerial exception, the Court wrote:

> We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.80

That is it. A single paragraph, bereft of citations or authority, is the Court’s sole rationale for adopting the *Hosanna-Tabor* per se rule. The remainder of the opinion addressed counterarguments of the parties and application of the doctrine to the plaintiff’s claims.81 The above passage is woefully inadequate, merely restating the minister’s role in shaping religious beliefs. It makes no attempt to justify application of the per se rule to government action that only incidentally affects the selection or retention of ministers. And this is the very gap in history and precedent that the Court’s analysis needed to fill.

On its own terms, *Hosanna-Tabor* only justifies a per se rule for government action that directly and purposefully affects selection of ministers. The Court’s discussion of history, precedent, and constitutional principle does not support such strong medicine for neutral, generally applicable government actions that only incidentally affect the selection of ministers. In short, there is a yawning analytical gap between *Hosanna-Tabor*’s rationale and the breadth of its per se rule.

II. The Incongruity of the *Hosanna-Tabor* Per Se Rule

Part II shows that the analytical gap discussed in Part I should be no surprise because the *Hosanna-Tabor* per se rule is inconsistent with multiple constitutional doctrines that apply a balancing test to neutral, generally applicable government actions. Section A discusses two other types of First Amendment associations—news organizations and

80. *Id.* at 188–89.
81. *Id.* at 189–96.
expressive associations. Importantly, and not examined by any other author, Hosanna-Tabor did not reconcile its strong ministerial exception with the weak protection accorded news organizations under the Free Press Clause.

Section B explains how Hosanna-Tabor provides greater constitutional protection to the free exercise interests of religious groups, like churches and other worship communities, than individual persons of faith. Under the Hosanna-Tabor per se rule, any interference with an organization’s selection of ministers, direct or incidental, is unconstitutional without further analysis. Individual free exercise of religion, however, is protected by a balancing test that admits some consideration of the government’s interest. And not a single word in the Hosanna-Tabor opinion even acknowledges the countervailing free exercise interest of a minister when performing a religious role.

Section C explains that the incongruity of the Hosanna-Tabor per se rule reflects a deeper concern of constitutional principle: it is wholly anomalous to apply a per se rule of unconstitutionality to government action that places only an incidental burden on a constitutional interest. Rather, some form of a constitutional balancing test is warranted. Section D draws that very conclusion and proposes a solution for this constitutional incongruity.

A. First Amendment Associations

The Hosanna-Tabor per se rule is inconsistent with the Court’s treatment of two closely analogous forms of First Amendment association. First, as discussed in Section II.A.1, the ministerial exception is at odds with the Court’s treatment of legal claims involving editorial employees of news organizations. The Free Press Clause of the First Amendment protects the editorial decisions of news organizations, and editorial employees shape and execute the organization’s editorial policies. This constitutional interest directly parallels the relationship between ministers and religious organizations. It follows, then, that news organizations should have similar constitutional protection in selecting editorial employees to what religious organizations have in selecting ministers. And yet, the Court rejected an editorial exception almost a century ago. Given the Court’s recent declaration that the First Amendment should

82. The current Justices are divided on the proper test. See Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); id. at 1882–83 (Barrett, J., concurring) (suggesting that less than strict scrutiny should apply to neutral, generally applicable laws that burden free exercise of religion); id. at 1924 (Alito, J., concurring) (“A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.”).

83. See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 n.15 (1987) (holding that Title VII’s exemption from religious discrimination for religious employers did not violate the Establishment Clause due to the Court’s observation that “[u]ndoubtedly, [the plaintiff’s] freedom of choice in religious matters was impinged upon”).

84. See Associated Press v. NLRB, 301 U.S. 103 (1937).
be read as a unified whole,\textsuperscript{85} this starkly different treatment of similar First Amendment associations—which went completely unacknowledged in \textit{Hosanna-Tabor}—must be resolved.

Second, Section II.A.2 discusses the right of association for expressive purposes, where the Court has addressed laws that require groups to include unwanted members. As with religious organizations, expressive associations (meaning groups formed with the purpose of expressing a particular message) develop and communicate their message through their members. And so, inclusion of an unwanted member may affect the group’s protected First Amendment expression. The Court, however, applies a balancing test—and not a per se rule—to government actions that interfere with the membership of expressive associations. Again, the Court should resolve this doctrinal inconsistency.

To see how a religious organization’s constitutional interest in selecting ministers directly parallels similar interests of news organizations and expressive associations, recall the logic of the religious organization’s constitutional interest in selecting ministers:

Both subsections discuss how neutral, generally applicable government action might incidentally affect the selection of editors and association members. Yet, despite this parallel across First Amendment associations, the Court applies different rules to government action that

\textsuperscript{85} See \textit{infra} note 156 and accompanying text (referencing the Court’s acknowledgement in \textit{Kennedy} that the First Amendment Clauses, while separate and distinct, have complementary purposes).
incidentally affects the selection of members. In short, the Hosanna-Tabor per se rule is a constitutional anomaly in need of correction.

1. **Freedom of the Press, News Organizations, and Editorial Employees**

The First Amendment Free Press Clause, which prohibits laws “abridging the freedom of . . . the press,”\(^86\) protects an implied right of association parallel to that in Hosanna-Tabor.\(^87\) The following chart depicts the structure of the logic:

The remainder of this subsection explains each step of this chain of logic and compares the Court’s treatment of news organizations to that of religious groups.

First, in *Miami Herald Publishing Co. v. Tornillo*,\(^88\) the Court recognized that the Free Press Clause protects a news organization’s editorial processes and decision-making from government interference.\(^89\)

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86. U.S. Const. amend. I.
87. There is commentary discussing whether the word “press” refers to the institutional press, such as newspapers and the like, or access to and of the prevailing technology of the printing press. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012). The Supreme Court, however, has recognized a limited associational right under that Clause, and this subsection discusses the inconsistency between the treatment of editorial associations, like news organizations, and religious associations, like churches.
89. Id. at 258.
There, a state law gave candidates for public office the legal right to force a newspaper to publish a response to a published criticism or attack of the candidate. The state law implicated a core First Amendment interest of news organizations to decide, in their editorial judgment, what to print.\(^90\) The state law directly and purposefully intruded upon this interest through “compulsion . . . on a newspaper to print that which it would not otherwise print.”\(^91\) A law that does so “is unconstitutional” without further analysis—that is, the Court applied a per se rule.\(^92\) This parallels the religious association context where a per se rule protects against direct, purposeful government decisions concerning religious doctrine.\(^93\)

The parallel between news and religious organizations continues in the following passage where the Court explains the role of editors in executing editorial policy:

> [The state’s forced access law was an] intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.\(^94\)

An editor participates in the organization’s First Amendment activity of “editorial control and judgment” over a newspaper’s content, just as a minister participates in the development and communication of religious beliefs.\(^95\) And so, just as the selection of ministers affects the content of protected religious beliefs, the selection of editors and reporters affects

\(^90\). Id. at 255–56.
\(^91\). Id. at 256.
\(^92\). Id.
\(^93\). See supra notes 42–47 and accompanying text.
\(^94\). Mia. Herald Publ’g Co., 418 U.S. at 258 (footnote omitted). The Associated Press made a parallel argument for editorial employees, explaining the impact of an NLRB proceeding on the exercise of its First Amendment function:
> The question of editorial personnel then becomes a question for the [government] to determine. And the management of the editorial affairs of this great news service of the American Press, in the gathering and preparation of news, is displaced by the Labor Board which Congress has created.

\ldots

> Freedom of the press and freedom of speech . . . means that freedom of expression must be jealously protected from any form of governmental control or influence.


\(^95\). Mia. Herald Publ’g Co., 418 U.S. at 258; see supra notes 42–47 and accompanying text.
the content of protected news reports. When government action directly and purposefully interferes with these protected roles, the Court applies a categorical rule of per se unconstitutionality.

The Court’s treatment of religious organizations and news organizations diverges when it comes to employment lawsuits by ministers and editors respectively. Almost a century ago, in Associated Press v. NLRB, the Court declined to adopt an “editorial exception” for government actions that interfere with employment decisions concerning editors. That case involved an action by the National Labor Relations Board (NLRB) against the Associated Press (AP) news organization under the National Labor Relations Act (NLRA). The NLRB alleged that the AP had terminated an editorial employee in retaliation for his union organizing activities, which would have violated the NLRA. The AP denied that the termination was motivated by the employee’s union activity, but rather was on account of “unsatisfactory service,” which would not violate the NLRA. Since the employee performed editorial work, the employer’s determination that his work was “unsatisfactory” necessarily entailed its judgment about the criteria for assessing editorial work, and how those criteria applied to the employee’s performance. In response, the NLRB argued that the AP’s asserted reason was a pretext for its actual, unlawful motive. Note that this pretext argument specifically questioned the AP’s exercise of its core constitutional right to exercise independent editorial judgment.

96. See Associated Press, 301 U.S. at 137 (Sutherland, J., dissenting) (explaining that the content of news reporting is affected not only by editorial policy, but also by “the employment and discharge of the agents through whom the policy is to be effectuated”).

97. 301 U.S. 103 (1937).

98. In 2020, when the staff at several news outlets negotiated over their next collective bargaining agreement, they sought a term that would require “just cause” for termination. See Kerry Flynn, New Yorker Union Wins Fight for Just Cause in Contract, CNN Bus. (Oct. 5, 2020, 8:49 PM), https://www.cnn.com/2020/10/05/media/new-yorker-union-just-cause-contract/[https://perma.cc/J34Q-KA4Z]. In doing so, they rejected their employer’s demand for an “editorial exception” from just cause termination that would allow news organizations to terminate an employee in their independent editorial judgment. This editorial exception is similar to the ministerial exception recognized in Hosanna-Tabor. Also, note that if the First Amendment protected such an editorial exception, it would not be a matter over which a news organization would need to collectively bargain. Cf. NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 507 (1979) (providing that to avoid “sensitive questions” under the Religion Clauses, the Court interpreted the National Labor Relations Act to not apply to employment relationships between religious schools and their teachers).

99. If the Court did recognize such an exception, it would have to develop a test for determining which employees of news organizations performed editorial functions covered by that exception. Cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–66 (2020) (discussing the standard for deciding which employees of religious organizations are covered by the ministerial exception). While reporters and columnists would likely fall within such an exception, for the purpose of simplifying the above discussion, this Article refers only to “editors” and “editorial employees.”

100. Associated Press, 301 U.S. at 123.

101. Id. at 125.
The NLRB’s claim in Associated Press closely parallels the religious teacher’s claim in the ministerial exception case, Our Lady of Guadalupe. Both cases involved employers engaged in protected First Amendment activities (a religious school in Our Lady of Guadalupe, and a news organization in Associated Press), and employees who performed First Amendment-related activities (a teacher of religious subjects in Our Lady of Guadalupe, and a reporter-editor in Associated Press). Both employers terminated the employee and asserted a lawful basis for doing so (the employee’s poor performance of their First Amendment-related duties), and both employees countered that their termination was for an unlawful reason (age discrimination in Our Lady of Guadalupe, and retaliation for union activity in Associated Press).

And to resolve these conflicting claims about the employer’s motive, the decision-maker needed to exercise its own judgment about the employer’s exercise of protected First Amendment discretion (effectiveness of religious teaching in Our Lady of Guadalupe and editorial judgment in Associated Press).

Based on the connection between editors and editorial judgment, the AP argued for a per se editorial exception similar to the Hosanna-Tabor ministerial exception. The Court summarized the AP’s argument as follows:

The conclusion which the [Associated Press] draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who... edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.

Just as the church did in Hosanna-Tabor, the AP argued that the First Amendment categorically barred any government inquiry into the propriety of or motives for the discharge of employees who performed duties related to the organization’s First Amendment activities.

102. Our Lady of Guadalupe, 140 S. Ct. at 2056–58.
103. Id. at 2058 (‘The school maintains that it based its decisions on classroom performance—specifically, Morrissey-Berru’s difficulty in administering a new reading and writing program, which had been introduced by the school’s new principal as part of an effort to maintain accreditation and improve the school’s academic program.”).
104. Id.; Associated Press, 301 U.S. at 123.
105. Associated Press, 301 U.S. at 131 (emphasis added); id. at 140 (Sutherland, J., dissenting) (“Due regard for the constitutional guaranty requires that the publisher or agency of the publisher of news shall be free from restraint in respect of employment in the editorial force.”).
Despite these critical similarities, the Court declined to adopt a per se rule barring employment lawsuits against news organizations while doing so for religious organizations. This contrast is most notable in the following passage from *Associated Press*:

The act does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of [the employee] to his former position in no sense guarantees his continuance in petitioner’s employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.  

Here, the Court concludes that the free press guarantee does not restrict neutral, generally applicable government action that incidentally affects the selection or retention of editorial employees. This conclusion rests on three premises that sharply differ from the Court’s treatment of religious organizations. First, the government may inquire into and decide for itself a news organization’s *actual motive* for terminating an editorial employee, including whether the employer’s asserted reason was a pretext. Second, in reaching this decision, the decision-maker may make its own finding about the editorial employee’s performance under the news organization’s editorial policies. Third, this government intrusion into a news organization’s employment decisions does not raise First Amendment concerns.

Consequently, when an editor sues a news organization under a neutral, generally applicable employment law, the Free Press Clause permits a court to take three actions that would be prohibited by the ministerial exception:

(1) A court may decide whether the news organization’s asserted reason for an employment decision concerning an editor was its actual motive. In reaching this decision, the court may independently evaluate the news organization’s editorial judgment.

(2) A court may order reinstatement of an editorial employee if it concludes that the employee’s employment was unlawfully terminated.

(3) A court may order an award of money damages to compensate the editorial employee for injury caused by the unlawful termination of employment.

The only First Amendment limit on a court’s discretion is that *Miami Herald* prohibits an order that the news organization change

106. *Id.* at 132 (majority opinion).
the content of its news coverage. Thus, the government can apply a neutral, generally applicable law—such as federal employment discrimination laws—to news organizations, even if doing so would incidentally affect the organization’s employment decisions and, in turn, its editorial decision-making.\footnote{107}

The court of appeals case \textit{Passaic Daily News v. NLRB}\footnote{108} nicely illustrates application of current Free Press Clause framework to a neutral, generally applicable employment law. There, an NLRB administrative law judge (ALJ) decided that a newspaper had violated the NLRA by terminating a columnist based on “anti-union animus.”\footnote{109} The judge ordered the newspaper to reinstate the columnist, pay lost wages, and resume publication of the columnist’s weekly column. The newspaper argued that the First Amendment barred the NLRB from even inquiring about its reasons for terminating an editorial employee.\footnote{110}

Citing \textit{Associated Press}, the court of appeals rejected the newspaper’s request to completely dismiss the NLRB action.\footnote{111} The court explained that \textit{Associated Press} clearly held that “the First Amendment does not prevent the [NLRB] General Counsel from either challenging the Company’s decision or questioning its motives.”\footnote{112} But citing \textit{Miami Herald}, the court held that the First Amendment barred the ALJ’s order that the newspaper resume publication of the employee’s...
weekly column.\textsuperscript{113} This decision rested on a news organization’s “absolute discretion to determine the contents of their newspapers.”\textsuperscript{114}

In sum, the Court’s First Amendment doctrine provides sharply different protection to religious and news organizations from neutral, generally applicable employment laws. On the one hand, the Court applies the Hosanna-Tabor per se rule to bar all employment claims by a minister against a religious employer. On the other hand, the Court permits an editor to sue a news organization under a neutral, generally applicable employment law without any First Amendment scrutiny. Thus, the same Amendment provides dramatically different protection to parallel groups that associate for First Amendment purposes.

Despite these parallels, Hosanna-Tabor did not even acknowledge this difference in treatment between news and religious organizations, nonetheless offer a justification.\textsuperscript{115} In addition, none of the briefs in the case addressed this inconsistency. As discussed in Section II.D, the Hosanna-Tabor per se rule—and not the press cases—is the constitutional anomaly in need of reform.\textsuperscript{116}

2. First Amendment Protection of Expressive Associations

The Court has also recognized First Amendment protection under the Free Speech Clause for expressive associations—that is, groups that “engage in some form of expression, whether it be public or private.”\textsuperscript{117} The following chart shows the chain of logic connecting the First Amendment to that type of protected association:

\begin{itemize}
\item 113. Id. at 1549; see also McDermott v. Ampersand Publ’g, LLC, 593 F.3d 950 (9th Cir. 2010) (applying the same two-track approach).
\item 114. Passaic Daily News, 736 F.2d at 1557.
\item 115. In addition, only one amicus brief even cited Associated Press. See Amicus Brief of Antitrust Professors and Scholars as Amici Curiae in Support of Respondents at 9 n.4, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3532701, at *9 n.4 (“The First Amendment does not inoculate political, religious, or expressive organizations from Sherman Act scrutiny, and this Court has long permitted the Sherman Act to regulate conduct that is primarily commercial in nature, as distinct from spiritual or expressive conduct that enjoys First Amendment protection.”). Oddly, the Table of Authorities in the Brief for Petitioner includes a listing for the “Free Press Clause,” but there is no citation to or discussion of that Clause on the referenced page. Brief for the Petitioner at xi, 33, Hosanna-Tabor, 565 U.S. 171 (No. 10-553), 2011 WL 2414707, at *xi, *33.
\item 116. While it is beyond the scope of this Article, the Court could reconsider the lack of any First Amendment protection for a new organization’s selection of editorial employees. Associated Press was a 5–4 decision with the dissenting Justices favoring an editorial exception similar to the current ministerial exception. Associated Press v. NLRB, 301 U.S. 103, 134–41 (1937) (Sutherland, J., Van Devanter, J., McReynolds, J. & Butler, J., dissenting).
\end{itemize}
This chain of logic shows that the right to expressive association serves a similar, facilitative purpose to the right to religious association. Just as religious association aids the genuine development and communication of religious doctrine, expressive association facilitates the development and communication of political, social, and other views. And the members of each type of association affect the development and communication of the association’s beliefs and views. Not surprisingly, then, just as the ministerial exception protects internal decisions about membership in a religious organization, the Free Speech Clause protects expressive associations from government actions that “interfere with the internal organization or affairs of the group,” including the selection of members.

Despite this similarity, the Court applies different constitutional tests to neutral, generally applicable government action that incidentally interferes with membership in expressive versus religious associations. While religious organizations are protected by the *Hosanna-Tabor* per se
rule, the Court applies a balancing test to such laws that incidentally affect the membership of expressive associations.\textsuperscript{121} Specifically, in an expressive association case, the Court asks three questions:\textsuperscript{122}

1. Is the association “expressive” for purposes of the Free Speech Clause of the First Amendment?\textsuperscript{123}
2. If so, does the challenged government action significantly affect or burden the association’s ability to engage in expression?\textsuperscript{124}
3. If so, does the challenged government action serve a compelling government interest that “cannot be achieved through means significantly less restrictive of associational freedoms”?\textsuperscript{125}

As with news organizations, the Court permits some neutral, generally applicable regulation of expressive associations. Unlike news organizations, though, the \textit{Hosanna-Tabor} opinion attempted to distinguish expressive associations from religious associations:

The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s and [the plaintiff’s] view that the First Amendment analysis should

\textsuperscript{121} See \textit{The Irony of Hosanna-Tabor}, supra note 18, at 955 (“The combination of Smith and Hosanna-Tabor means that religious individuals have absolutely no protection from neutral laws of general applicability, even if the laws bar them from participating in a sacrament (the Smith rule), while religious institutions may be protected absolutely, even if their acts have no religious basis (the ministerial exception approved by Hosanna-Tabor).”).

\textsuperscript{122} The Court defers to the expressive association on the second question. “As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression.” \textit{Dale}, 530 U.S. at 653. The Court independently reviews the first and third questions. \textit{Id.} at 648.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 650 (“Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts’ ability to advocate public or private viewpoints.”).

\textsuperscript{125} \textit{Id.} at 648 (quoting \textit{Roberts}, 468 U.S. at 623) (“We have held that the freedom could be overridden ‘by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.’” (quoting \textit{Roberts}, 468 U.S. at 623)). As stated, this standard is not the “strict scrutiny” applied under the Free Speech Clause. While the test does require a compelling interest, it does not require that the challenged action be the least speech-restrictive alternative, which is the Court’s prevailing test under free speech strict scrutiny. See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 799 n.6 (1989) (discussing the difference between the “least intrusive means” analysis under strict scrutiny and the more forgiving “narrow tailoring” analysis for content-neutral laws). Instead, the test is phrased closer to the analysis required under the Court’s time, place, and manner test, which requires that a law not restrict “substantially more speech than is necessary” to serve the government’s interest. See \textit{McCullen v. Coakley}, 573 U.S. 464, 486 (2014) (“For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’ Such a regulation, unlike a content-based restriction of speech, ‘need not be the least restrictive or least intrusive means of serving the government’s interests.’” (quoting \textit{Ward}, 491 U.S. at 798, 799)).
be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.\textsuperscript{126}

This argument is unconvincing. All forms of First Amendment association derive from and support an individual right protected by a separate clause. The Court made this point in a passage from \textit{Roberts v. United States Jaycees},\textsuperscript{127} which addressed the right of expressive association:\textsuperscript{128}

\begin{quote}
An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.\textsuperscript{129}
\end{quote}

For expressive association, the right to associate with others supports the individual right to freedom of speech, and for religious association, the right to associate with other believers supports the individual right of free exercise.\textsuperscript{130} And the right of a religious group to select ministers rests on a chain of logic that traces back to an individual’s right to decide what they believe.\textsuperscript{131} Indeed, while \textit{Hosanna-Tabor} invokes the “text” of the First Amendment, the words of that provision mention neither expressive associations nor religious associations. The question, then, is: Why should this correlative protection of religious association rights receive the greater protection of a per se rule than expressive associations, which have a balancing test? \textit{Hosanna-Tabor} provides no answer.

\textsuperscript{126.} \textit{Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC}, 565 U.S. 171, 189 (2012) (citation omitted).
\textsuperscript{128.} \textit{Id.} at 618–19.
\textsuperscript{129.} \textit{Id.} at 622 (emphasis added) (citations omitted).
\textsuperscript{130.} \textit{Id.} The quoted passage in the text cited to \textit{Larson v. Valente}, 456 U.S. 228, 244–46 (1982), which addressed the right to religious association as correlative to the Religion Clauses.
\textsuperscript{131.} See supra notes 42–47 and accompanying text.
3. First Amendment Associations Summary

In sum, current First Amendment doctrine consists of three different tests for neutral, generally applicable laws that incidentally affect membership in protected associations:

(1) In the context of religious groups, the Hosanna-Tabor per se rule bars all such laws.
(2) In the context of expressive associations, a heightened scrutiny balancing test applies.
(3) In the context of news organizations, such laws receive minimal rationality review.

Those who associate for religious purposes, in aid of their rights under the Free Exercise Clause, receive the highest protection; those who associate for expressive purposes, in aid of their rights under the Free Speech Clause, receive less protection under heightened scrutiny; and those who associate for newsgathering and reporting purposes, in aid of their rights under the Free Press Clause, receive the least protection.

Given that the Court has not offered a principled basis for these differences, the question remains how to reconcile these disparate approaches. After reviewing other constitutional doctrines in Sections II.B and II.C, Section II.D turns to that question.

B. Individual Free Exercise of Religion

The Court’s treatment of individual Free Exercise Clause claims also incorporates a sharp distinction between direct and incidental burdens. Since Employment Division v. Smith, the Court has applied rational basis review to neutral, generally applicable government actions that only incidentally burden free exercise, and strict scrutiny to government actions that purposely or selectively target religious exercise.


133. Government action lacks neutrality if it is “hostile to the religious beliefs of affected citizens [or] . . . passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” Masterpiece Cakeshop v. Colo. C.R. Comm’n, 138 S. Ct. 1719, 1731 (2018); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (“Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.”).

134. Government action lacks general applicability either if “it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions,’” or “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” Fulton, 141 S. Ct. at 1877 (alteration in original) (quoting Smith, 494 U.S. at 884).

135. See Church of the Lukumi Babalu Ave. Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993); Fulton, 141 S. Ct. at 1876 (“Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.”).
Smith and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* nicely illustrate this different treatment.

*Smith* involved the application of a neutral, generally applicable state criminal drug law to the religious use of peyote. The law was general because it applied to all use of peyote, not only religious use; and the law was neutral because its purpose was public safety and not hostility toward religion or religious practice. Consequently, the Court applied deferential rational basis review to hold that the law’s incidental burden on religious practice did not violate the Free Exercise Clause.

Conversely, *Church of Lukumi* involved a series of city ordinances that prohibited the killing of animals as a religious sacrifice. The ordinances were not general because, in practice, they applied solely to religiously motivated animal slaughter, and they were not neutral because the legislative history showed that the city council was motivated by hostility to a minority religion. The Court applied strict scrutiny to hold that the ordinances violated the Free Exercise Clause.

So, under the Court’s Free Exercise Clause doctrine, we have one clause, two approaches. For laws that affect a religious organization’s selection of ministers, a single per se rule applies to both direct, purposeful interference and neutral, generally applicable laws. But for laws that affect individual religious exercise, a heightened balancing test (though

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137. The case arose when a person was denied unemployment benefits after their employment was terminated due to use of peyote in violation of state law. *Smith*, 494 U.S. at 874. Since the state drug law was the basis for the benefit decision, the Court decided whether that law violated the Free Exercise Clause. *Id.* at 876.
138. *Id.* at 892 (stating the case included “no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs”).
139. *Id.* at 878. In *Fulton*, a majority of Justices signaled they are prepared to overrule *Smith* and apply a heightened form of scrutiny to laws that incidentally burden free exercise rights. Justice Barrett, writing for two other Justices, indicated a preference for a form of intermediate scrutiny. “I am skeptical about swapping *Smith*’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court’s resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.” *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).
140. Church of Lukumi, 508 U.S. at 545 (“We conclude, in sum, that each of Hialeah’s ordinances pursues the city’s governmental interests only against conduct motivated by religious belief.”).
141. *Id.* at 542 (“In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion.”).
142. *Id.* at 546–47.
143. See *The Irony* of *Hosanna-Tabor*, supra note 18, at 955 (“The second problem with this distinction is that it results in a free exercise jurisprudence that provides more protection for religious institutions than it does for religious individuals.”).
a balancing test, nonetheless) applies to purposeful restraints, while deferential rational basis review applies to neutral, generally applicable laws that impose a mere incidental burden. Why the different treatment of organizations and individuals?

Recognizing this disparate doctrinal treatment, *Hosanna-Tabor* attempted to distinguish *Smith*:

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [Emp. Div. v. Smith, 494 U.S. 872, 877 (1990)] (distinguishing the government’s regulation of “physical acts” from its “lend[ing] its power to one or the other side in controversies over religious authority or dogma”). The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.144

Wait, what? The Court’s distinction between “outward physical acts” and “internal decisions” is anomalous and deeply problematic for several reasons. First, it is wholly conclusory, bereft of analytical justification. Indeed, the above quote is the Court’s sole attempt to distinguish the *Smith* line of cases. And the citation to *Smith* is misleading. The quoted fragments from *Smith* are from a passage concerning cases, which are discussed above,145 where the government had directly and purposefully dictated the selection of ministers.146 That is, in context, the passage made precisely the distinction proffered in this Article: between neutral, generally applicable laws and purposeful interference with religious exercise. Yet, *Hosanna-Tabor* takes this passage out of context to support a more general distinction between regulations of physical acts and all laws that incidentally interfere with “religious authority.” The citation, then, in no way supports applying the *Hosanna-Tabor* per se rule to neutral, generally applicable laws that only incidentally affect the selection


145. *See supra* notes 77–78 and accompanying text.

of ministers. To so blithely cite Smith in this way is judicial sleight of hand substituting for analysis.

Second, as a matter of constitutional text, the Free Exercise Clause protects the “exercise of religion,” which plainly includes physical acts of some sort, even if only in the context of worship. Indeed, for a person of faith, the Court’s distinction between “outward physical acts” and “internal church decisions” turns free exercise on its head. For example, for some religious persons, their faith consists in discerning how all actions they take—no matter how small or mundane—express their relationship with the divine being. For those believers, what the Court refers to as mere “outward physical acts” are their exercise of religion, what defines their relationship with the divine, as well as what is expected of them in this life and the next. “Internal decisions” of the religious organization, while surely important, are only in service of that individual discernment and action. Textually, then, it is confounding to relegate the actions of individual persons of faith to secondary status while elevating the internal decisions of religious groups.

Third, as Professor Caroline Mala Corbin has so well stated, “[a]llowing institutions but not individuals to violate the law in the name of religious belief amounts to privileging the derivative right over the primary one.” As discussed above, the primary constitutional right is that of individual religious belief, and the constitutional interest in religious association derives from and supports that right. Logically, then, the primary constitutional right of individual belief and exercise should receive constitutional protection at least on par with the correlative right to associate. The Hosanna-Tabor per se rule does just the opposite, providing categorical protection from incidental burdens on the associational right, and protecting the individual right with a balancing test.

147. See supra notes 77–78 and accompanying text.
149. See Joseph A. Tetlow, Making Choices in Christ: The Foundations of Ignatian Spirituality 2 (2008) (spirituality “offers a way to discern what God wishes us to do, both with the whole of our lives as we focus down on a personal vocation and in the many concrete decisions we have to make every day”); Mark E. Thibodeaux, God’s Voice Within: The Ignatian Way to Discover God’s Will 7 (2010) (“In any given situation, whether in an ordinary day or in a day of momentous decision, there are many voices in your head and heart proposing to you a variety of actions, reactions, and nonactions. The Ignatian method of discernment teaches you how to fine-tune your spiritual senses so that you can more readily detect and move toward the voice of the Good Shepherd, distinguishing that voice from all the others.”).
150. See Tetlow, supra note 149, at 2; Thibodeaux, supra note 149, at 7.
151. See generally Galliaretz, supra note 46.
152. Above the Law, supra note 18, at 1988–89.
153. See supra notes 42–47 and accompanying text.
154. See The Irony of Hosanna-Tabor, supra note 18, at 954–55.
In sum, the Hosanna-Tabor per se rule is inexplicably out of step with the Court’s treatment of individual claims under the Free Exercise Clause. And unlike the doctrinal anomalies discussed in the preceding sections, this incongruity lies within the same clause. The Supreme Court’s opinion in *Kennedy v. Bremerton School District*\(^\text{155}\) indicates why these inconsistencies in First Amendment doctrine are important:

It is true that this Court and others often refer to the “Establishment Clause,” the “Free Exercise Clause,” and the “Free Speech Clause” as separate units. But the three Clauses appear in the same sentence of the same Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” A natural reading of that sentence would seem to suggest the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail over the others.\(^\text{156}\)

As discussed in the next section, this inconsistency reflects a larger problem with *Hosanna-Tabor*’s failure to distinguish direct and incidental burdens.

### C. Purposeful v. Incidental Burdens

As the preceding sections illustrate, multiple First Amendment doctrines distinguish government action that purposefully and directly burdens a constitutional interest from government action that imposes a mere incidental burden.\(^\text{157}\) The distinction is not accidental, but rather reflects important constitutional principles.\(^\text{158}\) First, purposeful and direct infringements often cause greater constitutional harm. By focusing its legislative or administrative efforts on imposing the burden, the government is likely to be more effective in doing so. This can be seen in free speech cases, where the government either compels expression

\(\text{155. } 142 \text{ S. Ct. } 2407 \text{ (2022).}\)

\(\text{156. } \text{Id. at } 2426 \text{ (first quoting U.S. CONST. amend. I; and then citing Everson v. Bd. of Educ., 330 U.S. 1, 13, 15 (1947)).}\)

\(\text{157. While outside the scope of this Article, it is worth noting that numerous other constitutional doctrines recognize the distinction between government action that purposefully and directly infringes a constitutional interest and government actions that only incidentally do so. See, e.g., 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312–16 (2023) (distinguishing laws that directly and indirectly compel expression under the Free Speech Clause); Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153 (2023) (‘In its ‘modern’ cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws ‘driven by . . . “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”’ (alteration in original) (quoting Dep’t of Revenue v. Davis, 553 U.S. 328, 337–38 (2008))); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (holding that under the Equal Protection Clause, strict scrutiny applies only to government action that purposefully discriminates based on race)).}\)

\(\text{158. See generally Michael C. Dorf, } \text{Incidental Burdens on Fundamental Rights, } 109 \text{ HARV. L. REV. } 1175 \text{ (1996).}\)
of a favored idea or censors discussion of a topic or viewpoint.\textsuperscript{159} Such focused, content-based restrictions cause a core First Amendment harm: eliminating viewpoints and skewing the marketplace of ideas towards the government’s favored views.

Conversely, an incidental burden is just that—an unintended, unanticipated effect of a law directed at a different result. Such incidental impacts are more like glancing blows than direct hits, and so may be less severe. Content-neutral regulations of expression and conduct are of this type. For example, a city law that prohibits all use of outdoor amplified sound after eleven o’clock at night leaves all speakers on an equal footing, which might turn down the volume of the marketplace of ideas but has minimal impact on the balance of viewpoints.\textsuperscript{160}

Second, purposeful and direct infringements often cause symbolic harm. Government action that evidences a motive to harm an unpopular group, practice, view, or belief sends a message of government disapproval of those who are members of that group, engage in the practice, or hold that view or belief.\textsuperscript{161} And the message of government disapproval can lead to ostracism, harassment, or other harm.\textsuperscript{162}

Third, purposeful and direct infringements may be difficult to correct through democratic processes. If a law is motivated by disapproval or animus toward a group or belief, that implies that a current majority shares the sentiment that underlies the action.\textsuperscript{163} If so, then advocacy for relief from the infringement in democratic forums is unlikely to succeed. Indeed, advocacy by unpopular groups can be an occasion for further vilification and harm.\textsuperscript{164} In such cases, judicial protection is required to vindicate constitutional interests.

\textsuperscript{159} See \textit{303 Creative}, 143 S. Ct. at 2312 (“Generally . . . the government may not compel a person to speak its own preferred messages.”).

\textsuperscript{160} See \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 805 (1989) (applying intermediate scrutiny to a content-neutral law that only incidentally burdened speech). Of course, the government may impose a facially content-neutral regulation of speech for the purpose of silencing discussion of specific subjects or viewpoints. In that case, the Court would treat the law as content based and apply strict scrutiny. \textit{See City of Austin v. Reagan Nat’l Advert. of Austin, LLC}, 142 S. Ct. 1464, 1471 (2022) (“A regulation of speech is facially content based under the First Amendment if it ‘target[s] speech based on its communicative content’—that is, if it ‘applies to particular speech because of the topic discussed or the idea or message expressed.’” (alteration in original) (quoting \textit{Reed v. Town of Gilbert}, 576 U.S. 155, 163 (2015))).


\textsuperscript{163} \textit{See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review} 81–82 (1980) (discussing how a majority of citizens can “advantage itself at the expense of a minority (or group of minorities) it is inclined to regard as different”).

\textsuperscript{164} \textit{Cf. Church of Lukumi}, 508 U.S. at 540–42 (discussing the animus expressed by a city council toward a minority religious group); \textit{Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n}, 138 S. Ct. 1719, 1729 (2018) (discussing the animus expressed by a government official toward a religious group during an official proceeding).
D. Coda: Taking Stock of the Analysis

As a matter of constitutional doctrine and principle, there is an important difference between government action that purposefully and directly burdens a constitutional interest, and neutral, generally applicable government action that only incidentally does so. Categorical per se rules are generally reserved for government actions that directly and purposefully burden protected constitutional interests or activities. Neutral, generally applicable laws that only incidentally burden constitutional interests are subject to a balancing test, whether strict scrutiny, rational basis review, or some form of intermediate review. Thus, that application of the Hosanna-Tabor per se rule should be overruled.

The preceding analysis supports the following revisions to the Hosanna-Tabor framework:

1. A per se rule of invalidity applies only to government action that purposefully and directly affects the selection of ministers.
2. A constitutional balancing test applies to neutral, generally applicable laws that only incidentally affect the selection of ministers.

The question, then, is what level of balancing test ought to apply to neutral, generally applicable laws?

A strong case can be made that the Court ought to apply the same balancing test as would apply to neutral, generally applicable laws that burden individual exercise of religion. As the current Court is in flux on the appropriate constitutional standard for such cases, this Article leaves that question for another day. Instead, the remaining discussion shows that even under strict scrutiny, which is the most demanding constitutional balancing test, ministers may bring some employment lawsuits against their employers.

The universe of possible legal claims involving a minister and their religious employer is vast. The NLRB could bring proceedings against a religious employer under federal labor law. As in Hosanna-Tabor and Our Lady of Guadalupe, the minister might bring suit under federal anti-discrimination law. Or, a minister might bring a state law breach of contract or tort suit against their religious employer. A revised ministerial exception doctrine would need to take account of this variety of controversies involving a minister’s employment relationship.

To focus the analysis that follows, this Article applies strict scrutiny to a hypothetical minister’s claim that their employer discriminated against

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165. It could also be argued that the Court should apply the same standard as under the Free Press Clause or the standard it applies to expressive associations. This Article leaves those questions for another day.
167. See supra notes 27–30 and accompanying text.
168. See infra notes 259–260 and accompanying text.
them based on their race. This focus is warranted because a claim of race discrimination in employment likely poses the strongest case for the government under strict scrutiny. And so, if the government cannot satisfy strict scrutiny for a claim of race discrimination, it is unlikely to do so for other types of legal claims.

The strict scrutiny test has two parts. First, the government bears the burden to show that a compelling interest underlies the challenged action. Part III explains that the government can show such an interest in protecting ministerial employees from race discrimination in employment. Second, the government bears the burden of showing that the challenged law is narrowly tailored to that interest, or that the law is “actually necessary” to serve that interest. Part IV discusses how a claim of race discrimination can be narrowly tailored to the government’s compelling interest.

III. The Government’s Compelling Interest in Protecting Ministerial Employees from Employment Discrimination Based on Race

The government’s burden to show a compelling interest has two parts. First, the government must identify an interest of sufficient importance that it qualifies as “compelling.” Section A explains that the government has a compelling interest in protecting ministerial employees from race discrimination by their employers. Second, the government must have evidence that the compelling interest poses an “actual problem” in need of solving, and not merely a hypothetical concern. Section B discusses the case that an actual problem exists.

A. The Government’s Compelling Interest

Current case law supports a compelling government interest in providing employees generally, and ministerial employees specifically, with a remedy for employment discrimination based on race. To start, consider Bob Jones University v. United States, where the Supreme Court held that the government had a compelling interest in preventing race

171. Id.
173. See Boos v. Barry, 485 U.S. 312, 321–24 (1988) (applying strict scrutiny to a content-based regulation of speech where the Court discussed but did not decide whether protecting the dignity of foreign diplomats was a compelling government interest).
discrimination in a Free Exercise Clause case.\footnote{176} There, the Internal Revenue Service (IRS) denied tax-exempt status to a private, religiously-affiliated university because of its policy prohibiting interracial marriage or dating.\footnote{177} The Supreme Court had previously held in \textit{Loving v. Virginia}\footnote{178} that state laws prohibiting interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment,\footnote{179} and the IRS subsequently issued a Revenue Ruling finding that schools that discriminated based on race could not receive status as a tax-exempt “charitable” institution.\footnote{180} Based on this Ruling, the IRS denied tax-exempt status to Bob Jones University.

In a lawsuit challenging the IRS’s decision, the University argued that the Revenue Ruling violated its rights under the Religion Clauses of the First Amendment.\footnote{181} To frame this argument, the Court described the religious character of the University:

Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.\footnote{182}

The University policy against interracial dating and marriage was adopted because “[t]he sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.”\footnote{183} By withholding the tax exemption, the University argued, the IRS had imposed a financial disadvantage on a religious school based on its sincerely held religious beliefs.

Applying a version of strict scrutiny to the University’s Free Exercise Clause claim,\footnote{184} the Court held that the IRS rule served a compelling interest.\footnote{185} Specifically, the Court held that “the Government has a fundamental, overriding interest in eradicating racial discrimination in

\begin{footnotes}
\item[176] Id. at 604.
\item[177] Id. at 580.
\item[178] 388 U.S. 1 (1967).
\item[179] Id. at 11–12.
\item[180] Rev. Rul. 71-447, 1971-2. C.B. 230 (“All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.”).
\item[181] Bob Jones Univ., 461 U.S. at 602–03 (“Petitioners contend that [the IRS non-discrimination] policy . . . cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs.”).
\item[182] Id. at 580.
\item[183] Id.
\item[184] Id. at 603 (“On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct.”).
\item[185] Id. at 604 (“The governmental interest at stake here is compelling.”).
\end{footnotes}
education.” The question here is whether a ministerial employee can show a similar compelling interest in eliminating race discrimination in employment.

The Court’s Equal Protection Clause cases support such a compelling interest in the employment context. In *City of Richmond v. J.A. Croson Co.*, the Court stated that the government has a compelling interest in providing a remedy for “past discrimination” identified by “judicial, legislative, or administrative findings of constitutional or statutory violations.” And the Court reaffirmed this point more generally in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, noting that the government has a compelling interest in “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.” On this reasoning, if a court finds that a religious employer has discriminated against a ministerial employee based on race, the government has a compelling interest in providing a remedy for that specific act of discrimination. Thus, the government has a compelling interest in providing a legal remedy to a minister who proves a claim of race discrimination in employment.

**B. Proof that the Compelling Interest Poses an “Actual Problem”**

Even if the government has a compelling interest in protecting ministerial employees from employment discrimination, strict scrutiny requires clear proof that the challenged law addresses an actual and not theoretical problem. Here, that means that the government must show that federal anti-discrimination laws target an actual threat of employment discrimination based on race. The government should be able to do so for two reasons.

First, in *Bob Jones University*, the Court noted that the nation’s extensive history of race discrimination in education supported a compelling interest in eliminating such discrimination:

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186. *Id.*
188. *Id.* at 497–99.
189. *Id.* at 497 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)). Justice Powell’s opinion in *Bakke* stated, “[w]ithout such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.” *Bakke*, 438 U.S. at 308–09 (footnote omitted).
190. 143 S. Ct. 2141 (2023).
191. *Id.* at 2162. The Court also noted a second compelling interest in “avoiding imminent and serious risks to human safety in prisons, such as a race riot.” *Id.*
192. Brown v. Ent. Merchs. Ass’n, 564 U.S. 786, 799–800 (2011) (explaining that the government’s “burden [under strict scrutiny] is much higher [than under intermediate scrutiny], and because [the government] bears the risk of uncertainty, ambiguous proof will not suffice” (citation omitted)).
The Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no “less restrictive means” are available to achieve the governmental interest.  

Legislative findings of a history of race discrimination carried the government’s burden that the compelling interest actually existed. The government should be able to rely on similar legislative findings of a history of race discrimination in employment. Specifically, the legislative history of Title VII of the Civil Rights Act of 1964, which contains the federal employment discrimination protections, documented an extensive history of race discrimination in employment. This should carry the government’s burden of supporting the existence of its compelling interest in providing a remedy for race discrimination in employment. 

Second, and more fundamentally, it is inherent in an employment discrimination lawsuit that the compelling interest will be proven in each case. That is because, for each federal employment discrimination claim, the plaintiff must prove by a preponderance of the evidence that they suffered an adverse employment action because of their race. Each successful plaintiff, then, will have shown that there was an actual problem with race discrimination in their case. Thus, by its very nature, a legal remedy for employment discrimination targets only situations where there is an actual problem with race discrimination.

IV. FEDERAL EMPLOYMENT DISCRIMINATION CLAIMS CAN BE NARROWLY TAILORED

The narrow tailoring analysis defines the scope of government action that properly balances the government’s compelling interest and the burdened constitutional interest. Section A summarizes the Court’s narrow tailoring doctrine and applies that doctrine to a minister’s race discrimination claim.
discrimination claim. Section B then explains how such a claim could be brought under the current provisions of Title VII.

A. The Narrow Tailoring Analysis

The Court considers three interrelated factors in deciding whether government action is narrowly tailored to the government’s compelling interest. First, the challenged government action must have little or no over- or under-inclusiveness to the compelling government purpose.196 This factor is discussed in Sections IV.A.1 and IV.A.2. Second, the government must show that less burdensome regulatory alternatives would be less effective in achieving the compelling purpose.197 This factor is discussed in Section IV.A.3. Third, the government must show that the restriction on the constitutional interest is “actually necessary” to achieve the government’s purpose.198 This factor is discussed in Section IV.A.4. In addition to describing each factor, each subsection explains how to tailor a race discrimination lawsuit to satisfy the factor.

Note that the discussion that follows draws on strict scrutiny cases from a variety of constitutional contexts, including the Religion Clauses, the Free Speech Clause, and the Equal Protection Clause. While the nuances of strict scrutiny may apply differently in these contexts, the essential elements of the analysis are the same.199

1. Over-Inclusiveness

First, the Court reviews the degree to which the challenged government action is overinclusive to the government’s compelling interest.200 Generally, overinclusive means that the government action burdens


197. See Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (“[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest.”); see also Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).


199. For example, one aspect of narrow tailoring is whether the challenged action is overinclusive to the government’s purpose. Generally, overinclusive means that the challenged government action imposes a greater constitutional burden than needed to serve the government interest. In Equal Protection Clause cases, the constitutional burden is to treat a group differently, such as when a law classifies based on race or sex. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023). In those cases, an overinclusive classification would include more people than necessary to achieve the government’s interest. In the Free Speech Clause cases, the constitutional interest is the right to engage in protected speech. And so, as discussed below, a law is overinclusive if it burdens more speech than necessary to achieve the government’s interest. See supra note 198 and accompanying text; infra notes 200–204 and accompanying text.

more of a constitutionally protected interest than necessary to serve the government’s purpose. Over-inclusiveness, then, applies differently depending on the constitutional interest at stake. When the constitutional interest is equality under the Equal Protection Clause, a law is overinclusive when the classification includes people who do not threaten the government’s interest. For example, a state law might set a mandatory retirement age of fifty years old for state police to ensure that officers are physically fit. That law is overinclusive because some officers burdened by the law—those age fifty and older—are physically fit and thus do not threaten the government’s interest.

In the Free Exercise Clause context, a law is overinclusive if it burdens more religious exercise than necessary to serve the government’s interest. For example, during the early months of the COVID-19 pandemic, state and local governments restricted certain gatherings to prevent or limit the spread of the virus. If a type of religious gathering did not threaten that interest, a legal ban that covered that type of gathering was overinclusive.

The question in the ministerial exception context is whether a lawsuit alleging race discrimination under federal employment discrimination law is overinclusive. The government’s compelling interest is to provide an individual remedy for identified acts of race discrimination in employment. The nature of a civil lawsuit is that the remedy is awarded only after a judicial finding that the employer engaged in the very conduct that threatens the government’s interest—discrimination based on race. And so, a civil lawsuit is not overinclusive to the government’s compelling purpose.

2. Under-Inclusiveness

Next, the Court reviews the degree to which the challenged government action is underinclusive to the government’s compelling interest. Generally, underinclusive means that the government action burdens less conduct than necessary to serve the government’s purpose. As with over-inclusiveness, under-inclusiveness applies differently depending on the constitutional interest at stake.

The case Reed v. Town of Gilbert illustrates how under-inclusiveness applies in the free speech context. There, the Supreme Court analyzed whether a municipal sign code was underinclusive to the government’s
asserted purpose of preventing distracted driving. The sign code tightly restricted signs displaying directions to temporary events while more loosely regulating signs with political or ideological messages. The Court found that this regulation was “hopelessly underinclusive” because the government did not show that directional signs were more distracting than political or ideological signs. Because of this under-inclusiveness, the law was not narrowly tailored.

The question in the ministerial exception context is whether a lawsuit alleging race discrimination under the federal employment discrimination law is underinclusive. The government’s compelling interest is to provide an individual remedy for identified acts of race discrimination in employment. Specifically, then, the question is whether the federal civil remedy leaves out any employer conduct that threatens the government’s interest. Once again, the nature of a civil lawsuit answers this question—such a lawsuit awards a remedy to all employees who receive a judicial finding that their employer discriminated against them based on race. And so, a civil lawsuit would not be underinclusive to the government’s compelling purpose.

One issue on under-inclusiveness is that a Title VII action is only available against an employer with fifteen or more employees. Since there is no logical or empirical reason to believe that employers with fewer than fifteen employees do not engage in employment discrimination, one could argue that this under-inclusiveness undermines the law. The counterargument would be that this under-inclusiveness applies to all employers, and does not specifically disadvantage religious employers. For example, in the COVID-19 context, the Court explained that narrow tailoring requires the government to show that “the religious exercise at issue is more dangerous than those activities” that are permitted by the law. Because the fifteen-employee threshold applies equally to religious and non-religious employers, the under-inclusiveness is not a sign of unequal treatment that threatens free exercise interests.

3. A Civil Lawsuit Is Necessary to Protect Ministers from Race Discrimination

Under the narrowly tailored prong, the Court has also asked if the challenged government action is really “necessary” to address the actual problem that underlies the compelling government interest. For purposes of this analysis, the question is whether an employment discrimination lawsuit is necessary to address the government’s concern with

208. The Court assumed for the purpose of analysis, but did not decide, that this interest was compelling. Id. at 171.

209. Id. at 172 (“The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.”).

210. Id.


race discrimination by a minister’s religious employer. The government should have two satisfactory answers to this question.

First, similar to the Bob Jones University case, the government can produce historical evidence of past race discrimination. In Bob Jones University, the historical record showed pervasive race discrimination in education. And as noted above, Title VII is supported by findings of past race discrimination by private employers. So, as in Bob Jones University, government action is needed to solve an actual problem.

Second, as discussed above, proof sufficient to establish a federal employment discrimination claim will necessarily show that there is an actual problem to be solved in that case. The successful ministerial plaintiff will have shown by a preponderance of the evidence that race was a motive for their employer’s action. That finding will satisfy the constitutional requirement that a legal remedy is necessary in that case.

4. Less Restrictive Alternatives

In the First Amendment context, narrow tailoring requires that the challenged government action be the least restrictive alternative for achieving the government’s compelling interest. That is, the government must “show that measures less restrictive of the First Amendment activity could not address its interest.” To determine whether government action imposes the least restriction on “First Amendment activity,” we must identify the protected “activity” at issue. Here, the question is: What First Amendment activity does an employment discrimination lawsuit burden, and how can the lawsuit be tailored to minimize the burden on that activity? The remainder of this subsection discusses these two points.

According to Hosanna-Tabor, the First Amendment protects the selection of ministers because of the connection between ministers and religious doctrine and practice. The specific question under the “least restrictive alternative” analysis, then, is: How might a minister’s employment discrimination claim interfere with religious doctrine? Such a lawsuit could involve religious doctrine in three possible ways.

First, the alleged discrimination could be dictated by religious doctrine. For example, the Catholic Church limits the ordination of priests to men, and so sex discrimination is a matter of church doctrine.

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213. See Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989) (explaining that the “least-restrictive-alternative analysis” applies under strict scrutiny and not under the more lenient time, place, and manner test for content-neutral regulations of speech).


215. See supra notes 42–47 and accompanying text.

216. See Above the Law, supra note 18, at 2013–22 (describing the types of responses a religious employer might make to a minister’s Title VII claim).

217. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012) (“[I]t would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.”).
Without a ministerial exception, a federal court could impose legal liability for the faithful application of such religious doctrine, providing a powerful economic incentive to change religious doctrine. And even if the law allowed a defense for bona fide occupational qualifications based on religious doctrine, courts would need to decide what clergy qualifications were actually required by religious doctrine. Either way, courts are entwined in religious beliefs.

To avoid this interference with religious doctrine, the ministerial exception should prohibit an employment discrimination claim when the alleged basis for discrimination is dictated by religious doctrine. Consider how this would work for a hypothetical claim of sex discrimination against the Roman Catholic Church. The plaintiff’s complaint would allege that the church denied her ordination because of her sex. In a motion for summary judgment, the church would include an affidavit explaining that religious doctrine prohibited the ordination of women, and would request summary judgment based on the affirmative defense of the ministerial exception. The court would defer to the church’s assertion that religious doctrine dictated the basis of the alleged discrimination and grant summary judgment on the employer’s affirmative defense. This approach would avoid a court imposing liability for religious doctrine concerning the qualifications for ministers.

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218. See Laycock, supra note 15, at 1400–01.
219. Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).
220. Hosanna-Tabor states that the ministerial exception is an affirmative defense and not a matter of court jurisdiction. Hosanna-Tabor, 565 U.S. at 195 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”).
221. If the employer moved to dismiss under Rule 12(b)(6) or 12(c) and included the affidavit, which is a matter outside of the pleadings, the court would treat the motion as a motion for summary judgment. See Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”); Peter J. Smith & Robert W. Tuttle, Civil Procedure and the Ministerial Exception, 86 Fordham L. Rev. 1847, 1875–76 (2018).
222. The sole element of this affirmative defense would be that the basis of the alleged discrimination is dictated by the employer’s religious beliefs, and the Free Exercise Clause would require that the court accept the employer’s assertion as conclusive on this element. In that case, there would be no genuine dispute as to the affirmative defense, and summary judgment for the employer would be proper. See Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).
223. As an original matter, I agree with Professor Corbin’s argument that the First Amendment, properly interpreted, does not prohibit the application of Title VII to claims where the basis for discrimination is dictated by religious doctrine. See Above the Law, supra note 18, at 2014 (“In allowing Title VII claims against religious organizations, the court is not declaring that antidiscrimination represents an organization’s true beliefs. It is merely declaring that antidiscrimination is the secular law and must be complied with. Whatever indirect influence the state may have on the development of religious doctrine, it does not equate to authoritatively declaring its content, and it is the latter that violates the establishment clause.”)
The Court’s case law holds one complication on this first point. Recall that in *Bob Jones University*, the Court upheld government action aimed at preventing race discrimination over a religious organization’s Free Exercise claim that such discrimination was required by religious beliefs. And the Court did so despite the fact that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools.” The Court noted, though, that the burden of losing the tax exemption would “not prevent those schools from observing their religious tenets.” It would just make doing so more costly.

This last point may distinguish *Bob Jones University*. If the basis of alleged discrimination is dictated by religious beliefs, the employment discrimination law would effectively “prevent” the employer “from observing their religious tenets.” To avoid that direct interference with religious exercise and tailor a least restrictive alternative, an employment discrimination claim should be dismissed when the alleged basis for discrimination is dictated by religious beliefs.

Second, even when discrimination is not dictated by church doctrine, courts may still be asked to consider religious beliefs when deciding an employment discrimination claim. For example, Catholic religious doctrine does not limit ordination based on race, and so race discrimination against clergy members is not dictated by religious doctrine. If a plaintiff claimed that the Catholic Church denied his ordination because of his race, the church could not defend that the denial was dictated by religious doctrine. Instead, the church might argue that the plaintiff lacked the religious qualifications for the priesthood. The plaintiff could reply that the church’s argument is a mere pretext for race discrimination. And one way to prove pretext is to show that the church’s non-race reason is false—that is, that the plaintiff actually met the religious qualifications for the priesthood. To analyze pretext, however, a court would have to determine the qualifications for Catholic priesthood and decide whether the plaintiff satisfied those qualifications. In other words, a pretext argument may involve the court in questions of religious doctrine and its application. To avoid interference with religious doctrine, a court should accept a religious employer’s assertion that the minister did not meet religious qualifications. In practice, this means that the court accepts as legally conclusive a religious organization’s sworn statement that a motive for the challenged employment action (e.g., termination of employment, 

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(footnote omitted)). As noted at the outset, this Article accepts the core holding of *Hosanna-Tabor* and proposes a reformed ministerial exception that builds upon that holding.

224. See supra notes 175–184 and accompanying text.
226. *Id.* at 604.
227. See *Above the Law*, supra note 18, at 2018–22.
refusal to hire, demotion, compensation) was the employer’s judgment concerning the minister’s qualifications or performance under religious criteria. The minister should then be permitted to prove that an additional motive for the employment action was a forbidden ground of discrimination. In employment discrimination law, this is known as a “mixed-motive” claim where the employer’s actions were due to a mix of lawful and unlawful motives.229

Note that the mixed-motive claim eliminates the concern that a court will inquire into religious matters in deciding whether the religious employer acted based on a pretext. Recall that the pretext argument is that the religious employer’s asserted nondiscriminatory reason for the employment action, such as the minister’s failure to meet religious qualifications, is not its real reason. This argument invites inquiry into religious matters. In a mixed-motive claim, however, the court accepts the truth of the employer’s asserted nondiscriminatory reason. The minister may, then, offer direct or circumstantial evidence of an additional, prohibited discriminatory motive. For example, the minister could offer oral or written statements where the employer mentions the minister’s race as a basis for the employment action,230 or the minister could

229. In practice, a plaintiff does not assert a “mixed-motive” claim in their complaint. See Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1235 n.4 (11th Cir. 2016); King v. Murphy, No. 15-CV-2306, 2018 WL 4857289, at *1 (N.D. Ga. Jan. 19, 2018) (“There is no such thing as a mixed-motive claim.”). Rather, the plaintiff alleges discrimination on a prohibited basis, such as race, and the employer counters that the employment decision was made for a permitted reason, such as poor performance. The fact finder could then reach three possible decisions: (1) the employer’s decision was based on the prohibited reason, (2) the employer’s decision was based on the permitted reason, or (3) the employer’s decision was motivated by both the prohibited and permitted reason. Finding (3) would mean the employer had a mixed motive for its decision. As discussed below, under Title VII, finding (1) results in employer liability, finding (2) results in no liability for the employer, and finding (3) results in limited liability for the employer. See infra Section IV.B.

230. “Direct evidence” of employment discrimination is “evidence ‘showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated’ the adverse employment action.” Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (quoting Thomas v. First Nat’l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)); see also Robert A. Kearney, The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination, 5 U. Pa. J. Emp. & Labor L. 303 (2003). If the plaintiff has alleged discrimination based on sex, direct evidence “might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, or stated hostility to women being in the workplace at all.” Kerns v. Cap. Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999). For examples of statements found to constitute direct evidence of discrimination, see Wallace v. Performance Contractors, Inc., 57 F.4th 209, 220 (5th Cir. 2023) (employee could not perform work at an elevated job site because “females stay on the ground”); Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210, 1213 (8th Cir. 2001) (“[A] woman can’t handle [the plaintiff’s] job” and the plaintiff was “a woman in a man’s job”), abrogated by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Green v. Dillard’s, Inc., 483 F.3d 535, 540 (8th Cir. 2007) (“racial epithet ‘is direct evidence of discrimination’”); EEOC v. Liberal R–II Sch. Dist., 314 F.3d 920, 924 (8th Cir. 2002) (plaintiff “was too old to drive a bus”), abrogated by Torgerson, 643 F.3d at 1031; Kneibert v. Thomson Newspapers, Mich. Inc., 129 F.3d 444, 452 (8th Cir. 1997) (employer statement that
point to a pattern or practice of treating employees differently based on race.\textsuperscript{231} This evidence of discrimination would not involve consideration of religious beliefs.

Third, even if courts scrupulously avoid questions of church doctrine, the mere existence of discrimination claims could indirectly influence a church’s choice of clergy. For example, rather than risk a Title VII lawsuit, a church may decide to retain an unqualified minister who is a member of a protected class. Given the presumed connection between messenger and message, this influence, standing alone, arguably infringes church autonomy.\textsuperscript{232} The Hosanna-Tabor Court made this argument:

[The plaintiff] no longer seeks reinstatement, having abandoned that relief before this Court. But that is immaterial. [The plaintiff] continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney’s fees. An award of such relief would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination. \textbf{Such relief would depend on a determination that Hosanna-Tabor was wrong to have relieved [the plaintiff] of her position, and it is precisely such a ruling that is barred by the ministerial exception.}\textsuperscript{233}

The last sentence is the lynchpin to this argument. The Court is concerned that a lawsuit would necessarily require a finding that the religious employer did not have proper religious grounds to terminate employment. But, as discussed above, that is not necessarily the case. In a mixed-motive case, the Court can accept a religious employer’s asserted reason for terminating employment and then ask if the employer had an \textit{additional}, prohibited motive. And proof of this additional motive can be limited to direct or circumstantial evidence of race discrimination, such as statements or a pattern of action that showed prohibited racial animus. Thus, a mixed-motive claim limited to proof of racial animus would avoid the concern about interference with religious doctrine.

In sum, an employment discrimination claim based on race would be the least restrictive alternative if it incorporated three limitations. First, a minister may not bring an employment discrimination claim when the basis for discrimination is dictated by religious beliefs. Second, a
court must accept as true any religion-based motive for the employment action asserted by a religious employer. In that case, the minister would be limited to a mixed-motive claim. Third, in proving the mixed motive, the minister would be limited to offering direct or circumstantial evidence of racial animus. The minister could not offer evidence that the religion-based motive was a pretext.

B. Mixed-Motive Employment Decisions Under Title VII

A form of the narrowly tailored employment discrimination claim is available under current federal law. To see how this claim would work, we need to start with the prevailing litigation framework under Title VII. In a typical race discrimination claim, a plaintiff alleges that their employer intentionally discriminated against them in taking an adverse employment action, such as refusal to hire or promote, termination, or demotion. The plaintiff then has the burden to show that a prohibited reason, such as race, was a “motivating factor” for that employment action. One way is to offer what courts have called “direct evidence” of race discrimination, which includes statements by the employer that mention the plaintiff’s race in connection with the employment action. Another way is for the plaintiff to offer circumstantial evidence of the employer’s motive, such as evidence of a pattern of different treatment among employees based on race. Regardless of the type of evidence,

234. For an overview of disparate treatment claims under Title VII, see Martha Chamallas, Principles of Employment Discrimination Law 19–51 (2d ed. 2023).

235. In addition to claims for intentional discrimination, Title VII supports claims on other grounds, such as disparate impact based on race, racial harassment, and retaliation for raising a claim of race discrimination under Title VII. See id., at 17 (“The development of federal anti-discrimination law has resulted in a proliferation of such proof frameworks attached both to the various theories of liability—most notably, disparate treatment, disparate impact, and harassment—and to distinctive types of discrimination and statutory violations, such as claims for retaliation, race, national origin and religious discrimination under Title VII . . . .”). The discussion above focuses on claims of intentional discrimination to illustrate how a Title VII claim can be narrowly tailored under strict scrutiny. Courts would apply a similar constitutional analysis for other types of Title VII claims.

236. See 42 U.S.C. § 2000e-2(a)(1) (2018) (“[F]ail[ure] or refus[al] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”); see also Chamallas, supra note 234, at 14–15 (“In addition to establishing employee status, plaintiffs seeking coverage under anti-discrimination laws must demonstrate that they have suffered what amounts to cognizable harm under the statutes. Many courts have used the shorthand phrase ‘adverse action’ to describe the kind of harms that are covered, contrasting it to less serious or material harms that fall outside the statutes’ scope. Despite its frequent use, however, the adverse action requirement has no grounding in the statutory language and has not yet been expressly endorsed by the U.S. Supreme Court.”).


238. See supra notes 228–229 and accompanying text.

239. See Desert Palace, 539 U.S. at 96 (plaintiff offered evidence that “she received harsher discipline than” male employees, and that she was “treated less favorably”).
the question is whether the challenged employment action was motivated, at least in part, by race.240

In response, the employer may offer a race-neutral basis for the challenged employment action, such as the employee’s lack of qualifications.241 In a minister’s lawsuit, this could happen in three ways. First, the employer could respond that the alleged race discrimination was based on religious doctrine. As discussed above, the reformed ministerial exception would require summary judgment if a religious employer made this assertion on the record.242

Second, the employer could deny that it discriminated based on race and assert that its actual motive was a race-neutral employment qualification with no connection to religious doctrine.243 For example, a religious employer could assert that it refused to hire the plaintiff because they did not have a graduate degree in a secular subject from an accredited university. Because such an asserted race-neutral motive would not involve religious doctrine, a court would not interfere with religious doctrine by hearing the case.244

In this second type of case, the plaintiff’s claim should go forward under the Supreme Court’s burden-shifting framework for such Title VII cases.245 Under this approach, the plaintiff’s initial burden is to make a prima facie showing that the challenged employment action was based on race.246 If the plaintiff makes the prima facie showing, the burden shifts to the employer to show that it would have taken the same employment action for a legitimate, nondiscriminatory reason.247 If the religious employer makes this showing, the burden shifts back to the plaintiff to show that the employer’s asserted nondiscriminatory reason was a pretext for discrimination.248 When a religious employer asserts a secular reason for the challenged employment action, none of these inquiries require consideration of religious doctrine.

240. Id.
241. See Chamallas, supra note 234, at 24–39. Professor Corbin notes four types of responses that a religious employer might offer to the plaintiff’s claim. See Above the Law, supra note 18, at 2013.
242. See supra notes 215–221 and accompanying text.
243. See Above the Law, supra note 18, at 2015–16.
244. See id.
246. Under the Court’s decision in McDonnell Douglas, to make a prima facie case, the plaintiff must show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

Id. at 802. In applying this test, courts adapt the above elements to the type of employment action involved, such as termination, compensation, or failure to promote.

247. Id. (“The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).
248. Id. at 804–05.
Third, the employer could deny that it discriminated based on race and assert that its actual motive was that the plaintiff did not meet a race-neutral religious qualification for a minister.\textsuperscript{249} As above, a court should accept as conclusive the religious employer’s assertion that lack of religious qualifications was one motive for the challenged employment action. The court should then allow the plaintiff to prove that racial animus was an additional motive for the action. In other words, the plaintiff would argue that the employer had a mixed motive for the challenged employment action. Title VII specifically provides for such a mixed-motive claim:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.\textsuperscript{250}

Under this provision, a court would accept a religious employer’s assertion that one motive for the employment action was the minister’s lack of qualifications or performance under religious criteria. This would be “other factors” that “motivated” the employment decision. The minister could then prove that race was also a “motivating factor for” the employment decision. If the minister proves this additional motive by a preponderance of the evidence, the religious employer would be liable under this mixed-motive provision.

As previously discussed, the minister’s proof that race was a motivating factor would be limited to direct or circumstantial evidence of racial animus; the plaintiff could not introduce evidence of pretext. For example, one court has found an employer’s use of a racial epithet toward the plaintiff to constitute direct evidence of racial animus.\textsuperscript{251} And since the court would have accepted as a matter of law that religious grounds were also a motivating factor, a court would exclude any evidence that contradicted that finding.\textsuperscript{252}

If a minister proves a mixed-motive claim, Title VII limits the available remedies:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

\textsuperscript{249} Chamallas, supra note 234, at 24–39.
\textsuperscript{251} See, e.g., Green v. Dillard’s, Inc., 483 F.3d 533, 540 (8th Cir. 2007) (racial epithet “is direct evidence of discrimination”); see supra notes 228–229 and accompanying text.
\textsuperscript{252} Federal Rule of Evidence 401 limits relevant evidence to facts that are “of consequence in determining the action.” Fed. R. Evid. 401(b). Because a minister is barred from controverting the employer’s religious motive, any evidence offered for that purpose would not concern a matter at issue in the case, and so would not be admissible as relevant.
(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).\(^\text{253}\)

This provision specifically prohibits reinstatement of the ministerial employee, avoiding any First Amendment concern about forced acceptance of an unwanted minister. Further, though civil damages may not violate strict scrutiny, the current statute bars an award of money damages on a mixed-motive claim. The minister would be limited to an award of attorney’s fees, costs, and “injunctive relief.” Cases show that injunctive relief can include an order that the employer take steps to avoid future employment discrimination, such as employee training and other efforts to mitigate future wrongdoing.\(^\text{254}\) None of these permitted remedies transgresses the religious employer’s core interest in avoiding interference with religious beliefs or doctrine.

In sum, existing provisions of Title VII provide ministers with a legal remedy for race discrimination that survives strict scrutiny. By providing a remedy for proven race discrimination, the lawsuit would serve a compelling government interest. And by carefully limiting the evidence allowed and the available remedies, the lawsuit would be narrowly tailored to that interest. The Supreme Court should reform that ministerial exception and permit just such lawsuits.

V. Issues for Future Consideration

This Article has made the case for replacing the *Hosanna-Tabor* per se rule with a balancing test for neutral, generally applicable laws that only incidentally affect the selection of ministers. If the Court does so,


\(^{254}\) For example, a federal district court described the following injunctive remedies requested by a plaintiff who had established a mixed-motive claim:

As for injunctive relief, Plaintiff seeks an order (1) requiring Defendant to include the judgment and requested declaration in Plaintiff’s personnel files, (2) enjoining Defendant from engaging in retaliatory actions against Plaintiff for three years, (3) requiring Defendant to provide religious sensitivity training, (4) requiring Defendant to amend its manuals to include materials related to discrimination as a result of participation or non-participation of an individual in religious or non-religious holidays or events that may conflict with the individual’s religious beliefs, and (5) requiring Defendant to state in its materials relating to team-building exercises that non-participation due to religious belief will not result in an adverse employment action.

Hickman v. Fla. Dep’t of Corr., No. 18cv382, 2021 WL 3135951, at *5 (N.D. Fla. Apr. 5, 2021). The court ultimately decided not to order injunctive relief because the wrongdoers no longer worked for the employer and the wrongdoing was isolated. \(\text{Id. at *6–7.}\) Thus, injunctive relief was not needed to prevent future wrongdoing. \(\text{Id.}\)
several issues would remain to fully implement that approach. This Part identifies four issues.

First, as with the per se rule, courts must decide which employees of religious organizations fall within the ministerial exception. A majority of the Court currently applies a functional approach, with two Justices preferring deference to the religious employer. If the Court adopts the latter approach, which would give religious organizations carte blanche to invoke the ministerial exception, it will be even more important to give these vulnerable employees a way to hold their employers accountable under neutral, generally applicable laws.

Second, courts must decide which types of legal claims fall within the scope of the ministerial exception. Courts and commentators have discussed a variety of claims beyond employment discrimination, including breach of contract and wrongful termination. As acknowledged in Hosanna-Tabor itself, employees may bring tort claims against their employers, such as a claim for defamation. And while the Court has interpreted the NLRA to not apply to employees at religious organizations, Congress could amend that law to extend coverage to such employees. Because these legal claims are based on neutral, generally

255. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (“We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers [the plaintiff], given all the circumstances of her employment.”); see, e.g., Lindley, supra note 3.

256. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063 (2020) (“In determining whether a particular position falls within the Hosanna-Tabor exception, a variety of factors may be important.”).

257. Id. at 2069–70 (Thomas, J., concurring) (“[T]he Religion Clauses require civil courts to defer to religious organizations’ good-faith claims that a certain employee’s position is ‘ministerial.’”).

258. Hosanna-Tabor, 565 U.S. at 196 (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”).


applicable laws, the reformed ministerial exception would apply a balancing test to decide whether they are barred.

Third, related to the preceding issue, if more claims are included within the ministerial exception and strict scrutiny applies to those claims, courts must decide what other government interests are compelling. In the context of the First Amendment right to expressive association, the Court has recognized a compelling interest in eliminating sex discrimination. In the free speech context, the Court has acknowledged that public accommodations laws that prohibit the exclusion of an individual on the basis of race, religion, sex, and sexual orientation serve a sufficient interest to overcome constitutional scrutiny. And the Court has made the same acknowledgment when addressing a Free Exercise Clause challenge to an anti-discrimination law. These cases may support additional compelling interests.

In addition, ministers have also brought claims raising other bases of discrimination covered by federal employment discrimination law, including sexual harassment, age, disability, and sexual orientation. If the NLRA is expanded to cover religious employers, the question is whether the government has a compelling interest in protecting the right of employees to organize and collectively bargain. And as just noted, ministers have brought claims under state contract and tort

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263. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) (addressing application of a state public accommodations law to a parade: “Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”).

264. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719, 1727 (2018) (“[W]hile . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”).


268. See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020) (holding that Title VII prohibition of employment discrimination based on sex includes discrimination based on sexual orientation); Morgan & Piatt, supra note 19, at 26 (discussing how to accommodate Bostock and the ministerial exception).

law. It is to be determined whether any of these legal claims serve an interest sufficient to satisfy the applicable constitutional balancing test.

More generally, the government may have a compelling interest in protecting the free exercise interests of ministers who experience a religious call to their work. As discussed above, for some persons of faith, the fullest expression of their beliefs is through their actions in everyday life, including their occupation. The nature of such a call can be that the person sees that position as part of their religious exercise and so part of their salvation. To leave or give up on that call can be seen as a religious failing that affects their relationship with the divine and their expectation of treatment by the divine. To be terminated from a ministerial position, then, is a direct interference with that person's exercise of their faith. And given that such a call may be to serve in a specific faith tradition, the ministerial employee cannot simply find substitute employment either in the same geographic area or elsewhere.

Hosanna-Tabor illustrates just such a ministerial employee. The Court's opinion noted in several places that the plaintiff had experienced a religious “call” to her work at the church. Specifically, she was a “called” teacher who was “regarded as having been called to [her] vocation by God through a congregation.” Since she had discerned that vocation through her faith, following that call was an exercise of that faith just as much as sacramental observances protected by other decisions under the Free Exercise Clause. The government, then, has an interest in protecting the employee's free exercise of religion through pursuit of a religious vocation.

Fourth, the courts must decide whether civil remedies like reinstatement, back pay, and other money damages would survive strict scrutiny. For example, would reinstatement of a minister survive that test? On the one hand, Hosanna-Tabor might treat reinstatement as unduly burdensome and so limit a minister to less burdensome remedies, such as those currently available to a mixed-motive plaintiff under Title VII. On the other hand, the Associated Press case permits reinstatement of an editor of a news organization, which directly interferes with the core Free Press Clause protection of editorial judgment. Also, as one commentator has noted, a minister who has been terminated is not a complete stranger to

270. See The Irony of Hosanna-Tabor, supra note 18, at 969 (“People who wish to serve their God should not have to choose between their calling and their civil rights.”).
271. See supra notes 148–151 and accompanying text.
273. Id. at 177.
the religious organization because they were a member of the community for a period of time. Thus, reinstatement may be distinguishable from cases where the government selected the minister for a religious organization without the organization’s participation.

Conclusion

While Hosanna-Tabor announced its per se rule with great confidence, the opinion has a major blind spot. By applying a categorical approach to neutral, generally applicable laws that only incidentally affect the selection of ministers, the Court extended the per se rule well beyond any plausible, principled rationale and created an irreconcilable conflict with other constitutional doctrines. To bring the rule within logical limits and harmonize the doctrine, the per se rule should be limited to government actions that directly and purposefully interfere with the selection of ministers. Courts should apply a constitutional balancing test, such as strict scrutiny, to neutral and generally applicable government action that incidentally burdens that interest. When courts do so, they will find that, at the very least, a carefully tailored version of a federal employment discrimination claim based on race will survive that test. And while the constitutionality of other claims and remedies may be unclear, the courts will at least be asking the right questions.

276. See The Irony of Hosanna-Tabor, supra note 18, at 963 (“[R]einstating a previously appointed minister who has won a discrimination suit is not the equivalent of the Crown imposing a random government-selected official onto a church, as the Court described when discussing the historical backdrop of the religion clauses.”).

277. For additional discussion of the propriety of the reinstatement remedy, see id. at 963–65.