
HOSANNA-TABOR, THE MINISTERIAL EXCEPTION, AND
JUDICIAL COMPETENCE

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I. INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,¹ the United States Supreme Court confirmed a view about which there had been no disagreement in the U.S. Circuit Courts of Appeals,² namely, that the First Amendment incorporates a ministerial exception so that religious entities will be immune from suit for subjecting their religious leaders to possibly unwarranted, adverse employment action. Numerous questions remain to be worked out, including who qualifies as a minister for purposes of the exception and whether or to what extent the decision changes current Religion Clauses jurisprudence.

To some extent, the *Hosanna-Tabor* Court merely affirmed existing law. For example, the Court has long held that the Constitution is respectful of the autonomy of religious institutions in that civil courts are precluded from choosing religious leaders.³ However, the Court did not thereby suggest that it was beyond the competence of civil courts to decide disputes between religious organizations and their employees.⁴ Instead, the Court clarified that the exception is an affirmative defense that, while a powerful tool, does not undercut the ability of civil courts to adjudicate matters involving religious employees in appropriate cases.⁵ Further, while the *Hosanna-Tabor* Court did

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¹ 132 S. Ct. 694 (2012).

² See *id.* at 714 (Alito, J., concurring) (“every circuit to consider the issue has recognized the ‘ministerial’ exception. . .”).

³ See, e.g., *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

⁴ *Hosanna-Tabor*, 132 S. Ct. at 710.

⁵ *Id.*

find the plaintiff teacher a minister for purposes of the exception, the Court offered a number of factors before making that finding without specifying which factors were most important or whether any were either necessary or sufficient for the exception to be triggered. This will almost certainly result in widely differing interpretations in the lower courts, which will mean that relatively similar individuals will trigger the exception in certain jurisdictions but not in others. While *Hosanna-Tabor* clarified that the First Amendment includes a ministerial exception, it raised many more questions than it answered and will likely further muddy the jurisprudence for years to come.

II. RELIGIOUS INSTITUTIONS AND CIVIL COURTS

Civil courts have been asked to hear cases involving religious institutions in a variety of contexts. Sometimes, there is a schism within a church, and different factions each claim to be the rightful owner of the church building and property.⁶ At still other times, a congregation seeks to divorce itself from the hierarchical church of which it is a part.⁷ At other times, an individual sues a church, claiming to have been wrongly treated by the institution.⁸ When articulating the protections afforded by the Constitution, the Court has tried to strike a balance between required state deference with respect to religious doctrine on the one hand and the need to adjudicate disputes in light of neutral laws on the other.⁹ Until *Hosanna-Tabor*, the Court at least seemed to have struck a balance that had respected religious beliefs but had also countenanced subjecting religious institutions to neutral laws.

A. *Limitations on the Civil Courts*

The Court has long recognized that civil courts should not decide certain kinds of issues involving religious organizations and their beliefs. In *Watson v. Jones*,¹⁰ the Court announced that the “law knows no

⁶ See, e.g., *Watson v. Jones*, 80 U.S. 679 (1871); *Presbytery of Hudson River of Presbyterian Church (U.S.A.) v. Trs. of First Presbyterian Church & Congregation of Ridgeberry*, 72 A.D.3d 78 (N.Y. App. Div. 2010).

⁷ *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

⁸ See, e.g., *Rita M. v. Roman Catholic Archbishop of L.A.*, 187 Cal. App. 3d 1453 (1986) (where an individual sued the Church for alleged sexual acts by its priests).

⁹ See *Watson*, 80 U.S. 679; *Blue Hull Mem'l*, 393 U.S. 440; *Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

¹⁰ 80 U.S. 679.

heresy, and is committed to the support of no dogma, the establishment of no sect.”¹¹ Because that is so, the civil courts are limited with respect to the kinds of issues that they can decide:

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.¹²

Civil courts have neither the authority nor the expertise to correct church tribunals with respect to their interpretations of church doctrines.

The Court reiterated its commitment to deferring to church tribunals on doctrinal matters in *Gonzalez v. Roman Catholic Archbishop of Manila*.¹³ The *Gonzalez* Court explained that “[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.”¹⁴ Secular courts simply are not permitted to take a second look to determine whether the religious tribunals have offered accurate interpretations of church doctrine.

Several points might be made about the implications of the *Gonzalez* description of the jurisprudence. Church tribunals will be given deference on matters of doctrine, even when according that deference may adversely affect someone’s “civil rights.” Here, when the Court is using the term “civil rights,” the Court is not focusing on the freedom from invidious discrimination on the basis of race,¹⁵ but instead on rights arising under civil as opposed to criminal laws. The Court’s reason that deference should be given is important to note—the Court suggested that the parties had explicitly or implicitly accepted the authority of the religious tribunal.¹⁶ However, implicit within the agree-

¹¹ *Id.* at 728.

¹² *Id.* at 727.

¹³ 280 U.S. 1 (1929).

¹⁴ *Id.* at 16.

¹⁵ Cf. Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451, 1472 (2009) (“By 1969, equal protection analysis under the Fourteenth Amendment had become the dominant way of thinking about civil rights: it prevented government actors from segregating or discriminating on the basis of race in a variety of circumstances.”).

¹⁶ *Gonzalez*, 280 U.S. at 16 (“[T]he decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before

ment to accept the authority of such decisions is that the decision would be reached in good faith.¹⁷ Because of that implicit limitation, such decisions will stand as long as they are not based on “fraud, collusion, or arbitrariness,”¹⁸ the presence of which would vitiate the force of the consent to the jurisdiction of the court.

The Court again discussed deference in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*,¹⁹ where the Court considered the freedom of a religious institution to choose its own clergy. The *Kedroff* Court explained that the “[f]reedom to select the clergy, where no improper methods of choice are proven, . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”²⁰ Here, the focus is not on religious tribunal operations, but instead on clergy selection methods. While the focus has shifted, the message is the same—the Constitution affords protection to religious institutions. Nonetheless, the qualifier should not be ignored—constitutional protection is afforded “where no improper methods of choice are proven.”²¹ This qualification leaves open whether free exercise guarantees protected clergy selection even when wrongdoing can be established, although the Court provided no explanation as to what would constitute an improper method or how the use of such a method might be proven.

In subsequent case law, the Court has offered some explanation of the *Gonzalez* arbitrariness exception. At issue in *Serbian Eastern Orthodox Diocese for United States of America and Canada v. Milivojevich*²² was a decision issued by the Illinois Supreme Court reversing a clergyman’s “removal and defrockment”²³ because, allegedly, the Church had not abided by its own “constitution and penal code”²⁴ and thus had acted in an “arbitrary”²⁵ fashion. The United States Supreme Court reversed,

the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.”).

¹⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 710 (2012) (Thomas, J., concurring) (“[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”).

¹⁸ *Gonzalez*, 280 U.S. at 16.

¹⁹ 344 U.S. 94 (1952).

²⁰ *Id.* at 116.

²¹ *Id.*

²² 426 U.S. 696 (1976).

²³ *Id.* at 708.

²⁴ *Id.*

²⁵ *Id.*

reasoning that the Illinois Supreme Court had wrongly rejected “the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes.”²⁶ Basically, the Court rejected that the civil courts had the power to determine whether religious tribunals had acted arbitrarily—there is “no ‘arbitrariness’ exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations.”²⁷ Rather, the Constitution requires civil courts “to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”²⁸ However, the *Milivojevich* Court did not overrule the *Gonzalez* exceptions entirely; instead, the Court merely rejected the arbitrariness exception in particular,²⁹ thereby leaving open whether the exceptions for fraud or collusion still had force.

Not only did the *Milivojevich* Court expressly refuse to discuss the possibility that a church tribunal might act fraudulently or be in collusion with someone else, but another point about *Milivojevich* also bears emphasis. The Court was precluding civil courts from second-guessing whether religious courts were acting arbitrarily, but a different question not even addressed in *Milivojevich* is whether civil courts are also precluded from examining the acts of other religious figures, e.g., religious leaders, for evidence of arbitrariness, fraud, or collusion. Thus, one interpretation of *Milivojevich* is that it was precluding a civil court from second-guessing the actions of its religious counterpart for arbitrariness, which leaves open the court’s ability to second-guess religious tribunal decisions based on fraud or collusion³⁰ and, in addition, the

²⁶ *Id.*

²⁷ *Id.* at 713.

²⁸ *Id.*

²⁹ *See id.* (refusing to decide “whether or not there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes”).

³⁰ *See* Michael G. Weisberg, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REFORM 955, 975 (1992) (“Thus, while departures from religious doctrine are beyond the scope of civil court review when the departures are ‘arbitrary,’ but made in good faith for spiritual purposes, the Constitution permits secular court review of departures from doctrine when the departures are fraudulent or collusive.”).

actions of non-tribunal religious authorities for arbitrariness, as well as fraud or collusion.³¹

While civil courts are not equipped to decide matters of doctrine, they are equipped to apply neutral laws to various parties, including religious parties. Consider cases involving church property disputes. As the *Watson* Court explained, such disputes might arise within an independent religious organization that is not part of a hierarchical church.³²

Suppose that there is a major break within an independent church and two competing factions each claim to represent the true church and thus to own the church building and property. The Court reasoned that in cases where “there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.”³³ If, for example, the congregation had agreed to majority rule, then “the numerical majority of members must control the right to the use of the property.”³⁴ Courts are not to choose between competing factions on the basis of doctrine—there should be

no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church.³⁵

Basically, courts can adjudicate such disputes, but they must be careful to decide those cases in light of neutral principles of governance

³¹ *But see* Marci A. Hamilton, *Religious Institutions, The No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1192 n.404 (2004) (“inquiry into arbitrariness of church actions was foreclosed”); Jana R. McCreary, *Tell Me No Secrets: Sharing, Discipline, and the Clash of Ecclesiastical Abstention and Psychotherapeutic Confidentiality*, 29 QUINNIPIAC L. REV. 77, 93 (2011) (“In *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*, the Court . . . did affirmatively strike down any exception for arbitrariness.”). Professors Hamilton and McCreary read the Court to preclude inquiries into arbitrariness as a general matter, although the Court did not say that.

³² *Watson v. Jones*, 80 U.S. 679, 722 (1871) (“the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority”).

³³ *Id.* at 725.

³⁴ *Id.*

³⁵ *Id.*

agreed upon by the organization's members and not in light of doctrinal matters that the courts are not competent to adjudicate.

Sometimes, church disputes involve a disagreement between a particular congregation and the hierarchical religious denomination of which it is a member. In this kind of case, the civil courts are required to defer to religious tribunals on matters of doctrine.³⁶ The *Kedroff* Court cited *Watson* with approval³⁷ when explaining why the New York Court of Appeals was in error when deciding which church "would most faithfully carry out the purposes of the religious trust."³⁸ The civil court was simply not in the position to make such a judgment. That said, the *Kedroff* Court was not recognizing absolute church autonomy, instead pointing out that there are "occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property."³⁹ However, "in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls."⁴⁰ Thus, not only are civil courts precluded from making doctrinal determinations, but they are also bound by religious tribunal interpretations of doctrine, even where those interpretations might be dispositive with respect to the civil issues that are presented.

The Court clarified its position in *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.⁴¹ While reaffirming that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,"⁴² the Court nonetheless noted that "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment."⁴³ For example, "courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property."⁴⁴ Further, "there are neutral principles of law, devel-

³⁶ *Id.* at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.").

³⁷ See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115-16 (1952).

³⁸ *Id.* at 109.

³⁹ *Id.* at 120.

⁴⁰ *Id.* at 120-21.

⁴¹ 393 U.S. 440 (1968).

⁴² *Id.* at 449.

⁴³ *Id.*

⁴⁴ *Id.*

oped for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."⁴⁵ Thus, civil courts can apply neutral principles of law to church disputes, although the courts must always be mindful of the "hazards [that] are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."⁴⁶

Neutral principles of law have been used to decide church disputes where ownership of property was not at issue. At issue in *Tony and Susan Alamo Foundation v. Secretary of Labor*⁴⁷ was whether a religious organization involved in commercial activities was subject to the Fair Labor Standards Act.⁴⁸ The Foundation engaged in a variety of commercial activities.⁴⁹ The businesses were staffed predominately "by the Foundation's 'associates,' most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation."⁵⁰ The associates were not paid salaries⁵¹ but instead received "food, clothing, shelter, and other benefits."⁵²

While recognizing that the Foundation was a "nonprofit religious organization,"⁵³ the Court rejected the proposition that subjecting it to the requirements of the Fair Labor Standards Act would "violate the rights of the associates to freely exercise their religion and the right of the Foundation to be free of excessive government entanglement in its affairs."⁵⁴ The Court explained that the "Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations . . . and the recordkeeping requirements of the Fair Labor Standards Act,

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 471 U.S. 290 (1985).

⁴⁸ *Id.* at 291-92 ("The threshold question in this case is whether the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act, 52 Stat. 1060 . . . apply to workers engaged in the commercial activities of a religious foundation.").

⁴⁹ *Id.* at 292 ("The Foundation does not solicit contributions from the public. It derives its income largely from the operation of a number of commercial businesses, which include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy.").

⁵⁰ *Id.*

⁵¹ *Id.* ("These workers receive no cash salaries.").

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 303.

while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs.”⁵⁵ Further, the Court noted that “the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant’s freedom to exercise religious rights,”⁵⁶ and rejected that free exercise guarantees were somehow violated by requiring that the Act’s requirements be met.⁵⁷ Here, the Religion Clauses did not immunize a religious organization from a neutral law’s requirements that employees receive certain sorts of treatment.

So, too, in *Jimmy Swaggart Ministries v. Board of Equalization of California*,⁵⁸ the Court upheld California’s imposition of sales and use taxes on the sale of religious products. The Court concluded that, “the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant’s religious practices or beliefs.”⁵⁹ Because

the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs *per se*, rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California,⁶⁰

it could not be claimed that California was somehow targeting religious organizations or products for disadvantageous treatment.⁶¹ Requiring the payment of taxes on the sales of religious retail items did not impose a “constitutionally significant burden on appellant’s religious practices or beliefs,”⁶² and thus was not precluded by the Religion Clauses.

The Court summed up its view of the free exercise jurisprudence in *Employment Division, Department of Human Resources of Oregon v.*

⁵⁵ *Id.* at 305-06.

⁵⁶ *Id.* at 303 (citing *United States v. Lee*, 455 U.S. 252, 256-57 (1982); *Thomas v. Review Bd. Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717-18 (1981)).

⁵⁷ *Tony & Susan Alamo Found.*, 471 U.S. at 304-05 (“We therefore fail to perceive how application of the Act would interfere with the associates’ right to freely exercise their religious beliefs.” (citing *Lee*, 455 U.S. at 257)).

⁵⁸ 493 U.S. 378 (1990).

⁵⁹ *Id.* at 392.

⁶⁰ *Id.* at 389.

⁶¹ *Id.* at 390 (“There is no danger that appellant’s religious activity is being singled out for special and burdensome treatment.”).

⁶² *Id.* at 392.

Smith,⁶³ which was issued a few months after *Jimmy Swaggart Ministries*.⁶⁴ The *Smith* Court explained that, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁶⁵ Basically, the Court seemed to have adopted a fairly consistent position with respect to religious organizations—courts were precluded from second-guessing religious organizations’ interpretations of their own doctrines, which meant that civil courts were precluded from imposing their own views about which individuals would best represent or understand particular religious views. However, the Court had approved the use of neutral doctrines even when applied to the actions of religious organizations and thus has not embraced wholesale deference to religious entities.

B. *Hosanna-Tabor*

Prior to *Hosanna-Tabor*, a few issues seemed relatively clear. Civil courts were not to substitute their own judgment for that of religious tribunals with respect to the contents of religious doctrines or practices. However, civil courts could apply neutral laws to religious institutions as long as they did not thereby exceed their own areas of competence. *Hosanna-Tabor* may have clarified or, perhaps, changed the law, although that will not be clear until the *Hosanna-Tabor* doctrine is itself developed in future cases.

At issue in *Hosanna-Tabor* was Cheryl Perich’s claim that she had been wrongfully terminated in violation of the Americans with Disabilities Act.⁶⁶ Perich, who had started out as a “lay” teacher in the school, received the requisite training and then became a “called” teacher.⁶⁷

⁶³ 494 U.S. 872 (1990).

⁶⁴ *Jimmy Swaggart Ministries* was issued on January 17, 1990 (see 493 U.S. at 378), while *Smith* was issued on April 17, 1990 (see 494 U.S. at 872).

⁶⁵ *Smith*, 494 U.S. at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

⁶⁶ *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*, 132 S. Ct. 694, 701 (2012) (“Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act.”).

⁶⁷ See *id.* at 700 (“Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a ‘diploma of vocation’ designating her a commissioned minister.”).

“Called” teachers were held out as “ministers”⁶⁸ and enjoyed preferential treatment in hiring⁶⁹—“lay” teachers were hired only when called teachers were not available to do the work.⁷⁰

One important issue was whether Perich was a minister for purposes of the ministerial exception. The circuits had long held that employees might fall within the relevant category even if they were not officially recognized as members of the clergy. For example, the ministerial exception had successfully been invoked not only in cases involving ministers⁷¹ or would-be ministers,⁷² but also against a music director,⁷³ an individual in charge of dietary matters,⁷⁴ and a university professor.⁷⁵ Thus, the issues presented in *Hosanna-Tabor* were whether the Court would recognize a ministerial exception at all and whether the Court would accept that it included individuals who did not head their congregations. The Court answered both questions in the affirmative.⁷⁶

Perich was an elementary school teacher whose duties did not differ from those of a lay teacher,⁷⁷ and lay teachers were not even required to belong to the denomination.⁷⁸ Nonetheless, the Court held that she was a minister for purposes of the exception, citing several factors—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important relig-

⁶⁸ *Id.* at 707 (“Hosanna–Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna–Tabor extended her a call, it issued her a ‘diploma of vocation’ according her the title ‘Minister of Religion, Commissioned.’”).

⁶⁹ *Id.* at 699 (“A commissioned minister serves for an open-ended term”); *id.* at 699–700 (“At Hosanna–Tabor, they [lay teachers] were appointed by the school board, without a vote of the congregation, to one-year renewable terms.”).

⁷⁰ *Id.* at 700.

⁷¹ See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2003).

⁷² See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

⁷³ See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

⁷⁴ See *Shalieshabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004).

⁷⁵ See *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

⁷⁶ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 707 (2012) (“there is a ministerial exception grounded in the Religion Clauses of the First Amendment”); *id.* (“Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree.”).

⁷⁷ *Id.* at 700 (“teachers at the school generally performed the same duties regardless of whether they were lay or called”).

⁷⁸ *Id.* at 699 (“‘Lay’ or ‘contract’ teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran.”).

ious functions she performed for the Church.⁷⁹ Declining “to adopt a rigid formula for deciding when an employee qualifies as a minister,”⁸⁰ the Court refused to say which of these factors was either necessary or sufficient.⁸¹ For example, the Court expressly noted both that Perich had taken the housing allowance accorded to ministers⁸² and that Perich’s “job duties reflected a role in conveying the Church’s message and carrying out its mission,”⁸³ suggesting that each of these factors played some role in the determination but that neither was dispositive.

It is understandable that the Court did not want to set down hard and fast rules in the Court’s “first case involving the ministerial exception.”⁸⁴ However, it is one thing to refuse to set down rigid rules⁸⁵ and another to send very mixed signals to the lower courts, thereby almost guaranteeing very divergent approaches. On the one hand, lower courts may choose to emphasize the Court’s suggestion that those who take advantage of some of the benefits of being a minister cannot later deny that they are ministers in order to seek tort damages. This view of the exception emphasizes that individuals should not be allowed to pick and choose the benefits and drawbacks of having a particular status, although a separate question is why individuals who follow a calling to be a minister thereby accept that they can be fired for arbitrary or invidious reasons with impunity.⁸⁶

On the other hand, other lower courts will emphasize the duties performed by the plaintiff, and lay teachers who cannot claim the benefits of being ministers might nonetheless be subject to the exception because they, too, convey the Church’s message and carry out its mis-

⁷⁹ *Id.* at 708.

⁸⁰ *Id.* at 707.

⁸¹ *See id.* at 708 (“[S]uch a title, by itself, does not automatically ensure coverage.”).

⁸² *Id.* (“she claimed a special housing allowance on her taxes that was available only to employees earning their compensation ‘in the exercise of the ministry’”).

⁸³ *Id.*

⁸⁴ *Id.* at 707.

⁸⁵ *See* *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at *4 (S.D. Ohio Mar. 29, 2012) (“However, the high court refrained from addressing ministerial exception jurisprudence as a whole and from articulating a test or standard for determining who qualifies as a ministerial employee. Rather, the Court limited its decision to the facts of the case before it, determining that the plaintiff in *Hosanna-Tabor*, Cheryl Perich, was a ministerial employee.”).

⁸⁶ *Cf.* Elizabeth R. Pozolo, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in Petruska v. Gannon University*, 57 DEPAUL L. REV. 1093, 1120-21 (2008) (“the ministerial exception creates much more than ‘minimal infidelity’ to Title VII and, in some cases, actually results in invidious discrimination”).

sion.⁸⁷ Presumably, *all* employees carry out the mission of the Church in some way, so depending upon how the relevant test is read, the exception could be very broad indeed.⁸⁸ Ironically, someone who was not even a member of the faith might be thought a minister for purposes of the exception,⁸⁹ and someone different from Perich in every way⁹⁰ might nonetheless be thought to trigger the exception.⁹¹

To make matters more confusing, the Court implied that it might be less inclined to find that someone was a minister for purposes of the exception if the only reason that she had particular duties was that a

⁸⁷ See *Hosanna-Tabor*, 132 S. Ct. at 708 (“We express no view on whether someone with Perich’s duties would be covered by the ministerial exception in the absence of the other considerations we have discussed.”).

⁸⁸ Cf. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y. Cmty. Sch. Dist. No. 10*, 855 F. Supp. 2d 44, 63 (S.D.N.Y. 2012) (holding that, “in deciding that the Free Exercise Clause provide for a ‘ministerial exception’ that bars a minister from bringing an employment discrimination suit against her church, the Court emphasized the wide berth religious institutions are to be given with respect to their core activities, including worship” (citing *Hosanna-Tabor*, 132 S. Ct. at 706)).

⁸⁹ See *Dias*, No. 1:11-CV-00251, 2012 WL 1068165, at *1 (stating, “Plaintiff is not a Catholic, and Defendants employed her and other non-Catholics.”); *id.* at *2 (holding “Defendants filed the instant motion to dismiss, contending Plaintiff’s role at the school was religious such that the ‘ministerial exception’ to Title VII should apply, thus permitting their action.”). *But see id.* at *5 (ruling “The Court finds dispositive that as a non-Catholic, Plaintiff was not even permitted to teach Catholic doctrine. Plaintiff had received no religious training or title and had no religious duties. The authorities cited by Plaintiff show that it is not enough to generally call her a ‘role model,’ or find that she is a ‘minister’ by virtue of her affiliation with a religious school.”). However, a different court might have reached a different conclusion.

⁹⁰ See, e.g., *id.* at *5 (holding that “Plaintiff here contends none of the facts applicable to Perich are applicable to her. Defendants here did not hold Plaintiff out as a minister, they did not give her any sort of religious title or commission, and the congregations of the Defendant churches took no role in reviewing her ‘skills in ministry’ or her ‘ministerial responsibilities,’ because she had none. Plaintiff argues Defendants never charged her with teaching the faith, participating in religious services, or leading devotional exercises, and she never held herself out as a minister, nor did she ever undergo religious training. In fact, as a non-Catholic, Defendants would not permit her to teach basic Catholic doctrine.”) (citations omitted).

⁹¹ See *Petschonek v. Catholic Diocese of Memphis*, No. W2011-02216-COA-R9-CV, 2012 WL 1868212, at *1, *4 (Tenn. Ct. App. May 23, 2012) (discussing the ministerial exception and citing to *Hosanna-Tabor*). The *Petschonek* Court nonetheless reasoned that the courts may adjudicate matters that involve religious institutions when “‘the court can resolve the dispute by applying neutral legal principles and is not required to employ or rely on religious doctrine to adjudicate the matter.’” (citing *Jones v. Wolf*, 443 U.S. 595, 602-07 (1979)). However, a different court might cite to *Hosanna-Tabor* to justify reading the exception more broadly and then apply the exception to someone who had neither the relevant training nor the same faith.

commissioned minister was not available to perform those duties.⁹² Needless to say, it is not at all clear why an individual is less appropriately thought to be conveying the Church's message and carrying out its mission merely because officially recognized ministers are in short supply.

The Court sent out other mixed messages as well. For example, it explained that the "purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."⁹³ Rather, the exception "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."⁹⁴ At least two points might be made about the Court's articulation of the exception's purpose. First, the reason that the *Gonzalez* and *Kedroff* Courts qualified the conferred constitutional immunity in the selection of the clergy⁹⁵ was presumably because the Constitution strikes a balance between protecting the ability of religious institutions to interpret and promulgate their own doctrine on the one hand and requiring even religious institutions to avoid engaging in certain kinds of practices on the other. The *Hosanna-Tabor* Court's "clarification" ignores a qualification that the *Hosanna-Tabor* Court had itself cited with approval, namely, the *Kedroff* qualification that the civil courts cannot second-guess clergy selection "where no improper methods of choice are proven."⁹⁶

Second, if the Constitution really immunizes Church decisions regarding who will be a minister to the faithful, then the exception might be thought to immunize a great deal when a minister is involved. The cases involving the ministerial exception tend to involve an individual who is suing the church for wrongful treatment, e.g., sex or race discrimination in the employment context.⁹⁷ But suppose that

⁹² See *Hosanna-Tabor*, 132 S. Ct. at 708 (stating "it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable").

⁹³ *Id.* at 709.

⁹⁴ *Id.* (citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)).

⁹⁵ *Kedroff*, 344 U.S. 94; see *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); see also Goluboff, *supra* note 15.

⁹⁶ See *Hosanna-Tabor*, 132 S. Ct. at 704 (citing the *Kedroff* qualification with apparent approval).

⁹⁷ See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 200 (2d Cir. 2008) (African-American priest alleged race discrimination); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004) (minister asserted sexual harassment); *Bryce v. Episcopal Church in*

the individual suing the church is not himself a minister for purposes of the exception but is suing the church because a clergyman employed by the church has wronged him.⁹⁸ Permitting that suit to go forward might undermine the church's ability to "select and control who will minister to the faithful"⁹⁹ and thus might be thought to be precluded by the Religion Clauses. If, indeed, the "church must be free to choose those who will guide it on its way,"¹⁰⁰ churches might be given very expansive immunity.

When rejecting that Perich could be awarded "frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees,"¹⁰¹ the Court reasoned that such an award "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."¹⁰² But an analogous argument might be made to show why a church could not be ordered to pay damages for *retaining* a particular minister. Such an award might be thought to "operate as a penalty on the Church for [failing to] terminate an unwanted minister, and would be no less prohibited by the First Amendment than an order [requiring] the termination."¹⁰³ If indeed, *Hosanna-Tabor* is about protecting the autonomy of religious in-

the Diocese of Colo., 289 F.3d 648, 653 (10th Cir. 2002) (female minister contended sexual harassment); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999) (female pastor alleged sex discrimination); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 (8th Cir. 1991) (ordained priest asserted a sex discrimination claim); *Rayburn v. Gen. Conference on Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (woman denied pastoral position charging sexual and racial discrimination); *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972) (officer claimed that "she had received less salary and fewer benefits than that accorded similarly situated male officers, also that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices").

⁹⁸ See *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 442-43 (Tenn. 2012) (stating that "Mr. Redwing alleged that the Diocese breached its fiduciary duties and acted negligently with regard to the hiring, retention, and supervision of Fr. Guthrie. Mr. Redwing also alleged that the Diocese was aware or should have been aware that Fr. Guthrie was 'a dangerous sexual predator with a depraved sexual interest in young boys' and that the Diocese misled him and his family regarding its 'knowledge of Father Guthrie's history and propensity for committing sexual abuse upon minors.'").

⁹⁹ See *Hosanna-Tabor*, 132 S. Ct. at 709.

¹⁰⁰ *Id.* at 710.

¹⁰¹ *Id.* at 709.

¹⁰² *Id.*

¹⁰³ *Id.*

stitutions,¹⁰⁴ then one might expect the Court to hold that the Constitution immunizes religious institutions from a whole host of tort actions.

Suppose, however, that the Court rejects this line of reasoning and denies that the Constitution immunizes the wrongful hiring, retention, and supervision of ministers from being the basis of tort awards. Permitting such suits to proceed¹⁰⁵ may make churches feel somewhat constrained in whom they decide to hire, retain, and fire. The Tennessee Supreme Court reasoned that current constitutional limitations do “not necessarily immunize religious institutions from all claims for damages based on negligent hiring, supervision, or retention.”¹⁰⁶ Certainly, that is so when a non-ministerial employee is suing a religious institution for adverse employment treatment.¹⁰⁷ Further, it *may* be so when a non-ministerial plaintiff is suing a religious institution for the harms caused by one of its ministers.¹⁰⁸ But permitting such suits to proceed presupposes that the tort system is not constitutionally precluded from influencing religious institutions in their leadership choice. If the Constitution permits that, then it is unclear why the Constitution precludes ministers from suing their religious institutions for improper treatment when that improper treatment is totally unrelated to religious doctrine or belief.

In his *Hosanna-Tabor* concurrence, Justice Thomas suggested that the Constitution precludes the civil courts from deciding who is a minister for purposes of the exception—in his view, “the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as

¹⁰⁴ See Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 835-36 (2012) (“Taken together, the establishment and free exercise holdings of *Hosanna-Tabor* suggest a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions.”).

¹⁰⁵ See *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012) (“While the correct path between the secular and the religious is narrow, we have determined that Tennessee’s courts may adjudicate Mr. Redwing’s claims without straying into areas that are properly within the Diocese’s exclusive domain.”).

¹⁰⁶ *Id.* at 452.

¹⁰⁷ See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (Fletcher, J., concurring).

¹⁰⁸ *Cf. id.* (“This argument proves too much. Under Judge Kleinfeld’s reasoning, an altar boy’s suit against the church for sexual abuse by a minister is constitutionally forbidden.”).

its minister.”¹⁰⁹ He argued that a “religious organization’s right to choose its ministers would be hollow, however, if secular courts could second-guess the organization’s *sincere* determination that a given employee is a ‘minister’ under the organization’s theological tenets.”¹¹⁰ He did not discuss whether a civil court’s assessing the sincerity of a religious organization’s determination would alone make the Religion Clause guarantees hollow. If not, then it is unclear why a court’s determination that the claimed justification for adverse employment action was pretextual¹¹¹ would somehow undermine Religion Clause guarantees.¹¹²

When Justice Alito points out in his concurrence that “some faiths consider the ministry to consist of all or a very large percentage of their members,”¹¹³ he implies that making “ordination status or formal title determinative of the exception’s applicability” would sometimes include too many people.¹¹⁴ By the same token, however, he also points out that some faiths “eschew the concept of formal ordination,”¹¹⁵ thereby implying that the ministerial exception should not be limited to those whom the religion considers ministers. Justice Alito instead offers a functional approach, arguing that the ministerial exception should apply to “any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”¹¹⁶ Of course, such a position is itself open to broader or narrower interpretations. Would someone asked to lead the congregation in a prayer during a particular service trigger the ministerial exception? While it is fair to suggest that these matters will have to be worked out in the lower courts, a little more guidance might be quite helpful.

¹⁰⁹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 710 (2012) (Thomas, J., concurring).

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at 709 (majority opinion) (“The E.E.O.C. and Perich suggest that Hosanna-Tabor’s asserted religious reason for firing Perich—that she violated the Synod’s commitment to internal dispute resolution—was pretextual.”).

¹¹² *See id.* at 715 (Alito, J., concurring) (“For civil courts to engage in the pretext inquiry that respondent and the Solicitor General urge us to sanction would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades.”).

¹¹³ *Id.* at 713-14.

¹¹⁴ *Id.* at 714.

¹¹⁵ *Id.* at 713.

¹¹⁶ *Id.* at 712.

By the same token, the suggestion that the “Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith”¹¹⁷ is open to broader or narrower interpretations. For example, it might be thought to suggest that anyone who in fact is a teacher triggers the exception, which might be read to suggest that an individual who substitutes for a kindergarten class on a particular occasion qualifies.

There are several difficulties presented in determining the robustness of the ministerial exception recognized in *Hosanna-Tabor*. Both concurring opinions might be read as more or less robust, depending upon how they are spelled out. In addition, more needs to be said about the connection between the recognition that someone is a minister for particular religious purposes and the recognition that someone is a minister for the legal purposes served by the ministerial exception. For example, Justice Thomas would simply defer to the religious institution with respect to who counts as a minister. While such a view *might* make sense for religious purposes,¹¹⁸ it is unclear why the religious institution should be permitted to decide who should be included within the ministerial exception, which is essentially a legal rather than a religious concept having its own purposes. Thus, if the purpose of the exception is to protect the institution’s voice, then it is unclear why the exception should be applied to someone who has no connection to the institution’s message. Further, the whole notion of message needs clarification. Consider someone who “speaks” for the institution as a receptionist. Presumably, that is not the kind of speaking for the institution that should count for purposes of the ministerial exception.¹¹⁹

Justice Alito’s functional approach is potentially subject to the same criticism of over-breadth, although it is of course true that a functional approach has its advantages. Thus, it is fair to suggest that one’s being a minister should not be a necessary condition for triggering the exception—someone who does not have that official designation might nonetheless perform analogous religious functions and should be treated as a minister for purposes of the exception in a case in

¹¹⁷ *Id.* at 713.

¹¹⁸ *Dias v. Archdiocese of Cincinnati*, No. 1:11 – CV – 00251, 2012 WL 1068165, at *5 (S.D. Ohio Mar. 29, 2012) (holding that someone not a member of the faith could not be held a minister for the purposes of the ministerial exception).

¹¹⁹ *See Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (rejecting that the ministerial exception applied to receptionists).

which that person is viewed by the religious institution as misrepresenting doctrine. However, without reasonable limits, Justice Alito's position is capable of including a host of individuals; for example, receptionists and delivery people might be viewed as "messengers" and thus might be thought to trigger the exception's protections.

Not only are the concurring opinions themselves amenable to both broader and narrower interpretations, but a separate issue is whether they should be read as fleshing out the majority opinion or, instead, as offering a contrasting view. The Court purported to offer a narrow holding, both because it declined "to adopt a rigid formula for deciding when an employee qualifies as a minister"¹²⁰ and because it declined to discuss the implications of the decision, e.g., "whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."¹²¹ All of this will have to be worked out in the lower courts, and the Court has almost guaranteed extremely divergent approaches.

The Court discussed a significant point in a footnote, namely, that "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."¹²² The exception being an affirmative defense has important implications. For example, commentators' claims to the contrary notwithstanding,¹²³ the Court is not implying that the civil courts are simply incompetent to decide cases that might have import for the autonomy of religious institutions.¹²⁴ On the contrary, civil courts are competent to decide these

¹²⁰ *Hosanna-Tabor*, 132 S. Ct. at 707.

¹²¹ *Id.* at 710.

¹²² *Id.* at 709 n.4.

¹²³ See Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 *ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS* 168, 169 (2012) ("the decision in *Hosanna-Tabor* is not about an ordinary constitutional right—subject to balancing—but about a structural limit on the scope of the government's authority").

¹²⁴ See *id.* at 172 ("a unanimous Supreme Court took a discrete line of cases involving religious disputes and church property and enlarged on it so as to give rise to a fullthroated protection of religious institutional autonomy").

cases,¹²⁵ and there are numerous reasons to believe that these kinds of cases will continue to come before the courts.¹²⁶

First, even in cases in which the affirmative defense is asserted, courts may well defer deciding whether the plaintiff is a minister for purposes of the exception,¹²⁷ perhaps because the parties might settle¹²⁸ or because in a more ambiguous case the issues might be resolved in a way that would reduce the probability of reversal on appeal. Second, defendants may not assert the affirmative defense in some cases¹²⁹ or, perhaps, will not preserve it on appeal.¹³⁰ That might be a choice of the religious institution itself, e.g., because it wishes to be cleared of wrongdoing rather than appear to be using a legal maneuver to hide its wrongdoing. Or, the decision not to assert the affirmative defense might be part of the attorney's strategy.¹³¹ In any event, by making the exception an affirmative defense, the Court implies that civil courts are competent to decide secular matters even when a religious institution is one of the parties.

¹²⁵ Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. REV. 233, 268 (2012) ("the Court does not agree that courts are jurisdictionally 'incompetent'").

¹²⁶ *Id.* at 289-90 ("[T]he Supreme Court attempted to resolve this conflict in passing by proclaiming the exception an affirmative defense. This superficial yet seemingly clear resolution will leave litigants and jurists wanting.").

¹²⁷ *Id.* at 292 ("Those courts that recognize that they are disabled from deciding questions that depend on some religious matter may defer decisions on the application of the ministerial exception from the threshold of the adjudication until later in the judicial process.").

¹²⁸ *See id.* (suggesting that a court might defer the decision in the hopes that the parties would settle).

¹²⁹ *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it." (citing *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009))).

¹³⁰ *Id.* at 1318 ("Southland's brief mentions the ministerial exception only once, and that is when describing the district court's rulings: 'The Court determined that the ministerial exception did not apply in this case.' Appellee Br. 7. Southland abandoned that exception as a defense by failing to list or otherwise state it as an issue on appeal." (citing *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003))).

¹³¹ *Cf. State v. Berryhill*, No. A08-1318, 2009 WL 2366085, at *2 (Minn. Ct. App. Aug. 4, 2009) ("Minnesota courts have found the waiver of an affirmative defense, or the failure to assert such a defense, to be a permissible exercise of the defense attorney's discretion in selecting trial strategy." (citing *State v. Doppler*, 590 N.W.2d 627, 635 (Minn.1999))).

III. CONCLUSION

The *Hosanna-Tabor* Court settled both that the Constitution recognizes the ministerial exception and that the exception includes individuals who are not members of the clergy. Regrettably, the Court sent signals that are almost guaranteed to yield widely divergent holdings in relevant similar cases in the lower courts. While ostensibly issuing a narrow opinion that would allow the contours of the ministerial exception to be worked out in subsequent cases, the Court offered a sweeping rationale that would have implications in a much wider set of cases than previously contemplated. The Court mentions some factors that can be taken into account when deciding whether a particular individual is subject to the ministerial exception, but offers so little guidance that increased confusion in the lower courts is a foregone conclusion. The Court implicitly rejects that civil courts are incompetent to decide certain matters involving religious institutions. Yet, that had been the basis of the jurisprudence in the past and, further, seems to be the most plausible basis for a jurisprudence that respects both religious institutions and the rule of (neutral) laws. While *Hosanna-Tabor* clarifies some issues, it virtually assures an increasingly muddled and confusing jurisprudence for the foreseeable future.

