AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Our Lady of Guadalupe School v. Morrissey-Berru, 140 S.Ct. 2049** (2020)

*Agnus Morrissey-Berru taught fifth and sixth grade students at Our Lady of Guadalupe School in Los Angles. Morrissey-Berru’s duties including teach various lay subjects and Catholicism. In 2015, the school terminated her employment. Morrissey-Berru filed suit, claiming that her contract was renewed so the school could hire a younger teacher in violation of federal age discrimination laws. Our Lady of Guadalupe School claimed that Catholic schools were exempt under the free exercise clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment from federal anti-discrimination laws when they hired and fired teachers under* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC *(2012). The lower federal court dismissed the case, but that decision was reversed by the Court of Appeals for the Ninth Circuit. Our Lady of Guadalupe School appealed to the Supreme Court of the United States.*

 *Kristine Biel had a similar experience at St. James School, another Catholic school in Los Angeles. She was a fifth-grade teacher whose contract was not renewed. Biel filed a lawsuit claiming that her contract was not renewed in violation of federal law because she had asked for a leave of absence to have her breast cancer treated. A lower district court granted summary judgment to St. James, but that Court of the Ninth Circuit again reversed. St.. James appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 7-2 vote reversed the judgment of the Court of Appeals in both cases. Justice Samuel Alito’s majority opinion ruled that the “ministerial exception” covered both the decision to terminate Morrisey-Berru and Biel. Courts, he claimed, had to defer substantially to a religious organization’s understanding of what employees played essential roles is transmitting the faith. Why does Alito insist on substantial deference (and Justice Thomas on almost complete deference)? Why does he consider Morrissey-Berru and Biel to be subject to the ministerial exceptions? Does Justice Sonya Sotomayor dispute the deference or the application of the deference? Why does thing Morrissey-Berru and Biel do not fall under the ministerial exception? Is the dissent correct in thinking that the majority opinion abandons any effort to police religious employment? Suppose Morrissey-Berru claimed she was terminated because she was a person of color. Same result? Same voting alignment?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079bbc0be11eaacfacd2d37fb36e9) delivered the opinion of the Court.

. . . . The First Amendment protects the right of religious institutions “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”  Applying this principle, we held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the “ministerial exception” to laws governing the employment relationship between a religious institution and certain key employees. . . . The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

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The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters “ ‘of faith and doctrine’ ” without government intrusion.  State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.

The independence of religious institutions in matters of “faith and doctrine” is closely linked to independence in what we have termed “ ‘matters of church government.’ ”  This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

The “ministerial exception” was based on this insight. Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. . . . Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.

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. . . Simply giving an employee the title of “minister” is not enough to justify the exception. And by the same token, since many religious traditions do not use the title “minister,” it cannot be a necessary requirement. . . . For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. . . .

What matters, at bottom, is what an employee does. And implicit in our decision in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. . . . . Religious education is vital to many faiths practiced in the United States. In the Catholic tradition, religious education is “ ‘intimately bound up with the whole of the Church's life.’ ” . . . Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation. A core belief of the Puritans was that education was essential to thwart the “chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures.”. . . Religious education is a matter of central importance in Judaism. As explained in briefs submitted by Jewish organizations, the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith. . . . Religious education is also important in Islam. “[T]he acquisition of at least rudimentary knowledge of religion and its duties [is] mandatory for the Muslim individual.” . . . The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education, with roots in revelations given to Joseph Smith. . . . . Seventh-day Adventists “trace the importance of education back to the Garden of Eden.” Seventh-day Adventist formation “restore[s] human beings into the image of God as revealed by the life of Jesus Christ” and focuses on the development of “knowledge, skills, and understandings to serve God and humanity.”

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When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. . . . In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079bbc0be11eaacfacd2d37fb36e9), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079bbc0be11eaacfacd2d37fb36e9) joins, concurring.

. . . . I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations’ good-faith claims that a certain employee's position is “ministerial.”

This deference is necessary because, as the Court rightly observes, judges lack the requisite “understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.”  What qualifies as “ministerial” is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis.  Contrary to the dissent's claim, judges do not shirk their judicial duty or provide a mere “rubber stamp” when they defer to a religious organization's sincere beliefs.  Rather, they heed the First Amendment, which “commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine.”

Moreover, because the application of the exception turns on religious beliefs, the duties that a given religious organization will deem “ministerial” are sure to vary. Although the functions recognized as ministerial by the Lutheran school in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) are similar to those considered ministerial by the Catholic schools here, such overlap will not necessarily exist with other religious organizations, particularly those “outside of the ‘mainstream.’ ”  To avoid disadvantaging these minority faiths and interfering in “a religious group's right to shape its own faith and mission,” courts should defer to a religious organization's sincere determination that a position is “ministerial.”

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. . . . [T]he Religion Clauses do not permit governmental “interfere[nce] with ... a religious group's right to shape its own faith and mission through its appointments.”  To avoid such interference, we should defer to these groups’ good-faith understandings of which individuals are charged with carrying out the organizations’ religious missions.

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079bbc0be11eaacfacd2d37fb36e9), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079bbc0be11eaacfacd2d37fb36e9) joins, dissenting.

Two employers fired their employees allegedly because one had [breast cancer](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ib73a5554475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the other was elderly. Purporting to rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were “ministers” of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers’ claims, the Court skews the facts, ignores the applicable standard of review, and collapses [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

Our pluralistic society requires religious entities to abide by generally applicable laws.  Consistent with the First Amendment (and over sincerely held religious objections), the Government may compel religious institutions to pay Social Security taxes for their employees, deny nonprofit status to entities that discriminate because of race, require applicants for certain public benefits to register with Social Security numbers, enforce child-labor protections, and impose minimum-wage laws.

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The “ministerial exception” . . . is a judge-made doctrine. . . . When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their “ministers,” even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. . . . . When this Court adopted the ministerial exception, it affirmed the holdings of virtually every federal appellate court that had embraced the doctrine.  Those courts had long understood that the exception's stark departure from antidiscrimination law is narrow. Wary of the exception's “potential for abuse,” federal courts treaded “case-by-case” in determining which employees are ministers exposed to discrimination without recourse. That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees. This focus on leadership led to a consistent conclusion: Lay faculty, even those who teach religion at church-affiliated schools, are not “ministers.” . . .

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. . . . [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) declined to adopt a “rigid formula for deciding when an employee qualifies as a minister.” Rather, [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) focused on four “circumstances” to determine whether a fourth-grade teacher, Cheryl Perich, was employed at a Lutheran school as a “minister”: (1) “the formal title given [her] by the Church,” (2) “the substance reflected in that title,” (3) “her own use of that title,” and (4) “the important religious functions she performed for the Church.”  Confirming that the ministerial exception applies to a circumscribed sub-category of faith leaders, the Court analyzed those four “factors,”  to situate Perich as a minister within the Lutheran Church's structure.

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. . . . The Court starts with an unremarkable view: that [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s “recognition of the significance of ” the first three “factors” in that case “did not mean that they must be met—or even that they are necessarily important—in all other cases.”  True enough. One can easily imagine religions incomparable to those at issue in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and here. But then the Court recasts [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself: Apparently, the touchstone all along was a two-Justice concurrence. To that concurrence, “[w]hat matter[ed]” was “the religious function that [Perich] performed” and her “functional status.”  Today's Court yields to the concurrence's view with identical rhetoric. “What matters,” the Court echoes, “is what an employee does.”

But this vague statement is no easier to comprehend today than it was when the Court declined to adopt it eight years ago. It certainly does not sound like a legal framework. Rather, the Court insists that a “religious institution's explanation of the role of [its] employees in the life of the religion in question is important.”  But because the Court's new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.

Indeed, the Court reasons that “judges cannot be expected to have a complete understanding and appreciation” of the law and facts in ministerial-exception cases,  and all but abandons judicial review. Although today's decision is limited to certain “teachers of religion,” , its reasoning risks rendering almost every Catholic parishioner and parent in the Archdiocese of Los Angeles a Catholic minister. . . .

Today's decision thus invites the “potential for abuse” against which circuit courts have long warned.  Nevermind that the Court renders almost all of the Court's opinion in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable. . . . As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (or at least its majority opinion) condones such judicial abdication.

Faithfully applying [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s approach and common sense confirms that the teachers here are not Catholic “ministers” as a matter of law. This is especially so because the employers seek summary judgment, meaning the Court must “view the facts and draw reasonable inferences in the light most favorable to” the teachers.

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[N]either school publicly represented that either teacher was a Catholic spiritual leader or “minister.” Neither conferred a title reflecting such a position. Rather, the schools referred to both Biel and Morrissey-Berru as “lay” teachers, which the circuit courts have long recognized as a mark of nonministerial, as opposed to “ministerial,” status. . . . The title “teacher” does not convey ministerial status. Nor does the Court gain purchase from the disputed fact that Biel and Morrissey-Berru were “regarded as ‘catechists’ ” “ ‘responsible for the faith formation of the[ir] students.’ ” . . .

[N]either teacher had a “significant degree of religious training” or underwent a “formal process of commissioning.”  Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. . . . [N]either Biel nor Morrissey-Berru held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental, ceremonial, or administrative) available only to spiritual leaders. Nor does it matter that all teachers signed contracts agreeing to model and impart Catholic values. This component of the [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) inquiry focuses on outward-facing behavior, and neither Biel nor Morrissey-Berru publicly represented herself as anything more than a fifth-grade teacher. . . .

. . . . To be sure, Biel and Morrissey-Berru taught religion for a part of some days in the week. But that should not transform them automatically into ministers who “guide” the faith “on its way.” . . . Here, the time Biel and Morrissey-Berru spent on secular instruction far surpassed their time teaching religion. . . . In other words, both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination.

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. . . . [T]eaching religion in school alone cannot dictate ministerial status. If it did, then [*Hosanna-Tabor*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026844325&pubNum=0000708&originatingDoc=I5d9079bbc0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) wasted precious pages discussing titles, training, and other objective indicia to examine whether Cheryl Perich was a minister. . . . Were there any doubt left about the proper result here, recall that neither school has shown that it required its religion teachers to be Catholic. The Court does not explain how the schools here can show, or have shown, that a non-Catholic “personif[ies]” Catholicism or leads the faith.  Instead, the Court remarks that a “rigid” coreligionist requirement might “not always be easy” to apply to faiths like Judaism or variations of Protestantism.  Perhaps. But that has nothing to do with Catholicism.

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The Court's conclusion portends grave consequences. As the Government (arguing for Biel at the time) explained to the Ninth Circuit, “thousands of Catholic teachers” may lose employment-law protections because of today's outcome.  Other sources tally over a hundred thousand secular teachers whose rights are at risk. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers’ religious tenets.

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This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived “discrimination against religion.” *E.g.*, *Espinoza* v. *Montana Dept. of Revenue* (2020) Yet here it swings the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. . . .

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