# ESSAY

# PRESCRIPTIVE JURISDICTION, ADJUDICATIVE JURISDICTION, AND THE MINISTERIAL EXEMPTION

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## INTRODUCTION

On January 11, 2012, the Supreme Court decided the first significant case of the October 2011 Term, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[1] A unanimous Court held that a "called" teacher (a commissioned Lutheran minister) teaching secular subjects from a Christ-centered perspective could not prevail in an action challenging her termination under the Americans with Disabilities Act (ADA).[2]

The Court for the first time recognized the "ministerial exemption" to the ADA and other federal employment discrimination laws,[3] af-

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[1] 80 U.S.L.W. 4056 (2012).

[2] *Id.* at 4057-58, 4061-63; *see also* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 61-64 (2011) (describing the factual and procedural background of the case).

[3] *Hosanna-Tabor*, 80 U.S.L.W. at 4061.

firming the uniform position of the federal courts of appeals.[4] The exemption provides that, under the First Amendment, federal employment discrimination law does not apply to claims concerning the employment relationship between religious institutions and their ministerial employees.[5] Lower courts had defined ministerial employees broadly[6] to include not only the heads of religious organizations.[7] Instead, the exemption had been held also to cover anyone responsible for religious doctrine, teaching, and administration, including clergy,[8] religion, theology, and canon law scholars and teachers,[9] pastoral counselors,[10] ministerial administrators,[11] lay administrators,[12] and even organists and choir leaders.[13]

The exemption is justified as preventing constitutionally problematic second-guessing on ecclesiastical matters, thereby avoiding interference with the relationships between religious organizations and those who teach, speak, and minister on ecclesiastical and theological matters.[14] The exception also prevents secular courts from ordering a

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[4] *See id.* & n.2. Several circuits had addressed the issue. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010); Rweyemamu v. Cote, 520 F.3d 198, 204-09 (2d Cir. 2008); Schleicher v. Salvation Army, 518 F.3d 472, 474-75 (7th Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303-07 (3d Cir. 2006).

[5] *Hosanna-Tabor*, 80 U.S.L.W. at 4061. *See generally* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1975-76 (2007) [hereinafter Corbin, *Above the Law?*]; Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 106 NW. U. L. REV. COLLOQUY 96, 97 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/22/LRColl2011n22Corbin.pdf [hereinafter Corbin, *Irony*]; Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 156, 158-59 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/27/LRColl2011n27Horwitz.pdf [hereinafter Horwitz, *Act III*]; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 118-22 (2009) [hereinafter Horwitz, *Institutions*]; Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 48-49 (2008); Lund, *supra* note 2, at 21-23.

[6] *See* Corbin, *Above the Law?*, *supra* note 5, at 1976-77.

[7] *See Hosanna-Tabor*, 80 U.S.L.W. at 4061.

[8] *See Rweyemamu*, 520 F.3d at 200; *Petruska*, 462 F.3d at 304; McClure v. Salvation Army, 460 F.2d 553, 554 (5th Cir. 1972).

[9] *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457-58 (D.C. Cir. 1996).

[10] *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 224-25 (6th Cir. 2007).

[11] *See* Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 329-30 (4th Cir. 1997).

[12] *See* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1240 (10th Cir. 2010).

[13] Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006).

[14] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4063 (2012) ("The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."); *id.* at 4061 (de-

church to hire someone into a ministerial position or to pay someone whom it does not wish to hire or employ, typical remedies in employment discrimination cases.[15] Such a judicial order invades religious organizations' core mission of educating and forming their members, which depends on their ability to select those who minister and teach religious doctrine.[16]

The ministerial exemption is a specific application of the broader freedom of the church doctrine—also styled as the church autonomy doctrine—which recognizes the constitutional liberty of religious organizations to manage their institutions and limits the reach of secular or civil authority into their internal workings.[17] Church autonomy re-

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scribing the right of churches to control "selection of those who will personify its beliefs"); *see also* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1612 (arguing that government nonentanglement with religious groups includes leaving them the freedom to "organize themselves, define their mission, and choose their workers"); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/28/LRColl2011n28Garnett.pdf ("The 'ministerial exception' . . . is a clear and crucial implication of religious liberty, church autonomy, and the separation of church and state . . . ."); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 154 (2009) ("[T]he ministerial exception limits the power of the state to specify the content of the clerical office or the terms of the relationship between cleric and congregation.").

[15] *Hosanna-Tabor*, 80 U.S.L.W. at 4061.

[16] *See id.* at 4064 (Alito, J., concurring) (arguing that the First Amendment protects "certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith"); Berg et al., *supra* note 14, at 176 ("[The exemption] protects the fundamental freedom of religious communities to educate their members and form them spiritually and morally."); Lupu & Tuttle, *supra* note 14, at 120 (arguing that religious liberty protects churches' choice of leaders).

[17] *See* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952) (describing the freedom "to select the clergy" as emanating from "a spirit of freedom for religious organizations, an independence from secular control or manipulation"); *Skrzypczak*, 611 F.3d at 1242 n.4 ("Th[e] church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." (alteration in original) (quoting Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002))); *see also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 53-54 (1998) ("[T]he autonomy of the [religious] group is nonetheless protected [by the Establishment Clause] from interference by whatever value preferences that modern society seeks to impose . . . ."); Richard W. Garnett, *"Things That Are Not Caesar's": The Story of* Kedroff v. St. Nicholas Cathedral (arguing that church autonomy commands the ministerial exemption), *in* FIRST AMENDMENT STORIES 171, 187-89 (Richard W. Garnett & Andrew Koppelman eds., 2011); Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom* [hereinafter Garnett, *Religious Liberty*] ("[T]he Constitution guarantees religious freedom not only to individual believers but also to the Church as an organized society with its own law and jurisdiction." (internal quotations marks

quires that secular authority keep its "hands off" matters of faith, religious doctrine, theological pronouncements, the structure and internal governance of religious institutions, and other matters of the spiritual domain.[18] The doctrine previously manifested itself in a series of Supreme Court decisions involving disputes over church property. As the Court recognized in *Hosanna-Tabor*, these cases confirm that there are limits on the government's power to interfere with a church's determination of who can minister.[19]

The church autonomy doctrine's limitations on state authority ensure a structural balance separating church and state as competing sovereigns within American society, each with irreducible authority in its own "sphere."[20] The First Amendment ensures the "penultimacy of the state," and the ultimacy of the church, in those areas in which the church must predominate,[21] as well as the converse in those areas in

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omitted)), *in* CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 271 (John Witte, Jr. & Frank S. Alexander eds., 2010); 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, 1373 (1981) (arguing that "churches have a constitutionally protected interest in managing their own institutions free of government interference"); Lund, *supra* note 2, at 10 ("The ministerial exception arises from the conflict between employment laws and constitutional principles of church autonomy."); Lupu & Tuttle, *supra* note 14, at 120 (arguing that the First Amendment protects control over internal affairs of religious organizations).

[18] *See Hosanna-Tabor*, 80 U.S.L.W. at 4061 (describing church control over "internal governance" as a means of "protect[ing] a religious group's right to shape its own faith and mission"); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 854 (2009) [hereinafter, Garnett, *Hands-Off*] ("The hands-off rule, then, is . . . a rule that state actors should not render *religious* decisions . . . ."); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) ("[S]ecular courts must not determine questions of religious doctrine and practice."); Lund, *supra* note 2, at 12 ("By requiring the government to stay out of religious affairs, the Constitution commits matters of religious belief and practice exclusively to the private sphere."); *see also* Rweyemamu v. Cote, 520 F.3d 198, 204-05 (2d Cir. 2008) (stating the general rule that courts cannot interfere with religious organizations' choices about clergy).

[19] *Hosanna-Tabor*, 80 U.S.L.W. at 4059-60.

[20] *See* Garnett, *Hands-Off*, *supra* note 18, at 849 (describing the constitutional mandate that secular and religious authorities "'not interfere with each other's respective spheres of choice and influence'" (quoting EUGENE VOLOKH, THE FIRST AMENDMENT 916-21 (2d ed. 2005))); Horwitz, *Act III*, *supra* note 5, at 161 ("[C]ourts, and the state itself, are simply not authorized to intervene in life at the heart of churches."); Horwitz, *Institutions*, *supra* note 5, at 83, 107-08 (applying the theory of "sphere sovereignty" to the ministerial exception); Lupu & Tuttle, *supra* note 14, at 121 (arguing that the religion clauses "limit[] government to the secular and temporal, and foreclos[e] government from exercising authority over the spiritual domain").

[21] Kalscheur, *supra* note 5, at 91.

which the state should predominate.[22] It reflects the injunction to "render unto Caesar the things which are Caesar's, and unto God the things that are God's."[23]

Prior to *Hosanna-Tabor*, the courts of appeals uniformly recognized some form of ministerial exemption.[24] Even the EEOC and the plaintiff in *Hosanna-Tabor* acknowledged that the First Amendment prohibited the core case of federal law requiring ordination of women by the Catholic Church or by an Orthodox Jewish seminary.[25] The divide was over the exemption's scope beyond that core—how to define minister, and whether the exemption should extend beyond those who perform core, basic religious functions to actors on the periphery, such as lay teachers.[26] While the Supreme Court recognized the exemption, it declined to adopt a "rigid" formula for defining a minister, leaving harder questions for another day and concluding simply that the teacher in this case did qualify, based on her title, religious training, self-identification, and job functions.[27]

A second open issue surrounded the ministerial exemption prior to *Hosanna-Tabor*: its proper jurisdictional characterization. Is the exemption a jurisdictional limitation or an aspect of the merits of a claim? Does it reflect a First Amendment limitation on the reach of substantive secular law into matters of faith, doctrine, and church governance? Or does it limit the adjudicative jurisdiction of the courts in which such disputes might be resolved? Put differently, if and when the ministerial exemption defeats a claim in federal court, does the claim fail because the court lacks subject matter jurisdiction or because the plaintiff's claim fails on the merits?

Lower courts divided on this issue along multiple, confusing, and often incoherent lines. Some circuits treated it as a question of the trial court's subject matter jurisdiction, resolvable on a Rule 12(b)(1) motion.[28] Other circuits treated it as a merits issue.[29] Still other cir-

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[22] *See* Horwitz, *Act III*, *supra* note 5, at 161 ("This allocation of authority is not intended to signal the primacy of churches or the inferiority of the state. It is a double-sided settlement . . . .").

[23] *Matthew* 22:21.

[24] *See supra* text accompanying note 4.

[25] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4061 (2012).

[26] *See* Lund, *supra* note 2, at 64-65. *Compare* Horwitz, *Act III*, *supra* note 5, at 163-64 & nn.34-36, *with* Corbin, *Irony*, *supra* note 5, at 103-06.

[27] *Hosanna-Tabor*, 80 U.S.L.W. at 4061-63.

[28] *See, e.g.*, McCants v. Alabama-West Fla. Conf. of the United Methodist Church, Inc., No. 09-13316, 2010 WL 1267160, at *3 (11th Cir. Apr. 5, 2010); EEOC v. Hosanna-

cuits had not taken an explicit position, simply taking cases as the district court characterized them, whether as merits determinations,[30] jurisdictional dismissals,[31] or without characterization.[32] And one circuit actually had contradictory panel decisions.[33] The few scholars to engage the question had argued that it was a limit on the jurisdiction of the court,[34] or at least described it with jurisdictional rhetoric.[35]

The Supreme Court did not grant certiorari on the characterization question, nor did the issue arise during oral argument. Nevertheless, the Court noted and resolved the conflict in short order in a footnote, stating:

> [T]he exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. This is because the issue presented by the exception is "whether the allegations the plaintiff makes entitle him to relief," not whether the court has "power to hear [the] case." . . . District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception."[36]

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Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 775-76 (6th Cir. 2010); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006); Combs v. Cent. Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 345, 350-51 (5th Cir. 1999).

[29] *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1242 (10th Cir. 2010); Petruska v. Gannon Univ., 462 F.3d 294, 302-03 (3d Cir. 2006); Werft v. Desert Sw. Annual Conf. of the United Methodist Church, 377 F.3d 1099, 1104 (9th Cir. 2004) (per curiam); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989); *see also* Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008) ("The fact that enforcement of the [Fair Labor Standards Act] in a particular case would entangle the court in an ecclesiastical controversy would be a compelling reason to dismiss that case, but not a reason founded on a lack of jurisdiction over a plaintiff's claim . . . .").

[30] *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 361-62 (8th Cir. 1991).

[31] *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 201 (2d Cir. 2008).

[32] *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996).

[33] *Compare* Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 329 (4th Cir. 1997) (affirming jurisdictional dismissal), *with* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985) (affirming merits dismissal based on statutory interpretation).

[34] *See* Kalscheur, *supra* note 5, at 81 (arguing that the requirement that courts decline review of ministerial employment cases "seems to be another way of saying that the Constitution removes . . . the subject-matter jurisdiction").

[35] *See* Esbeck, *supra* note 17, at 44 ("It is helpful to envision the scope of this jurisdictional bar as a sphere within which the Supreme Court has stated that churches may operate free of civil constraints."); Lupu & Tuttle, *supra* note 14, at 121 ("[T]he Religion Clauses are primarily jurisdictional . . . ."); *id.* at 146 (arguing that courts should not be "vest[ed] with jurisdiction to decide on the quality of a minister's job performance").

[36] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4063 n.4 (2012) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010)).

In doing so, the Roberts Court continued its recent jurisprudential project of correcting "profligate" and "less than meticulous" use of the word jurisdiction in the lower courts, while signaling to lower courts the need to avoid issuing jurisdictional rulings that are not, upon fuller analysis, truly jurisdictional.[37] It also marked the second time in recent years that the Court resolved a circuit split on a jurisdiction/merits issue in passing in a case in which jurisdictionality was not directly in play. Two terms ago, the Court made a two-page detour to pronounce the merits character of the extraterritoriality of federal securities fraud statutes.[38] This time, the Court did it in a footnote.

*Hosanna-Tabor* correctly characterized the ministerial exemption as a limitation on the merits of the employment discrimination claim. I repeatedly argued for this position before the Court entered the mix,[39] including in this Essay, which was written and accepted for publication in October 2011 (before the Court discovered unanimity and thus was able to decide the case fairly quickly). But the Court's jurisdictionality footnote was entirely conclusory, failing to explain why the issue controls whether the plaintiff's allegations entitle him to relief rather than whether the court has power to hear the case.

It thus remains to unpack why the exemption is, in fact, a merits doctrine. First, doing so demonstrates the correctness of the conclusion in *Hosanna-Tabor*, putting to rest any normative dispute on the issue. Second, mischaracterization of the ministerial exemption resulted from the same category errors that plague characterization of other legal issues; this issue illustrates nicely the routine conflation of jurisdiction and merits and courts' failure to maintain clean lines between doctrines and underlying concepts.[40] While the Court's conclu-

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[37] Arbaugh v. Y & H Corp., 546 U.S. 500, 510-11 (2006); *see also* Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 947-48 (2011) [hereinafter Wasserman, *Drive-by*]; Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 311, 315-16 (2012) [hereinafter Wasserman, *Revival*].

[38] *Morrison*, 130 S. Ct. at 2876-77.

[39] *See* Howard Wasserman, *Characterizing the Ministerial Exemption, Again*, PRAWFSBLAWG (Apr. 4, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/04/characterizing-the-ministerial-exemption-again.html; Howard Wasserman, *Tenth Circuit Gets Ministerial Exemption Right, Appellate Procedure Wrong*, PRAWFSBLAWG (July 20, 2010), http://prawfsblawg.blogs.com/prawfsblawg/2010/07/tenth-circuit-gets-ministerial-exemption-right-appellate-procedure-wrong.html [hereinafter Wasserman, *Tenth Circuit*].

[40] *See generally* Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547 (2008); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227 (2008) [hereinafter Wasserman, *Non-Extant Rights*]; Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579 (2007); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) [hereinafter, Wasserman, *Jurisdiction and Merits*].

sion that the exemption is merits-based might be enough to signal lower courts on future jurisdictionality issues, actual analysis and explanation may better enable them to understand and recognize the limits of what goes to jurisdiction and, inversely, the breadth of what goes to substantive merits.

This Essay, I hope, provides that analysis.

## I. JURISDICTION AND DISABILITIES

The *Hosanna-Tabor* Court reached the correct conclusion about the jurisdictionality of the ministerial exemption: it is a constitutional affirmative defense to an otherwise cognizable employment discrimination claim that defeats the claim on the merits.[41] But the Court did not provide the normative foundation for that conclusion, which is what this Part sets out to do.

Our starting point must be to define "merits," which we can do in any of four ways.

The first definition asks whether a provision of federal law "reaches" the defendant's conduct, meaning it "prohibits" that conduct.[42] As I have argued previously, the "same idea may be framed as whether the statute applies to, binds, legally constrains, or controls some actor or conduct."[43]

Second, and relatedly, we could ask whether the creator of a legal rule—most notably Congress—has "asserted regulatory power over the challenged conduct."[44] This could ask either whether the legislature did assert regulatory power over some actors or conduct, or whether it constitutionally could assert regulatory power over those actors or conduct.

Third, we could say that merits issues dictate "who is entitled to sue whom, for what, and for what remedy."[45] A plaintiff prevails on her claim when applicable law permits her to sue this defendant for this conduct and entitles her to this remedy; she fails on her claim if applicable law does not permit suit against this defendant for this conduct or for this remedy.

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[41] *Hosanna-Tabor*, 80 U.S.L.W. at 4061, 4063 n.4.

[42] *Morrison*, 130 S. Ct. at 2877.

[43] Wasserman, *Drive-by*, *supra* note 37, at 950.

[44] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

[45] John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); *see also* Wasserman, *Non-Extant Rights*, *supra* note 40, at 236 ("The substantive merits of a legal claim of right focus on who can sue whom over what real-world conduct and for what remedy under applicable law.").

Finally, we can frame the concept in Hohfeldian terms.[46] The merits of a claim ask whether the legal rule under which the plaintiff sues establishes a right in her and imposes a duty on the defendant, and whether the defendant's conduct was inconsistent with that duty, violating the plaintiff's rights and entitling her to some remedy.[47] A plaintiff prevails if she can show a violation of a right-duty combination on the facts at issue.

Ultimately, all four framings get at the same idea: merits turn on whether an enforceable legal rule exists as law that protects the plaintiff; controls the defendant; regulates the conduct, transaction, or occurrence at issue; and renders the defendant liable to the plaintiff for some remedy.

### A. *The Many Faces of Jurisdiction*

The conception of church and state as competing, coexisting sovereigns has long been framed in jurisdictional terms. John Calvin spoke of two sovereigns, one religious and one civil, given "the not inappropriate names of spiritual and temporal jurisdiction."[48] In *A Letter Concerning Toleration*, John Locke similarly spoke of matters belonging to the church and the worship of God being "removed out of the reach of the magistrate's jurisdiction."[49] The *Hosanna-Tabor* Court looked to James Madison for the same idea. As President, in vetoing a bill that would have incorporated the Protestant Episcopal Church, Madison emphasized "the essential distinction between civil and religious functions."[50]

Modern law-and-religion scholars similarly speak of the First Amendment in power terms, that is, as deriving from churches' sovereign nature and limiting the state's authority to secular and temporal

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[46] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (describing the theory of legal relations).

[47] *See id.* at 32 (explaining the correlation between rights and duties); *see also* Wasserman, *Non-Extant Rights*, *supra* note 40, at 236 (describing Hohfeld's theory).

[48] 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 140 (Henry Beveridge trans., 1953) (1536); *see also* Horwitz, *Institutions*, *supra* note 5, at 83-84, 107 (describing theory of "sphere sovereignty").

[49] JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans. 1689), *available at* http://www.constitution.org/jl/tolerati.htm.

[50] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4060 (2012) (quoting 22 ANNALS OF CONG. 982-83 (1811) (veto statement of President James Madison)).

concerns.[51] The First Amendment thus imposes a "jurisdictional bar"[52] that limits the reach of civil jurisdiction over spiritual matters.[53]

Therein lies the source of the confusion. Jurisdiction, Evan Lee argues, means "something like legitimate authority."[54] But there are many forms of legitimate authority—or jurisdiction—vested in many distinct legal bodies and actors. Simply labeling the ministerial exemption as jurisdictional is imprecise; the question is "legitimate authority in whom to do what."[55] This sets up two fundamental, overlapping distinctions that drive the merits/jurisdiction divide generally and the ministerial exemption in particular.

### 1. Adjudicative Jurisdiction and Prescriptive Jurisdiction

The first distinction is between adjudicative or judicial jurisdiction on the one hand, and prescriptive or legislative jurisdiction on the other.

Prescriptive jurisdiction is the power of secular rulemakers to prescribe legal rules and to regulate real-world behavior. It can be understood under any of our definitions: as the power to assert regulatory authority over some actors and to prohibit or regulate some conduct; as the power to establish Hohfeldian rights and duties; or as the power to determine who can sue whom for what primary conduct.[56] The most common wielder of prescriptive jurisdiction is the legislature, which bears primary responsibility for establishing prospective legal rules of general applicability to real-world behavior.

The Constitution primarily deals in prescriptive jurisdiction. It speaks to Congress's authority to prescribe legal rules, establishing internal limits (e.g., the requirement that regulated conduct affect interstate commerce, or the limits on congressional power under § 5 of the Fourteenth Amendment[57]) and external limits (e.g., the First Amend-

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[51] *See e.g.*, Horwitz, *Act III*, *supra* note 5, at 158-59 (citing Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8).

[52] Esbeck, *supra* note 17, at 49; Kalscheur, *supra* note 5, at 63, 88.

[53] *See* Lupu & Tuttle, *supra* note 14, at 121 ("[T]he Religion Clauses are primarily jurisdictional, limiting government to the secular and temporal, and foreclosing government from exercising authority over the spiritual domain.").

[54] Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003).

[55] Wasserman, *Non-Extant Rights*, *supra* note 40, at 261.

[56] *See* Wasserman, *Non-Extant Rights*, *supra* note 40, at 236 (considering jurisdiction under each framework); *supra* text accompanying notes 42-47.

[57] *See* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *id.* amend. XIV, § 5 (power to enforce § 1 of the Fourteenth Amendment); *see also* United States v. Morrison, 529 U.S. 598, 607, 609, 619-20 (2000) (discussing limits on Congress's prescriptive power under both provisions).

ment freedom of speech, or Fourteenth Amendment Equal Protection[58]) on that power. These limits operate as what Matthew Adler and Michael Dorf call constitutional "existence conditions."[59] For a subconstitutional legal rule, such as a statute, to come into existence as valid and enforceable law, it must satisfy certain constitutional conditions, notably legislative enactment in compliance with these internal and external limits.[60] Any rule that does not satisfy those constitutional conditions does not exist as law; it is nonlaw.[61] Most constitutional provisions (e.g., the Commerce Clause or the First Amendment) function as existence conditions: where a purported subconstitutional rule conflicts with an internal or external constitutional limit on legislative power, it never comes into existence as law, and never becomes a valid and enforceable rule regulating real-world conduct.[62] No legal rule reaches (prohibits) the conduct at issue, and no right/duty combination ever comes into existence as law.[63]

Constitutional existence conditions limit prescriptive jurisdiction. They deprive the government of jurisdiction—legitimate authority—to enact legal rules that are inconsistent with those conditions, and any legal rule or right/duty combination purportedly created does not exist as law. This is true both where the legislature enacts a rule that must be rejected as unconstitutional for exceeding the limits of the existence condition, and where the legislature, recognizing the constitutional limits on its prescriptive power, declines to enact a legal rule or enacts a narrower legal rule where a broader rule would exceed constitutional limits.[64]

The key, however, is that nonexistence of a legal rule does not deprive a court of judicial jurisdiction to adjudicate a claim under appropriate law. A claim of right fails because there is no legal rule—

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[58] U.S. CONST. amend. I; *id.* amend. XIV; *see also* Wasserman, *Non-Extant Rights*, *supra* note 40, at 252-55 (describing external limitations the Constitution places on Congress's legislative power).

[59] Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1108 (2003).

[60] *See id.* at 1120 ("[A] constitutional provision is an existence condition for that type of law if no proposition can be law of that type unless the provision is satisfied.").

[61] *Id.*

[62] *See id.* at 1113 (arguing that the First Amendment "can also be understood as setting forth existence conditions for legislation"); *id.* at 1154 ("All agree (tacitly) that [the Commerce Clause] states an existence condition.").

[63] *See supra* text accompanying notes 42-47.

[64] *See* Wasserman, *Non-Extant Rights*, *supra* note 40, at 244-45, 250-55 (providing examples of both situations).

and no right/duty combination—to be enforced, which results in the failure on the merits of any claim brought under that purported rule.

The First Amendment regularly functions as an existence condition for subconstitutional legal rules and a limit on legislative authority to enact those rules. Consider, for example, *Bartnicki v. Vopper*.[65] The Court held that an individual could not be liable for damages under federal wiretap statutes for disseminating an unlawfully intercepted telephone conversation where the defendant was not involved in the interception.[66] The First Amendment broadly protected dissemination of truthful, lawfully obtained information on a matter of public concern, and vested defendants with a constitutional liberty to publish such information free from legal constraint.[67] The statute prohibiting the defendant's conduct thus did not exist as law because it failed to satisfy the First Amendment existence condition. The wiretap statute exceeded constitutional limits on Congress's prescriptive jurisdiction and thus could not reach the defendant or his conduct.[68]

Similarly, the entire regime of First Amendment defamation law established in *New York Times Co. v. Sullivan*[69] and its progeny imposes an existence condition on state defamation law. No existing legal rule allows a public figure to recover for defamation absent a showing of actual malice proven by clear and convincing evidence.[70] Stated differently, a subconstitutional legal rule without those protections exceeds the prescriptive jurisdiction of the institution charged with establishing defamation rules; such a rule cannot exist as law given First Amendment requirements. Defamation is perhaps unique in that, as a common law legal rule, courts—rather than legislatures—exercise prescriptive jurisdiction. But that distinction is immaterial; the point is that the First Amendment imposes a limit on the authority to prescribe substantive legal rules, regardless of who may exercise that power.[71]

The ministerial exemption should be understood in similar terms, given that cases arise in an identical procedural posture—the First Amendment provides a defense in a civil action brought under a sub-

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[65] 532 U.S. 514 (2001).

[66] *Id.* at 518.

[67] *Id.* at 525, 527-28.

[68] Wasserman, *Non-Extant Rights*, *supra* note 40, at 253-54.

[69] 376 U.S. 254 (1964).

[70] *Id.* at 285-86.

[71] Many of the foundational church autonomy cases involved property disputes grounded in state common law. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *see also* Horwitz, *Institutions*, *supra* note 5, at 116 (discussing early church property disputes).

constitutional rule. The ministerial exemption limits the right/duty combinations that Congress can create between religious organizations and their ministerial employees, as well as the conduct that Congress, exercising its prescriptive jurisdiction, can prohibit in that relationship. In other words, it is accurate to say that the First Amendment erects a "jurisdictional bar," so long as we understand that the jurisdiction barred is Congress's prescriptive or legislative jurisdiction to enact legal rules regulating some real-world conduct.

Closely related to prescriptive jurisdiction is enforcement jurisdiction—the power of the executive or an executive-branch agency to enforce legislatively enacted legal rules. In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court considered whether the NLRB, the agency charged with enforcing the National Labor Relations Act (NLRA), possessed statutory authority to order the Catholic Diocese to recognize and bargain with a union representing lay teachers in diocesan schools.[72] The Court held that the Board lacked such power, at least absent a "clear expression of Congress' intent" to confer that authority,[73] given that Board enforcement would "'almost necessarily'" create First Amendment problems in that situation.[74]

The *Catholic Bishop* Court spoke in jurisdictional terms, albeit inconsistently. At times, it framed the issue as whether teachers at church-operated schools are "covered by the Act,"[75] which sounds in the merits realm of the reach of the statute. At other times, the Court framed the issue as whether teachers in church-operated schools were brought "within the jurisdiction of the Board."[76] The problem, even then, was the Court's less-than-meticulous use of key terms.[77] Asking whether the Board has jurisdiction really asks whether the executive has the authority to enforce the NLRA against the actors and conduct at issue. This, in turn, depends on (1) whether the Board is, in fact, the agency vested with enforcement authority,[78] and (2) whether the

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[72] 440 U.S. 490, 491 (1979).

[73] *Id.* at 507.

[74] *Id.* at 496 (quoting NLRB v. Catholic Bishop of Chi., 559 F.2d 1112 (7th Cir. 1977)).

[75] *Id.* at 504.

[76] *Id.* at 507.

[77] *See supra* text accompanying note 37.

[78] Take an admittedly simple example. Imagine a person given a traffic ticket by the police of Municipality *A* when his car was parked illegally in Municipality *B*. The ticket would be invalid and the prosecution would fail—not because any court was without jurisdiction and not because Municipality *A* lacked the authority to regulate parking, but because the police in Municipality *A* lacked enforcement authority under the parking laws of Municipality *B*.

substantive provisions of the Act reach the actors and events at issue. The latter question turns on the scope of the prescriptive jurisdiction that Congress could or did exercise in enacting the law in the first place. In other words, it asks whether the Catholic Church can be regulated under the terms of the NLRA, regardless of who the enforcing body or entity is.

The relevant executive enforcement agency for employment discrimination law is the EEOC, which possesses statutory authority to investigate and bring civil actions against violators of federal employment discrimination laws.[79] Like the NLRB, the EEOC's enforcement power depends on the existence of conduct subject to the reach of the underlying statute. Thus, the agency's power to institute an action is, in one respect, coextensive with that of a private plaintiff: both depend on the merits issue of the existence of enforceable substantive law violated by real-world conduct. Absent existing law that reaches and regulates the conduct at issue, there is nothing for the EEOC to enforce. As in *Catholic Bishop*, the First Amendment's religion clauses affect the statute's reach and, therefore, the EEOC's enforcement authority.

Prescriptive jurisdiction, and its corresponding enforcement jurisdiction, contrasts with adjudicative jurisdiction. The latter is a court's root power to adjudicate—to hear and resolve legal and factual issues under substantive legal rules, and to provide the adjudicative and remedial forum to resolve claims of right. Adjudicative jurisdiction has nothing to do with the ultimate success of a claim on its merits, but rather focuses solely on whether the court has the power to provide a forum for considering and resolving the legal and factual disputes under those rules in either direction.[80]

Failure to distinguish prescriptive jurisdiction from adjudicative jurisdiction is the fundamental flaw in the adjudicative jurisdiction approach to the ministerial exemption. Greg Kalscheur and others frequently emphasize the jurisdictional referent in church autonomy and in the religion clauses, speaking of limits on "federal jurisdiction"

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[79] *See* 42 U.S.C. § 2000e-5(f)(1) (2006) (granting the EEOC authority to investigate and initiate civil actions to enforce Title VII); 42 U.S.C. § 12117 (cross-referencing § 2000e and granting the EEOC the same authority to enforce the ADA). The EEOC initiated the civil action in *Hosanna-Tabor*, and the former employee, Cheryl Perich, intervened. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4058 (2012).

[80] Wasserman, *Drive-by*, *supra* note 37, at 948; Wasserman, *Non-Extant Rights*, *supra* note 40, at 261.

or "civil jurisdiction" or of constitutional limits on the jurisdiction of civil or secular government and authority.[81]

Again, however, a court's jurisdiction to adjudicate a case under existing substantive law is different from Congress's jurisdiction to bring that substantive law into existence in the first place. The ministerial exemption is indeed a constitutional bar on civil jurisdiction. But the bar is not on the court's civil jurisdiction to decide the case before it, but on Congress's civil jurisdiction to enact legal rules regulating churches' conduct toward ministerial employees. The nonexistence of an enforceable legal rule means the statutory claim to enforce that rule fails—on the merits.

### 2. Adjudicative Disabilities and Regulatory Disabilities

The difference between types of jurisdiction maps onto a second distinction—between adjudicative disabilities and regulatory disabilities. An adjudicative disability means courts are disabled from adjudicating—from hearing and resolving the legal and factual issues presented—because of an absence of adjudicative jurisdiction. A regulatory disability means government institutions, especially legislatures, are disabled from enacting legal rules that regulate particular real-world conduct and actors, and it arises from an absence of prescriptive jurisdiction.

Scholars routinely speak of the religion clauses as imposing an adjudicative disability or a limit on judicial competence.[82] Courts must avoid deciding, or even inquiring into, ecclesiastical matters.[83] To be sure, there is an adjudicative disability at work with the ministerial exemption. A court will be unable to conclude that a ministerial employee suffered discrimination. It cannot enter a judgment in favor of a ministerial employee plaintiff or grant her a remedy or relief for the harm she suffered; it can do nothing but reject a ministerial employee's claims. That disability preserves the necessary area of church authority over spiritual matters and avoids secular entanglement in those issues.

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[81] *See* Kalscheur, *supra* note 5, at 81-85, 91-95; *supra* note 35; *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) (discussing First Amendment limits in jurisdictional terms).

[82] *See* Esbeck, *supra* note 17, at 6 (describing First Amendment–imposed limits on judicial "competence"); Lupu & Tuttle, *supra* note 14, at 122 ("[T]he Constitution disables civil courts from resolving certain classes of questions. This is an adjudicative disability . . . .").

[83] *See* Schleicher v. Salvation Army, 518 F.3d 472, 474 (7th Cir. 2008) ("Blocking such inquiries—such entanglements of the secular courts in religious affairs—is one of the grounds on which the ministers exception was devised . . . .").

But the limitation on judicial decisionmaking is incidental to the broader limitation on legislative power and on the reach and scope of the substantive law Congress can enact. The First Amendment disables all secular law and all secular institutions from regulating the church's actions on matters of faith, structure, and membership, placing these matters entirely beyond the authority of the state.[84] The judiciary is implicated only because that is the forum in which secular legal rules are enforced. But the judicial limitation arises not from an absence of core adjudicative power, but from an absence of existing legal rules to be applied and enforced, which in turn arises from an absence of prescriptive authority to enact those rules. The problem, in other words, is not that courts are barred from evaluating a priest's job performance or from ordering his reinstatement; it is that secular lawmaking institutions are barred from enacting rules that provide a legal basis for evaluation or reinstatement.

Thomas Berg captured this best in insisting that the ministerial exemption rests fundamentally on substantive nonentanglement—which frees religious organizations to organize themselves, define their mission, and choose their workers without undue government interference—and not merely decisional nonentanglement.[85] The point is not that the First Amendment should not countenance judicial inquiries into matters of faith and religious structure; it is that the First Amendment should not countenance substantive law regulating matters of faith and religious structure, such as who can minister the gospel.[86] That is the "realm[] the law is not free to enter."[87]

As discussed earlier, the First Amendment can impose a regulatory disability and limit prescriptive jurisdiction in either of two ways—by causing Congress to legislate narrowly in light of constitutional concerns or by invalidating any rule Congress did enact.[88] Put another way, either Congress did not exercise its prescriptive authority to reach the conduct at issue or Congress exceeded that authority by attempting to regulate that conduct. Prior to *Hosanna-Tabor*, circuits adopting the merits view of the ministerial exemption had divided over how ex-

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[84] *See* Lund, *supra* note 2, at 35 (describing areas with which the "government should be flatly barred from interfering").

[85] Berg, *supra* note 14, at 1612-13; *see also* Lupu & Tuttle, *supra* note 14, at 120 (arguing for a focus on Congress's "regulatory capacity").

[86] *See* Esbeck, *supra* note 17, at 44 (describing the "sphere" within which "churches may operate free of civil constraints"); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4061 (2012).

[87] Horwitz, *Act III*, *supra* note 5, at 162.

[88] *See supra* text accompanying note 64.

actly it operated. Some treated it as a First Amendment affirmative defense to the claim.[89] Others interpreted the applicable federal statute narrowly in light of First Amendment problems (as in *Catholic Bishop*) and read the limitation into the statute itself; Congress was deemed not to have asserted regulatory authority or to have reached the church/minister relations in its statutory enactment.[90]

*Hosanna-Tabor* clearly resolved this point, holding the ministerial exemption to be constitutionally grounded in both religion clauses and to work as an affirmative defense that defeats the statutory discrimination claim.[91] In other words, the First Amendment stripped Congress of its authority to regulate the employment relationship between churches and ministers, rendering the ADA unconstitutional in the case at hand.

While it is helpful that the *Hosanna-Tabor* Court took a firm stance on how the prescriptive limitation functions, it made no difference to the broader conclusion that the exemption derives from a prescriptive limitation and is thus a merits doctrine. Under the Court's position, Congress exercised its regulatory jurisdiction, but the statute exceeded that jurisdiction by attempting to control the employment relationship between the church and its ministerial employees in a way inconsistent with the First Amendment. Under the alternative approach, Congress would be deemed to have declined to exercise regulatory jurisdiction that it lacked in any event, likely recognizing the First Amendment–imposed limits on its legislative authority. The end point is always that no legal rule exists as law protecting the minister plaintiff, regulating the church defendant, or imposing liability on the church defendant for its employment decisions as to the ministerial employee. And the claim brought to enforce that nonexistent rule must fail.

### B. Hosanna-Tabor *and the Ministerial Exemption*

With these two distinctions in mind, *Hosanna-Tabor* becomes an easy case on the jurisdictionality issue.

Cheryl Perich was a teacher at a Lutheran-affiliated school.[92] She began as a lay teacher and became a called teacher one year later, hav-

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[89] *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 208-09 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303-04 (3d Cir. 2006).

[90] *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972).

[91] *Hosanna-Tabor*, 80 U.S.L.W. at 4063 n.4.

[92] *Id.* at 4057-58.

ing completed colloquy classes on the Christian faith.[93] With her call, she received a certificate of admission into the teaching ministry and received the title of "commissioned minister."[94] Her teaching duties remained the same before and after receiving her call; she taught a range of secular subjects in kindergarten and fourth grades, while also leading religious observance and instruction.[95] The school sought to provide a "Christ-centered education" that incorporated God and religion into all its subjects.[96]

Perich took several months off while suffering from narcolepsy; the school objected when she sought to return to her teaching duties.[97] A dispute followed, which ultimately resulted in the school offering Perich a peaceful release from her duties, which meant resigning her call; Perich refusing; and the church rescinding the call.[98] The church viewed her insubordination and threats to sue as violations of Lutheran doctrines requiring internal resolution of all religious disputes.[99] After Perich filed a charge with the EEOC, the EEOC filed a civil action against the church, and Perich intervened as a plaintiff.[100]

There should be no question that there was a statutory basis for subject matter jurisdiction in federal district court. The claim was one under the ADA, a federal statute; it therefore was a civil action "arising under" the laws of the United States.[101] The district court also could adjudicate the case as a civil action "brought under" the ADA.[102] Given these statutory grants of authority, the district court had subject matter jurisdiction. Whether the plaintiff's claim ultimately succeeds or fails must be beside the adjudicative jurisdictional point.

The real question was the breadth of the ministerial exemption, but the Supreme Court identified a broad constitutional exception that barred Perich's ADA claims.[103] In other words, the First Amendment imposed a regulatory disability on Congress, depriving it of pre-

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[93] *Id.* at 4058.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 4057.
[97] *Id.* at 4058.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] 28 U.S.C. § 1331 (2006); *see also* Wasserman, *Jurisdiction and Merits*, *supra* note 40, at 695-96 (offering definitions of "arising under").
[102] 42 U.S.C. §§ 12117(a), 2000e-5(f)(3).
[103] *Hosanna-Tabor*, 80 U.S.L.W. at 4061-63.

scriptive authority to enact the ADA and to regulate a church-affiliated school in its employment relationship with the minister-plaintiff.

We can explain this conclusion through any conception of merits. We could say that the ADA does not—and cannot, in light of the First Amendment—reach the church-operated school's conduct toward Perich; this, the *Morrison* Court told us, is the same as saying that the ADA does not, and cannot, prohibit the church's conduct as to this employee. Or we could say that Congress did not, and could not, assert regulatory authority over the church school as to its employment relationships with a commissioned minister such as Perich. Or, in Hohfeldian terms, no right-duty correlative was breached. Perich, as a commissioned minister, had no secular right not to be fired by the church for reasons related to her functions, and Hosanna-Tabor had no secular duty not to fire her for such reasons. Or we could say that Perich, or the EEOC on her behalf, could not sue the church for its employment decisions seeking reinstatement or back pay because she was a ministerial employee.

The point is that no statutory rule exists as law subjecting the church-operated school for this employment decision affecting this employee. The EEOC and Perich's civil action to enforce such a nonexistent rule fails, a failure on the merits under any of our definitions.

On the other hand, had the *Hosanna-Tabor* Court held that the ministerial exemption did not apply on the facts at hand—because, for example, Perich was not a minister—application of the ADA would have been constitutional. And we could frame it as the converse of the merits definitions: the ADA does, and can, reach the church and prohibit it from firing Perich because of her disability; Congress did, and could, assert regulatory authority over a church-operated school as to this employment relationship; Perich does have a secular right not to be fired for her disability, the church does have a secular duty not to do so, and that right/duty correlative was breached on the facts at hand. Perich could sue the church for its employment decision, and she would be entitled to a remedy for its violation of the statute.

We then would move to the central statutory inquiry of whether the church violated the ADA in firing Perich. If it did, then the EEOC and Perich would have won on the merits.

## II. Characterization in the Supreme Court

Jurisdictionality was not formally in play in *Hosanna-Tabor*. The Court did not grant certiorari on it. The issue did not arise during

oral argument, although at one point the Solicitor General described the exemption as "a question of the realm of permissible governmental regulation,"[104] language sounding in substantive merits. One amicus supporting the church argued the subject matter jurisdiction ununderstanding,[105] although using much of the reasoning and analysis criticized in Part I of this Essay.

Nevertheless, it is neither surprising nor unwelcome that the Court reached out to resolve the issue, even if only in a conclusory fashion.

As noted earlier, this analysis was consistent with the Roberts Court's jurisdictional project of eliminating "drive-by jurisdictional rulings," decisions in which a legal rule is treated as jurisdictional only through "unrefined" and "less-than meticulous" analysis and labels, without rigorous consideration of the meaning or consequences of those labels.[106] The Court in the last decade has decided several jurisdictionality cases, explicitly holding in all but one that the provision at issue was not jurisdictional.[107] In particular, the Court has twice adopted a merits interpretation of a federal claim–creating statute in the face of a circuit split over whether limits on the scope and reach of the statute defeated claims on the merits or deprived courts of jurisdiction.[108] The Court thus was seizing another easy opportunity to resolve a circuit split on jurisdictionality. Indeed, several Justices—including the Chief Justice, the author of *Hosanna-Tabor*—seem to have an interest in procedural issues, so the desire to resolve the issue, even in a case in which it was not squarely presented, was somewhat expected.[109]

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[104] Transcript of Oral Argument at 40, *Hosanna-Tabor*, 80 U.S.L.W. 4056 (No. 10-0553), 2011 WL 4593953, at *39.

[105] Brief for WallBuilders, Inc. as Amicus Curiae Supporting Petitioners at 28-34, *Hosanna Tabor*, 80 U.S.L.W. 4056 (No. 10-0553), 2011 WL 2581850, at*28-34.

[106] *See supra* text accompanying note 37.

[107] *See, e.g.*, Gonzalez v. Thaler, 80 U.S.L.W. 4045, 4048 (2012) (holding that the statute relating to required content in a Certificate of Appealability for habeas petitioners is nonjurisdictional); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (holding that the extraterritorial reach of federal law is a merits question); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010) (holding that the requirement of copyright registration is a nonjurisdictional precondition to suit); Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006) (holding that the definition of employer under Title VII is a merits issue). *But see* Bowles v. Russell, 551 U.S. 205, 206-07 (2007) ("We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature."). In a second case, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132 (2008), the Court held that the statute of limitations on claims against the United States in the Court of Federal Claims is not waivable or forfeitable and can be raised at any time, although the Court did not explicitly label it jurisdictional.

[108] *Morrison*, 130 S. Ct. at 2877; *Arbaugh*, 546 U.S. at 511, 516.

[109] Wasserman, *Revival*, *supra* note 37, at 312.

*Morrison* provided the model for what the Court did here. The Court had granted certiorari to consider the extraterritorial application of § 10(b) of the Securities Exchange Act of 1934 to misconduct by foreign defendant corporations that harmed foreign plaintiffs in foreign-exchange securities transactions.[110] Lower courts were inexplicably divided over whether extraterritoriality was jurisdictional,[111] although the Court did not expressly take the case for the purpose of considering or resolving that split. Nevertheless, writing for a unanimous Court, Justice Scalia took a brief detour to insist that extraterritoriality was a merits question going to the statute's reach, properly resolved on a Rule 12(b)(6) motion, rather than a jurisdictional question resolvable on a Rule 12(b)(1) motion.[112] The Court then continued to the central question, holding that the statute did not have extraterritorial application and thus did not reach or regulate the conduct and actors at issue.[113]

*Hosanna-Tabor* invited similar treatment. As in *Morrison*, the lower court had adopted an adjudicative jurisdiction characterization, which the parties did not contest, but which was plainly erroneous on a more precise and refined understanding of the merits/jurisdiction divide. And, as in *Morrison*, the issue had divided the courts of appeals.

Moreover, the circuit split on the ministerial exemption ran along multiple, confusing lines, demanding Supreme Court involvement. As discussed earlier, some lower courts treated it as a question of the trial court's subject matter jurisdiction; other circuits treated it as a merits issue; others had not taken an explicit position; and one circuit actually had contradictory panel decisions.[114] Given this incoherence among lower courts, the issue was ripe for Supreme Court resolution, and a wise exercise of supervisory power justified the Court addressing it in this context.

It should not be surprising that the Court so easily dispatched with the issue. The Court appears to be arriving at the view that jurisdiction/merits cases are fairly straightforward. It is easy to recognize when an issue relates to what the statute prohibits or to who can sue whom for what conduct. There is no longer a need to grant certiorari or brief this specific issue because that merits characterization is simply

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[110] 130 S. Ct. at 2875-76.

[111] *See id.* at 2877.

[112] *Id.*; *see also id.* at 2888 (Stevens, J., concurring in the judgment) (agreeing that, because the statute did not apply extraterritorially, the plaintiffs failed to state a claim).

[113] *Id.* at 2883.

[114] *See supra* text accompanying notes 28-33.

obvious. Instead, it can be handled in a few sentences, even in a footnote, in the course of resolving the real substance of the claim, such as whether Perich was a minister.

The quick resolution also might suggest that the Court is adopting a more absolute approach to what constitutes a merits issue, an approach I previously urged.[115] The Court has granted certiorari specifically to resolve a jurisdiction/merits dispute in only one recent case—*Arbaugh v. Y & H Corp.*[116] *Arbaugh* involved Title VII's definition of "employer" as an entity having fifteen or more employees, with a unanimous court characterizing this as a substantive element of a claim and not as a limit on the court's adjudicative jurisdiction.[117] The key, the Court said, was whether Congress ranks a statutory limitation as jurisdictional through a clear statement; if Congress did not, as with Title VII, then the issue is nonjurisdictional.[118] *Arbaugh*'s plain statement rule in jurisdiction/merits cases[119] unfortunately leaves Congress free to conflate merits and jurisdiction, and define all manner of substantive issues as going to judicial jurisdiction.[120]

Yet in neither *Hosanna-Tabor* nor *Morrison* did the Court cite *Arbaugh* or look for congressional statements or intent as to characterization. In both, the Court characterized limitations on the scope and reach of the legal rule as merits-based simply because what a legal rule prohibits and who it controls is, by its nature, a merits issue.[121] Congressional intent was irrelevant to the categorical conception of what are merits issues.

Ironically, in deciding jurisdictionality issues in an unreasoned and unexplained footnote without the benefit of briefing, the *Ho-*

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[115] Wasserman, *Drive-by*, *supra* note 37, at 953.

[116] 546 U.S. 500 (2006).

[117] *Id.* at 515-16.

[118] *Id.* at 514-16.

[119] This contrasts with issues dividing jurisdiction and procedure, which represent a more complicated divide and in which *Arbaugh*'s plain statement approach does work. *See* Wasserman, *Drive-by*, *supra* note 37, at 959 ("[T]he line between adjudicative jurisdiction and pure procedure is notoriously soft and confusing in practice . . . ."); *id.* at 960 (arguing that *Arbaugh* works in drawing the line between jurisdiction and procedure); *see also, e.g.*, Gonzalez v. Thaler, 80 U.S.L.W. 4045, 4048 (2012) (holding that the statute relating to required content in a Certificate of Appealability for habeas petitioners is nonjurisdictional); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010) (holding that the requirement of copyright registration is nonjurisdictional).

[120] *See* Wasserman, *Drive-by*, *supra* note 37, at 953.

[121] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4063 n.4 (2012); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010).

*sanna-Tabor* Court essentially delivered a drive-by ruling. The difference is that it got this one right.

The Court also used less-than-meticulous language in discussing jurisdictionality, prompting some continued confusion. The last sentence of the Court's footnote on jurisdictionality states, "District courts have power to consider ADA claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception."[122]

The idea of a claim being "barred" is often associated with jurisdiction, although it becomes more complicated when we consider the different types of jurisdiction involved.[123] Moreover, saying the claim can "proceed" suggests the ministerial exemption functions as a threshold to considering the ADA claim, which again sounds like adjudicative jurisdiction. The Court appears to have meant that the ministerial exemption analysis determines the constitutional validity of the ADA on the facts of the case, and therefore the existence of the ADA as an enforceable legal rule in this case, which demands First Amendment analysis prior to any statutory analysis. But the threshold analysis still goes to the ultimate validity of the claim under a purported subconstitutional rule, not to the federal court's root power to hear the claim arising under federal law.

## III. JURISDICTIONALITY AND PROCEDURAL STRATEGY

We might consider whether churches, religious organizations, and law-and-religion scholars are satisfied with the full outcome in *Hosanna–Tabor*. They won a broad ministerial exemption that at least suggested a wide scope for who is a ministerial employee, a result that has been welcomed by many commentators.[124]

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[122] *Hosanna-Tabor*, 80 U.S.L.W. at 4063 n.4.

[123] *See supra* subsection I.A.1.

[124] *See, e.g.*, Marc DeGirolami, *The Historical and Particularist Quality of* Hosanna-Tabor, MIRROR JUST. (Jan. 11, 2012, 11:45 AM), http://mirrorofjustice.blogs.com/mirrorofjustice/2012/01/the-historical-and-particularist-quality-of-hosanna-tabor.html; Richard W. Garnett, Hosanna-Tabor *Ruling A Win For Religious Freedom*, USA TODAY.COM (Jan. 11, 2012, 1:38 PM), http://www.usatoday.com/news/opinion/forum/story/2012-01-11/hosanna-tabor-church-state-case/52500140/1; Douglas Laycock, *My Take: Huge Win For Religious Liberty at the Supreme Court*, CNN.COM (Jan. 12, 2012, 9:58 AM), http://religion.blogs.cnn.com/2012/01/12/my-take-huge-win-for-religious-liberty-at-the-supreme-court. *But see* Mike Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html.

But they did not get a jurisdictional characterization of the exemption,[125] which many religious organizations had been pushing, often to great lengths. As noted earlier, one amicus supporting the church in *Hosanna-Tabor* argued the subject matter jurisdiction understanding.[126] The church itself appeared to accept the lower courts' jurisdictional characterization, arguing only that the court wrongly applied the exemption.

Perhaps more telling was the 2010 Tenth Circuit decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa*.[127] The plaintiff was a former lay administrator of a community outreach and education program run by the Catholic Diocese who brought claims for gender and age discrimination following her termination. The Diocese moved to dismiss for lack of subject matter jurisdiction, asserting the ministerial exemption.[128] The district court converted the motion to one to dismiss for failure to state a claim, then converted that to a motion for summary judgment when the parties presented evidence beyond the pleadings on the exemption issue.[129] The court then granted summary judgment in favor of the Diocese on ministerial exemption grounds, agreeing that the plaintiff's job responsibilities made her a ministerial employee.[130] The plaintiff appealed to the Tenth Circuit, and the Diocese cross-appealed, urging the court of appeals to convert the order back to a Rule 12(b)(1) dismissal. The Tenth Circuit properly declined to do so, correctly characterizing the ministerial exemption as a merits issue, before affirming the grant of summary judgment in favor of the Diocese.[131]

Footnote 4 of *Hosanna-Tabor* quietly ends the debate and makes clear that future ministerial exemption disputes will be resolved as merits defenses. But consider the irony of churches' previous, and perhaps continued, insistence on the adjudicative jurisdiction view: religious organizations are better off with the merits characterization.

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[125] *Cf.* Michael Moreland, Hosanna-Tabor*: Freedom of Religion (Not Merely Association) and a Note about Defenses*, MIRROR JUST. (Jan. 11, 2012, 2:47 PM), http://mirrorofjustice.blogs.com/mirrorofjustice/2012/01/hosanna-tabor-freedom-of-religion-not-merely-association-and-a-note-about-defenses.html (arguing that the ministerial exemption is best understood as a subject matter jurisdiction defense, but stating "I suppose it's a great day for religious freedom when one is left only to nitpick over the distinction between a jurisdictional bar and a defense on the merits").

[126] *See supra* note 105 and accompanying text.

[127] 611 F.3d 1238 (10th Cir. 2010).

[128] *Id.* at 1241.

[129] *Id.* (converting the motion pursuant to FED. R. CIV. P. 12(d)).

[130] *Id.*

[131] *Id.* at 1242. I have questioned elsewhere whether the cross-appeal was procedurally proper or necessary. *See* Wasserman, *Tenth Circuit*, *supra* note 39.

A Rule 12(b)(6) dismissal on ministerial exemption grounds is with prejudice—it reflects a legal defect in the claim because no law exists subjecting the defendant to liability or entitling the plaintiff to a judgment. Both a grant of summary judgment and a Rule 12(b)(6) dismissal operate as judgments on the merits having preclusive effect; the plaintiff will be unable to initiate a new lawsuit based on these facts or events, and the church would be relieved from its burden of having to defend any further. On the other hand, a Rule 12(b)(1) dismissal is without prejudice, not on the merits, and not preclusive; the plaintiff could refile the identical discrimination claims in state court.[132] Had the Diocese prevailed on its cross-appeal in *Skrzypczak*, it would have converted a merits dismissal into a jurisdictional dismissal, opening the door for the plaintiff to refile her action in state court and forcing the Diocese to litigate all over again.

Of course, were the plaintiff to refile in state court, the Diocese would again assert the ministerial exemption as the basis for dismissal, arguing that the First Amendment stripped state courts of jurisdiction as well. This argument is problematic in two respects. First, state courts are courts of general jurisdiction, meaning they have authority to hear claims purportedly brought under any existing law, regardless of source. If the case fails in state court, then it must be because of a problem with the substance of the underlying law. Second, a subsequent adjudicative jurisdiction dismissal in state court leaves the plaintiff entirely without a judicial forum empowered to hear her claim. Limits on federal adjudicative jurisdiction typically are premised on the availability of some alternative forum in which to seek relief.

On the other hand, a person should not be entitled to any forum if no existing law gives her an enforceable right. And this demonstrates why *Hosanna-Tabor*'s conclusion as to the exemption's merits nature was correct. The First Amendment limits Congress's authority to regulate church conduct by statute; Congress cannot enact the ADA or Title VII as an enforceable legal rule against religious institutions as to ministerial employees. A ministerial employee can no more sue for employment discrimination in state court than in federal court.

Religious organizations perhaps have pushed the adjudicative jurisdiction approach in pursuit of other procedural benefits, namely a quick exit from litigation and avoidance of the burden and expense of

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[132] *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985) (stating that dismissal for lack of subject matter jurisdiction does not preclude later adjudication in another court); Wasserman, *Jurisdiction and Merits*, *supra* note 40, at 666 & n.107 (explaining the nonpreclusive effect of Rule 12(b)(1) dismissals).

invasive discovery. As a competing sovereign, the argument goes, churches must have every opportunity to quickly escape the burdens associated with having to litigate and deal with attendant costs and intrusions.[133] Because subject matter jurisdiction typically is a threshold issue raised and resolved in the early stages of litigation, a successful ministerial exemption defense can be resolved at the outset, ending the litigation without extensive discovery. At the same time, subject matter jurisdiction can be raised at any time, meaning the church cannot waive the exemption and can always go back to assert it.[134]

But these procedural benefits are either illusory or available without mischaracterizing the exemption. First, the church cannot escape discovery. No matter how the ministerial exemption is characterized, the court must determine whether it applies in a given case, which means an inquiry into (1) whether the defendant is a religious organization, and (2) whether the plaintiff is a ministerial employee, however that is defined.[135] This is a factual inquiry—under the majority's approach, a multifactor, fact-intensive inquiry—which necessarily requires discovery. We label this "jurisdictional discovery,"[136] and it may be limited only to the plaintiff's ministerial status and no other issue. But discovery, and the attendant intrusion on the church and its officials, must be had.

Perhaps religious groups believed that jurisdictional discovery would be narrower, shorter, and less intrusive, justifying the adjudicative jurisdictional characterization. But churches can achieve identical procedural benefits even with the exemption as a merits rule. If the facts in a future case showing the plaintiff's ministerial character appear on the face of the complaint, a church can get early resolution of the legal issue, without the need for discovery, by filing a Rule 12(b)(6) motion. Alternatively, a church can file an early summary

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[133] *See* Berg et al., *supra* note 14, at 189 ("[T]he ministerial exception protects against the burdens of litigation and investigation . . . ."); Kalscheur, *supra* note 5, at 89-90 (describing the exemption as reducing the social costs of litigation, akin to sovereign immunity).

[134] *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[135] *Compare* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4061-63 (2012) (considering multiple factors that made the plaintiff a ministerial employee), *with id.* at 4063-64 (Thomas, J., concurring) (arguing that the key is whether the religious organization sincerely believes the plaintiff is a minister), *and id.* at 4064 (Alito, J., joined by Kagan, J., concurring) (arguing for emphasis on the functional status of the plaintiff); *see also* Lund, *supra* note 2, at 71 (arguing for a two-fold approach, looking at both job duties and whether the plaintiff holds clerical status or ecclesiastical office).

[136] S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 491 (2010).

judgment motion asserting the ministerial exemption,[137] and then ask the court to limit discovery only to fact issues going to the exemption.[138] And a district court likely will agree to limit initial discovery where, as here, substantial First Amendment interests are implicated.[139]

Second, it is important not to confuse true adjudicative jurisdiction rules from the procedural incidents of those rules, such as nonwaivability or early resolution.[140] Many merits-based legal doctrines rest on similar policies of getting defendants out of litigation quickly and relieving them of the burdens of litigation. For example, government-official immunities in constitutional litigation are treated as defenses against suit and justified as protecting government officials from the costs, distractions, and burdens of litigation, which means they must have a chance at early exit from the case.[141] But that immunity is never treated as a limit on adjudicative jurisdiction.

Similarly, nonjurisdictional doctrines can be accorded procedural incidents of jurisdiction, such as nonwaivability, where the policy goals and values underlying that doctrine demand it.[142] Thus, the ministerial exemption could still be nonwaivable, even as a merits defense, if the policies underlying church sovereignty and church autonomy demand this additional procedural protection. The *Hosanna-Tabor* Court did not consider the waivability of the exemption and the problem has not arisen in prior cases, although perhaps this an issue for future cases.

The best explanation for insistence on adjudicative jurisdiction arguments is symbolism—the symbolic meaning of winning on jurisdictional grounds. As Greg Kalscheur argues, when federal and state "courts clearly and consistently treat the ministerial exception as a limitation on the subject matter jurisdiction of the civil courts, they make a powerful statement about the foundations of limited government:

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[137] *See* FED. R. CIV. P. 56(b) ("[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery.").

[138] *See* FED. R. CIV. P. 26(b)(2)(C) (listing factors for courts to consider in limiting the frequency or extent of discovery).

[139] *See, e.g.*, Lipinski v. Skinner, 781 F. Supp. 131, 139 (N.D.N.Y. 1991) (considering First Amendment concerns in determining the scope of discovery).

[140] *See* Kalscheur, *supra* note 5, at 83-85, 90 n.331 (noting procedural concerns affecting the ministerial exemption).

[141] *See* Pearson v. Callahan, 555 U.S. 223, 231-32 (2009) (stating that qualified immunity is immunity from suit and should be resolved at the earliest possible stage of litigation).

[142] *See* Wasserman, *Drive-by*, *supra* note 37, at 963-64; *see also* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 9 (2008) (arguing that nonjurisdictional rules can possess jurisdictional traits).

Such statements affirm the penultimacy of the state."[143] A jurisdictional win is perceived as an "uber-victory,"[144] a uniquely profound and powerful litigation win. It suggests that the church is so powerful or so protected as a competing sovereign as to be beyond the court's authority. This symbolism trumps the procedural benefits that come with the merits characterization.

But religious institutions remain special even if the ministerial exemption provides a merits victory. The *Hosanna-Tabor* Court insisted that the First Amendment "gives special solicitude to the rights of religious organizations."[145] It is, or should be, an equally powerful statement on the penultimacy of the state that the church lies beyond Congress's prescriptive jurisdiction. The religion clauses function just as much as a structural protection for religion when they bar Congress's exercise of its prescriptive regulatory authority and place religious organizations beyond the reach of secular law. The church's status as a special competing and predominant sovereign is doing just as much work in placing church personnel and organizational decisions beyond congressional regulation. The broader symbolic point—that the church enjoys unique constitutional immunity from the state's sovereign reach on some issues—remains. And that symbolic point can be made without logical, theoretical, and doctrinal incoherence.

## CONCLUSION

The only thing lost in the Court's quick and unexplained resolution of the jurisdictionality issue is the chance to guide lower courts. The ministerial exemption is unquestionably now a constitutional affirmative defense to a statutory employment discrimination claim. There is less certainty as to how lower courts understand the fundamental difference between prescriptive and adjudicative jurisdiction and how that, in turn, affects future jurisdictionality determinations.

As I have argued elsewhere, clearing up confusion over jurisdictionality and its analytical components has become a major part of the Roberts Court's jurisprudential agenda.[146] *Hosanna-Tabor* provided an opportunity to add to that agenda, and the Court took it, correctly la-

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[143] Kalscheur, *supra* note 5, at 51.

[144] Thanks to Lumen Mulligan for suggesting this phrase.

[145] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 80 U.S.L.W. 4056, 4061 (2012).

[146] *See* Wasserman, *Drive-by*, *supra* note 37, at 947-48.

beling the ministerial exemption as a merits issue that has nothing to do with a court's adjudicative jurisdiction.

Some analysis and explanation in support of its conclusion perhaps was warranted, however, both for justifying resolution of the circuit split over the ministerial exemption and for guiding lower courts in future cases on other jurisdictionality issues that similarly turn on the line between prescriptive and adjudicative jurisdiction. This Essay, I hope, provides the missing analysis. It offers the normative basis for courts to define the line between jurisdiction and merits. And it demonstrates that true limits on adjudicative jurisdiction are relatively few and that most of the limits that come before the courts go to the merits of the federal claim and must be treated as such.

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